

X v Kuoni [2021] UKSC 34: the Final Word?

The webinar will start shortly

Next time: On 19th August Sarah Prager and special guest Chris Deacon, of Stewarts Law, will be discussing How To Get The Most Out Of Your Barrister

X v Kuoni: the facts

The facts

- The Claimant was sexually assaulted whilst on a package holiday.
- Her assailant was an electrician, although she said that it was her understanding at the time that he was a security guard. The judge rejected this assertion and found as a fact that she knew that he was a member of the hotel maintenance staff.
- He had offered to help her find her way through the hotel grounds in the early hours of the morning.

X v Kuoni: the claim

The causes of action

- Breach of the package holiday contract:

“...we will accept responsibility if due to fault on our part, or that of our agents or suppliers, any part of your holiday arrangements booked before your departure from the UK is not as described in the brochure, or not of a reasonable standard...”

X v Kuoni: the claim

The causes of action

- Breach of Regulation 15(1) of the Package Travel, Package Holidays and Package Tours Regulations 1992:

“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...”

X v Kuoni: the defence

The defence under Regulation 15(2)(c)(ii):

“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 any fault of that other party nor to that of another supplier of services, because...such failures are due to...an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.”

X v Kuoni: the decision at first instance

At first instance: HHJ McKenna

- At the time of the assault the member of hotel staff had not been carrying out any of the duties he was there to undertake.
- The Defendant had not contracted with the Claimant for the services of an electrician. Therefore his role fell outside the scope of the package contract.
- The assault was not so closely connected with his duties that it was just to regard it as having occurred during the course of them.

X v Kuoni: the decision on appeal

The Court of Appeal: the majority decision

- The Claimant's appeal failed.
- The employee's actions in purporting to escort the Claimant through the grounds fell outside his duties and outside the 'holiday arrangements' within the meaning of the contract.
- Alternatively, the tour operator was only liable for the acts and omissions of its direct suppliers, ie the hotel, and not of their staff.

X v Kuoni: the decision on appeal

The Court of Appeal: the minority judgment of Longmore LJ

- From the Claimant's point of view, an offer from a hotel employee to help her navigate the hotel grounds clearly formed part of the holiday arrangements.
- Regulation 15 imposes liability for the acts and omissions of the supplier, whether these occur via an employee or not - in fact most of the holiday services will be provided via individual members of staff and not the corporate entity with which the operator contracts.

X v Kuoni: the Supreme Court #1

The Supreme Court

- ABTA intervened at this stage. They argued for a more nuanced approach than that of the majority of the Court of Appeal in relation to the meaning of ‘supplier’.
- Nevertheless, an employee of a supplier would not himself be a supplier, and thus, *if the hotel was not vicariously liable for the acts of the employee*, the defence in Regulation 15(2)(c)(ii) was engaged.
- Whether or not the supplier was vicariously liable would depend on the applicable foreign law

X v Kuoni: the Supreme Court #1

The Supreme Court

- The Supreme Court referred two questions to the CJEU. In doing so it asked the Court to assume that guiding the Claimant through the hotel grounds was indeed a service within the 'holiday arrangements' provided by the Defendant, and that the assault therefore constituted an improper performance of the holiday contract.

X v Kuoni: the Supreme Court #1

The Supreme Court: the referral

(1) Where there has been an improper performance on the part of an employee of a supplier, is there scope for the supplier to raise a defence under Regulation 15(2)(c)(ii)? And if so, by what criteria should the court determine whether the defence applies?

[a question about the applicable law on vicarious liability.]

X v Kuoni: the Supreme Court #1

The Supreme Court: the referral

(2) Is an employee a supplier of services within the meaning of Regulation 15(2)(c)(ii)?

[That is to say, can it be said that the improper performance is due to an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall?]

X v Kuoni: the CJEU

The Court of Justice of the European Union

- An employee is not a supplier of services within Regulation 15.
- Nevertheless, an organiser cannot raise the defence under Regulation 15(2)(c)(ii) where the improper performance is due to the acts or omissions of an employee of a supplier.

X v Kuoni: the Supreme Court #2

The Supreme Court: the first issue

Did the assault constitute improper performance of the tour operator's obligations?

- Yes. The holiday services contracted for must be construed broadly.

X v Kuoni: the Supreme Court #2

The Supreme Court: the first issue

“The precise content of the ancillary services may vary from one contract to another. However, for example, the obligation to provide the service of cleaning the hotel with reasonable care and skill would be inherent in every such contract. So would the service of looking after and serving holidaymakers courteously in matters relating to their holiday experience.”

X v Kuoni: the Supreme Court #2

The Supreme Court: the first issue
Guidance from one part of the hotel to another fell within the scope of reasonable assistance during the course of the holiday.

(The court seems to have found it relevant that the hotel was a four star hotel.)

X v Kuoni: the Supreme Court #2

The Supreme Court: the first issue

The focus was on the guidance provided, which was part of the Defendant's obligation, and not on the criminal act which fell outside the scope of the contract.

The fact that the employee was acting on his own behalf at the time of the assault was not fatal to the claim.

X v Kuoni: the Supreme Court #2

The Supreme Court: the second issue
Was liability excluded by operation of
Regulation 15(2)(c)(ii)?

- Is an employee of a supplier himself a supplier of services? No.
- Is the organiser liable for the acts of an employee of a supplier of services? Yes.
- Can the defence be invoked in these circumstances? No.

X v Kuoni: the Supreme Court #2

The Supreme Court: the overall approach to these claims

- The scope of Regulation 15(1) is to be interpreted widely.
- The scope of the Regulation 15(2) defences is to be interpreted narrowly.
- The doctrine of vicarious liability is irrelevant.

Where does this leave us now?

The two Package Travel Regulations:

“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...” has become:

“ 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. ”

Where does this leave us now?

The two Package Travel Regulations:

There are subtle differences in the two provisions - but the determination of the Supreme Court that the scope of the organiser's duty is to be considered widely renders these differences of little importance.

Where does this leave us now?

The two Package Travel Regulations:

“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 any fault of that other party nor to that of another supplier of services, because...such failures are due to...an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.”

has become...

Where does this leave us now?

The two Package Travel Regulations:

“The traveller is not entitled to compensation for damages...if the organiser proves that the lack of conformity is...attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable....”

Can an employee of a supplier really be said to be unconnected with the provision of the travel services, construed broadly? What if the assailant were an independent contractor brought into the hotel temporarily?

Where does this leave us now?

Might this construction of the 1992 Regulations (and, by extension, the 2018 Regulations) be consistent with caselaw on the duty owed by domestic hoteliers?

- *Al Najjar v Cumberland Hotel* [2020] WLUK 314;
- *White Lion v James* [2021] 2 WLR 911.

Where does this leave us now?

Might this construction of the 1992 Regulations (and, by extension, the 2018 Regulations) affect interpretation of the Athens and Montreal Conventions?

- The Conventions are standalone legal provisions.
- Where applicable they are exclusive.
- However, the notion of broad duties and narrow defences is gaining currency.

Where does this leave Claimants?

Cases arising out of deliberate acts should now be considered more favourably.

Even in cases arising out of fault, there is no reason why the duty owed by organisers should not be considered broadly.

The Regulation 16 defences are to be construed narrowly, and will not often be applicable.

Where does this leave Defendants?

Organisers should be conducting urgent reviews of outstanding cases.

Terms and conditions will need to be reviewed to determine the scope of the services and facilities contracted for.

Should hotels be audited with potential liability for deliberate acts in mind?

Supply contract terms and conditions will need to be altered significantly to take the increased scope of the duty into account.

Was *X v Kuoni* rightly decided?

Was the decision of the Supreme Court
the right one?
What do you think?

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And Special Guest James Riley of Irwin
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