

RE-SINKING THE *MIKHAIL LERMONTOV*

Whither *Baltic Shipping* distress and disappointment damages in the age of limitations on claims for non-economic loss?

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MS *Mikhail Lermontov*, off Cape Jackson, NZ, 16 February 1986

Overview

1. In *Baltic Shipping Co v Dillon*³, the High Court of Australia confirmed the entitlement to seek damages for distress and disappointment where the damage flows either from physical inconvenience caused by a contractual breach or a breach of a contractual promise to provide “*enjoyment, relaxation or freedom from molestation*”⁴.
2. In *Scenic Tours Pty Ltd v Moore*⁵, the NSW Court of Appeal held that a claim for distress and disappointment damages arising from breach of the ‘result’ and ‘purpose’ consumer guarantees⁶ were subject to the limitations placed upon awards of damages for non-economic loss for personal injury claims in Part 2 of the *Civil Liability Act 2002* (NSW). This decision extended the effect of *Insight Vacations v Young*⁷, which so held in respect of a claim for distress and disappointment damages arising from a physical injury. The reasoning in both

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³ (1993) 176 CLR 344, adopting the approach taken in *Jarvis v Swan Tours Ltd* [1973] QB 233.

⁴ 176 CLR 344 at 365 per Mason CJ.

⁵ [2018] NSWCA 238.

⁶ Section 61, *Australian Consumer Law* (ACL).

⁷ (2010) 78 NSWLR 641.

Insight Vacations and *Scenic Tours* is that claims for distress and disappointment damages brought in contract, tort or statute (including under the Australian Consumer Law) will be caught by Part 2 of the NSW *Civil Liability Act*. This approach will likely affect the operation of CLA-type laws in each State and Territory in Australia⁸.

3. In effect, the decisions of the Court of Appeal renders nugatory any claim for distress and disappointment damages in tort, contract or under statute given that any such ‘injury’ could never meet the threshold set by the *Civil Liability Act*, namely that the severity of the non-economic loss must be at least 15% of “a most extreme case”.
4. On 17 May 2019, Gageler and Keane JJ indicated that the High Court was likely to grant special leave in *Scenic Tours* to Mr. Moore to appeal from this aspect of the decision (subject to hearing from *Scenic Tours*).⁹ The special leave application was however adjourned to permit further grounds being run which concerned matters on which this aspect depended. The adjourned hearing is scheduled for the date of presentation of this paper (13 September 2019). Confirmation of whether leave will be granted on this ground make be given on the day, and by the time, this paper is delivered.

Baltic Shipping – distress and disappointment flowing directly from contractual breach

5. In *Baltic Shipping*, the plaintiff Ms Dillon purchased from Baltic Shipping Company a 14-day cruise of the South Pacific and New Zealand departing Sydney onboard the MV *Mikhail Lemontov*. On the tenth day of the cruise, the *Mikhail Lemontov* sank after it struck a shoal off the north-eastern tip of the South Island of New Zealand. As she abandoned ship, Ms Dillon was injured. She also lost her

⁸ *Civil Liability Act 2003* (Qld); *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (Tas); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (WA); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Wrongs Act 1958* (Vic), Part VBA (as inserted in 2003 by the *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003*).

⁹ *Moore v Scenic Tours Pty Ltd; Scenic Tours Pty Ltd v Moore* [2019] HCATrans 108 (referred to as ‘ground (a)’).

luggage. She and 122 fellow passengers commenced proceedings against Baltic Shipping for breach of contract. Among the damages sought by Ms Dillon were damages for distress and disappointment. Ms Dillon was awarded \$5,000 for this head of damages, which was roughly twice the amount of the fare.

6. On appeal to the High Court, it was held that, although the “general rule” is that damages for distress and disappointment are not recoverable following a breach of contract, an exception to that rule will apply if it is an express or implied term of the contract “*that the promisor will provide pleasure or enjoyment or personal protection for the promisee*”¹⁰. As was stated by Deane and Dawson JJ¹¹:

The object of the contract between Baltic and Mrs Dillon in the present case was to provide Mrs Dillon with the relaxing enjoyment and entertainment of a fourteen-day pleasure cruise. It was an implied term of the contract that Baltic would take all reasonable steps to provide such a cruise. The direct consequences of Baltic’s admitted breach of contractual duty was that Baltic failed to provide the latter part of that promised pleasant holiday. Instead, it provided an extraordinarily unpleasant experience. Subject to the ordinary need to avoid double compensation, Mrs Dillon was entitled to recover damages for the disappointment and distress which she suffered as the result of Baltic’s breach of contract.

7. In the leading judgment, Mason CJ categorised distress and disappointment damages as being an exception to the ‘general rule’¹²:

For that reason, if for no other, it is preferable to adopt the rule that damages for disappointment and distress are not recoverable unless they proceed from physical inconvenience caused by the breach or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation. In cases falling within the last-mentioned category, the damages flow directly from the breach of contract, the promise being to provide enjoyment, relaxation or freedom from molestation. In these situations the court is not driven to invoke notions such as “reasonably foreseeable” or “within the reasonable contemplation of the parties” because the breach results in a failure to provide the promised benefits.

¹⁰ At 402 per McHugh J.

¹¹ At 382.

¹² At 365

8. As demonstrated by this passage, the Court also distinguished between distress and disappointment damages that are the direct result of a contractual breach, and those that are consequent upon physical injury or inconvenience caused by a breach, but held that both ought to be recoverable¹³. This is an important distinction. Although in both instances the damage sustained is distress and disappointment, the cause of the damage is different. In one case the direct cause is the failure to provide enjoyment and entertainment in breach of a contractual promise. In the other case, the damage results from a personal injury. Although the injury has been caused by a contractual breach, that breach is not the failure to provide enjoyment and entertainment. The enjoyable and entertaining aspects are still available; the point is that the injury sustained means that the contracting party is unable to take advantage of them.

Civil Liability Act 2002 (NSW)

9. In 2002, NSW enacted the *Civil Liability Act (CLA)* to address perceived problems with the application of tort law and resulting increases in insurance premiums producing a ‘public liability insurance crisis’ especially for local councils in NSW.
10. Part 2 of the CLA applies to personal injury damages awarded in claims brought in tort, in contract, under statute, or otherwise¹⁴. For the purposes of Part 2:
 - (a) “personal injury damages” include damages relating to the *injury* of a person; and
 - (b) “injury” includes the impairment of a person’s physical or mental condition¹⁵.
11. Part 2 of the CLA includes section 16 which concerns damages for “non-economic loss” which is defined to include pain and suffering and loss of

¹³ See also McHugh J at 405.

¹⁴ Section 11A(2), CLA.

¹⁵ Section 11, CLA.

amenities of life¹⁶. Section 16 states that damages for non-economic loss may not be awarded “*unless the severity of the non-economic loss is at least 15% of a most extreme case*” (being, for example, a quadriplegic with full brain function or a person who suffers both deafness and blindness) and that the maximum amount of damages that can be awarded is \$350,000.00 for the most extreme case.

12. The application of section 16 to restrict an award of damages is a two-stage process:
 - (a) First, the damages claim must relate to an injury, which may include an impairment of the mind;
 - (b) Second, the losses caused by the injury must be “non-economic”, which may include ‘pain and suffering’ or ‘loss of amenity’.

Insight Vacations – distress and disappointment as an incident of personal injury

13. In *Insight Vacations*¹⁷, the NSW Court of Appeal had cause to consider damages for distress and disappointment in the context of Part 2 of the CLA.
14. In that case, Ms Young has booked a European tour package provided by Insight Vacations through a NSW travel agency. Partway through the tour, Ms Young was travelling on by coach from Prague to Budapest when she stood up to retrieve something from her hand luggage stored overhead. At that moment, the coach braked heavily, causing her to fall and sustain injuries. Ms Young commenced proceedings against Insight Vacations in the NSW District Court, alleging she had sustained loss and damage by reason of the coach driver’s negligence. The claim was pleaded in both contract¹⁸ and tort.
15. Among other heads of damage, Ms Young claimed for disappointment and distress in accordance with the precedent set in *Baltic Shipping*. Insight Vacations

¹⁶ Section 3, CLA.

¹⁷ [2010] NSWCA 137.

¹⁸ Pursuant to a warranty implied by operation of s.74(1) of the *Trade Practices Act 1974* (Cth) [now s.60, *Australian Consumer Law*].

opposed this head of damage on the basis that it was excluded by section 16 of the CLA. At first instance¹⁹, District Court Judge Rolfe found that Insight Vacations had breached the term of its contract with Ms Young that required it to perform its services with due care and skill. In relation to the question of damages, his Honour drew a distinction between damages for distress, which amounted to “pain and suffering” and so was a non-economic loss precluded by section 16 of the CLA, and disappointment, which was akin to the damages awarded in *Baltic Shipping* and was not a “non-economic loss”. Damages were therefore awarded for Ms Young’s disappointment at being unable to enjoy her holiday.

16. On appeal by Insight Vacations²⁰, the Court of Appeal rejected Rolfe DCJ’s distinction between distress and disappointment. Basten JA observed that “*distress and disappointment are closely related concepts, in a practical sense, and each is concerned with the loss of enjoyment of an opportunity for recreation and relaxation*”²¹. Sackville AJA held that the damages for disappointment “*resulted from the respondent’s inability to enjoy her tour by reason of the injuries sustained in the course of the tour*” and so concluded that the damages were properly characterised as personal injury damages which were therefore excluded by s.16 of the CLA²². The Court also noted that, had Rolfe DCJ found for Ms Young in negligence (as had been pleaded but not determined), the damages would most certainly have been caught by section 16²³. A further appeal by Insight Vacations to the High Court on a separate point was unsuccessful²⁴.
17. The findings of the Court of Appeal in *Insight Vacations* are conceptually consistent with *Baltic Shipping*, at least insofar as the latter recognised distress and disappointment damages flowing from a personal injury and said nothing to indicate it should not be assessed as part of the claim for personal injury. Ms Young’s damages for distress and disappointment did not result from a

¹⁹ *Young v Insight Vacations Pty Ltd* [2009] NSWDC 122.

²⁰ (2010) 78 NSWLR 641.

²¹ At 649 [127].

²² At 654 [173].

²³ At 650 [129] and 655 [176].

²⁴ *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149.

contractual failure by *Insight Vacations* to provide entertainment or relaxation. The enjoyable holiday experience was provided, it was simply that Ms Young was not capable of experiencing it because of the injuries she had sustained. Her damages for distress and disappointment were consequent upon her personal injury, and so it was appropriate, and in any event consistent with *Baltic Shipping*, that the provisions of Part 2 of the CLA should apply to limit those damages as the legislature had intended.

18. However, commentators,²⁵ as well as the present authors, respectfully do not agree with the observation of Basten JA²⁶ that distress and disappointment flowing from the deprivation of the ability to participate in normal activities caused by a personal injury “*is not a different concept*” from the damages awarded in *Baltic Shipping*. Those comments were, strictly speaking, *obiter* so far as claims are made for distress and disappointment damages absent personal injury. It is this proposition that has thus far proved determinative in subsequent decisions including *Scenic Tours*, and will be the subject of the special leave application (discussed below) being heard on the day of presentation of this paper (13 September 2019).

Flight Centre v Louw

19. The issue was further considered in *Flight Centre v Louw*²⁷. In that case, Mr and Mrs Louw booked a vacation through the plaintiff at the Le Meridien resort in Tahiti. Unfortunately, the resort was undergoing extensive construction works at the time, which substantially affected the Louw’s enjoyment of their holiday. They commenced proceedings against Flight Centre in the small claims division of the NSW Local Court for the distress and disappointment they said they suffered as a result of their ruined holiday.

²⁵ See Kate Lewins and Sonia Walker, “Dashed Expectations? The impact of civil liability legislation on contractual damages for disappointment and distress”, (2014) 42 ABLR 465; Kate Lewins, “Cruise Ship Passengers and Australian Law: Known Problems and Some New Answers”, (2018) 32 A&NZ Mar LJ.

²⁶ At 649 [125].

²⁷ (2011) 78 NSWLR 656.

20. Pausing there, the authors submit that the type of damage sought by Mr and Mrs Louw is consistent with the damages awarded in *Baltic Shipping* and to be contrasted with the damages sought in *Insight Vacation*. The damage for distress and disappointment was sustained independent of any personal injury, and related to an alleged failure by Flight Centre to comply with its contractual promise that the holiday would be relaxing and enjoyable.
21. The Local Court awarded Mr and Mrs Louw modest damages for distress and disappointment. Flight Centre’s appeal to the Supreme Court was successful, Barr AJ accepting that that distress and disappointment constituted an “*impairment of a person’s mental condition*” as so amounted to an injury, and thus a personal injury, to which Part 2 of the CLA applied²⁸. It followed that Mr and Mrs Louw were not entitled to damages by operation of section 16. In reaching this conclusion, the Court placed particular weight on decisions of the NSW Court of Appeal that had interpreted the phrase “*impairment of a person’s . . . mental condition*” in the definition of “injury” in s.11 as wide enough to include anxiety and stress²⁹ along with humiliation and injury to feelings³⁰.
22. The decision in *Flight Centre* demonstrates the mischief wrought in lower courts by the comments of Basten JA in the Court of Appeal in *Insight Vacations*. The authors respectfully do not agree with the decision in *Flight Centre v Louw*. Although the impairment of a person’s mental condition may have broad meaning, for reasons discussed below it should not extend to disappointment and distress flowing from a contracting party’s failure to comply with a contractual promise to provide a relaxing holiday experience. Further, it is unhelpful to consider judicial interpretations of the meaning of “impairment of a person’s mental condition” divorced from their facts. Tortious damages for distress flowing from a police officer pointing a gun at you³¹ are, we argue, entirely

²⁸ At 633 [31].

²⁹ *State of New South Wales v Ibbett* (2005) 65 NSWLR 168 at [124]-[125] per Ipp JA.

³⁰ *State of New South Wales v Corby* (2010) 76 NSWLR 439 at [47] per Basten JA.

³¹ As was the case in *State of New South Wales v Ibbett* (2005) 65 NSWLR 168.

different from the disappointment of broken promises of an idyllic Tahitian getaway.

Scenic Tours

23. In *Scenic Tours*, the intersection between *Baltic Shipping* damages for distress and disappointment and the CLA has been, and continues to be, scrutinised.

Facts

24. Mr. Moore was one of over 1,000 passenger members of the group claiming in his proceedings. The passengers had booked luxury river cruises on vessels operated by Scenic Cruises on European waterways in 2013. Severe flooding of the Danube, Rhine, Main and other rivers in Central and Western Europe prevented the vessels navigating the length of the rivers. Many cruise holidays became instead bus tours along the rivers staying in sub-par accommodation and dining at below-standard restaurants. Limited compensation was paid through insurance or gratuitous compensation.

Legal Framework

25. Rather than sue for breach of contract (which would likely have been defeated by exclusion clauses), Mr Moore and his fellow passengers commenced proceedings in the NSW Supreme Court against Scenic Tours for breaches of the federal-mandated consumer guarantees contained in the Australian Consumer Law (ACL)³². The consumer guarantees are taken to be provided by service providers who provide services in trade or commerce to consumers. The guarantees, that cannot be excluded, restricted or modified by contract³³, include that:

- (a) The services will be rendered with due care and skill (**Care Guarantee**)³⁴;

³² Schedule 2, *Competition and Consumer Act 2010* (Cth).

³³ Section 64, ACL.

³⁴ Section 60, ACL.

- (b) The services will be reasonably fit for any particular purpose the passenger expressly or impliedly makes known to the supplier³⁵ (**Purpose Guarantee**);
 - (c) The services will achieve any intended result the passenger expressly or impliedly makes known to the supplier³⁶ (**Results Guarantee**).
26. If a supplier has failed to comply with a consumer guarantee, a range of remedies may be available to the consumer. This includes a right, pursuant to s.267(4), to recover damages from the supplier for any reasonably foreseeable loss or damage suffered because of the failure to comply with the guarantee, including damages for personal injury³⁷. However, s.275 of the ACL states that, if the supplier has supplied services pursuant to a contract, and the law of a State or Territory is the proper law of that contract, any law of the State or Territory that would operate to limit or preclude the recovery of damages for a breach of the contract will also be taken to limit or preclude the recovery of damages for breach of the consumer guarantee(s)³⁸.

Claim

27. Mr Moore and the other passengers alleged that in failing to warn them of the adverse conditions in Europe prior to the commencement of the tours, Scenic Tours had breached the Care Guarantee. The passengers further argued that the cruise services that were ultimately provided by Scenic Tours breached the Results Guarantee and the Purpose Guarantee. The passengers claimed damages under various heads, including damages for distress and disappointment.

³⁵ Section 61(1), ACL. In *Scenic Tours*, the NSW Court of Appeal found that a passenger may impliedly make a “particular purpose” known to a supplier if the passenger acquires services that only have one purpose.

³⁶ Section 61(2), ACL. Like with the purpose guarantee, the results guarantee can impliedly be made known to a supplier if the services only have one intended result: *Moore v Scenic Tours Pty Ltd (No 2)* [2017] NSWSC 733 at [764]-[765] per Garling J.

³⁷ Section 13 of the ACL states that “loss or damage” is taken to include reference to an injury.

³⁸ Section 275, ACL.

28. The authors argue that, although these damages were claimed for breaches for the Consumer Guarantees, there are substantively the same as the contractual damages awarded in *Baltic Shipping*. In both instances, the damages arose by reason of a failure to provide a promised enjoyable and relaxing experience (and not as a consequence of an injury). Nothing turns, we submit, on the fact that in one instance the obligation to provide the experience arose pursuant to a contractual promise freely given, and in the other the obligation arose by reason of a statutorily imposed, mandatory guarantee.

First Instance

29. At first instance, Mr. Moore accepted that *Insight Vacations* in the Court of Appeal would have precluded any claim to damages for distress and disappointment flowing directly from the breach of contract and absent any physical injury. It sought to preserve that point in any appeal. Further, Garling J had regard to the decision of the Court of Appeal in *Insight Vacations* and, in particular, Basten JA's observation that *Baltic Shipping* damages are conceptually indistinct from damages flowing from personal injury³⁹, and held that Mr Moore's damages claim for distress and disappointment was thus a personal injury claim within the meaning of Part 2 of the CPA. However, his Honour awarded damages to Mr Moore because he found that s.16 did not have "extraterritorial application", meaning it did not apply to wrongs committed outside New South Wales.

Court of Appeal

30. Relevantly, the Court of Appeal overturned Garling J's conclusion that s 16 had no extra-territorial application. The Court of Appeal held that the fact that the claim was being made in NSW was the relevant connecting factor in the legislation and applied on the facts. No other connecting factor was required. (However, the Court of Appeal did not go on to consider whether, by reason of ss.11-11A of the CLA, which required that there be a personal injury for Part 2

³⁹ *Insight Vacations* at 649 [125].

to apply, that personal injury had to be sustained in NSW. Under s 12(1)(b) of the *Interpretation Act 1987*, where legislation is silent on where a matter or thing is located it is presumed to be ‘in and of’ NSW.)

31. Again, Mr. Moore accepted (perhaps unnecessarily) that *Insight Vacations* precluded a claim for distress and disappointment damages absent any physical injury if Part 2 did apply, preserving that point for any appeal to the High Court.

Special Leave Application

32. On 13 September 2019, the day this paper is delivered, Mr Moore will resume his application for special leave to the High Court. Only if special leave is granted will the appeal proceed⁴⁰.
33. The amended special leave application addresses the issue of damages for disappointment and distress. Mr Moore will argue that the Court of Appeal erred in finding that damages of the type awarded in the *Baltic Shipping* (ie: that arise directly from a breach of a contractual promise to provide relaxation or enjoyment) are personal injury damages.
34. The central contention is that whenever the law, whether common law or statute based, recognises as damage the failure by a person to receive the benefit of a promised or represented state of mind, that is not compensation for impairment of mental condition, pain and suffering or loss of amenities of life within the conceptions that have built up at common law and been taken up in the CLA and its interstate analogues. Rather it is compensation for the failure to receive a promised benefit, being a state of mind that never existed. It was never part of the

⁴⁰ The adjournment was occasioned by new counsel seeking to raise further grounds on which the *Baltic Shipping* point was predicated. First, that s.275 of the ACL does not pick up s.16 of the CLA as it is not a law that limits liability or recovery within the meaning of s.275, and that Part 2 of the CLA contains an unstated assumption – recognised by French CJ, Gummow, Hayne, Kiefel and Bell JJ in *Insight Vacations* in the High Court at 156 [16] as a ‘possible’ interpretation – that it applies only where the claim, viewed as a tort, is governed by NSW law as the *lex loci delicti*. This second new point raises questions including whether s.118 of the Constitution may limit the power of the NSW legislature to regulate torts governed by interstate (and so foreign) law in circumstances where that law should govern all aspects of the claim including the heads of damages available: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503

intention of the CLA to deal with, or curtail, these types of damages and the language of the CLA does not mandate such a result.

35. However the services to be provided by Scenic Tours are defined in their terms and conditions, there is no basis to disturb the findings of the courts below that there was a breach of the purpose and result guarantees in s 61 ACL. In the way in which the services were presented in the detailed brochures supplied to customers (and notwithstanding some very fine 'fine print' buried deep in the 200+ page brochure) Scenic Tours was offering a five-star cruise in accordance with a particular itinerary. On the findings, there was a failure to provide the services to the standard required by the statute.
36. However, the loss which Mr Moore suffered was a loss of expectation analogous to that recognised in *Baltic Shipping* as flowing directly from the breach of contract. That is, his disappointment and distress arose from the *failure to receive the pleasure, entertainment or relaxation* which was the purpose and expected result of the services (guaranteed by the statute).
37. Mr Moore will argue that damages for loss of an expectation of enjoyment or relaxation should not be categorised as a form of mental impairment because a person feels disappointment or distress as a result because:
 - (a) The loss to be compensated is an expected state of mind that has not been achieved; and
 - (b) Neither disappointment nor distress are an impairment of the mind. Each is the appreciation a fully conscious and healthy (i.e. unimpaired) mind of a promised expectation that was not fulfilled.
38. Thus, in sustaining his loss Mr Moore did not suffer any physical injury and he did not suffer any recognised physical *or* psychiatric illness. This is important because Part 2 of the CLA only had application when there has been an '*injury*' to a person which, as noted above, includes *impairment of a person's mental*

condition. Mr Moore contends that he is not claiming damages relating to a personal injury to himself or to any impairment of his mental condition⁴¹.

39. In summary, Mr Moore argues that Part 2 of the CLA should not apply the *Baltic Shipping*-type damages for distress and disappointment because:
- (a) Disappointment or even distress arising from a failure to provide expected relaxation or enjoyment is not an impairment of the mind and so does not fall with the s.11 definition of “injury”;
 - (b) The damages claim does not concern an impairment of the mind but for the measure in money’s worth of a state of mind or body – relaxation and enjoyment – that was not provided;
 - (c) Neither disappointment nor distress, unaccompanied by a physical injury, amounts to pain or suffering or a loss of amenity so do not constitute “non-economic loss” within the meaning of s.3. *Baltic Shipping* damages do not involve a deprivation of the ability to participate in normal activities and thus to enjoy life to the full and to take full advantage.

Looking ahead

40. Possibly as a way of cutting through some of the difficulties faced by the Courts since the advent of the state-based *Civil Liability* regimes, Australia is presently considering whether to adopt the Athens **Convention** 1974 as amended by the 2002 protocol. In broad terms, the Convention entitles a “carrier” (meaning the person by or on behalf of whom a contract of carriage has been concluded, regardless of whether they actually perform the carriage⁴²) to limit its liability for loss suffered as a result of the death of or personal injury to a passenger, or the loss of damage to luggage, that occurred in the course of the carriage.

⁴¹ This argument is not without precedent. In *NSW v Williamson* (2012) 248 CLR 417 at [34], the High Court held that a claim under false imprisonment for damages on account of deprivation of liberty with accompanying loss of dignity and harm to reputation was not an impairment of a mental condition or otherwise a form of injury within s.11 of the CLA and was therefore not a claim for personal injury damages.

⁴² Art 1.1(a).

41. Ostensibly, the Convention applies to “any” international carriage⁴³, although it appears that this would not extend to international river carriages of the type in *Scenic Tours*, because the Convention defines “contract of carriage” as a contract for the carriage by sea of a passenger⁴⁴, “passenger” as any person carried in a ship⁴⁵ and “ship” means “*only a seagoing vessel*”⁴⁶. This means that, even if Australia were to adopt the Athens Convention, it would not necessarily provide uniformity of approach. As a threshold test, cruise passengers would need to determine whether their claim fell within the ambit of the Convention. As *Scenic Tours* demonstrates, not all claims would be captured. Another threshold test might be whether the passenger’s damage relates to “personal injury”, which is not defined in the Convention. Would it include *Baltic Shipping* damages? If it does, would that mean that separate liability regimes would develop to accommodate the different fact scenarios in *Baltic Shipping* and *Scenic Tours*?
42. The authors do not suggest that these obstacles are reasons why Australia should not adopt the Convention but merely indicative of an area of law that is continuing to evolve.

Some finishing thoughts

43. If the High Court grants special leave to Mr Moore to appeal the decision of the Court of Appeal in *Scenic Tours v Moore*, one of the questions for determination will be: are damages for distress and disappointment a species of personal injury damages, or are they a separate head of damages that flow from the failure to comply with a contractual promise to provide entertainment and enjoyment?
44. If the High Court finds in *Scenic Tours* that distress and disappointment damages are a form of personal injury damages caught by Part 2 of the CLA, then Australia’s adoption of the Convention raises the question whether that carriers’

⁴³ Art 2.1.

⁴⁴ Art 1.2.

⁴⁵ Art 1.4.

⁴⁶ Art 1.3.

liability for these damages (in addition to other personal injury damages) would also be limited.

45. However, if the High Court finds that *Baltic Shipping* damages are separate and distinct from personal injury damages, then the adoption of the Convention may result in multiple causes of action: under to the Convention for personal injury damages and any loss or damage relating to baggage, and pursuant to contract and/or the ACL for distress and disappointment damages.
46. Further, how the High Court rules on this matter may identify the need for any legislation implementing the Convention if ratified to make clear the scope of application of ACL and common law claims for damages for distress and disappointment vis-à-vis claims covered by the Convention. Would the former claims still be available independent of and unaffected by the Convention?
47. In some cases, these parallel claims would be relatively straightforward. If a cruise ship sank half way through the voyage and a passenger was physically uninjured, one could imagine a claim under the Convention for lost baggage, and claims in contract and/or pursuant to the consumer guarantees in the ACL for restitution for the unused part of the purchase price and for damages for distress and disappointment.
48. Consider a situation where the cruise ship sank halfway through the voyage. Assume also and the passenger sustained personal injury as they abandoned ship. Arguably, *Baltic Shipping* damages would be available for breach of contract and/or a failure to comply with the consumer guarantees , in which case the carrier could not limit its liability for that loss. But the carrier would argue that the passenger's damages for distress and disappointment flowed from their personal injury and the consequent inability to enjoy the rest of the cruise (had the ship not sunk), in which case the carrier could limit its liability for these damages. That is, the personal injury sustained meant that the passenger was not capable of enjoying the remainder of the cruise even if the ship had not sunk (as per the example in *Insight Vacations*) and that it would be inappropriate for the plaintiff

to be permitted to recover more than they would otherwise be entitled to if the carrier's liability was limited. The counter argument may well be that the personal injury would not have been sustained but for the fact that the ship sank which was a cause *both* of the injury (whatever its consequences) and the failure to confer the expected benefit. After all, there was no conferral of the expected benefit to be enjoyed (or not enjoyed) by the injured passenger. At least we can agree that any salvage of *Baltic Shipping* damages by the High Court will not free future plaintiffs from all the rocks and shoals of some unchartered legal waters.