MOORE ..... APPELLANT;
PLAINTIFF,

AND

SCENIC TOURS PTY LTD ..... RESPONDENT.
DEFENDANT.

[2020] HCA 17

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

HC of A 2020

CANBERRA *Feb* 11;

BRISBANE *April* 24 2020

Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ

*Damages — Consumer guarantees — Breach — Supply of services — Pleasure cruise — State limits on liability for breach of contract applicable — State law precluded personal injury damages for non-economic loss unless loss at least 15 per cent of most extreme case — Whether applicable to claim for damages for disappointment and distress not consequential upon physical or psychiatric injury — Competition and Consumer Act 2010 (Cth), Sch 2, ss 60, 61, 267, 275 — Civil Liability Act 2002 (NSW), ss 3, 11, 11A, 16.*

Sections 60 and 61 of the *Australian Consumer Law*, being Sch 2 to the *Competition and Consumer Act 2010* (Cth), contained certain guarantees in relation to the supply of services to consumers. Section 267(4) provided that the consumer may, by action against the supplier, recover damages for any reasonably foreseeable loss or damage suffered by the consumer because of a failure to comply with a guarantee. Section 275 provided that, if there was a failure to comply with a consumer guarantee that applied to a supply of services and the law of a State or a Territory was 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". Part 2 of the *Civil Liability Act 2002* (NSW) applied to and in respect of an award of "personal injury damages", which was defined to mean "damages that relate to the death of or injury to a person". Within Pt 2, s 16(1) provided that no damages could be awarded for non-economic loss unless the severity of the non-economic loss was at least 15 per cent of a most extreme case.

M booked a holiday tour for his wife and himself with a tour company, S, that included a European river cruise which was promoted in S's tour brochure as "a once in a lifetime cruise" with guests treated to "all inclusive luxury". The cruise was severely disrupted by adverse weather. The proper law of the contract between M and S was the law of New South Wales. M claimed damages under s 267(4) of the *Australian*

*Consumer Law* for, among other things, disappointment and distress for breach of a contract to provide a pleasant and relaxed holiday. Although the minimum threshold set out in s 16(1) of the *Civil Liability Act* was not reached, the primary judge held that s 16 had no application to loss suffered outside of New South Wales. The primary judge concluded that S had failed to comply with consumer guarantees in the *Australian Consumer Law* and awarded a sum in compensation for loss of value and damages for disappointment and distress. The Court of Appeal disagreed with the primary judge's conclusion about the application of s 16, and set aside the primary judge's award of damages for disappointment and distress. M contended on appeal to the High Court that s 16 of the *Civil Liability Act* was not picked up and applied by s 275 of the *Australian Consumer Law* because it was a law that governed the assessment and quantification of damages rather than a law that imposed a limitation on liability. Alternatively, M contended that his claim for damages for disappointment and distress for breach of contract fell outside Pt 2 of the *Civil Liability Act* because the damages did not relate to personal injury.

*Held*, (1) that s 275 of the *Australian Consumer Law* picked up and applied s 16(1) of the *Civil Liability Act*.

*Per curiam*. The evident purpose of s 275 is to pick up and apply State and Territory laws that limit the amount of compensation or damages that might otherwise be recovered under s 267(3) and (4) of the *Australian Consumer Law*.

(2) That loss consisting of disappointment and distress for breach of a contract to provide a pleasurable and relaxing experience, where not consequential upon physical or psychiatric injury, did not relate to personal injury. Accordingly, s 16(1) of the *Civil Liability Act* did not apply to preclude M from recovering damages for loss of that kind.

*Baltic Shipping Co v Dillon* (1993) 176 CLR 344, applied.

*New South Wales v Ibbett* (2005) 65 NSWLR 168; *New South Wales v Corby* (2010) 76 NSWLR 439; and *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641, considered.

Decision of the Supreme Court of New South Wales (Court of Appeal): *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244, reversed.

APPEAL from the Supreme Court of New South Wales.

David Moore booked an overseas holiday cruise supplied by Scenic Tours Pty Ltd for his wife and himself. Scenic Tours Pty Ltd had promoted the tour in its brochure as "a once in a lifetime cruise along the grand waterways of Europe" featuring "all inclusive luxury". The cruise was severely disrupted by adverse weather conditions. Mr and Mrs Moore cruised for only three of the scheduled ten days, the first three days of which were spent on a less luxurious ship than expected. They spent many hours travelling by bus. Mr Moore commenced representative proceedings against Scenic Tours Pty Ltd, claiming damages in respect of loss suffered as a result of its breaches of the

consumer guarantees contained in ss 60, 61(1) and (2) of the *Australian Consumer Law*. The alleged loss included disappointment and distress for breach of a contract to provide a pleasant and relaxed holiday. No physical injury or psychiatric illness was alleged to have resulted from the breach. The primary judge (Garling J) held that Scenic Tours Pty Ltd had breached the consumer guarantees, and awarded Mr Moore damages for disappointment and distress. His Honour held that s 275 of the *Australian Consumer Law* picked up and applied s 16(1) of the *Civil Liability Act*, but that the latter provision had no application to loss suffered outside of New South Wales. On appeal, the Court of Appeal (Sackville A-JA, with whom Payne JA and Barrett A-JA agreed) held that s 16(1) of the *Civil Liability Act* applied to loss sustained outside of New South Wales and precluded Mr Moore's claim. On 13 September 2019, Bell, Keane and Gordon JJ granted Mr Moore special leave to appeal to the High Court.

*J T Gleeson* SC (with him *J A Hogan-Doran* and *C G Winnett*), for the appellant. Properly construed, including by reference to its use elsewhere in the statute, "liability" within s 275 of the *Australian Consumer Law* ("ACL") means legal responsibility for a wrong and the concomitant entitlement to a remedy. Section 275 alters the criteria for liability attaching to breach of the substantive rights conferred by ss 60-62 of the ACL so as to mirror liability rules existing under certain State and Territory laws of contract. The provision singles out State and Territory laws that "limit or preclude liability, and recovery of any liability" for breach of contract in two interrelated senses: (i) by restricting the level of, or denying altogether, the defendant's legal responsibility for the wrong (the primary obligation); and (ii) by denying a remedy for liability contrary to what would ordinarily flow as a matter of law (the secondary obligation). Section 275 takes State and Territory laws that alter the substantive criteria for contract liability and applies them to modify liability rules attaching to the legal rights and obligations sourced in ss 60-62 of the ACL. Section 16 of the *Civil Liability Act* assumes the existence of a liability, and directs a court as to the quantum of damages that may be awarded for one particular head (non-economic loss). It is not a law that limits or precludes "liability" and "recovery of any liability" within the meaning of s 275 of the ACL. [NETTLE J. How does one recover a liability relevantly otherwise than by an award of damages?] Our point is to say that to limit the recovery is not the same as saying we will regulate the heads of loss or the measurement of those losses. They are distinctly different jurisprudential tasks. Instead of limiting or precluding "liability" and "recovery of liability" for a breach of contract, s 16 of the *Civil Liability Act* commands courts on how to assess and calculate damages for an established violation of legal rights and a concomitant right to a

remedy, and does so whether the underlying claims were "brought in tort, contract, under statute or otherwise" (s 11A(2)). The end result is that s 16 was not picked up in the proceedings below because the ACL, taking account of the limited effect of s 275 itself, "otherwise provides", and because s 275 did not separately apply that law to modify liability under the statutory guarantees relied upon by Mr Moore.

Alternatively, s 16 nonetheless has no application to the appellant's case because of geographic limitations inherent in s 16 read with s 12(1)(b) of the *Interpretation Act 1987* (NSW). First, the Court of Appeal should have held that the text, structure and history of the *Civil Liability Act* support an "unstated assumption" that the *Civil Liability Act* applies where the claim, viewed as a tort, is governed by New South Wales law as the lex loci delicti, and therefore the lex causae. Secondly, and alternatively, the Court of Appeal should have interpreted s 16 as applicable only where the death or injury the subject of the claim was suffered in New South Wales.

Finally, the Court of Appeal's conclusion that s 16 precluded damages under s 267(4) of the ACL was wrong for a different reason. The Court of Appeal erred in following *Insight Vacations Pty Ltd v Young* (1) and accepting that the kind of damages sought by Mr Moore under s 267(4) triggered the application of Pt 2 of the *Civil Liability Act*. Specifically, it wrongly held that a claim for damages for distress which is not consequent upon physical or psychiatric injury, but flows directly from breach of contract or a consumer guarantee – in other words, the kind of damages awarded to Mrs Dillon in *Baltic Shipping Co v Dillon* (2) – is a claim in respect of "non-economic loss", and a claim for "personal injury damages" within Pt 2 of the *Civil Liability Act*. *Insight Vacations* is an unsatisfactory authority for dealing with the problems raised by Mr Moore's case once the context of that decision is fully understood. Unlike the present proceeding, it was a case in which the distress and disappointment the subject of the claim was the result of a physical injury. [He also referred to *Rizeq v Western Australia* (3); *Mann v Paterson Constructions Pty Ltd* (4); *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (5); *John Pfieffer Pty Ltd v Rogerson* (6) and *New South Wales v Ibbett* (7).]

(1) (2010) 78 NSWLR 641.
(2) (1993) 176 CLR 344.
(3) (2017) 262 CLR 1.
(4) (2019) 267 CLR 560.
(5) (1994) 179 CLR 388.
(6) (2000) 203 CLR 503.
(7) (2005) 65 NSWLR 168.

*D L Williams* SC (with him *D S Weinberger* and *A A Lyons*), for the respondent. Section 275 of the ACL operates in respect of State laws that limit or preclude liability for the failure to comply with a consumer guarantee and/or recovery of that liability. The New South Wales Court of Appeal was correct to find that s 16 of the *Civil Liability Act* is such a provision. The word "liability" is a protean term, capable of a number of meanings. The text of the section and particularly its reference to "recovery" tell against the narrow construction for which the appellant contends. The appellant seeks to construe s 275 of the ACL as if there is a clear dichotomy between liability and liability for damages, with the provision applying to the former but not the latter. Such a dichotomy is not supported by the text or context. [KIEFEL CJ. Section 16 operates in relation to what a court is doing concerning a claim for damages and what it limits or precludes is the amount that may be awarded by the court. You say that equates to a preclusion or limitation of liability?] I do.

When s 16(1) of the *Civil Liability Act* is read with s 11A and the definition of "court" in s 3, the relevant matter or thing in and of New South Wales is seen to be the awarding of damages in New South Wales by a court or tribunal. There is no contextual reason for reading s 16(1) as subject to any other geographical limitation. It is important that the territorial application of a statute not be confused with the question of whether or not a State is able to legislate territorially. That power exists so long as there is a connection between the enacting State and the extraterritorial subject matter on which it operated, which requirement is "liberally applied" such that "even a remote and general connexion … will suffice" (8). There is no doubt, then, that the New South Wales legislature has a power to enact a law with the scope of s 16 as found by the Court of Appeal. In light of the legislative history, it is clear that the Court of Appeal's approach "best gives effect to the purposes and text of the provision when it is read in its statutory context" (9).

The Court of Appeal correctly held that s 275 of the ACL, read with s 16 of the *Civil Liability Act*, precludes an award of damages for distress and disappointment under s 267(4) of the ACL. In doing so, the Court of Appeal applied a series of intermediate appellate court

(8) See, eg, *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14, applying the comments of Gibbs J in *Pearce v Florenca* (1976) 135 CLR 507 at 518.

(9) *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 162 [36].

decisions (10) to the effect that damages for distress and disappointment were both personal injury damages and damages for non-economic loss. Each of those propositions is correct for the reasons given in those decisions. They have been further applied in a number of first instance decisions (11). The appellant seeks to undermine those authorities by reference to two matters: (1) he says the authorities are distinguishable on the basis that many concern *Baltic Shipping* (12) type damages in circumstances where the damage was consequent upon personal injury; and (2) he says that disappointment and distress is a healthy reaction of a natural mind to the expectation that was not fulfilled. The notion of "impairment" is the condition of having become worse or diminished in value or "deterioration" or "injurious lessening or weakening". The language of "impairment" of "mental condition" is apt to capture mental anguish, distress and disappointment, as is the ordinary meaning of the word "injury" which includes "wrongful treatment" and "hurt". But even if *Baltic Shipping* type damages do not amount to an impairment of mind, they comfortably satisfy the general concept of "personal injury damages" within the meaning of s 11 of the *Civil Liability Act*. They also satisfy the definition of "non-economic loss" in s 3 of the *Civil Liability Act*. They fall within that which common law would regard as pain and suffering or loss of amenities of life. [He also referred to *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (13); *John Pfieffer Pty Ltd v Rogerson* (14); and *Teubner v Humble* (15).]

*J T Gleeson* SC, in reply.

*Cur adv vult*

24 April 2020

The following written judgments were delivered: —

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ. In 2012, the appellant ("Mr Moore") booked a holiday tour for himself and his wife with the respondent ("Scenic"). The tour, which involved a European river cruise, did not proceed as promised. It is not in issue in this appeal that Scenic's attempts to perform its contractual obligations were attended by breaches of consumer guarantees in the

(10) *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641; *New South Wales v Corby* (2010) 76 NSWLR 439; *New South Wales v Ibbett* (2005) 65 NSWLR 168.
(11) Including *Thomas v Powercor Australia Ltd* [2011] VSC 586.
(12) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.
(13) (1994) 179 CLR 388.
(14) (2000) 203 CLR 503.
(15) (1963) 108 CLR 491.

*Australian Consumer Law* ("the ACL") (16). Mr Moore claimed damages in respect of loss suffered by him as a result of Scenic's breaches. The alleged loss included, among other things, disappointment and distress for breach of a contract to provide a pleasant and relaxed holiday recognised as a compensable head of loss in this Court's decision in *Baltic Shipping Co v Dillon* (17). The issue in this appeal is whether, as Scenic contends, s 16 in Pt 2 of the *Civil Liability Act 2002* (NSW) ("the CLA") applies to preclude Mr Moore from recovering damages for loss of that kind.

2 Mr Moore's claim, founded as it was upon the ACL, was brought in federal jurisdiction. The CLA, being a State law expressed to be binding on a court, cannot affect Mr Moore's claim unless it is picked up and applied by a law of the Commonwealth (18). Scenic contends that s 16 of the CLA is picked up and applied by s 275 of the ACL so as to preclude this part of Mr Moore's claim.

3 Mr Moore's first response to Scenic's contention is that s 16 of the CLA does not apply as a surrogate federal law because s 275 does not pick up and apply those State or Territory laws that affect the assessment of compensation for loss suffered. Secondly, Mr Moore submits that loss consisting of disappointment and distress for breach of a contractual obligation to provide a pleasant and relaxed vacation is not precluded by the provisions of Pt 2 of the CLA because those provisions are concerned exclusively with claims for damages for personal injury; and his claim for the disappointment of his expectation of a pleasant and relaxed vacation is not a claim for personal injury. Thirdly, Mr Moore submits that s 16 has no application where the loss for which damages are claimed is suffered outside of New South Wales.

4 Mr Moore's first submission must be rejected; but his second submission should be accepted. Accordingly, Mr Moore's appeal must be allowed; and it is unnecessary to rule upon Mr Moore's third submission.

5 It is convenient now to set out a brief summary of the factual, statutory and procedural background before turning to consider the arguments of the parties concerning the operation of s 275 of the ACL and the scope of s 16 of the CLA.

**The facts**

6 The river cruise was promoted in Scenic's tour brochure as "a once in a lifetime cruise along the grand waterways of Europe", with guests

(16) *Competition and Consumer Act 2010* (Cth), Sch 2.
(17) (1993) 176 CLR 344.
(18) *Rizeq v Western Australia* (2017) 262 CLR 1 at 24-26 [58]-[63].

on board the Scenic vessel treated to "all inclusive luxury" (19). Mr Moore and his wife chose Scenic's river cruise because they wanted to see different locations in Europe without having to unpack their belongings more than once (20). The river cruise also suited Mr Moore because he found it difficult to spend extended periods of time sitting down, particularly in confined spaces, following spinal surgery (21). The tour was paid for 12 months in advance with what Mr Moore described as his "life savings" (22).

7 The tour commenced in Paris on 31 May 2013. The river cruise along the Rhine, Main and Danube Rivers was scheduled to depart from Amsterdam on 3 June 2013 on board the *Scenic Jewel* and to conclude two weeks later in Budapest (23). The cruise was severely disrupted by adverse weather conditions that resulted in high water levels on the Rhine and Main Rivers (24). Instead of cruising for ten days as scheduled in the itinerary, Mr Moore's experience was of many hours spent travelling by bus; he cruised for only three days (25). The cruise also began on board a different vessel to the luxurious *Scenic Jewel* (26); and by the time the cruise concluded in Budapest, the Moores had changed ship at least twice (27). In short, the holiday tour fell far short of the "once in a lifetime cruise" in "all inclusive luxury" that Mr Moore was promised by Scenic (28).

**The proceedings**

8 Representative proceedings were commenced in the Supreme Court of New South Wales against Scenic by Mr Moore on his behalf and that of approximately 1,500 other passengers ("group members") of 13 Scenic cruises that were scheduled to depart between 19 May 2013 and 12 June 2013 (29).

9 In the representative proceedings it was alleged that Scenic failed to exercise due care and skill in the supply of the tours, in breach of the guarantee in s 60 of the ACL; that the severe disruptions to the river cruises rendered the services comprising the holiday tours unfit for the purpose for which Mr Moore and each of the group members acquired them, in breach of the guarantee in s 61(1) of the ACL; and that the

(19) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [3].
(20) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [78].
(21) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [78].
(22) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [2], [813].
(23) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 250-251 [4].
(24) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 251 [5].
(25) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [644].
(26) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 251 [5].
(27) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [5].
(28) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [3].
(29) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 250 [3], 251 [7].

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 the services to achieve, in breach of the guarantee in s 61(2) of the ACL.

10 Mr Moore's case was that Scenic knew or should have known about the weather disruptions that were likely to occur to each scheduled itinerary; and it chose not to cancel the cruises or inform the passengers in a timely manner to give them the opportunity to cancel their booking (30).

**Statutory provisions**

*The ACL*

11 The ACL regulates the supply of services by corporations to consumers, including services supplied abroad (31).

12 Mr Moore sought relief under s 267 of the ACL. That section provides relevantly as follows:

> "(3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:
>
> …
>
> (b) by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.
>
> (4) 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.
>
> (5) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3)."

13 Mr Moore claimed compensation pursuant to s 267(3) for the difference between the value of services provided by Scenic and the price he had paid for the services. That claim is no longer in issue. The focus of the dispute in this Court is Mr Moore's claim for damages under s 267(4) for disappointment and distress on the basis that "loss or damage" of that kind was "reasonably foreseeable" as a result of Scenic's failure to comply with the consumer guarantees.

14 Mr Moore claimed that s 267(4) permits a court to award damages for disappointment and distress because the contract with Scenic was

(30) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 251-252 [9].

(31) Section 5(1) of the *Competition and Consumer Act* extends the application of the ACL (other than Pt 5-3 thereof) to "the engaging in conduct outside Australia by … bodies corporate incorporated or carrying on business within Australia".

one aimed at providing enjoyment, relaxation, pleasure and entertainment. Scenic countered that s 275 of the ACL picks up and applies Pt 2 (and in particular s 16) of the CLA as a surrogate law of the Commonwealth, the effect of which is to preclude Mr Moore's claim for damages for disappointment and distress.

15 Section 275 of the ACL provides:

> "If:
>
> (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
>
> (b) 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."

16 It is uncontroversial in this appeal that, for the purposes of s 275, the proper law of the contract between Mr Moore and Scenic is the law of New South Wales. That law includes the CLA, to which one may now turn.

*The CLA*

17 Part 2 of the CLA is headed "Personal injury damages". The ambit of Pt 2 of the CLA is relevantly stated by s 11A as follows:

> "(1) This Part applies to and in respect of an award of personal injury damages …
>
> (2) This Part applies regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise.
>
> (3) A court cannot award damages, or interest on damages, contrary to this Part."

18 The term "personal injury damages" is defined in s 11 of the CLA to mean "damages that relate to the death of or injury to a person". The term "injury" is defined, in turn, in s 11 to mean "personal injury", and includes "impairment of a person's physical or mental condition".

19 Mr Moore submitted that his damages claim for disappointment and distress falls outside the scope of Pt 2 of the CLA because such damages are not damages that relate to personal injury. Scenic contended that disappointment and distress constitutes an impairment of his mental condition, and that therefore Mr Moore's claim falls within the scope of Pt 2 of the CLA.

20 Within Pt 2 of the CLA, s 16(1) regulates personal injury damages for non-economic loss. It provides 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."

21 It is common ground in this appeal that the minimum threshold set out in s 16(1) was not reached.

22 The term "non-economic loss" is defined in s 3 of the CLA as follows:

> "**non-economic loss** means any one or more of the following:
> (a) pain and suffering,
> (b) loss of amenities of life,
> (c) loss of expectation of life,
> (d) disfigurement."

23 Scenic argued that disappointment and distress is "pain and suffering" or "loss of amenities of life", and so, it was said, s 16(1) of the CLA applies to preclude Mr Moore's claim for damages for disappointment and distress.

**The primary judge**

24 The primary judge (Garling J) concluded that Scenic had failed to comply with the consumer guarantees in s 60 and s 61(1) and (2) of the ACL (32), and awarded Mr Moore $10,990 in compensation for loss of value (s 267(3) of the ACL); $2,000 in damages for disappointment and distress (s 267(4) of the ACL); plus interest (33).

25 His Honour held that s 275 of the ACL picks up and applies s 16 of the CLA to proceedings in federal jurisdiction (34) and, further, that he was bound by authority (35), "however surprising that result may appear in this case to be" (36), to hold that a claim for damages for disappointment and distress is a claim for damages that relate to the injury of a person under Pt 2 of the CLA (37).

26 In the upshot, however, the primary judge rejected Scenic's contention that s 16 of the CLA applies to Mr Moore's claim. The basis for that conclusion was that s 16 of the CLA has no application to loss suffered outside of New South Wales; and that, because Mr Moore's disappointment and distress was suffered overseas, his claim for damages by way of compensation for that loss was unaffected by s 16 (38).

(32) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [939].
(33) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [941], [944], [946(1)].
(34) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [942].
(35) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [854].
(36) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [854].
(37) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [854], [873].
(38) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [908]-[911], [943].

**The Court of Appeal**

27 The Court of Appeal of the Supreme Court of New South Wales (Sackville A-JA, with whom Payne JA and Barrett A-JA agreed) upheld the primary judge's conclusion that Scenic had breached the consumer guarantees in s 61(1) and (2) of the ACL in relation to Mr Moore's holiday tour (39). The Court of Appeal overturned the primary judge's conclusion concerning Scenic's breach of s 60 of the ACL (40), but that is of no present significance.

28 The Court of Appeal agreed with the primary judge that s 16 of the CLA is a law of New South Wales that is picked up and applied by s 275 of the ACL to limit Scenic's liability under the ACL. Sackville A-JA said (41):

> "Section 16 prohibits an award of damages for non-economic loss unless the threshold requirement of 15 per cent of a 'most extreme case' is met. It follows, subject to any geographical limitation, that s 16(1) applies to limit or preclude Scenic's liability for its failure to comply with the [relevant consumer guarantees] in the same way as s 16(1) would apply to limit or preclude liability for a breach of the contract between Scenic and Mr Moore."

29 On the other hand, the Court of Appeal disagreed with the primary judge's view that s 16 has no application to loss sustained outside of New South Wales (42). In this regard, Sackville A-JA explained that (43):

> "When s 16(1) of the [CLA] is read with s 11A and the definition of 'court' in s 3, the relevant matter or thing in and of New South Wales *is seen to be the awarding of damages in New South Wales by a court or tribunal*. In my opinion, there is no contextual reason for reading s 16(1) as subject to any other geographical limitation." (Emphasis added.)

30 Accordingly, the primary judge's award of damages for disappointment and distress was set aside.

31 In the Court of Appeal, Mr Moore reserved his position as to whether a claim for damages for disappointment and distress constitutes a claim for personal injury damages for non-economic loss within the terms of s 16 of the CLA (44). That position was taken in

(39) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 342-343 [396].
(40) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 342-343 [396].
(41) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 340 [381].
(42) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 341 [389], 342 [391].
(43) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 341 [388] (footnotes omitted).
(44) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 331 fn 222.

light of the state of authority in New South Wales on the issue. That issue was not considered by the Court of Appeal; but it is pursued by Mr Moore in this Court.

**Does s 275 of the ACL pick up and apply s 16 of the CLA?**

32 Mr Moore, in challenging the conclusion of the primary judge and the Court of Appeal that s 16 of the CLA is a law that is picked up and applied by s 275 of the ACL to his claim, submitted that, properly construed, s 275 is directed to State and Territory laws that limit or preclude liability for breach of contract, and is not concerned with laws that limit the assessment of damages once liability has been established. Mr Moore argued that s 16 of the CLA is a law that governs the assessment and quantification of "damages" rather than a law that imposes a limitation upon "liability".

33 It must be said immediately that the distinction that Mr Moore seeks to draw is as difficult to appreciate as it was for Mr Moore's counsel to articulate. Importantly, Mr Moore's construction of s 275 is distinctly awkward in its attempt to downplay the significance of the reference in the provision to "recovery of that liability". Section 275 contemplates limitations upon both "liability" and "recovery"; the reference to "recovery" must be given effect. "Recovery" is readily understood to encompass the amount of money assessed as compensation for the loss for which the defendant is liable. Mr Moore argued that the reference in s 275 to "recovery of that liability" is apt to pick up only those State and Territory laws that limit or preclude legal responsibility for a wrong by placing a ceiling or cap upon the entitlement to recover for that wrong. An example of such a law was said to be that in issue in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (45). It was said that s 275 is not concerned with laws that affect the quantification of recoverable damages where substantive liability for breach has already been established.

34 Mr Moore's argument sits uneasily with the ordinary meaning of the text of s 275. On the natural reading of s 275, the section is concerned to allow a State or Territory law comprehensively to limit or preclude both liability *and recovery* of compensation by way of damages for that liability if the State or Territory law has that effect in relation to other contracts governed by the law of the State or Territory.

35 Within the immediate context in which s 275 appears, the natural reading of the text is confirmed by s 267(3) and (4). These provisions permit a consumer to "recover" compensation or damages for failure to comply with a consumer guarantee; they plainly contemplate the quantification of an amount that may be recovered by way of

(45) (1994) 179 CLR 388.

satisfaction of the defendant's liability. The evident purpose of s 275 is to pick up and apply State and Territory laws that limit the amount of compensation or damages that might otherwise be recovered under s 267(3) and (4) of the ACL.

36 Other aspects of the context in which s 275 of the ACL appears provide no support for the distinction for which Mr Moore argues. In this regard, ss 281 and 285 of the ACL refer to a particular species of liability as being limited to an amount that does not exceed the sum of the amounts then set out. These provisions are plainly concerned with limitations upon the recovery of the amount, in monetary terms, that may be assessed to be necessary to extinguish the defendant's liability.

37 Mr Moore also contended that his argument is supported by the legislative history of s 275. He observed, in this regard, that s 275 of the ACL is similar in material respects to its predecessor, s 74(2A) of the *Trade Practices Act 1974* (Cth) ("the TPA"), which was enacted to preserve State laws against invalidity for inconsistency with federal laws under s 109 of the *Constitution*. Section 74(2A) of the TPA was enacted in response to this Court's decision in *Wallis*. In that case, a State law that purported to limit the extent of a carrier's liability for a customer's lost goods to $20 per package carried was held to be invalid on the basis that it was inconsistent with s 74(1) of the TPA, which created "full contractual liability for breach" (46). Seizing upon the circumstance that the State law in issue in *Wallis* imposed a monetary ceiling on recovery for each item of loss, Mr Moore sought to argue that s 74(2A) of the TPA and s 275 of the ACL should not be taken to have been intended to have an operation beyond the preservation of the validity of State laws of that particular kind. Nothing in the text, context, or purpose of the amendment of the TPA or the enactment of s 275 of the ACL suggests that either provision was confined to preserving only laws having that particular operation from the effect of s 109 of the *Constitution*. The legislative history provides no basis for the artificially constricted understanding of s 275 for which Mr Moore contended.

38 The evident purpose of the amendment of the TPA and the enactment of s 275 of the ACL was to ensure the application of State and Territory laws that limit the extent of recovery for breach of a contract otherwise governed by that law. It is difficult to see any reason why the purpose would be to apply State and Territory laws limiting heads of compensable loss but not to apply State and Territory laws regulating the quantification of damages recoverable. The extrinsic materials do not suggest any such reason for taking that course, or any

(46) (1994) 179 CLR 388 at 396.

reason why s 275 should not pick up and apply State laws, like s 16 of the CLA, which regulate the quantification of the damages required to extinguish a liability for loss (47).

**Do damages for disappointment and distress constitute personal injury damages for non-economic loss?**

39 Scenic submitted that Mr Moore's disappointment and distress is an "injury" for the purposes of Pt 2 of the CLA because it is an impairment to his mental condition. Scenic argued that a person's mental condition is impaired when expectations of pleasure, entertainment or relaxation in holiday cases are unfulfilled or dashed. In this regard, Scenic referred in particular to the reasoning of Brennan J in *Baltic Shipping*, where his Honour described "disappointment of mind" as "a mental reaction to a breach of contract" and "severe tension of mind and depression of spirit" as well as "mental distress" (48). Scenic also argued that disappointment and distress constitutes "pain and suffering" or, alternatively, "loss of amenities of life", within the definition of "non-economic loss" in s 3 of the CLA.

40 Mr Moore submitted that his claim for damages for disappointment and distress for breach of contract falls outside Pt 2 of the CLA because the damages he claimed by way of compensation for his disappointment and distress do not relate to personal injury. He argued that a reaction of disappointment and distress to the breach of such a promise – a promise that had been bought and paid for – is a normal and healthy response to that disappointment rather than an impairment of the plaintiff's mental condition. It was said that the disappointment of a contractual expectation of recreation, relaxation and freedom from molestation is not "impairment" of a person's mental condition within the meaning of "injury" in s 11; nor is it "non-economic loss" under s 3 of the CLA. There is force in this submission.

41 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 (49). 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

(47) cf Australia, House of Representatives, *Treasury Legislation Amendment (Professional Standards) Bill 2003*, Supplementary Explanatory Memorandum, p 1 [1.3]-[1.5]; Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum, p 208 [7.136]-[7.137].

(48) (1993) 176 CLR 344 at 368-371.

(49) *New South Wales v Corby* (2010) 76 NSWLR 439 at 444 [24].

unimpaired mind. In this regard, Mr Moore's claim for damages for his disappointment and distress resulting from Scenic's breach of contract can be seen as no more a claim relating to personal injury than would be a claim for damages for the indignation occasioned by false imprisonment or defamation. As was said in *New South Wales v Williamson* (50) by French CJ and Hayne J, with whom Kiefel J agreed (51), while there may be cases where an act of false imprisonment itself causes psychiatric injury, insofar as an action for false imprisonment claims damages for loss of dignity and harm to reputation associated with the deprivation of liberty it is not a claim for an "impairment of a person's physical or mental condition" or otherwise a form of injury within s 11 of the CLA.

42 Scenic's submission invites this Court to elide the distinction 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. That submission is untenable in light of this Court's decision in *Baltic Shipping*.

*Baltic Shipping*

43 In *Baltic Shipping* (52), every member of the Court accepted that disappointment and distress "caused by the breach of a contract … the object of the contract being to provide pleasure or relaxation" (53) is a compensable head of loss separate and distinct from injured feelings compensable under the rubric of pain and suffering and loss of amenities of life associated with personal injury.

44 Mason CJ, with whom Toohey and Gaudron JJ relevantly agreed, took stock of the exceptions to the general rule that damages could not be recovered for injured feelings caused by a breach of contract, and described one exception in favour of claims for "damages for distress, vexation and frustration where the very object of the contract has been to provide pleasure, relaxation or freedom from molestation" (54). That exception was identified as a category separate and distinct from a further exception, being a claim for "damages for pain and suffering, including mental suffering and anxiety, where the defendant's breach of contract causes physical injury to the plaintiff" (55). In relation to the latter category, Mason CJ was at pains to explain that damages for pain and suffering consequent upon physical injury may include

(50) (2012) 248 CLR 417 at 428-429 [33]-[34].
(51) (2012) 248 CLR 417 at 431 [45].
(52) (1993) 176 CLR 344 at 362-363, 371-372, 380-382, 383, 387, 404-405.
(53) (1993) 176 CLR 344 at 363.
(54) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 363.
(55) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 362.

compensation for injured feelings (56), while the former category stands independent of physical or psychiatric injury.

45 Scenic's reliance upon the reasons of Brennan J in *Baltic Shipping* is misplaced. His Honour made it clear that disappointment and distress is compensable damage where no physical or psychiatric injury or impairment has been suffered. Brennan J referred first to the general rule that "where disappointment of mind is no more than a mental reaction to a breach of contract and damage flowing therefrom" that reaction is not compensable damage (57). His Honour then referred to the exception to the general rule where the "'disappointment of mind' is itself the 'direct consequence of the breach of contract'" and made the point that "[i]n such a case the disappointment is not merely a reaction to the breach and resultant damage but is itself the resultant damage" (58). His Honour went on to say (59):

> "[I]f peaceful and comfortable accommodation is promised to holidaymakers and the accommodation tendered does not answer the description, there is a breach which directly causes the loss of the promised peacefulness and comfort and damages are recoverable accordingly."

46 Disappointment and distress of this kind is not "non-economic loss" under Pt 2 of the CLA. The text and structure of Pt 2 of the CLA are clear that non-economic loss within Pt 2 is a head of loss associated with personal injury as pain and suffering. At common law, "pain and suffering" was understood to mean actual physical hurt occasioned by the accident or its aftermath (60); and damages for emotional harm were not recoverable unless a psychiatric injury was suffered (61). Similarly, the assessment of damages for "loss of amenities of life" invites a comparison between the ability of a person to enjoy life before and after the personal injury (62). But in the present case, no physical injury was alleged and no psychiatric illness was alleged to have resulted from the breach of the consumer guarantees in the ACL. The exception to the general rule relating to promises of enjoyment, relaxation or freedom from molestation, breach of which results

(56) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 362 fn 95.
(57) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 368.
(58) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 369-370.
(59) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 371. Physical or psychiatric impairment is no part of the compensable loss.
(60) Balkin and Davis, *Law of Torts*, 5th ed (2013), pp 389-390, citing *Teubner v Humble* (1963) 108 CLR 491 at 507.
(61) Sappideen and Vines (eds), *Fleming's The Law of Torts*, 10th ed (2011), pp 280-281.
(62) *Teubner v Humble* (1963) 108 CLR 491 at 506, 508; Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), p 186 [13.20].

directly in disappointment and distress (63), compensates a plaintiff for what he or she was promised where the expectation of a peaceful and contented holiday has been unfulfilled (64). The comparison between "the expectations against the reality" (65) does not involve any reference to, or assessment of, an impairment to the plaintiff's mental condition.

*The authorities on Pt 2 of the CLA*

47 It has already been noted that the primary judge regarded himself as bound by authority to hold that a claim for damages for disappointment and distress was caught by Pt 2 of the CLA (66). The primary judge was not indulging in hyperbole when he described this result as "surprising" (67). Mr Moore's right to recover damages for such loss was securely established by this Court's decision in *Baltic Shipping*. Nothing in the text of the CLA suggests that Pt 2 was enacted with a view to limiting the liability of a defendant for claims that do not involve personal injury as defined in the CLA. It is a strong thing to hold that the entitlement recognised by this Court in *Baltic Shipping* as standing independently of personal injury was abrogated by Pt 2 of the CLA, given the absence of any reference to that entitlement, in either the text or the extrinsic materials (68), and given further that the mischief at which Pt 2 of the CLA was directed was what was perceived as the excessive strain on insurance schemes established to indemnify defendants against their liability under the common law for loss relating to personal injury. The loss suffered by Mr Moore, and Scenic's liability to compensate him for that loss, have nothing to do with the mischief at which Pt 2 of the CLA was directed.

48 The primary judge referred in particular to the decision of Barr A-J in *Flight Centre Ltd v Louw* (69). In that case the defendants claimed damages against the plaintiff travel agent for disappointment and distress in relation to an overseas holiday that was disrupted by construction noise and inaccessibility of parts of a resort by reason of the construction activity. The defendants had not claimed to have suffered any physical injury. Barr A-J held that "the inconvenience, distress and disappointment experienced … constituted non-economic loss for the purposes of s 3 [of the CLA], being pain and suffering …

(63) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 365.
(64) *Jarvis v Swans Tours Ltd* [1973] 1 QB 233 at 239.
(65) *Milne v Carnival Plc* [2010] 3 All ER 701 at 717 [47].
(66) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [854], [865].
(67) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [854].
(68) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 2002, pp 2085-2088.
(69) (2011) 78 NSWLR 656.

[T]hey constituted impairment of the mental condition of [the defendants] and so amounted to personal injury [under Pt 2 of the CLA]." (70) This view has subsequently been applied in *Tralee Technology Holdings Pty Ltd v Yun Chen* (71), but *Flight Centre* was the first case to hold that a claim of the kind made by Mr Moore is caught by Pt 2 of the CLA. In this regard, *Flight Centre* was incorrectly decided.

49 Barr A-J cited the Court of Appeal's decision in *Insight Vacations Pty Ltd v Young* (72) and the decisions of the Court of Appeal in *New South Wales v Ibbett* (73) and *New South Wales v Corby* (74) as support for the view that disappointment and distress constitutes an "impairment" of a person's mental condition under s 11 of the CLA. It is to be emphasised that these were cases where the disappointment and distress in issue was claimed as loss consisting of, or consequential upon, physical injury.

50 Neither *Ibbett* nor *Corby* concerned damages for disappointment and distress for breach of a contract to provide a pleasurable and relaxing holiday – neither case was analogous to the holiday cases. The references in these cases to "distress" and "humiliation and injury to feelings" do not import the same meaning as disappointment and distress as understood in the holiday cases. These decisions were concerned with claims for damages for personal injuries. They do not stand as authority for the proposition that a claim for damages for breach of contract for disappointment and distress which is not consequent upon physical or psychiatric injury, but instead flows directly from a breach of a contract to provide pleasure, relaxation and freedom from molestation, is a claim in respect of non-economic loss relating to personal injury within the scope of Pt 2 of the CLA.

51 When, in *Ibbett*, Ipp JA said that "anxiety and distress would be an 'impairment' of a person's mental condition in accordance with the ordinary meaning of 'impairment', as the word is used in s 11" (75), his Honour was speaking in a context in which he accepted that anxiety and distress arising from an apprehension of physical violence is encompassed by "injury" (76).

52 When, in *Corby*, Basten JA (with whom Beazley and Tobias JJA agreed) said that "to adopt a definition of 'injury' which did not include

(70) *Flight Centre Ltd v Louw* (2011) 78 NSWLR 656 at 663 [31].
(71) [2015] NSWSC 1259 at [61].
(72) (2010) 78 NSWLR 641.
(73) (2005) 65 NSWLR 168.
(74) (2010) 76 NSWLR 439.
(75) (2005) 65 NSWLR 168 at 175 [124].
(76) *New South Wales v Ibbett* (2005) 65 NSWLR 168 at 175 [125]. See also at 171 [11] per Spigelman CJ.

matters such as humiliation and injury to feelings … is untenable" (77), his Honour was directing his attention to an argument that aggravated damages fell outside personal injury damages. His Honour went on to explain (78):

> "The general damages available for compensation for tortious conduct include damages for pain and suffering. There is no basis for limiting pain and suffering to physical suffering."

53 *Insight Vacations* was a case in which the plaintiff claimed damages for personal injuries suffered during the course of a European tour purchased from the defendant. The disappointment and distress suffered by the plaintiff was directly occasioned by her physical injury. The plaintiff was unable to enjoy the balance of her tour by reason of the physical injuries sustained in the course of the tour (79). Those physical injuries resulted from the defendant's breach of the implied term of the contract obliging it to render the relevant services with due care and skill. Basten JA concluded that it was "sufficient for present purposes to conclude that elements of distress and disappointment resulting from the physical injury in the course of the holiday, would have warranted inclusion in an award of damages for non-economic loss under the general law in relation to negligence" (80).

54 Sackville A-JA reached the same conclusion, holding that "[t]he disappointment … resulted from the [plaintiff's] inability to enjoy her tour by reason of the injuries sustained in the course of the tour" (81). Sackville A-JA observed that (82):

> "Whatever uncertainties may arise in relation to the expression 'personal injury' in Pt 2 of the [CLA] … in the present case the [plaintiff] clearly sustained personal injury in consequence of the [defendant's] breach of contract. 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))." (Emphasis added.)

55 It has been seen that in *Baltic Shipping*, Mason CJ, in taking stock of the exceptions to the general rule that damages for disappointment and distress were not recoverable in actions for breach of contract, noted that one such exception was a claim for "pain and suffering, including

(77) (2010) 76 NSWLR 439 at 449 [47].
(78) *New South Wales v Corby* (2010) 76 NSWLR 439 at 449 [47].
(79) *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641 at 654 [173].
(80) *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641 at 650 [129].
(81) *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641 at 654 [173].
(82) *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641 at 653 [164].

mental suffering and anxiety, where the defendant's breach of contract causes physical injury to the plaintiff" (83). *Insight Vacations* was such a case. The present case is readily distinguishable because Mr Moore's disappointment and distress was not occasioned by any physical injury. Mr Moore made no claim that he had suffered any physical injury or recognised psychiatric illness by reason of his experience (84).

56 In *Insight Vacations*, Spigelman CJ agreed with the reasoning of both Basten JA and Sackville A-JA (85). This may have been something of a departure from Spigelman CJ's earlier view in *Ibbett* (86). In that case, his Honour had accepted that reactions such as disappointment and distress do not involve an impairment of a person's mental condition, at least where the reaction is not an aspect of physical injury. Spigelman CJ had said (87):

> "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. (See, for example, *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 359-363.)"

57 This passage, which accords with the view of French CJ, Hayne and Kiefel JJ in *Williamson* (88), reflects a correct appreciation of the effect of this Court's decision in *Baltic Shipping* that a claim of the kind made by Mr Moore in this case stands separately and apart from a claim for damages for disappointment and distress associated with physical injury.

58 For the sake of completeness, it should also be noted that there is a suggestion in the reasons of the Court of Appeal in the present case (89) that when *Insight Vacations* (90) came before this Court on appeal, the Court accepted that this issue had been correctly decided below. In this regard, the Court of Appeal erred. This Court in *Insight Vacations* did not address those conclusions, and, indeed, had no occasion to do so given the issues before it.

**Conclusion**

59 For these reasons, the appeal must be allowed.

(83) (1993) 176 CLR 344 at 362.
(84) *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 at [39].
(85) (2010) 78 NSWLR 641 at 644 [78].
(86) (2005) 65 NSWLR 168 at 172 [21]-[22].
(87) *New South Wales v Ibbett* (2005) 65 NSWLR 168 at 172 [21].
(88) (2012) 248 CLR 417 at 428-429 [33]-[34], 431 [45].
(89) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 331 fn 222.
(90) (2011) 243 CLR 149.

60 Mr Moore argued that s 16 of the CLA, construed in light of s 12(1)(b) of the *Interpretation Act 1987* (NSW), has no application to his case because the disappointment and distress in respect of which he claims was suffered outside of New South Wales. It is unnecessary to proceed to consider whether s 16 of the CLA is subject to the geographical limitation for which Mr Moore contended. As has been explained, s 16 does not affect Scenic's liability to Mr Moore in respect of his claim for damages for disappointment and distress. That is the case irrespective of where that loss was suffered.

**Orders**

61 The following orders, which the parties agreed should take effect in the event the appeal be successful, should be made:

1. The appeal be allowed.
2. Order 5 made by the Court of Appeal on 24 October 2018 be set aside and the primary judge's order of damages for disappointment and distress pursuant to s 267(4) of the ACL and for pre-judgment interest thereon be reinstated, and further it be ordered that Scenic pay to Mr Moore post-judgment interest under s 101 of the *Civil Procedure Act 2005* (NSW).
3. Order 8 made by the Court of Appeal on 24 October 2018 be set aside and the question of whether group members may recover damages for disappointment and distress be remitted to the primary judge.
4. Order 14 made by the Court of Appeal on 7 December 2018 be varied, with reference to the Agreed Common Questions and Answers filed on 7 November 2018, as follows:
    (a) Varying the last paragraph of A15, by deleting the words "however, there is no entitlement under that provision to any damages for distress or disappointment" and substituting "which damages may include disappointment and distress suffered by reason of the defendant's failure to comply with the guarantees".
    (b) Varying A17, by substituting "No".
5. Order 13 made by the Court of Appeal on 24 October 2018 be set aside, and the question of costs of that appeal be remitted to that Court for reconsideration.
6. Scenic pay Mr Moore's costs of the appeal and of the application for special leave to appeal.

62 EDELMAN J. I agree with the reasons and proposed orders in the joint judgment. I wish only to add the following additional remarks concerning why Mr Moore was correct in his submission that Pt 2 of the *Civil Liability Act 2002* (NSW) is concerned exclusively with

claims for damages for personal injury and why those damages do not extend to compensation for "expectation loss", including distress or disappointment, where that loss is not consequential upon physical injury whether the claim is brought for a breach of contract or a breach of the consumer guarantees in s 61(1) and (2) of the *Australian Consumer Law* (91).

63 The primary species of damages for a breach of contract are often expressed as "expectation damages" (92) or as responding to an "expectation loss" (93). These expressions were relied upon by both parties to this appeal in their explanations of the nature of damages for breach of the consumer guarantees in s 61(1) and (2) of the *Australian Consumer Law* and the operation of Pt 2 of the *Civil Liability Act* on those damages. However, the expressions are problematic (94). In particular, they can conceal a fundamental difference between two components of compensatory damages for breach of contract, both of which are necessary parts of the compensatory goal of restoring the injured party to the position they would have been in if the breach had not occurred (95). Those components are compensation directly for the performance interest and compensation for consequential losses. The two components are provided for separately in s 267(3) and s 267(4) of the *Australian Consumer Law* respectively.

64 Where contract damages provide compensation directly based on the performance interest, that component of the award is not concerned with loss in any real or factual sense. The compensation for the performance interest, "by the value of the promised performance", appears "as a 'loss' only by reference to an unstated *ought*" (96). The aim of this component of the award is to provide the promisee with the difference between the value of what was promised and the value of

(91) *Competition and Consumer Act 2010* (Cth), Sch 2.

(92) *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80, 82, 161; *Clark v Macourt* (2013) 253 CLR 1 at 11 [27].

(93) *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11-12; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 502 [12].

(94) Coote, "Contract Damages, *Ruxley*, and the Performance Interest" (1997) 56 *Cambridge Law Journal* 537 at 542. See also Friedmann, "The Performance Interest in Contract Damages" (1995) 111 *Law Quarterly Review* 628.

(95) *Robinson v Harman* (1848) 1 Ex 850 at 855 [154 ER 363 at 365]; *Wenham v Ella* (1972) 127 CLR 454 at 471; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80, 98, 117, 134, 148, 161; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 362; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 637 [191].

(96) Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 53 (emphasis in original). See *Clark v Macourt* (2013) 253 CLR 1 at 7 [11], 19 [61], 30 [107]. See also Winterton, *Money Awards in Contract Law* (2015), pp 148-165.

what was received. The promisee had a primary right to performance of the contract so, upon termination, the law generally provides for a secondary right for the value of the performance that was not received or the difference in value due to the defect (97).

65 This component of compensation is contained in s 267(3) of the *Australian Consumer Law*, where a consumer may "recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services". In contracts for the provision of a service involving pleasure or enjoyment this measure of damages can provide some compensation for the value of the lost enjoyment benefit "because the breach results in a failure to provide the promised benefits" (98). An assessment of Mr Moore's damages referable to his performance interest was remitted by the Court of Appeal of the Supreme Court of New South Wales for determination by the trial judge (99).

66 A promisee might also suffer true, consequential, loss from a breach of contract. These consequential losses might include economic (financial) losses to the promisee to the extent that they go beyond the value of the promised performance and are within the boundaries of legal responsibility (100). They can also include some non-economic losses.

67 This component of consequential loss is contained in s 267(4) of the *Australian Consumer Law*, a head of damages additional to s 267(3) (101), which allows for recovery of further loss or damage for a relevant failure to comply with a guarantee as provided in s 267(1) "if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure". The assumption of all the parties to this litigation has been that the damages recoverable under s 267(4) for non-economic loss are governed by the same principles as common law damages for breach of contract.

68 As to non-economic losses for a breach of contract at common law, in *Baltic Shipping Co v Dillon* (102) Mason CJ, with whom Toohey and Gaudron JJ agreed on this point, listed the circumstances based on earlier authority in which those non-economic losses are recoverable: (i) damages for injured feelings in an action for breach of promise of marriage; (ii) damages for pain and suffering, including mental

(97) *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 638-641 [195]-[197].
(98) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 365.
(99) *Scenic Tours Pty Ltd v Moore* (2018) 339 FLR 244 at 327 [335], 343 [396(iv)].
(100) cf *Hadley v Baxendale* (1854) 9 Ex 341 at 354 [156 ER 145 at 151] and *Transfield Shipping Inc v Mercator Shipping Inc* [2009] AC 61 at 68 [12].
(101) See *Australian Consumer Law*, s 267(5).
(102) (1993) 176 CLR 344 at 362-363.

suffering and anxiety, where the breach of contract causes physical injury to the plaintiff; (iii) damages for physical inconvenience including fatigue (103); (iv) damages for mental suffering directly related to physical inconvenience such as "vexation" and "discomfort" (104); and (v) damages for distress, vexation and frustration where "the very object of the contract has been to provide pleasure, relaxation or freedom from molestation".

69 In effect, damages for what might broadly be described as mental harm consequent upon a breach of contract are available at common law in categories where the harm is: (i) "pain and suffering" consequent upon physical injury that arises from the breach of contract, (ii) "vexation and discomfort" consequent upon physical inconvenience that arises from the breach of contract, or (iii) "distress or disappointment" in contracts for the provision of pleasure or relaxation. It may be that the common principle underlying recovery in these disparate categories is that in each category, unlike in contracts generally, a promisor will usually be taken to have assumed the risk of liability for such distress (105). Nevertheless, each category has had a separate history of development, reflected in the different descriptions of the types of mental harm in each category.

70 Although contract law recognised a category of damages for "pain and suffering" where the breach of contract resulted in physical injury, this head of damages was concurrent with the far more common means by which a plaintiff would claim for breach of their rights resulting in physical injury, namely by a claim based upon a tort, usually the tort of negligence. The expression "pain and suffering" is one of the long-established categories into which general damages for non-pecuniary loss are divided in the law of torts (106).

71 In the law of torts, "pain and suffering" encompasses, respectively, the "immediate felt effect upon the nerves and brain of some lesion or injury to a part of the body" and the "distress which is not felt as being directly connected with any bodily condition" (107). To this mental harm is sometimes added the "loss of amenities of life", which, apart

(103) For instance, *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111 at 115-116; cf at 120, 123 where Blackburn and Mellor JJ treated the award as a large award based on the expectation interest.

(104) *Watts v Morrow* [1991] 1 WLR 1421 at 1439-1440; [1991] 4 All ER 937 at 954-955. See also *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297 at 1303; [1982] 3 All ER 705 at 709 ("anxiety, worry and distress").

(105) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 362, rejecting Treitel, *The Law of Contract*, 8th ed (1991), p 878. See also *Transfield Shipping Inc v Mercator Shipping Inc* [2009] AC 61 at 68 [12].

(106) See, eg, Mayne, *A Treatise on the Law of Damages* (1872), p 351.

(107) McCormick, *Handbook on the Law of Damages* (1935), p 315.

from a modest amount for the objective capacity "to experience the varied quality of life" (108), is concerned with the "subjective element" of living with an "incapacity, fully conscious of the limitations which it imposes upon … enjoyment of life" (109). Sometimes an additional category for subjective distress caused by "disfigurement" has also been recognised (110), although the subjective effects of disfigurement could be divided among the categories of pain and suffering and loss of amenities of life and the usual practice is to award it as part of a single award of general damages encompassing pain and suffering and loss of amenity (111).

72 The restrictions in s 16 in Pt 2 of the *Civil Liability Act* concerning damages for non-economic loss are subject to two related constraints. Each constraint informs the interpretation of the other. The first constraint is that Pt 2 applies to, and in respect of, an award of "personal injury damages" (112). The definition of personal injury damages is in terms that borrow heavily from the law of torts. Personal injury damages are "damages that relate to the death of or injury to a person". An injury is defined as "personal injury", which includes "pre-natal injury", "impairment of a person's physical or mental condition", or "disease" (113). In Pt 3, the *Civil Liability Act* also generally follows the traditional approach of the law of torts by prohibiting recovery for "mental harm" that is not the consequence of "physical harm" to the body unless the mental harm consists of a recognised psychiatric illness (114). That traditional approach, embedded in the language of the law which still distinguishes the physical and the mental, treats mental harm as though it were not the product of physical processes. However, just as Windeyer J was "not prepared to carry Cartesian doctrine so far as to distinguish … between injuries to body and mind" (115) in order to make fundamental distinctions between "physical injury" and "mental injury" in the law of torts, Pt 3 of the *Civil Liability Act* also generally follows the law of torts and treats mental harm amounting to recognised psychiatric harm in the

(108) *Skelton v Collins* (1966) 115 CLR 94 at 102.
(109) *Skelton v Collins* (1966) 115 CLR 94 at 113; see also at 132, 137.
(110) Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed (2002), p 245.
(111) See, eg, *Shepherd v McGivern* [1966] 1 NSWR 55 at 56; *Stanners v Stanners* [1968] 2 NSWR 90 at 91; *Papanayiotou v Heath* (1969) 43 ALJR 433 at 434. See also Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019), p 235.
(112) *Civil Liability Act 2002* (NSW), s 11A.
(113) *Civil Liability Act*, s 11.
(114) *Civil Liability Act*, ss 27, 31.
(115) *Skelton v Collins* (1966) 115 CLR 94 at 130. See, now, *Tame v New South Wales* (2002) 211 CLR 317.

same way as physical injury (116), albeit with an added "control mechanism" (117) in s 30, before recovery will be permitted (118).

73 The second constraint in s 16 of the *Civil Liability Act* also borrows heavily from the law concerning compensation for personal injury in the law of torts. Section 16 applies only to non-economic loss, which is defined in s 3 as meaning any one or more of the following: (a) pain and suffering; (b) loss of amenities of life; (c) loss of expectation of life; and (d) disfigurement. Putting to one side the "conventional award" in the law of torts of an amount for an objective loss of expectation of life unconnected with any mental harm, which was described by Gibbs and Stephen JJ as "curious and unsatisfactory" (119) and was abolished as a separate head of damages in England and Wales (120), the other three categories comprise a classic statement of heads of general damages consequent upon physical injury in the law of torts.

74 The scheme in Pt 2 of the *Civil Liability Act* is therefore concerned only with claims for personal injury, assertions of violations of the integrity of body and mind that have traditionally been brought as a claim for a tort. Although s 11A(2) provides that Pt 2 of the *Civil Liability Act* applies "regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise", this is an anti-avoidance provision designed to ensure that a claimant cannot avoid the restrictions in Pt 2 by bringing their claim for damages consequential upon physical injury as a claim in contract or under statute. As the Ipp Report, upon which the *Civil Liability Act* reforms were based (121), explained (122):

> "[I]n order to be 'principled' and effective, reforms of personal injury law must deal with such liability regardless of the legal category (tort, contract, equity, under statute or otherwise) under which it arises. If they do not, it may be possible for a claimant to evade limitations on liability for personal injury and death that attach to one cause of action by framing the claim in another cause of action. For example, if a limitation on liability or damages were

(116) See Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), p 140 [9.19].

(117) *Tame v New South Wales* (2002) 211 CLR 317 at 379-380 [186].

(118) Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), pp 141-142 [9.24]-[9.27].

(119) *Sharman v Evans* (1977) 138 CLR 563 at 584.

(120) *Administration of Justice Act 1982* (UK), s 1(1)(a).

(121) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2002, p 5765.

(122) Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), p 30 [1.28].

applied only to the tort of negligence, injured persons would be encouraged to explore the possibility of framing their claim in contract or for breach of a statutory provision."

75 The scheme in Pt 2 of the *Civil Liability Act* may be comprehensive in its coverage of damages that are consequential upon physical injury so that, for instance, it would include damages for mental harm where the effect of the physical injury was to ruin or prevent the plaintiff's holiday (123). But where the claim for breach of contract or for breach of a statutory guarantee is not for damages that are consequential upon physical injury then Pt 2 of the *Civil Liability Act* does not apply to either of the components of a claim for compensatory damages for breach of contract, namely the performance interest or consequential losses.

1. *Appeal allowed.*
2. *Set aside order 5 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 24 October 2018 and reinstate the primary judge's order of damages for disappointment and distress pursuant to s 267(4) of the Australian Consumer Law and for pre-judgment interest thereon, and further order that Scenic Tours Pty Ltd pay to Mr Moore post-judgment interest under s 101 of the Civil Procedure Act 2005 (NSW).*
3. *Set aside order 8 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 24 October 2018 and remit to the primary judge the question of whether group members may recover damages for disappointment and distress.*
4. *Vary order 14 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 7 December 2018, with reference to the Agreed Common Questions and Answers filed on 7 November 2018, as follows:*
   *(a) Vary the last paragraph of A15 by deleting the words "however, there*

(123) *Ichard v Frangoulis* [1977] 1 WLR 556 at 558; [1977] 2 All ER 461 at 462; *Hoffman v Sofaer* [1982] 1 WLR 1350 at 1353.

*is no entitlement under that provision to any damages for distress or disappointment" and substituting "which damages may include disappointment and distress suffered by reason of the defendant's failure to comply with the guarantees".*

*(b) Vary A17 by substituting "No".*

*5. Set aside order 13 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 24 October 2018 and remit the question of the costs of that appeal to that Court for reconsideration.*

*6. Scenic Tours Pty Ltd pay Mr Moore's costs of the appeal and of the application for special leave to appeal.*

Solicitors for the appellant, *Somerville Legal*.

Solicitors for the respondent, *SWS Lawyers*.

EJD