

FEDERAL COURT OF AUSTRALIA

KARPIK V CARNIVAL PLC (THE RUBY PRINCESS) (INITIAL TRIAL)

[2023] FCA 1280

SUMMARY

In accordance with the practice of the Federal Court in some cases of public interest, importance or complexity, the following summary has been prepared to accompany the reasons for judgment and orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at www.fedcourt.gov.au together with this summary.

On 8 March 2020, the cruise ship *Ruby Princess* departed from Sydney. It had on board about 2,671 passengers and 1,146 crew members for a 13-day cruise to a number of ports in New Zealand and back to Sydney. At that time, Australia was bracing itself for the novel coronavirus pandemic which had already had a devastating impact in other parts of the world, disrupting daily life and bringing illness and death. What lay ahead for Australia was unknown, and feared.

Amongst the passengers were Susan and Henry Karpik from Figtree, a suburb of Wollongong in New South Wales. Mrs Karpik is a retired nurse and Mr Karpik is a retired police officer. They have a long history of taking holidays together on cruise ships.

Mr Karpik fell ill with COVID-19, the disease caused by coronavirus. Whether he contracted the disease on board the vessel or before boarding was in dispute. I have found that he was most likely infected on board, probably during the crowded safety muster shortly after boarding. Mr Karpik became very ill – he was intubated, ventilated and placed into an induced coma, and at one point was given only a few days to live. He spent nearly two months in hospital.

Although it was in dispute, I have found that Mrs Karpik most likely contracted COVID-19 on the voyage. Her negative PCR test taken shortly after the voyage was probably a false negative and her subsequent positive blood test was most likely a true positive.

Mrs Karpik's COVID-19 symptoms were relatively minor, but she endured witnessing the suffering of her husband and the fear that he was going to die, without being able to be by his bedside because she was in isolation herself after the voyage. As a result, she suffered a recognised psychiatric illness, namely an adjustment disorder with mixed anxiety and depressed mood. She claimed that she also suffered from Long COVID, but I am not satisfied of that diagnosis.

Immediately preceding the voyage at the heart of this case, the *Ruby Princess* undertook a similar voyage from Sydney to New Zealand and back to Sydney which ended early on 8 March 2020. There had been an outbreak of acute respiratory infection and influenza-like illness on board that cruise. That is relevant because of the possibility that that outbreak included coronavirus thereby heightening the risk of coronavirus being carried over to the next voyage, whether by a crew member who remained on board for the next cruise, or by some other means.

Arising out of those broadly sketched events, Mrs Karpik, as lead applicant, commenced a representative proceeding (class action) against Carnival plc, the time charterer of the *Ruby Princess*, and Princess Cruise Lines Ltd, the owner of the *Ruby Princess*. Mrs Karpik sought damages for personal injuries and distress and disappointment of more than \$360,000.

The group members on whose behalf the proceeding is brought include passenger group members, being passengers on the voyage who are not deceased, executor group members, being executors of passengers who died from contracting coronavirus on the voyage, and close family group members, being close family members of passengers on the voyage who died or became severely ill from contracting coronavirus on the voyage.

The matter proceeded to initial trial only on Mrs Karpik's claim on the basis that a number of common issues of fact and law would, in that process, also be decided in respect of all group members. The initial trial was completed in December last year.

Mrs Karpik advanced five alternative and overlapping causes of action, or claims.

Mrs Karpik advanced claims that the respondents failed to comply with guarantees under the Australian Consumer Law that the services provided to her would be, first, reasonably fit for the particular purpose that she had made known she acquired them for (the purpose guarantee) and, second, of such a nature and quality that they might reasonably be expected to achieve the result that she had made known she wished to achieve (the result guarantee).

I have found that under the consumer law, the respondents guaranteed that the cruise services would be reasonably fit for the purpose of having a safe, relaxing and pleasurable cruise holiday substantially in accordance with the advertised and booked itinerary, and that the services would be of such a nature and quality that they might reasonably be expected to achieve that desired result.

As a result of Mr and Mrs Karpik contracting COVID-19 on the cruise, Mrs Karpik did not have a safe, relaxing and pleasurable cruise holiday. The particular purpose for which the services were acquired and the result that was desired to be achieved accordingly failed. The reason for that failure was because the services were not reasonably fit to achieve that purpose and they were not of such a nature and quality that they might reasonably have been expected to achieve that result. Indeed, given the heightened risk of catching COVID-19 on a cruise ship compared to in the community generally, and the particularly heightened risk on the *Ruby Princess* because of the outbreak of respiratory illness on the previous voyage, it is doubtful that it was possible at that time to provide cruising services that were reasonably fit for the purpose of providing a safe cruise that was also relaxing and pleasurable.

Next, Mrs Karpik advanced claims that the respondents had committed the tort of negligence and also that they had failed to comply with their guarantee under the consumer law that the services supplied by them would be rendered with due care and skill.

I have found that the respondents owed Mrs Karpik a duty to take reasonable care for her health and safety, including with regard to the risk of harm caused by COVID-19 infection, and that they also owed her a duty of care with respect to a recognised psychiatric illness arising from a close family member contracting COVID-19 on the voyage.

I have found that before the embarkation of passengers on the *Ruby Princess* for the cruise in question, the respondents knew or ought to have known about the heightened risk of coronavirus infection on the vessel, and its potentially lethal consequences, and that their procedures for screening passengers and crew members for the virus were unlikely to screen-out all infectious individuals. That knowledge arises from the respondents' experience in February 2020 of coronavirus outbreaks on other vessels owned and operated by them, namely the *Diamond Princess* off Japan and the *Grand Princess* off California, their knowledge of the characteristics of the virus and in particular that asymptomatic and pre-symptomatic people could be infectious, and the respiratory illness outbreak on the *Ruby Princess*'s immediate past

voyage. To the respondents' knowledge, to proceed with the cruise carried a significant risk of a coronavirus outbreak with possible disastrous consequences, yet they proceeded regardless.

There are a number of considerations that have led me to conclude that cancellation of the cruise would not have been so burdensome that a reasonable person in the respondents' position would not have cancelled the cruise. They include the respondents' failure to adduce any evidence of how burdensome it would have been to cancel the cruise, or any explanation of their decisions to offer free cancellation for all cruises worldwide leaving from the very next day (9 March) and to suspend all cruising worldwide a few days later (13 March). The respondents were also apparently prepared to cancel the cruise if one of only nine PCR tests from the immediately preceding cruise had returned a positive result. Those matters suggest that to cancel the cruise would not have been unduly burdensome. On that basis, a reasonable person in the respondents' position would have cancelled the cruise. The respondents were therefore negligent and in breach of their duty of care.

The respondents were also negligent in certain specific respects with regard to the precautions taken for passenger safety. In particular, they should have warned passengers of the heightened risk of the virus being on board the *Ruby Princess* compared to cruise ships generally, implemented better pre-embarkation screening including temperature screening, implemented a system of physical distancing on board, and, from 11 March 2020, isolated ill passengers on board.

Finally, Mrs Karpik advanced a claim that the respondents had engaged in misleading and deceptive conduct in trade or commerce which is prohibited under the consumer law. The conduct in question is the respondents' pre-cruise communications, which were designed to reassure passengers of their safety on the cruise and the measures that the respondents were taking to protect them, and allowing the passengers to board the ship.

I have found that the respondents by their conduct made misleading representations that it was reasonably safe for passengers to embark on the cruise, that the respondents would take reasonable care for the safety of passengers during the cruise, that they would implement increased monitoring, screening and sanitation protocols to protect the health of passengers, and that they would do all things reasonably within their ability to enable the passengers to have a safe, relaxing and pleasurable cruise.

I am satisfied that causation and loss have been established on each of the claims.

An important legal point of contention in the case is whether certain limitations on claiming personal injury damages under the New South Wales *Civil Liability Act 2002* apply to Mrs Karpik's claims under the consumer law brought in this Court, a federal court. Contrary to arguments put on behalf of Mrs Karpik, I have held that the requirement that a claimant can recover damages only if their non-economic loss is of such severity that it is at least 15% of a most extreme case does indeed apply to limit the consumer guarantee claims. It was common ground that it would apply to limit the negligence claim. Personal injury damages are not available in respect of Mrs Karpik's misleading or deceptive conduct claim.

As Mrs Karpik's COVID-19 infection gave rise to very mild symptoms, her adjustment disorder was of moderate severity and relatively short duration, and, as I have found, she did not suffer from Long COVID, I have assessed her non-economic loss for personal injuries as 8% of a most extreme case. If, contrary to my finding, she did indeed experience Long COVID as she claims, that would add only another 4%, meaning that she would still be under the threshold of 15%. She accordingly receives no damages for her personal injuries.

She is, however, successful on her claim for out-of-pocket medical expenses in the sum of \$4,423.48 plus interest.

Mrs Karpik is also entitled to distress and disappointment damages on all her claims. These are damages that are available to compensate someone for what they were promised when the expectation of a happy and relaxing holiday has been unfulfilled. However, in this case all the passengers were paid a full refund by the respondents. As I assess Mrs Karpik's distress and disappointment damages at no more than the refund of about \$4,400 that she received, and Mrs Karpik does not dispute that the refund can be set-off against such damages, she gets nothing on this head of damages.

I will list the matter for further case management in order to hear the parties and make final decisions on the issue of common questions in the class action.

JUSTICE ANGUS STEWART

25 October 2023

SYDNEY