High Court soothes holiday disappointment in *Moore v Scenic Tours*

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Snapshot

- In *Moore v Scenic Tours Pty Ltd,* the High Court has clarified that mere injured feelings are not personal injury under the *Civil Liability Act*.
- The Court also concluded that the meaning of 'non-economic loss' in s 16 means pain and suffering or loss of amenities consequent on personal injury, confining the definition to a traditional common law understanding.
- The Court confirmed that *Baltic Shipping* damages for a disappointed holiday are separate and distinct from non-economic loss damages for personal injury, however, they may be subsumed into an assessment under *Civil Liability Act* s 16 if a claim in respect of a holiday contract includes a claim for personal injury.

In the April edition of the *LSJ*, I wrote that the High Court's decision in *Moore v Scenic Tours Pty Ltd* [2020] HCATrans 7 was keenly anticipated because it would clarify whether the definitions of 'injury' and 'non-economic loss' in part 2 of the *Civil Liability Act 2002* (NSW) ('***CLA***') encompassed mere injured feelings caused by a defendant's wrong. The High Court has since published *Moore v Scenic Tours Pty Ltd* [2020] HCA 17 ('***Moore***'), in which it unanimously held that mere injured feelings are not personal injury.

History of proceeding

In this case, Mr Moore paid Scenic Tours ('**Scenic**') for a 'once in a lifetime' luxurious cruise along 'Europe's most famous waterways'. However, unprecedented flooding forced Scenic to radically change the promised itinerary. Mr Moore spent only three of the ten days cruising. He spent much of his time uncomfortably travelling by road and was forced to change cruise ships at least twice, which aggravated a pre-existing back injury. He was, unsurprisingly, bitterly disappointed by the experience. In *Moore v Scenic Tours Pty Ltd (No 2)* [2017] NSWSC 733, Mr Moore sued Scenic under the Australian Consumer Law ('**ACL**') for breaching three statutory guarantees in respect of Scenic's service. Relevantly, the trial judge awarded Mr Moore $2,000 for distress and disappointment, under the authority of *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 ('***Baltic Shipping***'). *Baltic Shipping* holds that a plaintiff may be awarded non-economic loss damages to compensate disappointment or distress caused by a breached promise in a 'holiday contract' to provide pleasure or relaxation.

Scenic, however, relied on *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137 ('***Insight Vacations***') and *Flight Centre Ltd v Louw* [2011] NSWSC 132 ('***Flight Centre***') to argue that Mr Moore's distress and disappointment damages were subject to assessment under s 16 of the *CLA*. These cases held that distress and disappointment were an 'injury' as defined in s 11 of the *CLA* which defines 'injury' as including 'impairment of a person's … mental condition.' Hence, if a plaintiff was awarded damages for distress and disappointment, then this was an award of 'personal injury damages', which attracted the application of pt 2 of the *CLA*.

These cases further held that such injured feelings were 'pain and suffering' and therefore fell with the meaning of 'non-economic loss' in s 16. If pt 2 applies to an award of personal injury damages, then non-economic loss damages are assessed under s 16. Section 16 provides that a plaintiff cannot receive damages for non-economic loss unless their condition is at least fifteen per cent of a 'most extreme case.'

The trial judge in *Moore* felt obliged to follow the reasoning in *Flight Centre* (at [865]). His Honour held that, *if* s 16 applied, then Mr Moore had not proved his injured feelings were at least fifteen per cent of a most extreme case (at [873]). However, the trial judge ultimately held s 16 did not apply because it did not have extra-territorial operation (at [908]). Mr Moore therefore received $2,000 for his injured feelings.

New South Wales Court of Appeal

In *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238, the Court of Appeal upheld that Scenic had breached the consumer guarantees but held that s 16 governed the assessment of distress and disappointment damages (at [398]). Given Mr Moore did not prove his condition was at least fifteen per cent of a most extreme case, the Court overturned the award of $2,000 (at [391]).

High Court of Australia

In the High Court, Mr Moore submitted that his injured feelings were neither an 'injury' for the purpose of pt 2 of the *CLA*, nor a form of 'non-economic loss' for the purpose of s 16. The High Court unanimously agreed with this submission.

The joint judgement held that '[d]isappointment 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.' Rather, such feelings in that context are 'a normal, rational reaction of an unimpaired mind' (at [41]). Therefore, Mr Moore's pure injured feelings were not mental 'impairment' for the purpose of s 11 and not an 'injury' which attracted the application pt 2 of the *CLA*.

As to whether such injured feelings were 'non-economic loss' for the purpose of s 16, the joint judgment distinguished between 'loss being disappointment and distress for breach of a contract to provide a pleasurable and relaxing experience and loss being disappointment and distress that is consequential upon personal injury' (at [42]). It noted that in *Baltic Shipping*, the High Court established that injured feelings caused by breach of a contract to provide pleasure, relaxation and freedom from molestation were 'separate and distinct … from injured feelings compensable under the rubric of pain and suffering and loss of amenities of life associated with personal injury' (at [43]).

Hence, the Court concluded that the meaning of 'non-economic loss' in s 16 of the CLA means pain and suffering or loss of amenities consequent on personal injury (at [46]). It further supported this finding by noting that pt 2 was enacted to address the 'mischief' of personal injury insurance becoming unsustainable. It held neither the legislation itself nor any extrinsic materials indicated that the Parliament intended pt 2 to affect anything held in *Baltic Shipping* (at [47]). For these reasons, it held that *Flight Centre* was wrongly decided (at [48]).

Analysis

Baltic Shipping tells us that, at common law, injured feelings caused by a breach of a holiday contract ('frustrated holiday injured feelings') are separate and distinct loss from injured feelings caused by personal injury. Each can be compensated by its own award of damages. In *Baltic Shipping*, the plaintiff received both non-economic loss damages for her personal injury *and* an award for her frustrated holiday injured feelings.

However, if *Baltic Shipping* were decided today, then the outcome would be different because of pt 2 of the *CLA* . Although the Court in *Moore* held that injured feelings caused by personal injury are 'separate and distinct' from frustrated holiday injured feelings, it seems that, if the plaintiff is actually injured by a breach of a holiday contract, then the plaintiff's claim for frustrated holiday injured feelings will be subsumed into their claim for non-economic loss damages awarded in respect of their personal injury.

Part 2 of the *CLA* applies 'to and in respect of an award of personal injury damages', where s 11 defines 'personal injury damages' as 'damages that *relate to* … injury to a person.' (Emphasis added.) In *Moore*, the High Court appears to have accepted that when a claim for frustrated holiday injured feelings is made with a claim for personal injury, it is a claim that 'relate[s] to' the claim for personal injury. Hence, if pt 2 applies to the claim for personal injury damages, then the claim in respect of the frustrated holiday injured feelings is also a claim for 'personal injury damages'. That being so, the assessment of both forms of loss is subsumed into a single assessment under s 16, meaning that the plaintiff must demonstrate their condition was more than fifteen per cent of a most extreme case. Therefore, if the plaintiff in *Baltic Shipping* had brought her claim today, she would not be awarded separate awards for her personal injury and frustrated holiday injured feelings. Rather, she would have received a single lump sum assessed under s 16.

The High Court appears to have endorsed the above line of reasoning by citing with apparent approval the New South Wales Court of Appeal's decision in *Insight Vacations*. In *Insight Vacations*, the plaintiff's holiday was shortened by the defendant's negligence, which caused the plaintiff physical injury. The negligence was a breach of an implied warranty to exercise due care and skill implied into the holiday contract by *Trade Practices Act 1974* (Cth). The trial judge awarded non-economic loss damages for the physical injury, which was assessed under s 16. The trial judge also applied *Baltic Shipping* to award a separate $8,000 to compensate the plaintiff's distress and disappointment caused by the frustration of her holiday by the injury. In the trial judge's opinion, distress and disappointment were outside the definition of non-economic loss in s 16.

However, the Court of Appeal held that the frustrated holiday injured feelings damages could not be awarded separately from the non-economic loss damages awarded for her personal injury. In *Moore*, the joint judgment cited Sackville A-JA from *Insight Vacation*, where his Honour held:

'If the damages awarded for disappointment flowing from the [plaintiff's] inability, by reason of the personal injury, to enjoy the remainder of her holiday, were damages that "relate[d] to" her injury, they were "personal injury damages" (s 11) and pt 2 of the [*CLA*] applied in respect of the award of such damages (s 11A(1))' (at [164]).

If the High Court has thus held that a claim for frustrated holiday injured feelings is subsumed into a claim for non-economic loss damages in a personal injury claim, then a plaintiff who suffers an injury because of a breach of a 'holiday contract' should think about whether to include the personal injury aspect in a claim. If s 16 applies to assess the non-economic loss damages, then the plaintiff must be at least fifteen per cent of a most extreme case to be awarded anything. If the injury is minor and the plaintiff does not meet – or only just meets – the threshold, then it may be better to only claim *Baltic Shipping* damages, rather than any personal injury damages.

To conclude, the High Court's decision in *Moore* has confined the definition of 'non-economic loss' to a traditional common law understanding. Pure injured feelings are neither an 'injury' nor 'non-economic' loss under the *CLA*. However, claims in respect of injured feelings may nonetheless be treated as claims for 'personal injury damages' if the claim 'relate[s] to' a claim for personal injury. As noted above, this may subsume a claim for injured feelings into the assessment of non-economic loss damages for the personal injury. Whether this happens only in 'holiday contract' cases remains to be seen. **LSJ**