Case Note: *Moore v Scenic Tours Pty Ltd* [2020] HCA 17

On Friday, 24 April 2020, the High Court handed down an important decision on the interaction between the *Australian Consumer Law* ("ACL"),[1] and State law. The decision also addressed the meaning and scope of "personal injury" claims under the *Civil Liability Act 2002* (NSW) ("CLA"). This article considers the decision predominantly from a Victorian perspective. Victoria's definition of "personal injury" in the *Wrongs Act 1958* (Vic) ("WA") is identical to NSW's definition in the CLA.[2]

The facts

The facts are straightforward. Mr Moore was promised "*a once in a lifetime cruise along the grand waterways of Europe*", on a luxury river cruise. Mr Moore had had spinal surgery and had problems sitting for long stretches, spending his "*life savings*" to travel in luxury with his wife. Because of adverse weather, Mr Moore and his wife cruised only three out of 10 days, not on the luxury cruise, travelling the rest of the tour by bus.

Mr Moore, in a representative proceeding on behalf of about 1,500 passengers of Scenic Tours ("Scenic"), sued Scenic under the ACL, invoking the Federal jurisdiction of the Supreme Court of New South Wales.[3] He alleged that Scenic failed to exercise due care and skill in the supply of the tour in breach of the statutory guarantee found in section 60 of the ACL. That section is as follows:

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1 Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

2 See section 28B of the WA and section 26A of the CLA.

3 Despite the loss occurring overseas, the ACL applied because of the extraterritorial provisions found in section 5(1) of the *Competition and Consumer Act.* See para [11] and footnote [16] of the decision.

60 Guarantee as to due care and skill

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

In addition, Mr Moore claimed Scenic failed to provide a tour of a nature and quality as could reasonably be expected in breach of the statutory guarantees in section 61 of the ACL. That section is as follows:

61 Guarantees as to fitness for a particular purpose etc.

(1) If:

(a) a person (the ***supplier***) supplies, in trade or commerce, services to a consumer; and

(b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

(2) If:

(a) a person (the ***supplier***) supplies, in trade or commerce, services to a consumer; and

(b) the consumer makes known, expressly or by implication, to:

(i) the supplier; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;

the result that the consumer wishes the services to achieve;

there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

Scenic's failure, claimed Mr Moore, arose because Scenic knew or ought to have known about the weather conditions and cancelled or rescheduled the cruise.

Mr Moore claimed damages under section 267(4) of the ACL. Section 267 of the ACL permits the recovery of 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."

Mr Moore claimed damages in respect of:

1. the difference in value between the price he paid for the cruise services, and the actual value of the cruise services received; and
2. damages for "*disappointment and distress"* consequent upon Scenic's failure to provide the cruise services in accordance with his contract with Scenic.

The Courts below

In addition to damages for difference in value, the trial judge awarded Mr Moore $2,000 for his disappointment and distress. His Honour accepted that that claim was regulated by section 16 of the CLA, because it was an award for "*personal injury*" damages. However, the trial judge found that, because Mr Moore's loss occurred outside of NSW, section 16 of the CLA did not apply, as it was beyond NSW's jurisdiction.

Scenic appealed. The Court of Appeal allowed the appeal, ruling:

- that the CLA applied, even though Mr Moore's loss occurred outside of NSW, and indeed outside of Australia;
- that Mr Moore's claim for damages for "*disappointment and distress*" was a claim for "*personal injury*" damages within the meaning of the CLA; and that
- as such, section 16 operated to preclude any award of damages for non-economic loss being made to Mr Moore.

Mr Moore appealed to the High Court.

The dispute in the High Court

Before the High Court, it was no longer in issue that Mr Moore was entitled to recover damages in respect of the different in value of the cruise services paid for versus the value of those actually received.

The parties continued to dispute whether Mr Moore was entitled to an award of damages for "*disappointment and distress"* consequent upon Scenic's breach of contract and the guarantee contained in section 60 of the ACL.

Scenic argued that section 275 of the ACL operated so as to make Mr Moore's claim subject to the CLA. Section 275 is as follows:

> **275 Limitation of liability etc**
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> If:
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> (a) 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
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> (b) the law of a State or a Territory is the proper law of the contract;
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> 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 60 of the ACL is within "Subdivision B of Division 1 of Part 3-2".

Scenic argued that section 275, properly construed, picked up and applied the law of the State or Territory where the parties entered into the contract, in this case NSW, and in particular the CLA which operated in that jurisdiction to "*limit or preclude liability… and recovery of that liability"* in relation to the section 60 breach. Scenic made this argument despite Mr Moore bringing his claim under the Supreme Court's Federal jurisdiction.

Scenic argued that, if the CLA applied, Mr Moore's claim for damages for "*distress and disappointment"* must fail because of section 16 of the CLA.

Section 16 regulates the circumstances in which damages for non-economic loss may be awarded by a Court in "*personal injury*" claims in NSW, whether the claim be brought in tort, for breach of contract or under statute. In particular, non-economic loss damages may only be awarded if "*the severity of the non-economic loss is at least 15% of a most extreme case*". As such, section 16 performs a similar function to Part VBA of the WA, and in particular section 28LE which provides that a person may not recover damages for non-economic loss unless the person had suffered a "*significant injury".*

Scenic argued that Mr Moore's claim for damages for "*disappointment and distress"* was a claim for "*non-economic loss"* and "*personal injury"*, and that, as he had not met the 15% threshold provided for in section 16 of the CLA, he could not be awarded any damages under this head.

The High Court

The High Court allowed Mr Moore's appeal.

The Court found that, for claims brought pursuant to section 60 of the ACL, section 275 of the ACL picks up and applies State law, such that any State laws that preclude or restrict any entitlement to damages or the quantification of those damage apply. This is the case even if, as Mr Moore had done, a claimant relies solely on Federal law.

Accordingly, *prima facie* the CLA applied to Mr Moore's for breach of the section 60 guarantee.

However, the Court determined that Mr Moore's claim for damages for "*disappointment and distress"* was not in fact a claim for "*personal injury*" damages within the meaning of the CLA.

The High Court referred to its earlier judgment in *Baltic Shipping v Dillon*[4] to the effect that damages for "*disappointment and distress*" directly consequent upon a breach of contract are a form of damages distinct from damages for "*disappointment and distress"* consequent upon "*personal injury*". The distinct category of damages claimed by Mr Moore is sometimes referred to as "*expectation damages"*.[5] *Baltic Shipping*, the Court commented, made Scenic's submissions on the issue "*untenable"*.[6]

The High Court also noted that "*disappointment and distress"* in this context was not "*non-economic loss*" of the kind contemplated by Part 2 of the CLA, as this referred to damages in the nature of pain and suffering, or loss of enjoyment or amenity of life.

In so finding, the High Court quoted Spigelman CJ in *Insight Vacations Pty Ltd v Young*,[7] who said, with respect to this distinction, that:

> *"The concept of 'personal injury' ... has rarely, if ever, been used to refer to harm to reputation, deprivation of liberty, or to injured feelings such as outrage, humiliation, indignity and insult or to mental suffering, such as grief, anxiety and distress, not involving a recognised psychological condition."*

The Court did note that, in some cases, a plaintiff will have suffered "*disappointment and distress*" damages in not being able to complete a cruise which is "*consisting of,*

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4 [1993] HCA 4; (1993) 176 CLR 344.
5 See the judgment of Edelman J at [63].
6 At [42].
7 [2010] NSWCA 137; (2010) 78 NSWLR 641.

or consequential upon, physical injury", in which case that would be caught by a section, such as section 16 of the CLA. But that was not Mr Moore's claim.

Interestingly, the Court also noted that "*expectation damages"*, not being damages for "*personal injury"*, fall into a similar category to damages flowing from false imprisonment "*insofar as an action for false imprisonment claims damages for loss of dignity and harm to reputation associated with the deprivation of liberty*" - as opposed to a claim for a recognised psychiatric injury consequent upon false imprisonment.[8]

Given these findings, which were sufficient for the appeal to be allowed, the Court declined to address the question of whether the CLA operated to regulate the ability of a litigant to claim for non-economic loss when that loss was experienced beyond the borders of New South Wales.

In the case before the Court, Mr Moore was entitled to his verdict for disappointment and distress damages, unaffected by the CLA's restrictions on damages for "*personal injury*".

Take home points

The following key points flow from this decision:

- Pursuant to section 275 of the ACL, claims for damages brought pursuant to section 60 of the ACL will be subject to local laws that restrict or preclude that liability, or restrict the recovery thereof. In Victoria, the WA will apply to personal injury claims, in particular Part VBA.
- However, claims for damages for "*disappointment and distress*" consequent upon a breach of contract (as opposed to consequent upon an injury) are not

[8] Citing *New South Wales v Williamson* [2012] HCA 57; (2012) 248 CLR 417.

"*personal injury*" or "*non-economic loss damages"* claims within the meaning of the CLA and so are not subject to section 16.

- Given the similarity in the statutes, in a Victorian context it seems very likely that damages for direct "*disappointment and distress"* are not subject to Part VBA of the WA, and in particular the "*significant injury"* requirement.
- The important question of whether section 16 of the CLA, and by analogy part VBA of the WA, apply to losses sustained outside of NSW or Victoria respectively remains unresolved.

Given the relatively small quantum of damages that one might ordinarily expect would be awarded for pure "*disappointment and distress"*, it seems unlikely that the *Moore* decision will open any "*floodgates"*. A matter in which "*disappointment and distress"* is the only head of damage claimed is unlikely to be economically viable. The decision is obviously of more importance to class action proceedings.

We continue eagerly to await clarification as to the extent to which State law such as the CLA or WA might apply to ACL claims other than section 60 claims, such as claims against manufacturers, where section 275 of the ACL does not apply. Earlier decisions of the Supreme Court of Victoria have suggested that these State laws may have no application.[9]

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[9] See *Burke v Ash Sounds Pty Ltd* [2018] VSC 771, case note available at www.linkedin.com/pulse/falls-festival-class-action-provides-some-interaction-lachlan-allan.