The Death of Travel Personal Injury Law?

Some thoughts on *X v Kuoni Travel Limited* [2018] EWCA Civ 938;

[2018] 1 WLR 3777

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Winterbottom v Wright **(1842) 10 Meeson & Welsby 109; 152 ER 402 (Exch. of Pleas)**
Per Rolfe B at pp 405 - 406: "*This is one of those unfortunate cases in which there certainly has been damnum, but it is damnum absque injuria;*[1] *it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law*."

Introduction

Mrs X and her husband booked a 14 night all-inclusive package holiday to Sri Lanka. In the early hours of 17 July 2010 Mrs X made her way on foot (alone) from the Hotel room that she shared with her husband towards the Hotel reception. On her way she encountered someone that she had briefly met earlier the same evening: a uniform-wearing employee of the Hotel. The employee (an electrician in the Hotel maintenance department) informed Mrs X that he knew a faster way to reception and that she should follow him. They entered an engineering room at the Hotel where the employee raped Mrs X. Shortly thereafter, she reported the assault to her husband (who had been looking for her) and to the management of the Hotel.

The holiday was a regulated "*package*" within the meaning of Regulation 2(1) of the Package Travel etc. Regulations 1992. On her return to the United Kingdom Mrs X brought proceedings against the Defendant tour operator (the "*organiser*" and "*other party to the contract*") pursuant to the Defendant's Booking Conditions and regulation 15 of the Package Travel etc. Regulations 1992 (the Booking Conditions were intended to reflect the Defendant's obligations under the 1992 Regulations). The essence of her claim (as presented at Trial and summarised in the first instance judgment) was "… *that the sexual assault carried out by an employee of the Hotel whilst on duty, amounted to the improper performance of a contractual obligation owed by the Defendant to the Claimant pursuant to regulation 15 of the 1992 Regulations*" (*per* HHJ McKenna, sitting as an Additional Judge of the High Court: [2016] EWHC 3090 (QB), para 16).

Judgments at first instance and on appeal

As I have indicated, at first instance the case was tried by HHJ McKenna in the Birmingham District Registry. He held as follows:

[1] Loss without injury.

> "*To my mind it cannot sensibly be said that the actions of the Employee formed any part of the contractual services which the Defendant agreed to provide with reasonable care and skill. The Employee was not the Defendant's supplier, that was the Hotel, and the Employee, when he lured the Claimant into the engineering room, was not discharging any of the duties he was employed to do. The services of an electrician who happened to be employed by the Hotel were not services which the Defendant agreed to provide to the Claimant under the contract. It was not a term of the contract between the Claimant and the Defendant that an electrician would be employed by the Hotel. The highest it can be put is that the Defendant agreed that the Hotel would supply electricity and would, in so doing, take reasonable care and skill. It was no part of the contract between the Claimant and the Defendant that any electrician employed by the Hotel for that particular purpose would also provide the Claimant with general assistance such as showing her a short cut to reception. The House Rules relied on by the Claimant through which the Hotel imposes obligations on its employees is of no assistance because those House Rules simply do not form any part of the services which the Defendant agreed to provide to the Claimant and her husband and cannot therefore inform the terms of the contract between them. The sexual assault was not an activity forming part of the holiday arrangements within the meaning of clause 5.10(b). As it seems to me, what the Claimant is seeking to argue is that which was argued and rejected by the Court of Appeal in Hone v Going Places Leisure Travel Ltd [2001] EWCA Civ 947 , namely an absolute obligation that the Defendant warrants the safety of all its clients at all times.*" (para 44 *per* HHJ McKenna).

For good measure, HHJ McKenna went on to hold, *obiter*, that the Defendant would also have been entitled to rely on what were, somewhat generically, referred to as, "*the statutory defences*"[2] since, "*the sexual assault was an event which could not have been foreseen or forestalled even with all due care. The Hotel's employment of the Employee was done with reasonable care, he was a man of good character and there were no previous reports or complaints of a similar nature*." (para 45). Finally, albeit not part of Mrs X's case, it was held (at paras 46 – 48) that the employee was an electrician, that the offer to show Mrs X to

[2] It appears likely, in fact, that HHJ McKenna was actually referring to the statutory defence contained in regulation 15(2)(c)(ii) of the 1992 Regulations.

reception "*had no connection whatsoever*" with the employee's duties at the Hotel and that, accordingly, "*there was no close connection between the Employee's duties and the attack so as to make it just for the Hotel or indeed the Defendant to be held liable for that attack*." In the circumstances, it was held that, "[I]*t follows that in any direct claim by the Claimant against the Hotel it would not be held to be vicariously liable. In those circumstances, equally the Defendant could not be held liable under the* [1992] *Regulations*."

On appeal, Mrs X's argument was, one might think, a straightforward one:

1. The starting point was the package holiday contract. If there was fault by the Defendant, "*its agents or suppliers*" then those contractual services had not reached a reasonable standard/been performed with reasonable care and skill (and, in these circumstances, the Defendant accepted responsibility as a matter of contract);
2. The Defendant's "*agents or suppliers*" included the Hotel employee assailant;
3. The Hotel employee assailant was performing a contractual holiday service at the material time – he was assisting Mrs X to find her way around the Hotel grounds (all Hotel employees had some "*front of house*" duties of this kind);
4. At risk of stating the obvious, the relevant sexual assault constituted a failure to perform the contractual service (viz. assisting a guest to find her way around the Hotel grounds) to a reasonable standard/with reasonable care and skill: a failure to perform/improper performance for which the Defendant was liable both under its standard form Booking Conditions and under Regulation 15 of the Package Travel etc. Regulations;
5. The reliance placed by HHJ McKenna on Regulation 15(2)(c)(ii) was misplaced: the Hotel could only act through its servants and agents and the assault was foreseeable and forestallable by the assailant (being, the person through whom the relevant contractual service was being provided).

On appeal, the majority (Sir Terence Etherton MR and Asplin LJ) identified the following questions for determination:

> "*(1) whether the conduct of N* [the employee assailant] *formed part of "the holiday arrangements" in clause 5.10(b)* [of the Booking Conditions] *for which Kuoni accepted responsibility under the first part of that clause; and (2) if so, whether (a) N or the Hotel is to be treated as the "supplier" of that part of the holiday arrangements; and (b) Kuoni avoided liability to the claimant*

> *because of the exclusion of liability under the final part of clause 5.10(b) where any failure of the holiday arrangements or injury resulting from the holiday arrangements was due to "unforeseen circumstances which, even with all due care, [Kuoni] or [its] agents or suppliers could not have anticipated or avoided*". (majority judgment, para 28)

As to whether the employee's conduct formed part of the holiday arrangements, the majority adopted a narrow approach to this issue so that these "… *did not include a member of the hotel's maintenance team, known to be such to the hotel guest, conducting the guest to the hotel's reception, which was no part of the functions for which the employee was employed*." (majority judgment, para 34) The Court supported its conclusions in this regard by stating that, "*Reasonable people in the position of Kuoni and the appellant would not have understood at the time the contract was made that Kuoni was promising that such activity would be carried out to a particular standard*." (majority judgment, para 34) The Court observed that Mrs X's case on appeal was that notions of vicarious liability were irrelevant and the Court expressed its own agreement with this proposition. However, it went on to state, "*however, it is material that, on the claimant's interpretation, Kuoni is liable for the conduct of N in executing the service of offering assistance to the claimant, even if the hotel itself was not liable for N's wrongful conduct because that conduct was insufficiently connected with the acts which N was authorised to do as to be properly regarded as being done in the ordinary course of his employment. We do not consider that, at the time the contract between Kuoni and the claimant was made, reasonable persons in the position of the parties would have understood clause 5.10(b) to bear that meaning, any more than if a member of the hotel staff had conducted a group of hotel guests to a particular location, purporting to do so for their assistance, and then shot them all*." (majority judgment, para 35)

The majority went on to consider the issues surrounding the proper meaning of "*supplier*" and held that HHJ McKenna was correct to regard the Hotel, rather than the employee, as the supplier (for whom the Defendant tour operator bore a liability pursuant to its Booking Conditions and regulation):

a. "*Our supplier*" – where used in the Defendant's Booking Conditions – denoted only those with whom the Defendant had a direct contractual or promissory relationship. The Defendant had a contract with the Hotel, but no contractual or promissory relationship with the employee. It followed that the latter was not the Defendant's

supplier (and no question of liability for the Defendant in respect of his actions could, therefore, arise) (majority judgment, para 39);

b. The natural meaning of "*supplier*" in regulation 15 of the 1992 Regulations was "*the person who assumes a direct contractual or promissory obligation to provide such services and not an employee of such a person.*" The majority believed that this was consistent with regulation 15(1) which expressly reserved "*any remedy or right of action*" which the tour operator might have against the supplier (the implication being that the Defendant would have such contractual right or remedy against the Hotel, but not against the employee) (majority judgment, para 40);

c. In the context of wilful or intentional wrongdoing, any other approach to the interpretation of the Booking Conditions and regulation 15 would, the majority held, nullify the effect of a relevant statutory defence: regulation 15(2)(c)(ii), "*If such an employee is the supplier, regulation 15(2)(c)(ii) —which ... applies only where neither the package holiday operator nor the employer were at fault and, even with all due care, neither of them could have foreseen the event which caused the failure to perform the contract or the improper performance of the contract—cannot apply. Reading the provisions of regulation 15 as a whole, that is highly unlikely to have been the intention of the Secretary of State who made the Regulations or of Parliament and is not a reasonable interpretation*." (majority judgment, para 41).

Among other general observations, the majority also stated that the Defendant tour operator could not expect its supplier to indemnify it for any losses flowing from the wrongdoing of an Hotel employee and it would not be possible to insure against the risk of liability arising in this context. The appeal was dismissed.

There was a dissenting judgment by Longmore LJ:

1. As to the holiday arrangements, "*The critical wording is "we will accept responsibility if ... any part of your holiday arrangement is ... not of a reasonable standard". Kuoni undertake therefore to provide a holiday of a reasonable standard which itself must be judged against the description of the Hotel as a four-star hotel offering the facilities described. Mr William Audland QC for Kuoni submitted that there was no contractual obligation on the Hotel (or its staff) to guide guests to the reception. I am not sure about that since ancillary services are expressly referred to in the definition of the package element of a package holiday and the contract provides that "service charges" are included; but I am sure that, if a member of the*

hotel staff offers to guide a guest to reception that is a service for which Kuoni accept responsibility for that service being done to a reasonable standard. If it is not done to a reasonable standard Kuoni must accept responsibility for that." (para 11)

2. The holiday arrangements were (self-evidently) not of a reasonable standard (paras 13 – 14)

3. As to the "*supplier*" issue, "*The principle is that a person who undertakes a contractual liability will often perform his side of the bargain through other persons but the liability remains that of the person assuming the contractual obligation. Any person assuming such liability can always protect his position by insurance or requiring an indemnity (Kuoni did in this case have a contractual indemnity from the Hotel). ... It must, moreover, be remembered that the whole point of the Directive and the Regulations which implemented the Directive is that the holiday-maker whose holiday has been ruined should have a remedy against his contractual opposite and that it should be left to the tour operator to sort out the consequences of the ruined holiday with those with whom it has itself contracted who can then sort things out further down the line whether with their own employees or their independent contractor. ... If this was a case of an independent contractor rather than an employee, it would not be just or fair to conclude that the concept of "supplier" should stop with the Hotel. It should be just the same with an employee. There can be little doubt that some employees should be regarded as suppliers. The captain of a cruise ship, for example, supplies the important service of navigating the ship without exposing it to danger; the fact that he is the employee of the shipping line makes little difference to the holiday-makers on board and the travel operators should not be able to deny responsibility, even if the shipping line had taken reasonable steps to procure the services of an experienced captain*." (paras 21 – 23).

At face value, the effect of the Court of Appeal majority decision is that operational negligence by Hotel employees (of the kind that features in many tripping and slipping cases each year) will not usually give rise to any liability for the tour operator whether under its Booking Conditions or under regulation 15 of the Regulations. The principal (and rathet puzzling) reason for this is that tour operators do not have a direct contractual or promissory relationship with such Hotel employees. If this proposition is correct (and taken at face value) then this may well (coupled with recent tightening of the local safety standards defence: on

which, see ***Lougheed v On the Beach Ltd*** [2014] EWCA Civ 1538) mean of the death of (package) travel personal injury litigation in the English Courts.

Wrongly decided?

Package holiday contractual terms fall (*per* ***Hone v Going Places Leisure Travel Ltd*** [2001] EWCA Civ 947) into two broad categories: (1) express or specific promises, "*Hotel x has a swimming pool which is open from 10 am to 10 pm*"; and, (2) more general promises which fall into the "*reasonable care and skill with respect to holiday arrangements/a reasonable standard*" category.[3] Most cases (the common holiday trip or slip) will be concerned with the second category of contractual term. It would also seem sensible to analyse the conduct of the Hotel employee (the assailant) in ***X v Kuoni*** by reference to the second category of contractual term: there was no express promise to assist guests around the Hotel premises, but such "*front of house*" duties might naturally be performed by any uniformed Hotel employee who found himself interacting with guests (such assistance would also be consistent with a guidance manual issued by the Hotel to all members of staff, including the relevant electrician). A contractual duty is not usually exercised by the Hotelier (whether this is a corporate or natural person) in any direct sense. Instead, it is exercised through the Hotel staff. In other words, the Hotelier employs staff who may be exercising a specific function (swimming pool maintenance, electrician etc) but are all likely – when on duty "*front of house*" – to have a general function of being polite to and, where required, assisting Hotel guests. This seems to be the essence of what appears in Longmore LJ's (surely, correct) dissenting judgment (at paragraph 13). In the circumstances, the apparent distinction drawn by the Court of Appeal between electrical and maintenance staff and other front of house staff appears baffling.

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[3] *Per* Logmore LJ (the dissenting voice in ***X v Kuoni***), "*The starting point must, in my view, be the contract which Mr Hone made with the defendants. Contracts for holidays are often made informally and it will often be necessary to imply a term as to the standard of performance since the requirements will not be set out in any detail. In the absence of any contrary intention, the normal implication will be that the service contracted for will be rendered with reasonable skill and care. Of course, absolute obligations may be assumed. If the brochure or advertisement, on which the consumer relies, promises a swimming-pool, it will be a term of the contract that a swimming-pool will be provided. But, in the absence of express wording, there would not be an absolute obligation, for example, to ensure that the holiday-maker catches no infection while swimming in the swimming-pool. The obligation assumed will be that reasonable skill and care will be taken to ensure that the pool is free from infection. A similar term will be implied in relation to transportation in the absence of any express wording, viz that reasonable skill and care will be exercised. A travel agent or tour operator does not usually, for example, promise that the pilot of the aeroplane will not have a heart attack.*"

Does this mean that the Hotel employee (whether or not employed for a specific or particular purpose) is the *supplier* – for the purposes of the Booking Conditions and Regulation 15 – instead of or as well as the Hotelier? It is submitted that it is not at all clear that the employee is, together with the Hotelier who employs him, also a supplier within the meaning of regulation 15, but this may not be the most important question. First, because the Hotelier supplier can only act through employees or agents; second, because it is a contractual commonplace (as Longmore LJ also points out) that a person (Hotelier X) may use persons Y and Z actually to perform the contract while retaining any potential contractual liability himself; third, because (surely) the point of the Package Travel Directive and the Package Travel Regulations 1992 (Regulation 15 in particular) that it spawned is to save the consumer from having to pursue a myriad of local tortfeasors/contractual actors and the legislation achieved this by *extending* the liability for any wrongdoing to the tour operator, subject to very limited defences (English law notions of vicarious liability which the majority stated were irrelevant and then, in a non-sequitur, referred to in detail, ought not to drive the proper interpretation of the Package Travel Directive and the 1992 Regulations). If the employee is not a supplier, but simply the person through whom the Hotelier supplier performs his contractual duties (and for whose acts and omissions the Hotelier remains liable) then the objection (derived from regulation 15(2)(c)) to which the majority refer may fall away. I would add that the arguments advanced by Mrs X did not, as the majority held, rob regulation 15(2)(c)(ii) of any effect: even if the employee were regarded as a supplier, this statutory defence would continue to have potential application in respect of contractual obligations which were not fault-based, but were, instead, express or specific (my first category of contractual term referred to above).

What about the contractual indemnity issue? The experience of this writer is that it is common for tour operators to extract a contractual indemnity (in a contract of supply) from Hoteliers for wrongdoing (even intentional wrongdoing) by staff even if – see majority judgment at paragraph 48 – this was not included in the Kuoni supply contract. However, one wonders what the tour operator's right (or not) to indemnity has to do with the consumer's ability (pursuant to statute) to pursue the tour operator under the extended liability scheme contained in the 1992 Regulations? To accord undue weight to the tour operator's ability to indemnify itself might be regarded as an example of the tail wagging the dog.

It should also be noted that the majority in the Court of Appeal appear to have regarded "*the Hotel*" supplier as a readily identifiable entity, but this is not necessarily the case. The Hotel,

as supplier in this context, may mean the owner or occupier of the building; additionally or alternatively, it may mean the management company or, if different, the employer of the staff. The tour operator might have a promissory or contractual relationship with all or only some of these entities. These supply chain complications do not matter if regulation 15 of the 1992 Regulations means that the tour operator will be liable regardless of how/by whom the contractual services are performed. However, if the majority in the Court of Appeal are correct, then the contractual complexities that were experienced by the Claimant in ***Four Seasons Holdings Inc v Brownlie*** [2018] 1 WLR 192 (SC) – an off package travel case – may be experienced by Claimants in most package travel cases.

Finally, one wonders why the Court of Appeal did not refer to the many, many cases (decided at Court of Appeal level) in which a tour operator has been held liable for the acts and omissions of an Hotelier supplier's employees. A TATLA colleague has referred in this context to ***Wreford-Smith v Airtours*** [2004] EWCA Civ 453[4] (per Potter LJ at para 3):

> "*The claimants' cause of action was framed in contract under their agreement with the defendants who organised and provided their holiday under The Package Travel, Package Holidays and Package Tours Regulations 1992 . By Regulation 15 of those regulations the defendant was made liable for the negligence of any independent contractor used by the defendant to provide holiday services. The effective issue was whether Ali Temel, the driver of the coach who was employed by the Turkish company, Co-operative, hired by the defendant, was negligent in a manner which caused or contributed to the accident*. [emphasis added]"

The extent to which the majority judgment in ***X v Kuoni*** is silent as to previous authority is striking. One wonders whether it might politely be regarded as decided *per incuriam*.

Possible implications

What can Claimant lawyers do if the Court of Appeal judgment stands or is upheld?

1. Make an early application for disclosure (whether PAD or Specific Disclosure) of all of the tour operator's supply chain contracts?

[4] But there are many other such examples.

2. Join (in an action against the tour operator as D1) the Hotel company and any other relevant intermediary company as D2, D3, D4 etc?
3. Seek a stay of proceedings in appropriate cases pending Supreme Court decision in ***X v Kuoni***?
4. Consider alternative/additional causes of action against the tour operator (that is, alternative to the PTR 1992/2018 and any Booking Conditions).

Postscript: the New Package Travel etc. Regulations 2018

It should be noted that the re-wording of the statutory defence in the new Package Travel and Linked Travel Arrangements Regulations 2018 (SI No 634/2018) calls into question the majority decision in ***X v Kuoni*** insofar as this proceeds from analysis of what HHJ McKenna (at first instance) referred to as "*the statutory defences*" (ie. regulation 15(2)(c)(ii)):

Regulation 15(2) PTR 1992	**Regulation 15 and 16 PTLTA 2018**
15.—(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services. (2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to	**15.**—(1) The provisions of this regulation are implied as a term in every package travel contract. (2) The organiser is liable to the traveller for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers. **16** - (3) The organiser must offer the traveller, without undue delay, appropriate compensation for any damage which the traveller sustains as a result of any lack of conformity.

any fault of that other party nor to that of another supplier of services, because— (a)the failures which occur in the performance of the contract are attributable to the consumer; (b)such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or (c)such failures are due to— (i)unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or **(ii) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.**	(4) The traveller is not entitled to compensation for damages under paragraph (3) if the organiser proves that the lack of conformity is— (a)attributable to the traveller; **(b)attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; or** (c)due to unavoidable and extraordinary circumstances.

Permission to appeal in ***X v Kuoni*** was granted (Lord Reed, Lord Sumption and Lord Kitchin) on 31 October 2018. The appeal was heard by the Supreme Court on 1 May 2019 (panel not known at time of writing (ie. before 1 May 2019)). We await the Supreme Court decision! In the meantime, don't forget Mark Twain's line: "*Reports of my death have been greatly exaggerated*."

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