



Neutral Citation Number: [2020] EWCA Civ 1716

Case No: B3/2019/1839

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION)

Mr Justice Dingemans
HQ17P00870

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2020

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE FLAUX
and
LORD JUSTICE NEWAY

Between :

OHOUD AL-NAJAR
(by her litigation friend, KHADIA AL-MULLA)
and others

Appellants

- and -

THE CUMBERLAND HOTEL (LONDON) LIMITED

Respondent

Robert Weir QC and David Sanderson (instructed by Hodge Jones & Allen Solicitors Ltd.)
for the Appellants

Neil Block QC and Camilla Church (instructed by DWF Law LLP) for the Respondent

Hearing date: 5 November 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday, 18 December 2020.

Lord Justice McCombe:

Introduction

1. This is the appeal of Ms Ohoud Al-Najar, and of eight other claimants in the action, from the order of 21 June 2019 (sealed on 1 July 2019) of Dingemans J (as he then was) dismissing their claims for damages for personal injury against the Respondent, The Cumberland Hotel (London) Limited, and making other ancillary orders. The judge's order was made after the trial of a preliminary issue as to liability for, and causation of, the injuries in issue.
2. Permission to appeal to this court was granted by the order of 2 October 2019 (sealed on 10 October 2019) of Leggatt LJ (as he then was). Before us, Mr Robert Weir QC and Mr David Sanderson appeared for the Appellants and Mr Neil Block QC and Ms Camilla Church appeared for the Respondent. I am grateful to them all for their helpful arguments, both oral and in writing.
3. The Appellants suffered injuries, some of them serious injuries, at the hands of a criminal intruder, one Philip Spence ("Spence"), while staying at the Respondent's hotel, The Cumberland Hotel, situated at the western (Marble Arch) end of Oxford Street in central London, in the early hours of Sunday, 6 April 2014. The question arising is whether the Respondent is responsible in law for the injuries sustained because of a failure to take reasonable care to protect the Appellants against what occurred.
4. The serious nature of the some of the injuries will be understood when I say that on 1 October 2014, in the Crown Court at Southwark, Spence (who already had 37 previous convictions for 62 offences) pleaded guilty to an offence of aggravated burglary and to three offences of causing grievous bodily harm with intent, contrary to s. 18 of the Offences against the Person Act 1861. Thereafter, on 21 October 2014, in the same Crown Court, after a trial before HH Judge Leonard QC and a jury, he was convicted of three offences of attempted murder and of a further offence of conspiracy to commit aggravated burglary. He was sentenced by the trial judge to three concurrent sentences of life imprisonment, with a specified minimum custodial term of 18 years. No separate penalty was imposed for the other offences.
5. On 29 January 2015, on a reference by H.M. Attorney-General to the Criminal Division of this Court (Lord Thomas of Cwmgiedd CJ, Globe and Knowles JJ), made on the ground that the sentence was unduly lenient and that a specified "whole life" custodial term should have been imposed instead, Spence's sentence was increased by the court to one of life imprisonment, with a minimum custodial term of 27 years, in substitution for the minimum term of 18 years imposed by the trial judge: see *Attorney-General's Reference (No. 123 of 2014)* [2015] EWCA Crim 111; [2015] 1 Cr App R (S) 67.

Background Facts

6. The Appellants are all members of the same family and are citizens of the United Arab Emirates; they were guests at the hotel at the relevant time. The most serious injuries were suffered by the first three Appellants, who (with the parties' agreement) were referred to by the judge in his judgment as Ohoud, Khaloud and Fatima. With no

discourtesy intended, I propose to take the same course. Those three Appellants, and Khaloud's three children (aged 12, 10 and 7) were accommodated in rooms 7007 and 7008 on the seventh floor of the hotel; these were rooms with an inter-connecting door between them. CCTV footage showed Spence entering the hotel at 0113 hours on that Sunday morning, when Ohoud, Khaloud, Fatima and the three children were asleep in their rooms. Having crossed the hotel lobby, where he passed unchallenged at one point within about 8 metres of the hotel's lobby officer, Mr. Wasif Zafar, Spence took the lift to the 7th floor. He entered Room 7008 and began to steal money, jewellery and other items from there and from Room 7007. (The door to Room 7008 had been deliberately left unlocked and open so that another family member could return a hair-dryer that had been borrowed.) Khaloud awoke and Spence attacked her, hitting her on the head with a hammer. He also attacked Ohoud and Fatima in the same way. Spence then left the hotel carrying a suitcase and returned to his accomplice, who later used credit cards stolen from the Appellants to obtain £5,000 in cash.

7. The attack on Ohoud caused her catastrophic brain damage, rendering her now incapable of conducting her own affairs. Khaloud and Fatima also sustained serious injuries. As the judge said, the attack by Spence has had devastating consequences for all the Appellants.

The Judge's Decision

8. The judge recorded the issue at trial as whether the Respondent owner of the hotel had broken a duty "to take such care as in all the circumstances of the case was reasonable to see that [the Appellants'] person and property were kept reasonably safe, whilst they were staying at the hotel". At para. 9 of his judgment, the judge said:

"The Defendant admits that it owed the duty to its guests but contends that the duty did not include a liability to protect guests from the criminal acts of a third party such as Mr Spence, denies that the attack by Mr Spence was reasonably foreseeable, denies that it has acted in breach of any duty, and denies that any breach of duty caused the injuries suffered by Ohoud, Khaloud or Fatima."

9. At para. 11 the judge said that the final issues for him to determine were:

"(1) whether the duty owed by the Cumberland hotel extended to a duty to take reasonable steps to prevent the attack by Mr Spence; and if there was any such duty: (2) whether the attack by Mr Spence was a new intervening act which broke any chain of causation; (3) whether the attack by Mr Spence was reasonably foreseeable; (4) whether the hotel acted in breach of any duty owed to Ohoud, Khaloud and Fatima by failing to act as a reasonable, prudent and competent operator of a London hotel of this standard; (5) whether any breach of duty on the part of the Cumberland hotel caused the injuries suffered by Ohoud, Khaloud and Fatima; (6) whether there was any contributory negligence on the part of Ohoud."

His conclusions on those issues were as follows:

10. On Issue (1), after a careful review of the authorities, the judge said this:

“187. In the light of all these authorities in my judgment, among other duties which are not material, the Cumberland Hotel owed the claimants, as guests of the hotel, a duty of care "to take reasonable care to protect guests at the hotel against injury caused by the criminal acts of third parties". In my judgment the duty of care arises in respect of the omission to take steps to prevent the attack (or the duty to make things better by preventing the attack) as a "responsibility" type case as identified in paragraph 35 of *Robinson*¹. This is because the hotel invited guests to come and stay at the hotel and thereby assumed a duty to take reasonable care to protect guests. There is a loose analogy with the situation in *Stansbie v Troman*² and the imposition of the duty is consistent with the result of the decisions in *Chordas*³ and *Everett v Komo Jo*⁴ the latter of which is binding on me. As is apparent I have found the duty to exist by reason of the assumption of responsibility test set out in *Robinson* rather than by the use of the *Caparo* test, although I should record that in my judgment the imposition of such a duty of care accords with the reasonable expectations of both hotel proprietors and guests, as well as the subjective expectations of both the Claimants and the Defendant's witnesses such as Mr Stanbridge as given in evidence. It is clear that the common law relating to hotel proprietors has developed since 1604.”

11. On Issue (2), he found that that it followed from the duty that he had found to exist that the fact that the attack by Spence was a criminal act did not amount to a new intervening act breaking the chain of causation.

12. On issue (3), the judge found this:

“195. In my judgment it was reasonably foreseeable to the Cumberland hotel that a third party might gain entry to the hotel and might injure the guests by a criminal assault, whether as part of an armed robbery, sexual assault or physical assault, with consequences which might be very serious. This was specifically identified in the DSO⁵ training programme referred to above. However, it is also right to record that the evidence showed that the likelihood of such an attack occurring was extremely low, which is relevant to what steps ought reasonably to be taken by the hotel to prevent such an attack.”

¹ *Robinson v Chief Constable of W. Yorkshire* [2018] UKSC 4

² [1948] 2 KB 48

³ *Chordas v Bryant (Wellington) Pty Ltd.* (1988) 91 ALR 19

⁴ [2011] EWCA Civ 13, [2012] 1 WLR 150

⁵ Duty Security Officer

13. Issue (4), (breach of duty) was the issue on which, in the end, the case turned before the judge, as it does before us.
14. The trial involved a lengthy review of very many facets of the security arrangements at the hotel and the judge had to consider what was, in effect, a full-frontal attack by the Appellants upon the adequacy of the entirety of those arrangements as a whole. In paras. 199 to 228 of his judgment, the judge summarised some 30 heads of criticism as he put it “by broad reference to the way that they were pleaded in the Particulars of Claim and Defence” and his conclusions on them. He said that he recognised that once the evidence had been heard the submissions concentrated on some issues more than others. The judge found that the Respondent was not in breach of duty. While there was overall criticism of many aspects of the security system at the hotel, two specific areas of argument were directed to the questions of access to the guest lifts, which at that time could be operated without a key card, and to the role of Mr Zafar in challenging (or failing to challenge) those entering the hotel. It was those features that allowed Spence access to the lifts and thence to the 7th floor where the Appellants’ rooms were. In addition, of course, Spence actually gained access to rooms 7007 and 7008 because the door to one of those rooms had been deliberately left unlocked, open and readily accessible.
15. In general, the judge found the hotel’s overall security systems to be adequate. He did not find there was any breach of duty arising from the failure to challenge Spence when he entered the hotel or in the hotel not having in place key card access to the lifts. His findings on these points can be seen principally from paras. 229, 232 and 233 of the judgment, as follows:

“229. I have considered carefully all of the lay and expert evidence about the breaches of duty. In my judgment the evidence as a whole showed a hotel in which security was taken seriously by Mr Loughrey and the security officers and the hotel did take reasonable care to protect the Claimants against the injuries caused by Mr Spence. The hotel did not need to monitor continuously CCTV cameras. This is because there is nothing to suggest that this is an activity carried out by any other hotel proprietor given the low likelihood of any attack occurring. For similar reasons in my judgment to act reasonably the hotel did not need to install CCTV cameras in the lift or on the fire escape staircases. The hotel did not need to have an alarm system to alert security staff to open guest doors. Any such system would generate alarms when there was cleaning of the rooms, or guests were taking too long leaving the room. There was nothing to suggest that this should be used by any reasonable hotel proprietor. The duty was to take reasonable care to prevent the attacks, it was not an absolute duty to prevent an attack.

...

232 In my judgment the duty on the hotel did not require the hotel to provide another lobby officer or to require the lobby officer to host and greet every guest entering the hotel after 11

pm. This is because there was sufficient security provided by the lobby officer walking around the lobby and looking at guests, even though this activity was not apparent on all occasions as appears from Ms Coleman's evidence. In my judgment to act reasonably the hotel was not required to insist that the lobby officer greet every single guest after 11 pm. This was because the lobby officer was looking after the whole of the lobby and looking at some, but not all guests when they entered. For similar reasons there was no duty to put a key card reader and insist that every guest show their key card, even though this occurred later at a time of heightened terrorist alert.

233. In my judgment to act reasonably the hotel did not have to provide key card access to the lifts, even though it had been proposed by Mr Loughrey in 2012 and the system was adopted after the attack. The evidence showed that such systems were liable to being overridden by tailgating and other guests pressing buttons allowing access to others. Even after its installation it was noted that the lobby security officer was the primary means of providing security. My conclusion on these matters is part supported by the approach taken to security by other 4 star London hotels where all but one did not have key card lift access readers.”

16. On issue (5), the judge found (at para. 236) that if there had been a requirement for the lobby officer to greet/challenge all those entering the hotel, Spence would have feigned a desire to go to one of the public lobby areas, such as the bar, and would have left unobtrusively.
17. In view of his finding on issue (4), therefore, the judge dismissed the claim.

The Appeal and My Conclusions

18. The Appellants now appeal against the judge’s order. In the grounds of appeal, the case is succinctly put in paragraphs 2 and 3, as follows:

“2. The appellants submit that the learned judge erred in respect of his assessment that there was no breach of duty in relation to the failure by Mr Zafar, the lobby security officer ('lobby officer') to greet Mr Spence in the lobby; if that assessment is reversed, the appellants rely on the judge's finding on causation that the assaults would have been avoided.

3. The learned judge should have found that:

- (a) the requisite standard of care in respect of controlling access to the guest lifts by the lobby officer involved the lobby officer at the least meeting and greeting every guest after 11 pm where possible, alternatively where reasonably practicable;

(b) it was (eminently) possible/reasonably practicable for Mr Zafar to have greeted Mr Spence, given the court's findings at [227] – [228] (and those he should have made viz how quiet the lobby was at the relevant time);

(c) Mr Zafar's failure to greet Mr Spence involved a breach of duty, whether operational negligence by Mr Zafar or systemic negligence by the defendant for failing properly to train, supervise and/or monitor Mr Zafar;

(d) had the defendant not so acted in breach of duty to the claimants, Mr Zafar would have greeted Mr Spence;

(e) as found by the learned judge, in such a situation Mr Spence would have then left the hotel [236] i.e. the assaults would have been avoided.”

There follows, in paragraph 4 of the grounds a list of features of the judgment, in which it is said that the judge erred in reaching his conclusion on the breach of duty point. The first two of these are:

“4. Instead, and wrongly, the learned judge:

(a) erred in law in setting the standard as requiring only that the lobby officer walk around the lobby and look at guests [232];

(b) erred in law by asking only whether the duty on the defendant was to provide another lobby officer or to require the lobby officer to host and greet every guest entering the hotel after 11 pm [232] and not also whether the duty on the defendant required that the lobby officer host and greet every guest where possible, alternatively where reasonably practicable; ...”

In my judgment, those two points cannot properly be classed as errors of law at all, the findings criticised were merely assessments, on the facts of the case, of whether the admitted legal duty had been broken, which is a different thing: see the reference to *Biogen Inc v Medeva plc* [1997] RPC 1 at 45 below.

19. The legal duty, as the judge said, was not in dispute. I have quoted it from the judgment (para. 8) in paragraph 8 above. He took this from paragraph 20 of the Particulars of Claim which was admitted in paragraph 9 of the Defence. At para. 187 (see above), he put the duty slightly differently, but the difference does not matter and there is no challenge to the finding. What was in issue was what that legal duty required on the facts of this particular case.
20. The Particulars of Claim (in para. 23) alleged thirty respects in which security arrangements at the hotel were deficient. The focus on the appeal has now turned entirely upon one of these points, the lobby officer, but it is important to see the extensive nature of the allegations made in order to understand the “shape” of the trial

conducted by the judge, on the basis of both factual and expert evidence, over 10 court days. The judge addressed each of the thirty heads of criticism in paras. 199 and following of his judgment.

21. The particulars of negligence, pleaded in a comprehensive list, in paragraph 23 were (in summary) these (picking out more fully those relating directly to the lobby officer): failure to (a) establish and implement an adequate system of security governance; (b) establish security risk management/risk assessments; (c) assess threat levels, identify risks and vulnerabilities; (d) put in place and maintain adequate security procedures; (e) produce and implement standard procedure for Access Control; (f) establish and maintain a system of reviews of security governance documents; (g) have a system of reporting; (h) provide dedicated job descriptions for essential security roles of lobby officer and others; (i) provide consistent instruction to its lobby officers, including requirement that;

“(i) ‘Lobby must be covered 24 hours’; and

(ii) ‘Must patrol Momentus, Brasserie and outside main entrance’; and

(iii) ‘Assist with other departments if Lobby is quite [sic].’”

(j) (i) be fully aware of all criminal trends and ensure effective measures were in place to combat criminal activity; (ii) ensure effective procedures for protection against theft etc.; (iii) produce and maintain policies and procedures on security; (k) review systems in the light of incidents demonstrating access by thieves [details given]; (l) in its security department hold regular meetings; (m) ensure at two meetings in 2013 and 2014 that there was an assessment of risks from thefts; (n) institute a programme of training and continuing development for security personnel; (o) monitor performance of such personnel; (p) ensure those training security staff were properly qualified; (q) provide Security manager/Supervisor with training and professional education etc.; (r) prior to 5 April 2014 to provide Mr Zafar with “ (i) SOP Security Training, (ii) Security Policies Training, (iii) Security Awareness Training; (s) to take account of advice offered to hotels by the National Counter Terrorism Security Office [details given]; (t) install sufficient CCTV cameras and to check their operation; (u) monitor CCTV; (v) take adequate steps to address risk of Middle Eastern guests in particular leaving room doors “on the latch”; (w) carry out regular and sufficient patrols of guest corridors; (x) to use its “Morse Watchman” system properly; (y) carry out sufficient patrols in the night of 5/6 April 2014; (z) review and address shortcomings in patrol performance; (aa) have sufficient staff on duty over evening and night shift, including ... (ii) one patrolling officer; ... and (iv) one lobby officer; (bb) to ensure that from 2300 hours the lobby officer adopted a fixed and visible position; (cc) monitor the performance of the lobby officer and to secure compliance with instructions.

22. In the final head of particulars of negligence, para. 23(dd), the Appellants addressed the case on Mr Zafar, as follows:

“(dd) By its lobby officer Wasif Zafar, who was on duty between 23.15 on 5 April and 01.37 on 6 April 2014, it failed to provide an adequate level of security in that:

(i) He failed to position himself so that he was able to host and greet persons entering the hotel for more than 46 minutes (38%) of the period between 23.15 and 01.15 and left the lobby completely unattended for 3 minutes and 13 seconds;

(ii) Despite the written procedures and training requiring him to host, smile and greet all persons entering the hotel, to verify guests and to carry out security checks on persons entering the lifts via the main entrance:

(1) over the period between 23.15 and 23.45 he carried out no security checks and spoke to just one of the 175 people who entered the hotel;

(2) over the period between 23.45 and 00.15 he carried out no security checks and spoke to none of the 153 people who entered the hotel;

(3) over the period between 00.15 and 00.45 he carried out no security checks and spoke to none of the 133 people who entered the hotel;

(4) over the period between 00.45 and 01.15 he carried out no security checks and spoke to none of the 105 people who entered the hotel;

(iii) When Spence entered the hotel at 01.13 and walked directly to the lifts, Wasif was not positioned between the main entrance and the lifts, was paying no attention to persons entering the hotel and made no attempt to host, greet, verify or security check Spence.”

23. As I have said, the judge addressed each of the thirty heads of criticism separately in paras. 199 to 234 of his judgment. All the heads of appeal now, however, concentrate entirely on the single aspect of the judge’s assessment of the role of the lobby officer at the hotel and the performance of that role by Mr Zafar on the night in question. In my judgment, however, it is important to see that this was a trial putting in issue the adequacy of virtually every aspect of security provision at the hotel and the role of the lobby officer was only one of those aspects.

24. It appears from para. 59 of the judgment (and it is clear on the pleadings) that the Appellants were asserting that the duty actually assigned to the lobby officer by the Respondent was to “host, greet and smile at *all* persons entering the hotel” (emphasis added). Such a duty was indeed specified in one list of the officer’s duties. There were other similar instructions in training materials and the like. At para. 57, the judge noted this:

“57. The specific duties of the lobby security officer were set out in writing as part of the “lobby duties training record” which was signed by a person after training and re-training on

their duties: - For example Mr Zafar had signed on 3 August 2013 and then again on 10 August 2014. The listed duties included “Lobby must be covered 24 hours; Never leave your shift before on coming officer relieves you; ... Must patrol Momentus, Brasserie and outside main entrance (smoking area); ... Assist with other departments if lobby is quiet; Host, greet, smile and introduce to all persons entering hotel; security check of persons entering lifts via main entrance max 20 per hour; ... lobby officer is fully responsible for the protection of staff, customers & property; ... Be vigilant for undesirables: thieves, prostitutes, homeless;”.

It can be seen, however, that the duties so listed could not keep a single security officer in a fixed place in the lobby for the particular purpose of greeting or challenging those entering the hotel at all times. He had to attend other areas, including the bar, brasserie and outside smoking area. At the material time, the Respondent only engaged one lobby officer at any one time. The judge rejected criticism of the failure to engage more than one such officer at any one time (paras. 224 and 232) and the Appellants do not appeal against that finding.

25. The judge recognised that some of the written materials about “meeting and greeting” envisaged a lobby officer making contact with all or almost all guests and others entering the hotel. However, he also accepted the evidence of Mr Loughrey, the hotel security manager, that this was not required by the hotel management in fact. The lobby officer also had other duties in and around the “front of house”. At paragraph 59, the judge said:

“59. There was some discussion about the lobby security officer duties at the trial. It was apparent that the Claimants contended that the lobby security officer must greet and introduce himself to every person entering the hotel pursuant to the direction to “Host, greet, smile and introduce to all persons entering hotel”. Schedules were produced to show that Mr Zafar, in the early hours of the morning of 6 April 2014, was not positioned to intercept every person coming into the lobby through the front entrance left. Mr Loughrey contended that the duties were not intended to mean that every single guest had to be greeted, and that duties included patrolling the bar and restaurant area, meaning that not every guest could be hosted and greeted. Mr Loughrey said that by moving around the lobby security officer acted as a deterrent. Although a possible reading of the duties of the lobby security officer was to greet and introduce himself to every person entering the hotel (because of the words “ ... introduce to all persons entering hotel”) Mr Loughrey said that was not the proper interpretation of the duties of the lobby officer. This is because it would have been impossible to patrol the bar and restaurant areas, and to introduce himself to every guest, which were also part of the duties. I accept that the evidence showed that the lobby officers and the hotel understood that there was no

requirement to greet every single guest. This does not answer the point about whether the hotel, in order to discharge its duty of care, should have ensured that every guest was met by the lobby security officer.”

(In the end, in para. 232 of the judgment, the judge answered the question in the last sentence of para. 59 in the negative.)

26. In the light of these findings, and their obvious corollary that the single lobby officer could not meet/greet everyone who entered the hotel at any time, the Appellants now limit the level of care that they say that the Respondent should have achieved through the lobby officer. That is the requirement specified in para. 3(a) of the grounds of appeal that the duty required that he met and greeted “every guest after 11 p.m. where possible, alternatively where reasonably practicable”. It is argued that, in accordance with that requirement Mr Zafar should have accosted Spence when he entered the hotel, because that was “(eminently) possible/reasonably practicable.” Given the focussed manner in which that ground of appeal is advanced, the crucial question now is whether the Respondent was in breach of duty when Mr Zafar failed to accost this one individual on the particular occasion in question.
27. Mr Weir QC, in his excellent argument for the Appellants, emphasised the primary role of the lobby officer, in achieving the required security, acknowledged in both some of the hotel’s written security materials and some of the witness evidence, including the evidence of the experts. He stressed that throughout emphasis was placed upon the importance of achieving eye-contact with those entering the hotel in order to assess their *bona fides*. He submitted that Mr Zafar’s failure to greet/challenge guests, including Spence, in the period in question demonstrated a breach of duty by him and by the Respondent.
28. This has to be seen, however, in the light of the case presented for the Appellants at the trial. I have already summarised above the nature of the duties alleged in respect of the lobby officer, as pleaded in sub-paras. 23(bb) and (cc) of the Particulars of Claim, namely that the officer should have adopted a visible fixed position between the main entrance and the lifts, and that the hotel should have ensured that he hosted and greeted (i.e. if necessary, challenged) every “guest” entering and using the guest lifts. As can be seen, that absolute duty was not accepted by the defendant. I consider the judge correctly held at para. 239 of the judgment, (as was common ground on the pleadings) the duty on the hotel was to take reasonable care to prevent attacks such as this; it was not (and was not alleged to be) an absolute duty to prevent an attack. The judge also found that, while the consequences of an intrusion of this character might be very serious, the evidence showed that the likelihood of such an attack was extremely low (para. 195); that finding is not challenged. Having reviewed the evidence overall, the judge was clearly entitled to reach the view that the ambit of the duties actually imposed on the lobby officer by the Respondent was reasonable. Those duties rendered impossible the absolute duty, alleged on behalf of the Appellants, to engage every person entering the hotel at this time.
29. We were shown some of the still images, from the hotel’s CCTV footage available at the trial, which indicated the approximate relative positions of Mr Zafar and Spence at the time when Spence entered the hotel. Given Mr Zafar’s wider duties, beyond the duty of meeting everyone entering the hotel that the Appellants alleged, it could not

be said that Mr Zafar was in breach of any duty simply for being in the position that he was at the moment that Spence entered the hotel and crossed the lobby. Mr Zafar was where he was, at that moment, in fulfilment of the duty to patrol the lobby, and its surrounding areas, as a whole.

30. The question would then have arisen, under the more qualified duty now alleged in para. 3 of the Grounds of Appeal, whether it was “possible, alternatively reasonably practicable” to engage Spence when he entered. That issue was not explored to any significant extent in the evidence of Mr Zafar at the trial, as appears from the only extract from his cross-examination before the judge to which we were directed. We were shown the few pages of that evidence dealing with the moment of Spence’s entry. For example, Mr Zafar was not asked why Spence was not hailed by him from across the lobby or why he did not advance deliberately towards Spence in order to verify his purposes. It was not suggested to him, for example, that he should have followed Spence to the lifts to check him at that point. It was not explored with him (or other witnesses) whether to do so would have been consistent with the ambience of a hotel such as this, in the absence of a specific cause for suspicion. Such questions would have been highly material to the more qualified duty for which the Appellants now contend on the appeal.
31. The evidence on that subject, such as it was, was relatively confined and sparse. The significant passage that was shown to us was in the transcript for Day 6 of the trial at page 79, line 12 to page 81, line 3 where Mr Zafar was being cross-examined by Ms Rodway QC, then appearing for the Appellants. It was this:

“12 Q. And we can see that for periods of time,
13 in fact throughout most of the period of that
14 time, you are a long way away from the lift
15 lobby, aren't you?

16 A. Yes. I was walking around in the hall
17 lobby, the Brasserie and all --

18 Q. Yes, and you stand, sorry --

19 MR JUSTICE DINGEMANS: Mr Zafar,
20 you need to speak up a bit more?

21 A. Okay.

22 MS RODWAY: So, let us go back so you
23 can give that answer again. I am asking you
24 what you were doing when you were away
25 from the lift lobby?

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1 A. I was just walking around. I need to keep
2 an eye on the Brasserie. There was some
3 others sitting on that- with their pink lights,
4 there, and yeah there was no specific place
5 that I need to stand on the end of this - this
6 place. I was just moving around everywhere
7 and just keeping an eye, and sometime I need

8 to go outside as well, just to have a look

9 Q. So, it was your understanding that you
10 were not required to stay in a specific place
11 at night-time?

12 **A. Yes.**

13 Q. That is correct, is it?

14 **A. Yes.**

15 Q. And we also see that you do not interact
16 with any of the guests who are coming into
17 the hotel. Why was that?

18 A. I do interact sometime and if I found
19 someone suspicious, I do approach him,
20 challenge him or ask him something. Key
21 card or where is he going, but if he looks
22 suspicious or if he looks like he's avoiding
23 eye contact or looking around or something,
24 like he don't know where is he going--

25 Q. Right?

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- 1 A. -- Mr Spence, as you can see on the
2 picture, is - just focused, going straight to the
3 lift like he knows where's he going. ...

Page 81.”

32. After those questions and answers, the questioning moved onto Mr Zafar’s training and whether he understood that criminals do not always look suspicious, the importance of eye-contact in assessing people’s motives and so forth. There was apparently nothing more about Mr Zafar’s conduct, or about lack of reaction to Spence’s entry, in the moments between that entry and his taking one of the lifts. That was, of course, consistent with the case being advanced: namely that *every* person had to be engaged directly and Mr Zafar had clearly not done that. There was no significant challenge to him as to the possibility or practicality of making direct contact with Spence, whatever Mr Zafar’s conduct may have been towards others entering in that period. That was the evidence that the judge had on which to assess whether Mr Zafar (and with him the Respondent) was responsible for the tragedy that befell the Appellants at the hands of Spence.
33. I bear in mind here the words of Lord Hoffmann, in his speech in the House of Lords in *Biogen Inc v Medeva plc* (supra), of which the last sentence appears to be particularly pertinent in this case, but the whole paragraph is material in view of the judge’s careful judgment, after a long trial on extensive material, on the many issues before him:
- “The need for appellate caution in reversing the judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation. ... Where the application of a legal standard *such as negligence* or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge’s evaluation.” (Italics added)
34. The legal duty upon the Respondent in this case was agreed on the pleadings (as I have said in para. 8 above) and the issue on all the various aspects of security considered, was whether that agreed duty had been broken. It was only a question of degree, on each aspect of criticism of the hotel’s security arrangements in this case, whether there had been a breach of the duty or not.
35. Now on the single issue argued before us, the Appellants have sought (in para. 3 of the appeal grounds) to recast the duty on one aspect of the case only. In my judgment, that re-cast would have involved a different approach to the evidence as to Mr Zafar’s

conduct, as Mr Spence entered the hotel, from the approach adopted at the trial. As Lewison LJ said in *Fage UK Ltd. v Chobani UK Ltd.* [2014] EWCA 5 at [114]:

“Appellate courts have been repeatedly warned, by recent cases at the highest level, *not to interfere with* findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to *the evaluation of those facts and to the inferences to be drawn from them* ... The reasons for this approach are many. They include: ...” (Italics again added)

Of those reasons (i) and (iv) expressed by Lewison LJ have particular relevance here, in view of the shift of emphasis in the Appellants’ case on this appeal, but, while the principles expressed still apply, it might be thought indelicate to quote them precisely in the context of this tragedy.

36. In my judgment, the judge was entitled to assess the breach of duty alleged in respect of Mr Zafar’s conduct on the night by the nature of the case being made against the Respondent on this individual point and by the extent of the challenge made to Mr Zafar himself when he gave evidence. The judge did that and he reached a conclusion, on this one aspect of the many breaches of duty alleged, in light of those factors. There was no specific challenge at all as to whether it was possible or reasonably practicable for Mr Zafar, from where he was at the crucial moment, to have directed a specific challenge to Spence as he entered the hotel. The nature of the duty alleged has now become shaded from the absolute duty that was being assessed at the trial. That shaded duty was not the one that the judge was called upon to assess. I do not see that his final conclusion that (on the basis of the primary facts found by him) there was not a breach of the duty alleged, can be faulted.

Conclusion

37. For these reasons, I would dismiss this appeal.

Lord Justice Flaux:

38. I agree.

Lord Justice Newey:

39. I also agree.