

Recovery of non-economic damages for breach of consumer guarantees

Parisa Hart reports on *Moore v Scenic Tours Pty Ltd* [2020] HCA 17

The High Court has unanimously held that Part 2 of *Civil Liability Act 2005* (NSW) (the CLA) does not limit or preclude the recovery of damages for ‘disappointment and distress’ for breaches of consumer guarantees under the Australian Consumer Law (ACL) if they arise from a breach of contract.

Background

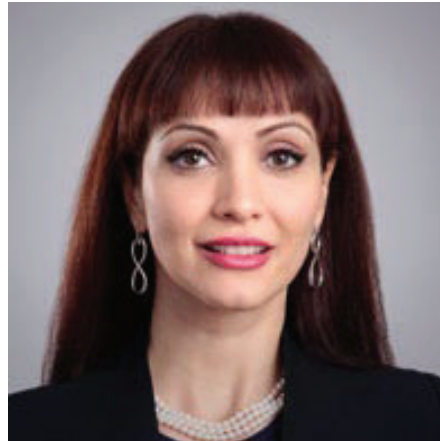
The plaintiff, Mr Moore, and his wife booked a river cruise with Scenic Tours (Scenic) which was promoted as ‘a once in a lifetime cruise along the grand waterways of Europe’ in ‘all-inclusive luxury’.

The tour was scheduled to commence in Paris on 31 May 2013 and proceed along the Rhine, Main and Danube Rivers, departing from Amsterdam on 3 June 2013 and concluding on 17 June 2013 in Budapest. However, the Rhine and Main Rivers were flooded due to unpropitious weather conditions and the cruise lasted only three days instead of ten days. Instead, the cruise passengers had to travel many hours by bus and by the time of the conclusion of the cruise in Budapest they had had to change ship at least twice.

Representative proceedings were commenced against Scenic in the Supreme Court of New South Wales on behalf of Mr Moore and 1,500 passengers who booked cruises with Scenic between the same period of time (‘group members’). Mr Moore was the lead plaintiff in these proceedings. He claimed that Scenic breached sections 60 and 61 of the ACL for the following reasons:

- Scenic failed to exercise due care and skill in the supply of the tours;
- The tours were not reasonably fit for the purpose that Mr Moore and each of the group members acquired them; and
- The tours were not of a nature and quality as could reasonably be expected to achieve the result that Mr Moore and each of the group members wished those services to achieve.

Mr Moore argued that Scenic ‘knew or should have known’ about likely severe



weather conditions but chose not to cancel the tours or inform the passengers in a timely fashion in order to give them an opportunity to cancel their trips. He claimed damages for loss suffered pursuant to sub-sections 267(3) and (4) of the ACL, including damages for ‘disappointment and distress’ pursuant to s 267(4). That section provided: ‘*The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.*’

Scenic contended that section 275 of the ACL picked up and applied section 16 of the CLA as a surrogate law of the Commonwealth. Section 275 provided:

‘If:

- there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2; and*
- the law of a State or a Territory is the proper law of the contract;*

that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.’

Section 16(1) limits awards of non-economic loss in personal injury claims by providing that:

‘No damages may be awarded for non-economic

loss unless the severity of the non-economic loss is at least 15% of a most extreme case.’

Scenic argued that Mr Moore was therefore precluded from recovering damages of that kind because his claim for personal injury damages for non-economic loss was not at least 15% of a most extreme case. This issue became the focus of the dispute in the High Court.

The issues

At first instance, Garling J in the Supreme Court of NSW found Scenic to be in breach of sections 60 and 61(1) of the ACL and awarded Mr Moore \$10,990 in damages for loss of value and \$2,000 in damages for disappointment and distress pursuant to sections 267(3) and (4) of the ACL respectively, plus interest: at [18].

His Honour took the view that section 275 of the ACL picked up and applied section 16 of the CLA as surrogate federal law but had no application in Mr Moore’s claim because he suffered disappointment and distress outside New South Wales. Therefore, his Honour rejected Scenic’s argument and stated that Mr Moore’s claim was not precluded by section 16 of the CLA.

The New South Wales Court of Appeal upheld Justice Garling’s decision that Scenic had contravened sub-sections 61(1) and (2) of the ACL and that section 275 of the ACL applied section 16 of the CLA as a law of New South Wales to limit or preclude Scenic’s liability for failure to comply with consumer guarantees. The Court set aside his Honour’s award of damages for disappointment and distress on the basis that section 16(1) was not subject to geographical limitations and applied to losses suffered overseas as well.

The High Court’s decision

In the High Court, Mr Moore argued that:

- section 275 of the ACL did not pick up and apply section 16(1) of the CLA;
- damages claimed for disappointment and distress as a result of breach of a contract to provide a pleasant and relaxing holiday were not precluded by section 16(1) of the CLA because they were not damages for personal injury; and



- section 16 of the CLA does not apply to claims for damages where the loss occurred outside New South Wales.

Does s 275 of the ACL apply part 2 of the CLA to limit and preclude recovery of damages?

Mr Moore relied on *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388 and submitted that section 275 of the ACL only applied to limit or preclude liability for breach of contract, not to laws concerning quantification of recoverable damages. He submitted that section 16 of the CLA was a law which governed the assessment and quantification of damages and did not impose limitations on liability. The plurality (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) rejected Mr Moore's submission and held that the natural reading of section 275 leads to the conclusion that the section imposes limitations on both 'liability' and 'recovery of damages'. The Court held that the purpose of section 275 of the ACL was to pick up and apply those state and territory laws that limit amounts of damages that might be recovered under section 267(3) and (4) of the ACL. Therefore, section 16(1) was picked up and applied by section 275 to limit the recovery of damages.

Do damages for disappointment and distress constitute personal injury damages for non-economic loss under part 2 of the CLA?

Scenic relied on *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 in contending that the appellant's disappointment and distress was an 'injury' and 'impairment to his mental condition' in circumstances in which his expectations of 'pleasure, entertainment or relaxation were unfulfilled'. Scenic further submitted that disappointment and distress

constituted 'pain and suffering' or 'loss of amenities of life' under the definition of 'non-economic loss' in section 3 of the CLA: at [39].

Mr Moore submitted that his claim for recovery of damages for disappointment and distress was not by nature a personal injury claim and, therefore, part 2 of the CLA did not apply. He further argued that his 'reaction of disappointment' to Scenic's breach of a promise to provide a relaxing holiday was 'a normal and healthy response' and was not an 'impairment of his mental condition' within the definition of 'injury' and 'non-economic loss' in section 3 of the CLA: at [40].

The plurality rejected Scenic's submission on the basis that it invited the Court to disregard the distinction between the disappointment and distress resulting from breach of a contract and disappointment as a consequence of personal injury, therefore, it was 'untenable' in light of the decision in *Baltic Shipping*: at [42].

The plurality held that: '*Disappointment at a breach of a promise to provide recreation, relaxation and peace of mind is not an "impairment" of the mind or a "deterioration" or "injurious lessening or weakening" of the mind. Frustration and indignation as a reaction to a breach of contract under which the promisor undertook for reward to provide a pleasurable and relaxing holiday is, of itself, a normal, rational reaction of an unimpaired mind*'. Consequently, Mr Moore's claim was for damages resulting from Scenic's breach of contract, not for personal injury: at [41].

The plurality also made the following observations:

- the decision in *Flight Centre Ltd v Louw* (2010) 78 NSWLR 656 was incorrectly decided because it held that disappointment and distress was an 'impairment' of a person's mental condition: at [48];

- *New South Wales v Ibbett* (2005) 65 NSWLR 168 and *New South Wales v Corby* (2010) 76 NSWLR 439 were concerned with damages consequential upon personal injury not for a breach of contract, and so did not stand as authority for the proposition that a claim for damages for breach of contract for disappointment or distress from a breach of a contract to provide pleasure, relaxation and freedom from molestation is a claim for non-economic loss relating to personal injury within the scope of Part 2 of the CLA: at [50]; and

- in *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641 the plaintiff's claim for disappointment and distress arose from physical injuries she sustained in the course of her holiday and was distinguishable from Mr Moore's claim which was occasioned by a breach of contract: at [53].

Edelman J agreed with the plurality but provided further reasoning in support of the conclusion that Part 2 of the CLA applies exclusively to damages that 'are consequential upon physical injury' rather than those arising from a breach of contract (at [62]-[75]).

His Honour concluded that section 16 of the CLA is subject to two constraints:

Part 2 of the CLA applies to an award of 'personal injury damages' which borrows its definition from the law of torts: at [72]; and this section is heavily concerned with compensation for personal injury in the law of torts and only applies to non-economic loss as defined in section 3 and within the ambit of s 11A(2) of the CLA: at [74].

Therefore, Part 2 only applies to damages arising from personal injury claims. **BN**