Can the High Court heal the wounds of a bad holiday?

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Snapshot

- Under current NSW authority, it is no longer possible to obtain damages for injured feelings caused by a breach of a promise to provide a relaxing holiday.
- This is because the NSW Court of Appeal holds that injured feelings are forms of injury as defined in *Civil Liability Act,* which required the application of s 16 to assess the claim.
- The High Court will soon decide whether the Court of Appeal's expansive interpretation of 'injury' is correct. This will have ramifications for several other causes of action.

On 11 February 2020, the High Court heard *Moore v Scenic Tours Pty Ltd* [2020] HCATrans 7, a representative action born out of a luxury European river cruise holiday that turned into a budget bus trip when the Danube was hit by record flooding in 2013. The judgment is eagerly anticipated as it will provide much-needed clarity on the scope of the meaning of 'injury', 'personal injury damages' and 'non-economic loss' in Part 2 of the *Civil Liability Act 2002* (NSW), ('***CLA***').

Legislative background

Part 2 of the *CLA* applies to many – if not most – awards of damages for personal injury in New South Wales. The NSW Parliament enacted Part 2 as part of its reform of the law of negligence in response to concern that personal injury damages were escalating out of control, and, as a result, insurance premiums were becoming unaffordable. Accordingly, much of Part 2 imposes limits on awards of damages.

Section 11A provides that Part 2 applies to awards of 'personal injury damages' regardless of whether the claim is brought 'in tort, in contract, under statute or otherwise', unless the award is excluded by s 3B. Section 11 defines 'personal injury damages' as 'damages that relate to the death of or injury to a person.'

Section 11 defines 'injury' to mean 'personal injury' and *includes* 'impairment of the person's … mental condition.' Hence, the definition of 'injury' for the purpose of Part 2 is not necessarily limited to the common law definition of personal injury, given that the Parliament has defined 'injury' to include mental 'impairment'.

The common law views 'personal injury' as physical injury and mental harm consisting of a diagnosable psychiatric condition. Generally, mere injured feelings – such as anger, distress or disappointment – that are not consequent on actual personal injury are not compensable forms of injury in tort or contract. However mere injured feelings can be compensated in limited causes of action, such as trespass to person, defamation or for certain breaches of contract.

Part 2 also contains s 16, which regulates the assessment of non-economic loss damages for pain and suffering, loss of amenity of life, disfigurement and loss of expectation of life in personal injury claims. Section 16 limits the amount that can be awarded for non-economic loss and also provides a mechanism for assessing the award, by requiring the court to evaluate the plaintiff's condition as a percentage of a hypothetical 'most extreme case'. Crucially, if the plaintiff's condition is less than 15 per cent of a most extreme case, then the plaintiff does not receive any non-economic loss damages.

Injured feelings as personal injury

In 2010-2011 a series of three cases – *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137 ('***Insight Vacations***'); *New South Wales v Corby* [2010] NSWCA 27 ('***Corby***'); and *Flight Centre Ltd v Louw* [2011] NSWSC 132 ('***Flight Centre***') – established the following propositions concerning the scope of the meaning of 'injury' in s 11 and 'non-economic loss' in s 16.

First, mere injured feelings – like anxiety and disappointment – were forms of mental 'impairment', and therefore within the definition of 'injury'. Thus, an award of damages in respect of them was an award of 'personal injury damages' under Part 2, unless s 3B precluded Part 2 from applying. *Second,* injured feelings were a form of 'pain and suffering', so that if Part 2 applied to the award, the court was obliged to assess the damages using the procedure in s 16. One consequence of these findings was that it closed off awards of damages for injured feelings caused by breach of contract in the so-called 'holiday cases'.

Under *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 ('***Baltic Shipping***'), it was well-recognised that a customer could be compensated with damages for injured feelings caused by a holiday-provider's breach of a promise to provide a relaxing and enjoyable holiday. There was no suggestion that such an award was in respect of personal injury.

However, the case of *Flight Centre (*referred to earlier) made it clear that such awards were awards of personal injury damages under the *CLA*, and subject to assessment under s 16.

In *Flight Centre*, the plaintiffs claimed $10,000 for 'inconvenience, distress and disappointment' after Flight Centre breached an implied term in a holiday contract to provide pleasure, relaxation and freedom from distress. Their claim was purely for injured feelings. They did not suffer personal injury as understood at common law.

The assessor awarded $4,898.66 under the authority of *Baltic Shipping*. However, on appeal, Barr AJ applied the Court of Appeal cases of *Insight Vacations* and *Corby* to find the 'inconvenience, distress and disappointment' experienced by the plaintiffs were forms of mental impairment under s 11. Therefore, they were suing in respect of an 'injury' which attracted the application of Part 2. (Section 3B did not exclude its application.) Following *Insight Vacations* and *Corby,* he held the claim was for non-economic loss – specifically, pain and suffering caused by the breach of contract – and s 16 should have been applied to assess the damages (at [31]). His Honour noted that, in his opinion, a claim for mere injured feelings would not reach the required threshold of 15 % of a most extreme case (at [41]).

The impact of these decisions was that in following lower court and tribunal decisions, plaintiffs were denied damages for injured feelings in causes of action which had previously allowed them. Even though such claims would not be considered claims in respect of personal injury at common law, Part 2 applied to the claims because the meaning of 'injury' for the purpose of Part 2 included mere injured feelings, and Part 2 applies irrespective of cause of action (s 11A(1)).

Scenic Tours Pty Ltd v Moore (NSWCA)

In 2018, the Court of Appeal heard the case of *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238 ('***Scenic Tours***'). This case was a representative action in which Scenic Tours failed to provide a relaxing and enjoyable holiday in Europe, breaching consumer guarantees provided by the Australian Consumer Law ('**ACL**').

The trial judge awarded $2,000 under ACL s 267(4) for distress and disappointment caused by the breach of consumer guarantees. A key question was whether ACL s 275 picked up and applied *CLA* s 16 to regulate that award. On the authority of *Insight Vacations, Corby* and *Flight Centre*, it was common ground that, if s 16 applied to the award, then Mr Moore's injured feelings did not meet the threshold under s 16. The Court of Appeal found that s 16 did apply to the award and the award for distress and disappointment was overturned (at [391]).

Moore v Scenic Tours Pty Ltd (HCA)

Mr Moore appealed to the High Court. Part of his appeal was to challenge the authority that mere injured feelings are mental impairment and are thus an 'injury' for the purpose of Part 2. Mr Moore submitted that damages awarded to compensate distress or disappointment in the holiday cases are a form of expectation damages that compensate the difference between what the provider promised and what the customer received. Any injured feelings caused by the breach do not result in mental 'impairment', but are a normal reaction to a disappointed expectation.

Mr Moore also submitted that injured feelings do not fall within the meaning of 'pain and suffering', thus attracting the application of s 16. He submitted the definition of non-economic loss within the *CLA* (s 3) was not intended to change its common law meaning. As such, he submitted that 'pain and suffering' referred to subjective pain and suffering caused by physical injury or psychiatric illness, not mere injured feelings.

Scenic Tours' response emphasised the wide definition of 'injury' in s 11. It emphasised that, first, injured feelings fit comfortably within a wider understanding of the word 'injury' and, second, the NSW courts were correct to find such feelings were forms of mental impairment. It also submitted the legislation requires the court to look at the *nature* of the damage, rather than what *causes* it. Hence, a breach of a holiday contract impairs a customer's mind because the disappointed customer is brought down from a heightened state of excitement and anticipation. Scenic Tours also relied on the policy behind the enactment of s 16. It noted, with reference to the Minister's second reading speech, that the Parliament intended to exclude small claims for non-economic loss damages, submitting that a *Baltic Shipping* type claim was a 'paradigm example'. As to whether injured feelings fall within the definition of non-economic loss as forms of pain and suffering, Scenic Tours submitted that the lines between the traditional 'heads' of loss overlap and are not distinct.

Consequences

Although the holiday cases have featured prominently in the cases considering the application of s 16 to claims in respect of injured feelings, more is at stake than damages for disappointed holiday-makers. If the High Court finds that injured feelings are 'injury' for the purpose of Part 2 – and that s 16 applies to assess the damages – then that poses some interesting questions about the scope of Part 2. Because Part 2 applies irrespective of cause of action, *any* cause of action where mere injured feelings are compensated may be subject to it, even if the common law would not have treated it as a claim in respect of personal injury.

For example, in *Corby*, Basten JA held that aggravated damages were 'compensation for mental suffering falling short of a recognised psychiatric illness' (at [48]). Does that mean aggravated damages could be subsumed by s 16?

In defamation, compensation for injured feelings can make up a large part of the damages awarded. Does that mean that the *Defamation Act 2005* (NSW) is subject to s 16?

Questions posed by the High Court bench during the appeal show the Court was alive to the prospect that torts like defamation and false imprisonment may be impacted by finding that mere injured feelings were injury for the purpose of Part 2. Given what is at stake, the High Court's judgment is eagerly anticipated. **LSJ**