

**INSIGHT VACATIONS PTY LTD T/AS INSIGHT VACATIONS v YOUNG
(S273/2010)**

Court appealed from: New South Wales Court of Appeal [2010] NSWCA 137

Date of judgment: 11 June 2010

Date of grant of special leave: 12 November 2010

Mrs Stephanie Young purchased a European package tour from Insight Vacations Pty Ltd ("Insight Vacations") in February 2005. Later that year she was injured when the bus in which she was travelling braked suddenly. (Mrs Young was standing at the time, trying to retrieve something from the overhead locker.) That accident occurred in Slovakia and was apparently the result of a road-rage incident involving the bus driver.

Mrs Young brought proceedings in both contract and tort against Insight Vacations, alleging that it was liable for the bus driver's actions. Insight Vacations however relied upon the exclusion clauses in the contract which it claimed relieved it from liability if Mrs Young was not wearing a seatbelt. It submitted that those clauses were authorised by section 5N of the *Civil Liability Act 2002* ("the Civil Liability Act"). On 4 June 2009 Judge Rolfe found that section 5N was ineffective and that the exclusion clauses were void due to the operation of section 68 of the *Trade Practices Act 1974* ("TPA"). His Honour then held that Insight Vacations had breached the warranty of due care and skill implied by section 74(1) of the TPA. By reason of that finding, his Honour did not deal with the alternative claim in tort. Judge Rolfe then awarded Mrs Young \$22,371.00 in damages, including \$8,000.00 for "disappointment". His Honour also found that "disappointment" was not a non-economic loss within the meaning of section 16 of the Civil Liability Act.

On appeal to the Court of Appeal, the issues were the constitutional finding and the award of damages for disappointment.

On 11 June 2010 the Court of Appeal (Spigelman CJ, Basten JA & Sackville AJA) allowed Insight Vacation's appeal in part. Their Honours unanimously held that Judge Rolfe's comparison of section 68B of the TPA and section 5N of the Civil Liability Act was misconceived. Justices Basten and Sackville held that Section 74(2A) of the TPA picks up a State law that directly restricts or precludes liability for breach of the statutory warranty. It does not pick up a State law that indirectly achieves the same result. They also held that where a State law purports to give effect to a term of a contract modifying the liability implied by section 74(1), the contractual term is rendered void as a result of its inconsistency with section 68 of the TPA. As section 74(2A) applies only to State laws that operate directly, it does not save such a term.

On the issue of damages for disappointment, all Justices held that grief, anxiety, distress and disappointment fall within the statutory definition of non-economic loss in the Civil Liability Act. Their Honours held that Judge Rolfe's distinction between damages for "disappointment" and those for "distress" was unpersuasive.

Insight Vacations has issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

The grounds of appeal include

- The Court of Appeal erred in holding that section 74(2A) of the *Trade Practices Act* 1974 (Cth) picks up and applies only a State law that, by its own terms, limits or precludes liability for breach of the implied statutory warranty in s 74(1) of the *Trade Practices Act* 1974 (Cth).
- The Court of Appeal ought to have held that section 74(2A) of the *Trade Practices Act* 1974 (Cth) picks up and applies a State law that authorises the inclusion of a contractual provision that limits or precludes liability for such a breach.