

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY**

Royal Courts of Justice
Strand, London, WC2A 2LL
30/11/2016

B e f o r e :

HIS HONOUR JUDGE MCKENNA

Between:

X

Claimant

- and -

KUONI TRAVEL LTD

Defendant

**Ms Katherine Deal (instructed by Irwin Mitchell LLP) for the Claimant
Mr William Audland QC (instructed by MB Solicitors Limited) for the Defendant**

Hearing dates: 10, 11, 12, 13 October 2016

HTML VERSION OF JUDGMENT

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His Honour Judge McKenna :

Introduction and Background

1. In this action the Claimant, Mrs X, whose date of birth is [a date in] 1980, seeks damages for personal injury and other losses arising out of a sexual assault (including rape), said to have taken place on 17th July 2010 during a 14 day all-inclusive package holiday which the Claimant had purchased from the Defendant, Kuoni Travel Ltd, which included accommodation at the [A] Hotel ("the Hotel") in Sri Lanka.
2. The Claimant and her husband had booked the holiday with the Defendant incorporating return flights and 15 nights' accommodation at the Hotel between 8th and 23rd of July 2010.
3. The holiday was a package holiday within the meaning of the Package Travel, Package Holiday and Package Tour Regulations 1992 ("the 1992 Regulations") and the Hotel was a supplier within the meaning of regulation 2(1) of the 1992 Regulations.
4. On their arrival, the Claimant and her husband were allocated room 320 and the holiday was, to all intents and purposes, uneventful until the evening / night of 16th July 2010 when it is the Claimant's case that, having had

dinner, she and her husband had a few drinks in the Hotel's bar with another couple whom they had met whilst at the Hotel, before the four made their way through the grounds of the Hotel to the Claimant's room sometime around 2am. Whilst sitting outside the Claimant's room, the Claimant's husband spoke briefly with a uniformed Hotel employee ("the Employee") who asked for and was given a drink and a cigarette. Sometime later, and following a disagreement between the Claimant and her husband, the Claimant, having packed a suitcase, left her husband in their room with the intention of going to reception to complain about noise which was emanating from a nearby room, and to make a phone call to the United Kingdom. On the way to reception the Claimant says that she was approached by the Employee. She told him that she was going to reception and he indicated that there was a faster route through the grounds of the Hotel than the one she was taking and that she should follow him, which she did, during the course of which they entered an engineering room where the Employee physically assaulted and raped the Claimant (collectively referred to in this judgment as the sexual assault). The Claimant and the Employee then left the engineering room together and shortly afterwards bumped into the Claimant's husband, who had been looking for her. The Employee then left the scene and the Claimant reported to her husband what had happened and he in turn reported it to the management of the Hotel.

5. The Claimant's husband completed an Accident / Incident Form in which, under the heading "*Details of incident*" he wrote "*X raped by staff member*". The location of the incident was identified as "*In the engineering room at [A] Hotel*" and under the heading "*How did the incident happen?*" the Claimant's husband wrote the following:

"The victim left her room after an argument with her husband. On her way to the reception area she met a member of staff who offered to show her a short-cut. Following this, she was lead to the engineering room where she was held against her will and forced to have sexual intercourse with the staff member"

6. The Claimant identified her attacker as the Employee (subsequently identified by Hotel management as Mr Nannayakkara) during the course of an identification parade conducted in her room the same night. He was at the time employed by the Hotel as an electrician (and had been since about May 2010) within the Hotel's maintenance department albeit that it is the Claimant's case that at the material time she believed him to have been employed as a security guard. However, she now accepts that he was in fact employed as an electrician. It is common ground between the parties that at the material time the Employee was wearing navy-blue overalls which, according to the evidence of Mr Cruse, (an employee of the Hotel) accepted by the Claimant, was the uniform of the maintenance team whereas the uniform worn by security guards consisted of dark-brown trousers and light-brown shirts (tucked into the trousers). There are photos of the two very distinct types of clothing in the trial bundle.
7. The attack was reported to the local police and a criminal investigation was commenced, the outcome of which is unknown. The police report dated 21st July 2010 includes the following:-

"This is to certify that Mrs X of ... made a complaint on 17th July 2010 stating that she was raped by a casual staff who is attached to maintenance department at Hotel [A] Hotel.

Complainer was produced to IMO (Balapitiya). As per the complainer I inquired into the matter and arrested the suspect on the same day and produced to the magistrate court Balapitiya on the 18th and suspect was remanded. On the 20th an identification parade was held in front of magistrate Balapitiya and the complainer couldn't identify the suspect.

Further investigations will be carried out."

8. There was some CCTV footage of the area around the engineering department which is apparently in the hands of the local police and has therefore not been available to the Court or indeed to the parties which according to the evidence of Mr Cruse (who viewed it) features both the Claimant and the Employee at some point prior to their entry into the engineering room. There is however no footage of the inside of the engineering room and therefore no footage depicting the attack itself. The evidence of both the Claimant and her husband was that they

did not view the footage though they were told of its content by the Hotel's manager,.

9. During the day following the attack the Claimant attended a more formal identification parade carried out at the local police station, during the course of which she identified someone other than the Employee as her attacker as reported in the Police Report referred to above. She was also seen by Doctor Wijewardana, who, though not an employee of the Hotel, was retained to look after guests as and when necessary.
10. Upon her return to the United Kingdom at the conclusion of the holiday, the Claimant was diagnosed with sexually transmitted diseases, one of which she was told was normally found outside the United Kingdom. She was prescribed antibiotic treatment. She also discovered that she was pregnant and that the child was not confirmed to be that of her husband until after testing, during the course of her pregnancy.
11. At the time of the holiday, the Claimant was employed by the National Health Service as a podiatrist. Following her return from holiday and after a period of some 5 weeks away from work, the Claimant returned to her employment as a podiatrist. She says that she told her manager what had happened whilst on holiday and arrangements were put in place with a view to ensuring that she did not have to be on her own with men who were unknown to her.
12. The Claimant went on maternity leave shortly before her daughter's birth on 1st April 2011. She developed depression post-natally. She resigned from the National Health Service before returning from maternity leave and she and her husband moved from Aberdeen to Glasgow.
13. Since resigning from the NHS, the Claimant has retrained as a cake maker / decorator.
14. It is the Claimant's case that she could not and cannot work as a podiatrist as a consequence of the sexual assault which took place on the night of 16th / 17th July 2010.
15. The Defendant for its part, whilst it does not admit the fact of the sexual assault, which the Claimant has been required to prove, did not seek to cross-examine the Claimant on the assault itself as opposed to the circumstances leading up to it which were in issue.

The issues for determination

16. Although in her Particulars of Claim the Claimant alleged that the Defendant was liable for the sexual assault on a number of different bases, by the time of the trial the basis of liability had narrowed and essentially what was relied on 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.
17. In particular it was accepted by the Claimant that the Defendant did not have any supervisory control over the Hotel's employees; that the recruitment of the Employee did not breach any local laws or practice and that there was no basis for suggesting that the Employee should have been identified as a risk prior to the incident in question. In the light of these concessions there is no need for me to refer to much of the evidence adduced of the Defendant's behalf which addressed these specific allegations.
18. The Defendant by contrast argues that Regulation 15 has no application since the sexual assault did not amount to the improper performance of any service which the Defendant agreed to supply and even if it did, the Defendant relies on the provisions contained within Regulation 15(2)(c) on the basis that the sexual assault could not have been foreseen or forestalled even with all due care.
19. It follows that the issues for determination therefore are as follows:
 - i) the circumstances of the sexual assault including whether or not the Claimant was raped;
 - ii) whether the sexual assault amounted to a failure of performance or more accurately an improper

performance of the holiday contract for which the Defendant is liable;

iii) (on the basis that the Defendant is liable to the Claimant), whether the Defendant is entitled to rely on any of the statutory defences and;

iv) (assuming liability is established) quantum, albeit that the parties have agreed all issues of quantum save the issue of past and future loss of earnings including pension.

The Contract and the 1992 Regulations

20. Clause 5.10(b) of the contract between the Claimant and the Defendant provides as follows:

"Subject to (d) 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, not of a reasonable standard, or if you or any member of your party is killed or injured as a result of an activity forming part of those holiday arrangements. We do not accept responsibility if and to the extent that any... injury is not caused by any fault of ours, or our agents or suppliers; is caused by you;... or is due to unforeseen circumstances which, even with all due care, we or our agents or suppliers could not have anticipated or avoided."

21. The 1992 Regulations provide as follows:-

"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 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 the 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."

The Evidence

22. The Court has heard factual evidence from the Claimant herself and from her husband and on behalf of the Defendant from two employees Linda Pedler, a purchasing manager, and Wendy Kenneally, the Defendant's VP purchasing and customer experience, who gave evidence as to the contractual and working relationship between the Defendant and the Hotel and two Sri-Lankan witnesses (whose evidence was given via videolink), Mr Dilshan Rajudeen who was at the time but is no longer, employed by Whittall Bowstead (Travel) Ltd of

Colombo, Sri Lanka, to act as the Defendant's local representative and Camillus Cruse, currently resident manager of the Hotel but who in the summer of 2010 was an executive assistant manager who gave evidence principally as to the Employee's recruitment and employment and the like.

23. In addition to the factual evidence the Court has also heard evidence from two psychiatrists; Dr Wylie instructed on the Claimant's behalf and Dr McLennan instructed on the Defendant's behalf. There is much that is agreed so far as their evidence is concerned.
24. In particular, and assuming that the Claimant's account of the sexual assault is accepted by the Court, they agreed that the Claimant ultimately developed Post-Traumatic Stress Disorder and that it arose as a result of the sexual assault in the absence of which it would not have developed and which lasted until March 2014. The Claimant also developed post-natal depression / a depressive disorder which resolved during the course of 2012. Given her past psychological history, the depressive disorder / post-natal depression may have arisen in the absence of any sexual assault but the sexual assault may have contributed to its onset.
25. So far as employment is concerned, the joint statement records the following as the experts' respective positions:

"(a) Dr McLennan believes that she could have worked as a podiatrist, and indeed she did so between her return to work after 5 weeks sick leave, until her absence on Maternity Leave.

Dr Wylie concurs with this.

(b) Dr McLennan believes her employers could have made Reasonable Adjustments to accommodate her issues with men, had these been disclosed to them, to continue to work as a podiatrist. There is no evidence that she disclosed these issues, despite her assertions to Dr McLennan ...in parenthesis Dr McLennan revised this opinion in her supplementary report after sight of occupational health records).

Dr Wylie concluded that as a result of the rape it is understandable that she was unable to continue to work as a podiatrist. While she has recovered from a psychiatric perspective, he believes she would be potentially unable to return to this line of work without the risk of the re-emergence of psychiatric symptomatology.

Dr Wylie accepts that, if it had been possible to ensure that she was dealing only with females in the course of her work, then this adjustment may have sufficient to permit her to return to this line of employment. He understood that such an adjustment could not be ensured and would be willing to concede this point were he to be shown that such adjustments could have been implemented and ensured.

(c) Dr McLennan is of the opinion that Mrs X was clearly fit to engage with remunerative employment, which she chose in a socially vulnerable situation from mid-2012. Dr McLennan views this as being the date from which she could have returned to remunerative employment, in her previous role or to an adjusted role, as agreed with her employers.

Dr Wylie is of the opinion that Mrs X was fit to return to remunerative employment from the autumn of 2012 with the caveats he states as above and with regard to working as a podiatrist.

(d) Dr McLennan concluded that if she did not wish to return to her role as a podiatrist, she could have been accommodated within the NHS in an alternative role, given that she was a graduate with managerial level skills and experience. There is no evidence that this was explored with her employers in NHS Grampian and she seems to have chosen not to commence employment with NHS Glasgow.

While Dr Wylie agrees that she would not have been precluded from returning to alternative work within the NHS this would have to have been in an environment where she would not perceive being

placed in vulnerable situations with males. Dr Wylie considers that to express an opinion as to the potential availability of such a post is outwith his area of expertise."

26. Finally, so far as evidence is concerned the Court has also had the benefit of reading reports and a joint statement from Sri Lankan lawyers, Mr Meddegoda instructed on the Claimant's behalf and Mr Neelakandan instructed on the Defendant's behalf. In the event it was not necessary to hear oral evidence from those witnesses in the light of the fact that the Claimant did not pursue her allegations of breach of local law or standards in the recruitment of the Employee and agreement that Sri Lankan law applied the English law of vicarious liability.

27. I turn now to the various issues.

The circumstances of the attack

28. On this issue the Claimant relies on her own evidence and that of her husband. It was the Claimant's evidence, supported by that of her husband, that on the evening of 17th of July she and her husband had been enjoying a few drinks in the Hotel's bar with a couple that they had met whilst on holiday. When the bar closed at about 2am they and the two friends went back to the Claimant's room at which point the female friend left but the male friend stayed for a short time talking to the Claimant's husband while sitting outside their room. Under cross-examination the Claimant conceded that she was under the influence of alcohol but not, as she put it, out of control drunk. She also denied that her intake of alcohol had affected her recollection of the events of the night in question. To my mind, however, the evidence is overwhelming that both she and Mr X had consumed a substantial amount of alcohol and were both, to all intents and purposes, very drunk.
29. In her witness statement the Claimant described how the Employee, whom she referred to as a security guard, approached her and her husband and requested a cigarette and drink which they offered to him. He stayed for a few minutes and spoke to them and in the course of the conversation mentioned that he had recently been deported from Dubai. In her oral evidence to the Court the Claimant indicated that the Employee actually told her husband that he was a security guard. She also said that when he arrived outside their room, he approached her husband and asked for a drink and cigarette at a time when she was not outside but inside their room, she said to enable her to use the bathroom. She then came out of the room whilst her husband was talking to the Employee. When she emerged the Employee was smoking one of her husband's cigarettes and, after he had left, her husband told her that the Employee had asked for a cigarette and a drink and that he had told her husband that he had been deported from Dubai. She also said that she had actually heard the Employee say that he was a security guard and had been working at the Hotel for a little while as a security guard.
30. After the Employee left, the Claimant and her husband got into an argument because she wanted to move rooms because of noise emanating from a nearby room whilst her husband was suggesting that they should wait until the morning and sort it out then. Things got quite heated and the Claimant said that she packed a suitcase so that she could go to reception and request a change of room. She also wanted to make a telephone call to the UK. She was unable to recall exactly which route through the Hotel grounds she had taken to reception. On the way, she was stopped by the Employee and she told him that she was trying to get to reception and he told her that there was a faster route and that she should follow him, which she did, she says because she trusted him because she knew that he worked for the Hotel as a security guard and because she had spoken to him earlier in the evening. He led her through a door to what he said was a short cut to reception but which in fact turned out to be the engineering room. He began to grab her bag and told her to sit down. He tightened his hands around her throat, she tried to, but was unable, to scream because she was frightened. At some point during this attack she says he burnt her with a cigarette and whilst he had hands on her throat he raped her. After the attack the Employee said that he wanted to take her to live with him. The Claimant said that she wanted to get away as quickly as possible, and so told him that she had some money in her room and that she would get it for him. As they left the engineering room they bumped into the Claimant's husband who had come looking for her. She ran to him. The security guard handed over her case and left. She then told her husband what had happened and then he went to reception to report what had happened.
31. As I have already indicated, the Claimant was not cross-examined as to the immediate circumstances of the

attack itself but was cross-examined at some length about the events leading up to the alleged attack and it is fair to say that her evidence was at times both confused and contradictory, for example, as to when and for how long she and her husband were in the bar, when they left the bar, when exactly the encounter with the Employee took place and she accepted, as she had to do, that she wasn't sure of timings. When asked about the basis on which she believed that the Employee was a security guard, she maintained that she believed he was a security guard because he was wearing a uniform and because he told her and her husband that he was a security guard, albeit that she made no such reference to having been told that he was a security guard in her witness statement or indeed in the Particulars of Claim, both of which suggested that the Employee was a member of the Hotel's staff identified as such by his uniform (namely blue overalls) (in her witness statement and identified by his uniform as a Hotel security guard (in the Particulars of Claim). The Defendant raised part 18 questions in respect of this issue as follows:-

"Please identify the individual features of the uniform which lead the Claimant to believe that the member of staff worked as a security guard?"

To which the response was:

"The distinctive colour and style of his uniform identified the assailant as a security guard in the employment of the hotel, The Claimant and her husband had identified the assailant as a security guard in the employment of the hotel prior to the assault through observing him in the course of his duties. The assailant also identified himself to the Claimant during a conversation that he worked as a security guard at the hotel. The Claimant was also informed by the hotel manager that the assailant was an employee of the hotel."

32. The Claimant was asked why she didn't simply say that the Employee was wearing blue overalls (as indeed it is common ground he was) and she really didn't have any satisfactory answer to that question. When asked about what duties she had observed the assailant carrying out prior to the attack that indicated that he was a security guard, the Claimant's response was equally unsatisfactory to the effect that he walked around the grounds and that she wasn't really paying any attention.
33. Mr X, in his witness statement, also said that he was able to identify the Employee as a member of staff because he was wearing staff uniform. He did not describe any conversation with the Employee in which the Employee identified himself as a security guard because he said that he didn't think that it made any difference whether the Employee was a security guard or not. Nor indeed did Mr X set out any detail about what transpired outside room 320 after the return from the bar in the early hours.
34. It was Mr X who first wrote to the Defendant to complain about what happened by letter dated 20 September 2010. The material section of Mr X's letter is as follows:

"However, as was reported to our representative Mr Dilshan and Kuoni at the time, my wife was sexually assaulted by a member of hotel staff at [A] Hotel on July 17th 2010. As a result of this incident, an attack by one of Kuoni's supplier's staff members, we were not only unable to enjoy our holiday, but have also spent the period since our holiday in a state of high stress and anxiety as we await the results of my wife's HIV / AIDS test, and a paternity test as we have since discovered that my wife is pregnant."

35. That letter was followed up by a letter from the Claimant's solicitors on 30 September 2010 which described the assault circumstances as follows:

"On 17 July 2010 our client was sexually assaulted by a member of hotel staff at [A] Hotel hotel. Our client was walking towards reception, when a staff member approached her. Our client was informed that there was a "short-cut to reception". Our client followed the staff member. She was taken by force into a room and sexually assaulted."

36. Given that the Claimant and her husband had been at the Hotel for a number of days and that security guards at

the Hotel wore distinctive dark-brown trousers and light-brown shirts and were plainly visible both at fixed points and whilst on foot patrol, accepting as I do the evidence of Mr Cruse to that effect, it is simply not credible that the Claimant who had a background in hotel management, would have taken an individual wearing blue overalls to be a member of the security team rather than, as in fact was the case, the maintenance team. Her evidence that she didn't recall seeing anyone dressed in dark-brown trousers and light-brown shirts was deeply unsatisfactory and I have no hesitation in concluding, contrary to the Claimant's assertion, that, at the material time, she was aware that the Employee was not a member of the Hotel's security team. Nor do I accept her evidence that the Employee identified himself as a security guard. Had he done so she would surely have said so at the outset. However, on any view, it is plain that the Claimant's case on this issue has evolved over time and it is also at best surprising that given that the Claimant now accepts that her assailant was wearing blue overalls that she did not say so at the outset, yet there is no reference to blue overalls in either the Particulars of Claim, the Further Information or indeed her first Witness Statement.

37. It is to be noted that in neither of the two most contemporaneous documents, the Accident / Incident Form completed by the Claimant's husband and the police report, is there any suggestion that the Employee was a security guard. Mr X describes the individual as "a member of staff" and "staff member" whilst the police report refers to "a casual staff who is attached to maintenance department". The only sensible conclusion, which is the conclusion urged upon me by counsel for the Defendant, is that the Claimant and indeed her husband have embellished their evidence in this regard in order to bolster the Claimant's case.
38. That does not, of course, necessarily mean that the Court cannot accept that a sexual assault took place. It was reported to her husband and then to the management of the Hotel within a very short period of it having occurred. The Claimant was given the morning after pill in Sri Lanka and underwent medical examinations in Sri Lanka including a genital swab and investigations for sexually transmitted diseases on her return to Scotland and was indeed diagnosed with such diseases and was treated with antibiotics. She also underwent testing for HIV and Hepatitis and paternity testing. It is difficult to believe that a Claimant would have been prepared to subject herself to all of those procedures had such an attack not taken place and on the balance of probabilities therefore I conclude that the Claimant was indeed the subject of a sexual assault in the early hours of 17th July 2010 by the Employee who was wearing blue overalls but who had not previously identified himself as a security guard and who the Claimant had no reason to believe and in fact did not believe was a security guard.

Improper performance of the holiday contract

39. It is common ground that the contract between the Claimant and Defendant is caught by the 1992 Regulations.
40. What is said on behalf of the Claimant is that she was provided with accommodation at the Hotel and the services of all the Hotel's employees connected with that accommodation as part of the holiday purchased from the Defendant and that those employees all had to discharge their obligations with reasonable skill and care. Those services included the provision by all Hotel employees of all and any services for the ultimate benefit of a guest at the Hotel whether or not the employee concerned was front of house or like the Employee, an electrician, in the background keeping the Hotel's various services running. Thus, the argument runs, the Defendant promised that there would be no deficiencies in those services which would be provided to a reasonable standard, and the Defendant accepts responsibility for personal injury as a result of any activity forming part of the holiday arrangements, such that the Claimant was entitled to be able to walk from her room to reception without being assaulted by a member of the Hotel's staff. She was entitled to accept an offer of a short-cut to reception from a uniformed and on duty employee and was entitled to expect not to be assaulted, still less not to be raped, by such an employee.
41. The Claimant relies on the terms of the contract between the Defendant and the Hotel, pursuant to which the Hotel accepted an obligation to provide services namely "accommodation, facilities, amenities, food and drinks and all kinds of services provided for the benefit of Clients at the Hotel by the Supplier and / or its agents or sub-contractors" and accepted an obligation to provide those services "in accordance with a standard of service which is adequate with the Hotel's official category". Moreover, it warranted that the Hotel and the Supplier and its employees...at all times fully comply with all applicable international national and local trade and other laws.

42. In the circumstances it is said that a violent attack in the middle of the night by a uniformed hotel employee on duty and lawfully in the Hotel is a flagrant breach of the Hotel's obligations to the Claimant. This was not a random attack by someone the Claimant had previously met that evening and at the time he was ostensibly at least providing a service to her in her capacity as a guest, namely showing her a short-cut and the attack happened in the midst of and as an inextricable part of the purported performance by the attacker of precisely the sort of services which the Claimant was entitled to expect under her contract with the Defendant.
43. As it seems to me, in order to succeed, the Claimant has to prove either a failure of performance or as she asserts, the improper performance of the contract and that improper performance has to amount to a breach of the contract. That is to say that there has been a failure to perform the contract with reasonable care and skill and in the sense that it must be shown that there is fault on the part of the other party to the contract or the supplier of the relevant service for whose fault the Defendant is responsible. The starting point must be the contract which the Claimant made with the Defendant, the material terms of which I have set out earlier in this judgment and effectively mimic the 1992 Regulations.
44. 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.

Statutory Defences

45. In the light of my findings there is no need to go on to deal with the issue of whether the Defendant is entitled to rely on any of the statutory defences. Again, to my mind, 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. No criticism is now made on the Claimant's behalf of the Employee's recruitment or vetting and therefore there was nothing to put anyone on notice.
46. I should also deal with the issue of vicarious liability albeit that it was no part of the Claimant's case since it was submitted on the Claimant's behalf that English law would impose liability on a hotelier if an on-duty employee in the course of engaging with the hotelier's guests committed a violent criminal assault in the light of the recent Supreme Court decision in *Mohamud v Morrison Supermarkets PLC* [2016] UKSC 11.
47. For an employer to be vicariously liable for the employee the wrongful conduct must be so closely connected with acts the employee was authorised to do that for the purposes of the liability of the employer to third parties, the wrongful act may fairly and properly be regarded as being done while acting in the ordinary course of an employee's employment. There are two matters to be considered:

- i) what functions or field of activities have been entrusted to the employee and;

ii) whether there is a sufficient connection between the position in which he was employed and his wrongful conduct,

to make it right for the employer to be held liable under the principle of social justice.

48. In this case the Employee was an electrician and not a security guard and to my mind 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. The Claimant merely bumped into the Employee during the night and was offered a short-cut to reception. That offer had no connection whatsoever with his duties. It 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 Regulations.

Quantum

49. In the light of my findings on the issue of liability there is also no need for me to go on to review the evidence adduced on this issue and make findings. However, for the sake of completeness, I will do so albeit shortly.
50. In the event, the only issue for determination, the parties having otherwise agreed the financial consequences of a finding of liability, are past and future loss of earnings from February 2012 onwards including any pension loss which in turn depends on the resolution of the question of whether the Claimant ceased to be a podiatrist as a direct result of the psychological injuries suffered following the sexual assault in July 2010 or for other life-style reasons.
51. On this issue, the Claimant's evidence was that but for the sexual assault, she would have continued as a podiatrist, moving into management before developing a private practice. While she accepted during the course of cross-examination that it was recorded in a letter from a therapist dated 20 July 2010, that she did not particularly enjoy the work and did not see it as being a long-term career, she insisted that the letter did not accurately reflect her views. She was unhappy with the particular role in which she found herself but hoped to be able to specialise in the near future.
52. However, as a result of the sexual assault she developed an aversion to being alone with men who were unknown to her, particularly if of south-east Asian appearance. Whilst in the period after her return to work and before the commencement of maternity leave, she had been able to continue to work as a podiatrist that had been on the basis of adjustments having been made through the good offices of her line manager who was aware of the circumstances of the sexual assault and was supportive. Such an approach would however not have been sustainable in the longer term. Moreover even in that period prior to the commencement of maternity leave, there had been occasions when the special measures had failed to work appropriately and the Claimant says she had been told that she would eventually have to resume lone visits.
53. So far as the move from Aberdeen to Glasgow was concerned, she suggested that the move was because she wanted to have the support of her family and that although her husband had indeed been made redundant from his job in Aberdeen, he had job offers in both the Aberdeen and Glasgow areas and they had childcare arranged in Aberdeen.
54. On this issue, had it been necessary, I would have had no hesitation in concluding that the decision was for life-style reasons. The Claimant did not like the role she was performing and despite her protestation that the letter of 20 July 2010 did not accurately reflect her views, she plainly did not seek podiatry as a long-term career.
55. She had returned to work after an initial period and reasonable adjustments had been made. It is accepted on the Claimant's behalf that she had a good relationship with her immediate line manager and the preponderance of the evidence suggests that she was coping well and felt well-supported prior to commencing her maternity leave. However after the birth of her daughter, Maya, she began to suffer from depression which continued until mid 2012 which would have prevented her from working in any event.
56. She made no attempt to contact occupational health about any short-comings in the reasonable adjustments in

the period prior to the commencement of her maternity leave and in my judgment had there been such problems, she would have raised them with occupational health. By the same token I am not persuaded by the argument that the only reason that the Claimant was able to cope in the period leading up to the commencement of her maternity leave was that she knew that it was only for a short period. The Claimant had a good relationship with her line manager and had she had a problem with the way the reasonable adjustments were being operated she would surely have raised that with the line manager who was both sympathetic and a friend.

57. In mid-September 2011, the Claimant moved to Glasgow. Her husband had been made redundant and although it was suggested that he had alternative job offers both in Aberdeen and Glasgow, the Claimant's mother lived in Glasgow and on the balance of probabilities, absent post traumatic stress disorder, in my judgment the Claimant would in any event have given up her role as a podiatrist and moved to Glasgow. On this issue, therefore, I would have concluded on the balance of probabilities that there was no claim.

Conclusions

58. It follows in my judgement that this claim should be dismissed.
59. I trust that the parties will be able to agree the form of an order including the issue of costs, in which case there will be no need for the parties to be represented at the formal hand down of this judgment. In the event that there are any outstanding issues which require determination, the parties should serve and file short submissions together with copies of any supporting documentation including a draft of the order sought (and copies of any authorities relied on) no later than three days prior to hand down with a view to any such issues being resolved on paper.
60. Finally, I would like to take this opportunity to thank both counsel for their assistance in this case.