

X v KUONI. A COMMENTARY ON THE ADVOCATE GENERAL'S OPINION

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In this article the author provides an update on the latest developments in this important case.

A Quick Summary of X v Kuoni to date

X v Kuoni (Case C-578/19) is a case that has been appealed all the way to the Supreme Court of England & Wales. Unsure how to decide the case, the Supreme Court referred the matter to the European Court of Justice – seeking guidance on how to interpret various parts of the EU Package Travel Directive. The case is actually brought under the old version of the Package Travel Directive, but the outcome is largely expected to be equally applicable to the current version of the Directive (which came into force in the UK in 2018). That said, some argue otherwise, but that is a discussion for another day!

As for the facts of the case, this is a tragic incident in which a holiday maker known as X was raped by an employee of the hotel. The employee was an electrician, on duty and wearing a hotel 'maintenance man' uniform at the time. The electrician offered to guide X to the hotel reception from her hotel room but, in the course of doing so, lured her into an engineering room where he raped and assaulted her.

What Has Just Happened?

The European Court has not yet made a ruling. They have, however, received a detailed legal opinion from their 'Advocate General' ('AG', available [here](#)). It is often the case that the European Court will largely adopt the opinion of the AG when they eventually make a ruling, but not always! With that in mind, let's have a look at what the AG has to say for himself.

Farewell To The 'Technical Defence'

The AG firmly dismisses a highly 'technical defence' that Kuoni have brought before the courts of England & Wales. If that 'technical defence' were to be accepted, it would be a 'game changer' for the travel industry. Tour operators would be given a green light to argue that they are not liable for any claim that arises due to the fault of an *employee* of one of their suppliers. Put simply, the number of valid claims against tour operators (whether for sickness or otherwise) would fall off a cliff, as almost all injury/illness claims arise from the negligence of a hotel employee, not the hotel owners themselves – no wonder therefore that the progress of *X v Kuoni* has received so much attention to date!

Of course, if something sounds too good to be true, it probably is. Despite the temptation of the industry to get excited about the prospect of this highly technical defence being accepted, it is fair to say that very few people in the travel industry or the legal profession ever expected that to happen.

That scepticism is shared by the AG. His opinion leads us to believe that, as expected, Kuoni's 'technical defence' will ultimately be dismissed by the European Courts and, in turn, the Supreme Court of England & Wales.

The Real Battleground

Assuming the European Court accept the opinion of the AG and put the 'technical defence' to bed, it is now much easier to see where the real battleground lies as to how *X v Kuoni* will be decided. The spotlight is now firmly focused on whether the courts of England & Wales will conclude that:

- The electrician was performing 'an obligation under the contract' when he assaulted X; or
- The electrician was performing ancillary services to those 'travel services' when he assaulted X

If the Supreme Court conclude that the answer to either of those questions is 'YES', the claim against Kuoni will succeed (with no further route to appeal).

What Does the Advocate General Think On That?

The AG's opinion suggests that, yes, the electrician probably was performing the 'travel services', or ancillary services, when he assaulted X. Examples considered include: where a hotel porter damages luggage, assaults a guest whilst providing table service or assaults a guest whilst escorting that guest to their room. The AG states that, in all those scenarios, it must clearly be found that the contract was improperly performed and that the tour operator will be responsible.

The AG's thoughts here, however, do not necessarily need to be adopted by the European Court in order to answer the specific questions put before them.

What Happens Next?

Procedurally, the next steps are that:

- The European Court will make a ruling;
- They will consider the opinion of the AG, but they are not obliged to follow it – though they often do;
- They will then refer the matter back to the Supreme Court of England & Wales;
- The Supreme Court will consider the European Court's ruling, apply that to the facts of the case, and then hand down a final Judgment

So that's the procedure, but where does that leave us in terms of the likely outcome?

Is X Likely To Succeed?

The AG's opinion will certainly give optimism to X and those that represent her that, despite having lost in the English courts twice already, the wind has finally changed in her direction! In particular because:

- The European Court does not answer questions that are 'theoretical', only if they are intended to resolve a 'live issue' before the local courts;
- The Supreme Court only asked the European Courts to tackle Kuoni's 'highly technical defence'; and
- The answer to that question only becomes relevant if there has been 'improper performance of the contract';

Many observers speculate, therefore, that the Supreme Court have already 'made up their minds' (unofficially) that when the electrician assaulted X, he was performing travel services (or services ancillary to those services) which were obligated under the contract. In other words, reading between the lines, the Supreme Court is ready to give Judgment in favour of X if and when they get the green light from the European Courts to dismiss Kuoni's 'technical defence'.

Is All Hope Lost For Kuoni?

Despite there being good cause for X to be optimistic, in my view, there is still plenty to play for because:

- The European Courts do not have to accept the opinion of the AG at all (although they often do);
- The examples considered by the AG, in particular the scenario as to when a hotel porter assaults a guest on the way to the hotel room, are probably 'surplus to requirements'. In other words, the European Court does not need to consider that issue in order to answer the specific questions put to them. They only need to deal with the 'technical defence';

- It is still a matter for the Supreme Court to consider the ruling of the European Court, and decide how that applies to the facts of the *X v Kuoni*

Although the courts of England & Wales have been struggling to decide 'why' the claim brought against Kuoni ought to be dismissed, the impression so far has been that this is the outcome the Supreme Court want to arrive at, they are just not sure as to the legal path on how to get there!

It is therefore still open to the Supreme Court to conclude that, at the point the electrician lured X away from the direction of the hotel room with the intention to assault her, he was no longer performing one of the obligations under the contract, i.e. that guiding services by an electrician in the middle of the night were not part of what the hotel had to provide. To conclude otherwise would open up a 'can of worms', i.e. where do we draw the line? For example, what would happen if the electrician had (whilst in uniform and whilst on duty) rounded up all the hotel guests, led them outside and shot them all? Surely, at some point the electrician had stopped performing the 'travel services' (or ancillary services) and had gone off 'on a frolic of his own'? That is certainly what the Court of Appeal said.

The lawyers for X will no doubt see it differently, they will say that holidaymakers must surely be protected in a scenario when a hotel employee commits a deliberate act of harm against them (and where that act at least stemmed from an employee performing the travel services – even if he was no longer doing so when the actual act of harm was committed).

Summary

To sum it all up, there is good cause for optimism for X and her lawyers that the claim against Kuoni may well succeed after all. The tide seems to have turned in their direction, but there is still a long way to go yet. We must await the actual Judgment of the European Court, and thereafter the Judgment of the Supreme Court of England & Wales. Only then we will know the outcome for sure!

What does seem likely, is that *X v Kuoni* will not be the ‘game changer’ that the travel industry had hoped it might be. However, the outcome may well shed some light on ‘where to draw the line’ as to where a tour operator is liable for deliberate acts of harm committed by employees of their suppliers – as opposed to the more common type of claim where those employees have simply ‘done their job negligently’! So although the signs are that it will not affect the vast majority of claims brought under the Package Travel Regulations, it may well have an important bearing on a small number of cases – but notably those type of cases may well be the kind that tour operators are keen to defend either on principle, or because they tend to be of higher value.

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