FEDERAL COURT OF AUSTRALIA

Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96

Appeal from:	*Karpik v Carnival plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280
File number:	NSD 1592 of 2023
Judgment of:	**MARKOVIC, SARAH C DERRINGTON AND JACKSON JJ**
Date of judgment:	29 July 2025
Catchwords:	**CONSUMER LAW** – cross-appeal – purpose guarantee in s 61(1) and result guarantee in s 61(2) of the *Australian Consumer Law* (**ACL**) – alleged error in finding that purpose and result of acquiring services was to have a "safe, relaxing and pleasurable cruise" – potential overlap of purpose guarantee and result guarantee – grounds of cross-appeal not made out **CONSUMER LAW** – cross-appeal – alleged error in finding breaches of purpose and result guarantees – compliance with guarantees is an objective test – inferences from facts and events before and after supply of services are permissible – grounds of cross-appeal not made out **CONSUMER LAW** – cross-appeal – s 267(4) of the ACL – causation of loss from breaches of purpose and result guarantees – alleged error in refraining from analysing each specific shortcoming in the services provided – grounds of cross-appeal not made out **CONSUMER LAW** – scope of guarantee – due care and skill guarantee in s 60 of the ACL – alleged error in finding of failure to supply services with due care and skill – grounds of cross-appeal not made out **NEGLIGENCE** – cross-appeal – scope of duty of care – alleged error in finding that owner and operators of passenger vessel owe a duty of care to passengers to care for their health and safety including in relation to the risk of harm caused by infectious disease – grounds of cross-appeal not made out **NEGLIGENCE** – cross-appeal – breach of duty of care – alleged error in finding that the respondents had breached their duty of care owed to the applicant – consideration of precautions a reasonable person in respondents' position

would have taken – grounds of cross-appeal not made out

DAMAGES – where personal injuries suffered were COVID-19 infection and associated adjustment disorder – consideration of availability and assessment of distress and disappointment damages – where appellant received a full refund of cost of cruise holiday – whether refund properly a credit against distress and disappointment damages – grounds of appeal not made out

DAMAGES – personal injury damages for non-economic loss – alleged error in assessment of severity of non-economic loss assessed against a most extreme case – grounds of appeal not made out

Legislation:

Competition and Consumer Act 2010 (Cth) Sch 2 (*Australian Consumer Law*) ss 18, 54, 60, 61, 267

Trade Practices Act 1974 (Cth) ss 74, 74D

Civil Liability Act 2002 (NSW) ss 5B, 5C, 5D, 5E, 11, 16, 32

Residential Tenancies Act 1999 (NT) s 122

Cases cited:

Adcock v Blue Sky Holidays Ltd (unreported, Court of Appeal, 13 May 1980)

Addis v Gramophone Co Ltd [1909] AC 488

Amaca Pty Ltd v Booth [2011] HCA 53; 246 CLR 36

Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479

Baltic Shipping Co v Dillon (1993) 176 CLR 344

Baltic Shipping Co v Merchant; "Mikhail Lermontov" (unreported, NSW Court of Appeal (1994) BC9402491)

Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191

BNL20 v Minister for Home Affairs [2020] FCA 1180

Boensch v Pascoe [2019] HCA 49; 268 CLR 593

C. Czarnikow Ltd v Koufos [1969] 1 AC 350

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47; 239 CLR 390

Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258; 75 NSWLR 649

Cameron v Qantas Airways Ltd [1995] 55 FCR 147

Christopher Hill Ltd v Ashington Piggeries Ltd [1972] AC 441

Collins v Insurance Australia Ltd (2022) 109 NSWLR 240

Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1

Cruise Group Pty Ltd v Fullard [2005] NSWCA 161

CSL Australia Pty Ltd v Formosa [2009] NSWCA 363; 261 ALR 441

David Jones Ltd v Willis (1934) 52 CLR 110

Dependable Motors Pty Ltd v Ashford Shire Council (1959) 101 CLR 265

Fisher v Nonconformist Pty Ltd [2024] NSWCA 32; 114 NSWLR 1

Francis v Lewis [2003] NSWCA 152

Gharibian v Propic Pty Ltd (t/as Jamberoo Recreation Park) [2007] NSWCA 151

Graham Barclay Oysters Pty Ltd v Ryan [2000] FCA 1099; 102 FCR 307

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; 211 CLR 540

Griffiths v Peter Conway Ltd [1939] 1 All ER 685

Hadley v Baxendale (1854) 9 Ex 341; 156 ER 145

Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 AC 31

Hobbs v London and South Western Railway Co (1875) LR 10 QB 111

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10; 247 CLR 613

I & L Securities v HTW Valuers [2002] HCA 41; 210 CLR 109

Jarvis v Swans Tours Ltd [1973] QB 233

Jones v Bartlett [2000] HCA 56; 205 CLR 166

Kenny & Good Pty Ltd v MGICA (1992) Ltd (1997) 77 FCR 307

Kenny & Good Pty Ltd v MGICA (1992) Ltd (1999) 199 CLR 413

Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; 243 CLR 361

Kurrie v Azouri (1998) 28 MVR 406

Langdon v Carnival PLC [2024] NSWCA 168; 115 NSWLR 78

Malik v Bank of Credit & Commerce International SA [1997] UKHL 23; [1998] AC 20

Medtel Pty Ltd v Courtney [2003] FCAFC 151; 130 FCR 182

Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [2011] FCAFC 128; 196 FCR 145

Milner v Carnival plc [2010] EWCA Civ 389; 3 All ER 701

Minister for the Environment v Sharma [2022] FCAFC 35; 291 FCR 311

Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61; 205 CLR 254

Moore v Scenic Tours Pty Ltd (No 2) [2017] NSWSC 733

Moore v Scenic Tours Pty Ltd (No 4) [2022] NSWSC 270; 409 ALR 259

Moore v Scenic Tours Pty Ltd [2020] HCA 17; 268 CLR 326

Morris v Leaney [2022] NSWCA 95

Nolan v TUI (UK) Ltd [2016] 1 Lloyd's Rep 211

Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313

Priest v Last [1903] 2 KB 148

Qantas Airways Ltd v Cameron [1996] FCA 349; 66 FCR 246

Royal Caribbean Cruises Ltd v Rawlings [2022] NSWCA 4; 107 NSWLR 51

Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2008] NSWCA 217; 72 NSWLR 559

Scenic Tours Pty Ltd v Moore [2018] NSWCA 238; 361 ALR 456

Scenic Tours Pty Ltd v Moore [2023] NSWCA 74

Shaw v State of New South Wales [2012] NSWCA 102; 219 IR 87

Shirt v Wyong Shire Council [1978] 1 NSWLR 631

Shoalhaven City Council v Pender [2013] NSWCA 210

Smith v Carnival Plc trading as P&O Cruises Australia [2018] NSWSC 782

Smith v Leurs [1945] HCA 27; 70 CLR 256

State of New South Wales v Napier [2002] NSWCA 402

Swift v Fred Olsen Cruise Lines [2016] EWCA Civ 785

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11; 273 CLR 454

Waine v Carnival Plc trading as P&O Cruises Australia [2022] NSWDC 650

Wallace v Kam [2013] HCA 19; 250 CLR 375

Young v Chief Executive Officer (Housing) [2023] HCA 31; 278 CLR 208

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations

Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	360
Date of hearing:	27–29 August 2024
Counsel for the Appellant:	Mr J Sexton SC, Ms C Ernst and Mr M Gvozdenovic
Solicitor for the Appellant:	Shine Lawyers Pty Ltd
Counsel for the Respondents:	Mr J Hutton SC, Mr J Kennedy and Mr H Cooper
Solicitor for the Respondents:	Clyde & Co (until 5 June 2025) Corrs Chambers Westgarth (from 5 June 2025)

ORDERS

NSD 1592 of 2023

BETWEEN:	**SUSAN KARPIK** Appellant
AND:	**CARNIVAL PLC (ARBN 107 998 443)** First Respondent
	PRINCESS CRUISE LINES LIMITED **(A COMPANY REGISTERED IN BERMUDA)** Second Respondent
AND BETWEEN:	**CARNIVAL PLC (ARBN 107 998 443)** First Cross-Appellant
	PRINCESS CRUISE LINES LIMITED **(A COMPANY REGISTERED IN BERMUDA)** Second Cross-Appellant
AND:	**SUSAN KARPIK** Cross-Respondent
ORDER MADE BY:	**MARKOVIC, SARAH C DERRINGTON AND JACKSON JJ**
DATE OF ORDER:	**29 JULY 2025**

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The cross-appeal is dismissed.
3. The appellant must pay the respondents' costs of the appeal, to be taxed by a Registrar of the Court if not agreed.
4. The respondents must pay the appellant's costs of the cross-appeal, to be taxed by a Registrar of the Court if not agreed.
5. There be liberty to apply on or before 26 August 2025 in relation to paragraphs 3 and 4 above.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 On 8 March 2020 the *Ruby Princess* cast off from the Overseas Passenger Terminal at Circular Quay in Sydney and headed towards New Zealand with approximately 2,671 passengers and 1,146 crew on board. It was the start of a 13-day cruise, referred to as voyage **RU2007**, which would see the ship head to several ports in New Zealand before returning to Sydney. At the time Australia was bracing itself for the novel coronavirus pandemic, which had already affected other parts of the world: see *Karpik v Carnival plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280 (**PJ**) at [1]. We will refer to the novel coronavirus in these reasons as the **virus** or **COVID-19**. The unfolding of the pandemic caused the voyage to be cut short, ending back in Sydney on 19 March 2020.

2 Susan Karpik, the appellant, and Henry Karpik, her husband, were among the passengers on board the *Ruby Princess*. During the voyage, Mr Karpik fell ill with the virus although, as the primary judge identified, whether he contracted the disease on board the vessel or before boarding was a matter in dispute. Mr Karpik was gravely ill and nearly died. He spent nearly two months in hospital. Many other passengers fell ill and some passed away: PJ[2]. Mrs Karpik also claimed to have contracted the virus, which was disputed, although her symptoms were relatively minor.

3 The day after disembarkation, Mr Karpik was taken by paramedics from his home to hospital where he spent nearly two months, during which time he was intubated, ventilated, and placed into an induced coma. Mrs Karpik witnessed her husband's suffering but was not able to be by his side for a long period, as she was required to be in isolation at home for some 16 days after the voyage. On 27 March 2020, whilst still self-isolating, she was informed that Mr Karpik's condition was critical and deteriorating and that he had only about a 10% chance of survival. Mercifully, Mr Karpik's condition began to improve over the next few days and, despite a long and difficult recovery, he survived. Mrs Karpik claimed that the impact of these events on her mental health was significant: PJ[2].

4 On 23 July 2020 Mrs Karpik as lead applicant commenced a representative proceeding in this Court against **Carnival** plc, the time charterer of the vessel, and **Princess** Cruise Lines Ltd (a company registered in Bermuda), its owner and operator, as **respondents**. She sought damages for personal injuries, distress and disappointment of more than $300,000. The **Group Members** on whose behalf Mrs Karpik brought the proceeding comprised: "Passenger Group

Members", being passengers on RU2007 who are not deceased; "Executor Group Members", being the executor or administrator of a person who was a passenger on the vessel who died by reason of contracting the virus during RU2007; and "Close Family Group Members", being close family members (as that term is defined in the *Civil Liability Act 2002* (NSW) (**CLA**)) of a passenger who contracted the virus during the voyage and died or became severely ill and who suffered a recognised psychiatric injury from mental or nervous shock in connection with the passenger dying or becoming severely ill.

5 Mrs Karpik relied on an amended originating application and a further amended statement of claim. As developed before the primary judge Mrs Karpik alleged:

(1) the services provided by the respondents failed to comply with the guarantees in s 61 of the *Australian Consumer Law* (**ACL**), being Sch 2 to the *Competition and Consumer Act 2010* (Cth). Mrs Karpik contended that the services were not reasonably fit for the intended purpose, being a safe, relaxing and pleasurable holiday from which she and other passengers would return feeling refreshed and reinvigorated, or as might reasonably be expected to achieve the desired result;

(2) in making certain representations in their promotional material for the cruise and an email to passengers which reiterated a commitment to safety by taking certain steps to protect their health and by inviting passengers to board the vessel without any accompanying health warning, the respondents contravened s 18 of the ACL; and

(3) in reliance on s 60 of the ACL and the tort of negligence, the respondents owed her a duty of care to take reasonable precautions to protect her from illness and from suffering mental harm on account of her husband's illness, which they breached.

6 The respondents filed a defence in which, as summarised at PJ[11], they contended:

(1) Mr Karpik did not contract COVID-19 on board and Mrs Karpik never contracted COVID-19;

(2) on the claim made pursuant to s 61 of the ACL, no purpose or desired result was ever communicated to them but, in any event, their services were not relevantly deficient;

(3) on the claim made pursuant to s 18 of the ACL, the communications on which Mrs Karpik relies could not be reasonably interpreted as giving rise to the representations pleaded; and

(4) on the negligence case, that they did not owe passengers a duty of care that extends to protecting against the risk of contracting COVID-19 and, even if they did, they did not

breach their duty of care, essentially because they complied with all relevant guidelines of peak health bodies.

7 The matter proceeded to trial on Mrs Karpik's claim alone, on the basis that a number of common issues of fact and law could be conveniently decided in respect of all Group Members. Following a lengthy hearing, on 25 October 2023 the primary judge published his reasons and directed the parties to bring in proposed orders. Commencing at PJ[1047] his Honour summarised his findings on each of Mrs Karpik's claims. Relevantly:

(1) on the critical factual issues, the primary judge found that Mr Karpik most likely contracted COVID-19 on board the *Ruby Princess* and Mrs Karpik contracted COVID-19 from Mr Karpik on the voyage and suffered a recognised psychiatric illness in the form of an adjustment disorder as a result of Mr Karpik's illness and hospitalisation but she did not suffer from "Long COVID": PJ[1048];

(2) the primary judge made findings as to the application of the CLA to Mrs Karpik's claims: PJ[1049];

(3) his Honour found that the respondents did not comply with the guarantees in subsections 61(1) and (2) of the ACL: PJ[1050];

(4) in relation to Mrs Karpik's claims alleging negligence and breach of s 60 of the ACL, the primary judge found that the respondents owed Mrs Karpik a duty to take reasonable care for her health and safety, including in relation to the risk of harm caused by COVID-19 infection, and with respect to a recognised psychiatric illness arising from Mr Karpik having contracted COVID-19 on the voyage. His Honour found that in relation to the claim in negligence, the "normal fortitude" test or requirement in s 32(1) of the CLA was satisfied. His Honour found that Carnival and Princess breached their duty of care in a number of ways: PJ[1051];

(5) his Honour found that the respondents contravened s 18 of the ACL by making four misleading representations referred to as a "Safe to Board Representation", "Reasonable Care Representation", "Best Practices Representation" and "Pleasurable Cruise Representation": PJ[1052]; and

(6) causation and loss were established on each of the causes of action: PJ[1053].

8 There is no challenge to the findings summarised at (1) and (2) above. The respondents challenge the findings at (3)-(6).

9 In assessing damages, the primary judge:

(1) did not award any personal injury damages on the claims made pursuant to ss 60, 61(1) and 61(2) of the ACL or the negligence claim because he assessed Mrs Karpik's case as being 8% of a most extreme case (**MEC**) (PJ[1007]) which as non-economic loss was less than the statutory threshold of 15% provided for in s 16 of the CLA (PJ[1054]);

(2) found that out of pocket expenses on the personal injury damages were recoverable on the ss 60, 61(1) and 61(2) claims and the negligence claim, in the sum of $4,423.48 plus interest (PJ[1055]); and

(3) found that distress and disappointment damages, which would be available on all causes of action, did not exceed the refund paid to Mrs Karpik with the result that no such damages were payable. The primary judge also found that most of Mrs Karpik's feelings of distress and disappointment were "tied up in her adjustment disorder" and that her feelings of stigmatisation were not compensable under this head of damages (PJ[1026]-[1029], [1056]).

Mrs Karpik challenges the assessment and findings at (1) and (3) above.

10 On 24 November 2023 the Court made Orders including that:

> ***Judgment***
>
> 1. Judgment be entered against the respondents in the amount of $4,423.48 plus prejudgment interest.
>
> ***Costs***
>
> 2. The respondents pay the applicant's costs of the proceeding, up to 5 October 2022, subject to prior interlocutory costs orders, which are not disturbed, with the question of the applicant's costs from 5 October 2022 to be reserved.
>
> 3. The applicant's costs be fixed in a lump sum.
>
> 4. Within 14 days of the Court determining the question of the applicant's costs from 5 October 2022, the applicant file and serve a Costs Summary of no more than 20 pages in compliance with [4.10]-[4.11] of the *Costs Practice Note* (GPN COSTS).
>
> 5. Within 28 days of the Court determining the question of the applicant's costs from 5 October 2022, the respondents file and serve a Costs Response of no more than 15 pages in compliance with [4.13]-[4.14] of the *Costs Practice Note* (GPN COSTS).
>
> 6. In the event that the parties cannot agree on the amount of the lump sum, within 42 days of the Court determining the question of the applicant's costs from 5 October 2022, the parties inform the Associate to Stewart J and file and serve submissions of no longer than 10 pages addressing the law as to costs on relevant issues.
>
> 7. Pursuant to r 1.37 of the *Federal Court Rules 2011* (Cth) a Registrar is to determine the amount of the lump sum in such manner as they see fit, including, if considered appropriate, on the papers.

11 On 7 February 2024 the Court made further Orders including that:

> 1. Pursuant to s 33Z of the *Federal Court of Australia Act 1976* (Cth) (**Act**), the common questions and answers from the initial trial of the applicant's claim are set out in Annexure A (**Common Questions**).
>
> 2 Pursuant to s 33ZB(a) of the Act, the Common Questions are binding on all group members as defined in the further amended statement of claim filed on 24 March 2021 other than on any person who has opted out of the proceeding under s 33J.
>
> 3. The costs of the initial trial from 5 October 2022 up to and including 5 February 2024 be reserved.

12 Both Mrs Karpik, on the one hand, and Carnival and Princess, on the other, appeal from the Orders made on 24 November 2023 and 7 February 2024: by amended notice of **appeal** filed on 6 March 2024 Mrs Karpik appeals from part of Order 1 made on 24 November 2023. She no longer presses her appeal from Order 3 made on 7 February 2024; and by further amended notice of **cross-appeal** filed on 27 August 2024 Carnival and Princess appeal from Orders 1 to 7 made on 24 November 2023 and Orders 1 and 2 made on 7 February 2024.

13 As Mrs Karpik's appeal is a challenge to the findings by the primary judge in relation to personal injury and distress and disappointment damages and the respondents' cross-appeal challenges the primary judge's findings on liability, we will address the cross-appeal before turning to the appeal.

CARNIVAL AND PRINCESS' CROSS-APPEAL

14 In their cross-appeal the respondents raise 16 grounds of cross-appeal which, as noted above, challenge the primary judge's findings in relation to liability.

Legislative scheme

15 Before addressing the grounds, it is convenient to set out the relevant legislative provisions which were the subject of findings by the primary judge. They are found in the ACL and the CLA.

The ACL

16 Section 18 of the ACL concerns the prohibition against misleading or deceptive conduct and relevantly provides a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

17 Division 1 of Pt 3-2 of the ACL concerns consumer guarantees and Subdiv B concerns guarantees relating to the supply of services. Mrs Karpik made claims pursuant to s 60 and s 61 of the ACL. Those sections relevantly provide:

> **60 Guarantee as to due care and skill**
>
> If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.
>
> **61 Guarantees as to fitness for a particular purpose etc.**
>
> (1) If:
>
> (a) a person (the ***supplier***) supplies, in trade or commerce, services to a consumer; and
>
> (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;
>
> there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.
>
> (2) If:
>
> (a) a person (the ***supplier***) supplies, in trade or commerce, services to a consumer; and
>
> (b) the consumer makes known, expressly or by implication, to:
>
> (i) the supplier; or
>
> (ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;
>
> the result that the consumer wishes the services to achieve;
>
> there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.
>
> …

The guarantees in subsections 61(1) and (2) are referred to respectively as the **purpose guarantee** and the **result guarantee**.

18 Section 267 of the ACL provides for the remedies available to consumers when a supplier of services fails to meet a consumer guarantee. That section relevantly provides:

> (1) A consumer may take action under this section if:
>
> (a) a person (the ***supplier***) supplies, in trade or commerce, services to the consumer; and
>
> (b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and

(c) unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:

(i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or

(ii) a cause independent of human control that occurred after the services were supplied.

(2) If the failure to comply with the guarantee can be remedied and is not a major failure:

(a) the consumer may require the supplier to remedy the failure within a reasonable time; or

(b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time—the consumer may:

(i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or

(ii) terminate the contract for the supply of the services.

(3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:

(a) terminate the contract for the supply of the services; or

(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.

…

The CLA

19 It was common ground that s 5B and s 5C of the CLA apply to the question of whether the respondents breached their duty of care to Mrs Karpik and to Mr Karpik insofar as Mrs Karpik's claim for damages for her alleged adjustment disorder was concerned. Sections 5D and 5E similarly apply in relation to causation. Those sections provide:

5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence—

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

5D General principles

(1) A determination that negligence caused particular harm comprises the following elements—

(a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent—

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider

(amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

20 Also relevant to the appeal is s 16(1) of the CLA, which has been referred to above and which provides, in relation to personal injury damages, that "[n]o 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".

The purpose and result guarantees: grounds 2-8

Ground 2: the purpose and result guarantees

21 By ground 2, the respondents contend that the primary judge erred in finding that Mrs Karpik made known to them that the particular purpose for which the relevant services were acquired, within the meaning of s 61(1) of the ACL, was to have a safe, relaxing and pleasurable cruise holiday. Ground 2 similarly includes the contention that Mrs Karpik did not make known that this was the result that she wished to be achieved, within the meaning of s 61(2).

22 The terms of s 61 are set out above. There was no issue at trial that the respondents had supplied, in trade or commerce, services to Mrs Karpik as a consumer, so s 61(1)(a) and s 61(2)(a) were each satisfied.

The primary judge's reasons

23 The primary judge identified the issues before him under s 61(1) of the ACL as concerning whether Mrs Karpik had made known to the respondents a particular purpose for which she was acquiring the relevant services, and whether it had been established that the services were not reasonably fit for that purpose. Similarly, in relation to s 61(2), the issues were whether Mrs Karpik had made known to the respondents the result she wished to achieve and whether the services were not of such a nature and quality, state or condition that they might reasonably have been expected to achieve that result. The respondents did not rely on the defence in s 61(3), which operates if the consumer did not rely on the skill or judgement of the supplier or if it was unreasonable for the consumer to do so.

24 After reviewing the services that the respondents were to provide to Mrs Karpik, by reference to the passage contract, brochures and other pre-cruise communications, the primary judge identified the particular purpose that Mrs Karpik made known "was to have a safe, relaxing and pleasurable cruise holiday substantially in accordance with the advertised and booked

itinerary": PJ[469]. His Honour held that the desired result that Mrs Karpik had made known was the same.

25 The primary judge then addressed a submission that the respondents had made (as he understood it) that this was a usual and ordinary purpose for a holiday, and so could not be a "particular" purpose under s 61(1)(b) of the ACL. His Honour described the respondents as submitting that a particular purpose, as distinct from the general or usual and ordinary purpose for which the services are supplied, must be made known to the supplier in order for the "care guarantee" found in s 60 to have any work to do beyond the purpose guarantee in s 61(1). His Honour understood the respondents to be making a similar submission as to the need for precision in the expression of "the result that the consumer wishes the services to achieve" for the purposes of s 61(2). They also submitted that there was no good reason to construe s 61(2) in a manner that would allow the desired result to be any less particular or communicated with any less precision.

26 The primary judge relied on the authority of *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238; 361 ALR 456 (***Scenic CA (No 1)***) to reject those submissions. On the basis of that case, and other authorities referred to in it, his Honour held that it is not necessary to show a more specific purpose than the only purpose for which the relevant services are generally acquired.

27 The primary judge also considered a submission by the respondents that an obvious desire on the part of passengers to have a pleasurable cruise did not amount to the communication of a particular purpose, because both the passengers and the cruise line may be reasonably expected to know that innumerable circumstances might arise where the cruise line could not guarantee that purpose. His Honour rejected that submission because s 61(1) does not give rise to an absolute guarantee; the services are only guaranteed to be *reasonably* fit for the particular purpose, and such that they *might reasonably have been expected* to achieve the desired result.

The respondents' submissions on the cross-appeal

28 Under the rubric of ground 2 the respondents purport to identify two errors on the part of the primary judge.

29 The first error, they say, stems from a misunderstanding on the part of the primary judge of the submissions they made to him at trial. According to their submissions on appeal, at trial their point was that "desires or hopes" were insufficiently precise to fall within s 61(1), and that wishes that a holiday might be "safe, relaxing and pleasurable" were mere desires and hopes.

They contrast this with a purpose that is the particular reason, use or function for which the consumer is acquiring the services.

30 In the respondents' principal written submissions on the cross-appeal (**RWS**), the reference to definite or concrete uses or functions is footnoted with numerous cases said to be analogous (many under the sale of goods legislation), including: use as a hot water bottle (*Priest v Last* [1903] 2 KB 148 at 154); a tractor to be used for road work (*Dependable Motors Pty Ltd v Ashford Shire Council* (1959) 101 CLR 265 at 271); and herring meal used as food for mink (*Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441 at 477, 490). The respondents contrast such specific purposes with "hopes or goals", such as that the holiday might be "relaxing" or "pleasurable".

31 Senior counsel for the respondents relied in particular on the characterisation of the consumer's purpose given in *Scenic CA (No 1)*, submitting that in that case, which also involved pleasure cruises, the purpose was confined to that of experiencing the cruise services that were to be provided.

32 The respondents thus do not criticise the primary judge's conclusion that a particular purpose can be the main and only purpose for which particular services are acquired. For example, walking can be the "particular purpose" for which shoes are acquired: ***David Jones*** *Ltd v Willis* (1934) 52 CLR 110 at 122. The respondents say, however, that this does not address the submission they made at trial.

33 The respondents rely on the differences between s 61(1) and s 61(2) to bolster their submission: a purpose cannot be the same thing as a result, as that would render s 61(2) superfluous. In oral submissions senior counsel for the respondents emphasised this point. He submitted that because s 61(1) requires services to be reasonably fit for the particular purpose, the purpose must be specific enough to allow that to be assessed. By contrast, the result guarantee in s 61(2) only requires that the services are such that they might reasonably be expected to achieve the result. In his submission, that accommodates results that can have broader subjective qualities, such as pleasure or relaxation. That subjective quality is also accommodated by the requirement in s 61(2) that the result be one "that the consumer wishes the services to achieve".

34 The primary judge's second error, according to the respondents, is that his Honour failed to take into account that the parties, objectively and reasonably in the circumstances, would not expect that a cruise provider could guarantee a safe, relaxing and pleasurable cruise, given the exigencies involved.

Consideration

35 It is not at all clear that the primary judge misunderstood the submissions made to him. The respondents rely on two paragraphs from their written closing submissions at trial, but without context. The first (para 548) contains the submission that "[a]morphous, recondite or indeterminate purposes are not capable of satisfying the requirements of s 61(1). It is impossible for the supplier to discern the existence of such purposes, or to guarantee that the services supplied will be reasonably fit for them". But how this was related to the objective of enjoying a "safe, relaxing and pleasurable cruise" as found by the primary judge is not possible to tell from the excerpt of the submissions put before us. The second paragraph from the closing submissions cited (para 572) appears not to go to this point, but to go to the primary judge's second alleged error, which we address below. The fact that, in the course of doing so, it refers to Mrs Karpik's objective as a "desire or hope" hardly rises to the level of a submission that this was not enough to satisfy the requirements of s 61(1), which his Honour is said to have misunderstood.

36 In any event, if we address the submission now sought to be made on its terms, it does not demonstrate that the primary judge erred. It can readily be accepted that the purpose that is made known to a provider of services must have a sufficiently precise meaning. It must be specific enough to allow the provider to judge the extent of the risk that the services are not reasonably fit for that purpose: see, in the slightly different sale of goods context, *Griffiths v Peter Conway Ltd* [1939] 1 All ER 685 at 692. But the purpose found by the primary judge here was sufficiently precise.

37 Nothing in the ordinary meaning of the text of s 61(2) suggests that subjective purposes are inherently unsuited to enliven the purpose guarantee. It does not assist for the respondents to affix mildly pejorative labels such as "hopes or goals" to that purpose. It must be recalled that the context here is quite different to most of the examples cited by the respondents. It is unsurprising that the purposes for which herring meal is acquired by a mink farmer, or a tractor by a road contractor, can be expressed in concrete terms. It does not follow that such terms are always required in different contexts.

38 The context here was that the Karpiks were contracting with the respondents to obtain a holiday. As our discussion below of ground 1 of the appeal shows, the law recognises that the object of contracts of that kind can be the achievement of subjective states of mind, such as pleasure and relaxation: see in particular ***Young*** *v Chief Executive Officer (Housing)* [2023] HCA 31; 278 CLR 208 at [71] (Gordon and Edelman JJ).

39 The primary judge's description of such states of mind, as found in the purpose for which the services here were acquired, is not afflicted by any problematic imprecision. Whether or not services are reasonably fit for the purpose of providing consumers with a pleasurable or relaxing experience is a matter that can be judged by the provider of the services and, if necessary, evaluated by a court.

40 The respondents' submission has even less force when it comes to the particular aspect of the purpose most obviously not achieved here: a safe cruise. In contrast to pleasure and relaxation, safety is an inherently objective concept. The primary judge included "health safety" as well as navigational and operational safety within that concept, and the respondents do not assert that he erred in doing so. The law is well accustomed to assessing whether situations are objectively safe (systems of work, for example). In ***Gharibian*** *v Propic Pty Ltd (t/as Jamberoo Recreation Park)* [2007] NSWCA 151, the New South Wales Court of Appeal had no difficulty in finding, in relation to services that were supplied for a recreational activity, tobogganing, that the purpose for which the toboggan and the toboggan run were supplied was to enable the consumers to undertake the toboggan run safely: at [49].

41 Parenthetically, this gives rise to doubt about whether the main point on which ground 2 is based goes anywhere. As will be seen in relation to ground 3 below, it was primarily the lack of safety in the cruise that led the primary judge to find that the purpose and result guarantees had been breached. Even if the respondents were to succeed in persuading us that subjective feelings of pleasure and relaxation are not capable of being the subject of the purpose guarantee, it is unlikely that that would lead us to overturn the finding that they breached the guarantees as to the safety of the cruise. Further, the respondents did not articulate how success on their first point would lead to any different conclusion in respect of the result guarantee.

42 Nevertheless, to return to the main thread of the argument, *Scenic CA (No 1)* does not require any conclusion that subjective or aspirational purposes, such as to experience pleasure and relaxation, cannot be the subject of the purpose guarantee. We accept, as the respondents submit, that the characterisation of the lead plaintiff's particular purpose that was endorsed by the Court of Appeal in that case referred to enjoying his cruise in accordance with the published itinerary, with "enjoy" being used there as a synonym for "experience" rather than "take pleasure": see *Scenic CA (No 1)* at [194], [212]-[213], [223], [226] and especially [231]. We do not rely on it as positive authority for the proposition that subjectively pleasurable feelings can be a particular purpose within the meaning of s 61(1) of the ACL.

43 But we are not bound to accept the particular characterisation approved in *Scenic CA (No 1)* as dictating what must be found in this case. Identifying the purpose for which goods or services are provided is a question of fact in each case: see *David Jones* at 117. The way the question is framed and answered will depend on the particular circumstances of each case; most obviously the evidence, but also the way that the issue is defined in the pleadings (as to which see *Scenic CA (No 1)* at [212]) and forensic decisions about what does and does not need to be proved.

44 In *Scenic CA (No 1)*, for example, whilst superficially similar to this case in that both involve pleasure cruises, the complaint of the plaintiffs was that due to conditions on the rivers in question, they did very little actual cruising and spent much of the time on buses. It did not concern illness and pandemic. The services that a plaintiff might choose to rely on in that case may be different to those that will be identified as relevant in a different case. Further, there is no suggestion that the particular point raised here was argued in *Scenic CA (No 1)*. The respondents' reliance on it does not advance their position on the question of construction they raise.

45 Nor do we accept the respondents' submission that "particular purpose" in s 61(1) must be understood in such concrete terms so as to distinguish it from the "desired result" that is the subject of s 61(2). In truth, the difference between the two concepts can be elusive, as several of the examples cited by the respondents illustrate. To take one, in ***Merck*** *Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128; 196 FCR 145 at [171], the Full Court (Keane CJ, Bennett and Gordon JJ) found that Mr Peterson had implicitly made known to a pharmacist that a particular medication was being acquired for the purpose of use as a treatment for arthritic pain without gastrointestinal side effects. It follows from this that the result that Mr Peterson wished to achieve was a lessening of his arthritic pain without gastrointestinal side effects.

46 We do not suggest that a purpose guarantee can always be reframed as a result guarantee, but there is plainly a deal of potential overlap between the application of the two provisions. Pointing to specific examples of overlap does not mean, however, that the field of operation of the two provisions is the same, so that one is redundant. Even with substantial overlap, each can have its own work to do. That a particular case, such as this one, may fall within that overlap does not mean that every case will. The respondents' submissions do not establish inevitable redundancy in the two provisions on the approach to them taken by the primary judge. They therefore do not establish a need to depart from the ordinary natural meaning of

the provisions in order to accommodate their place in s 61 and the ACL as a whole. The asserted need to draw a sharp distinction between the two provisions does not advance the respondents' position in relation to ground 2.

47 It is true, as the respondents submit, that by using the word "wishes", s 61(2) can extend to a result that a consumer hopes to achieve. If that is communicated, the service provider is taken to guarantee that the services might reasonably be expected to achieve that result. But it does not follow that the particular purpose in s 61(1) cannot be a purpose expressed in terms of a subjective experience which is the reason for which the consumer acquires the services. There is no need to exclude that kind of purpose from s 61(1) for the sake of differentiating it from s 61(2).

48 Finally, to return briefly to *Scenic CA (No 1)*, senior counsel for the respondents submitted that the Court of Appeal in that case treated the result that was the subject of a s 61(2) guarantee as different from the purpose that was the subject of s 61(1). But we do not read it that way. At [281], Sackville AJA described the result that the passengers impliedly communicated they wished for as "the result from the services which Scenic assured them in the Brochure that they would receive". The brochure in question assured passengers that they would receive certain services and see certain sights: see *Scenic CA (No 1)* at [187], [204]. In other words, it described the services that the passengers would receive, where, as we have described, the "particular purpose" found by the Court of Appeal was to experience the cruise in accordance with the published itinerary. It is not obvious that there is any difference in kind between the particular purpose and the wished for result that supports the respondents' argument. In any event, as we have said, that such a question of fact was resolved in a certain way in *Scenic CA (No 1)* is of limited assistance in this different case.

49 In this case, there is simply no problematic indeterminacy that precluded the respondents (or the Court) from evaluating whether the services they provided would be (or were) reasonably fit for the purpose of providing a safe, relaxing and pleasurable cruise.

50 Turning to the respondents' second point – that the primary judge failed to take into account the objectively ascertained reasonable expectations of the parties – it starts with a submission that reasonable expectations can modify what is implicitly made known to a supplier. As a general proposition, that may be accepted; implication almost always necessarily depends on context, and reasonable expectations may form part of that context.

51 The submission that follows this can also be accepted: a safe, relaxing and pleasurable time cannot be absolutely guaranteed, given the exigencies involved. The respondents rely on

Merck in connection with this submission too. They say, that at [172]-[173], the Full Court held that by acquiring prescription medication, a consumer does not make known a purpose that the medication is safe or without the risk of life-threatening conditions.

52 Indeed, at [172] in *Merck*, their Honours observed that the purpose that Mr Peterson had made known was "not to be understood as including, as a negative element of that purpose, some quality of absolute safety or complete absence of side-effect". Their Honours observed further, at [173], that when a patient acquires a prescription medication from a pharmacist, it is not presumed in law or obvious in fact that the patient impliedly makes known to the pharmacist that he or she is acquiring the medication for "some generalised purpose of safety or absence of adverse side-effects".

53 For two reasons, however, none of this advances the respondents' position on ground 2.

54 The first reason is that the guarantees in s 61 are not absolute guarantees. The supplier is not taken to guarantee that the purpose or result will always be achieved; so the asserted unreasonableness of expecting that it will be achieved in all circumstances is not relevant.

55 To make that point by reference to the present case, by itself there is nothing unreasonable (or even remarkable) about holidaymakers implicitly communicating to a cruise line that they are acquiring its services for the purpose of having a safe, relaxing and pleasurable time. The same can be said when they make it known that is the result they want to achieve. What might be unreasonable would be an expectation that the purpose or result would be achieved no matter what happens during the cruise. But any expectation that a purpose or result will be achieved, no matter what, does not form part of the purpose or result itself as conveyed. Nor is it a consequence of the operation of s 61 of the ACL, which provides for guarantees that are less than absolute, indeed that are reasonable. For the purposes of assessing what the consumers have implicitly conveyed, any more stringent expectation is beside the point.

56 Consistently with this, in *Moore v Scenic Tours Pty Limited (No 2)* [2017] NSWSC 733 (***Scenic TJ (No 2)***) at [392] Garling J observed (in the course of making findings that were not disturbed in *Scenic CA (No 1)*):

> It is also worth noting that the particular purpose does not have to be an objectively reasonable one. The ACL simply provides that if a particular purpose is made known, and the supplier of services goes on to supply those services knowing (either expressly or impliedly) of that purpose, then the purpose guarantee is brought into effect.

57 The second reason these submissions do not assist the respondents is that the passages relied on in *Merck* were addressing a different point. In that case the primary judge had found that

the drug supplied to Mr Peterson was not reasonably fit for purpose because it doubled the risk of a heart attack. The point the Full Court was making was that it was unlikely that after obtaining a prescription for the drug from a doctor, Mr Peterson had made known to the pharmacist from whom he bought it that he had some generalised purpose of safety or absence of adverse side effects. It was a factual point, relevant to the quite different facts before the Full Court in *Merck*. The Full Court's reasoning does not involve any general point about the proper construction of the statutory precursor to s 61.

Conclusion on ground 2 of the cross-appeal

58 Ground 2 is not made out.

Ground 3: breach of the purpose and result guarantees

59 By ground 3 of the cross-appeal, the respondents contend that the primary judge erred in finding that the services provided by the respondents did not satisfy the requirements of the statutory guarantees in s 61(1) and s 61(2) of the ACL. As will be seen, the primary basis of this ground is that his Honour erred in applying what is now known about the circumstances to his assessment of whether the services were reasonably fit for purpose or might reasonably be expected to achieve the wished for result.

The primary judge's reasons

60 The primary judge first considered a number of cases which, he said, assisted in giving the right meaning to the term "reasonably fit for purpose". Those that are relevant to the present ground of cross-appeal were:

(a) *Gharibian,* where at [62] it was held that liability under the implied warranty that goods were reasonably fit was strict, in the sense that the supplier's liability does not depend on whether it exercised reasonable care (PJ[485]-[488]);

(b) ***Medtel** Pty Ltd v Courtney* [2003] FCAFC 151; 130 FCR 182 at [70], which the primary judge understood as authority for the proposition that an assessment of whether goods were fit for purpose was to be undertaken in light of information concerning the goods available at time of trial (PJ[489]);

(c) *Scenic TJ (No 2)* at [395], where Garling J observed that the qualification "reasonably" means that not every small lapse or shortfall in the provision of services will result in a breach of the purpose guarantee (PJ[490]); and

(d) *Scenic CA (No 1)* at [235]-[236], which the primary judge considered provided examples of minor variations in promised services which would not amount to them

not being reasonably fit for purpose, and also illustrated the role that, in the process of assessing the services, was played by events outside the control of the service provider (PJ[494]-[495]).

61 The passage following this in the primary judgment needs to be read in full to appreciate the course of his Honour's reasoning on the application of these principles. We emphasise the following key points.

62 For reasons that need not be repeated, Mrs Karpik did not have a safe, relaxing or pleasurable cruise, meaning that the purpose and result that she had made known were not achieved. The primary judge then posed the question of whether that was because the services were not reasonably fit for that purpose or not of such a nature or quality that they might reasonably be expected to achieve the result. His Honour described that as "not a straightforward question": PJ[499]-[500].

63 The primary judge reviewed the state of the global pandemic at the time that RU2007 departed (acknowledging that the World Health Organization (**WHO**) had not yet called it a pandemic). In summary: COVID-19 was spreading worldwide; deaths had been caused; and the risk of transmission was heightened on cruise ships. His Honour also mentioned (PJ[502]) outbreaks that had already occurred on the *Diamond Princess* and the *Grand Princess*, operated by the respondents, as well as certain Nile River cruises. It is worth digressing a little at this point to describe some findings that were made earlier in the judgment in relation to the outbreaks on those two Princess cruise ships, as these are relevant not only to breach of the purpose and result guarantees, but also to the negligence case we address further below.

64 At PJ[57]-[63] the primary judge described the circumstances of the *Diamond Princess*, which departed on a cruise from Yokohama Port, Japan on 20 January 2020 on a 16-day round trip which included travelling to Hong Kong. At PJ[63] the primary judge found that the respondents knew:

(1) by 7 March 2020 that over 600 passengers who had been on the *Diamond Princess* cruise had tested positive for COVID-19, over 300 of those confirmed cases showed no symptoms of COVID-19 at the time of specimen collection for testing, and more than five passengers died due to the virus: PJ[61]; and

(2) when RU2007 departed Sydney, seven passengers from the *Diamond Princess* cruise had died due to the virus, nearly 700 of the approximately 3,700 passengers who had been on the *Diamond Princess* had tested positive for COVID-19, and over 40% of the

people on the *Diamond Princess* cruise who tested positive for COVID-19 were asymptomatic at the time of testing: PJ[62].

65 At PJ[64]-[68] the primary judge described the circumstances of the *Grand Princess*, which departed San Francisco on 11 February 2020 on a round trip voyage to Mexico and Hawaii, returning on 21 February 2020 (**first round trip**) and again departed San Francisco on 21 February 2020 on a round trip voyage to Hawaii (**second round trip**). The primary judge found (at PJ[68]) that the respondents knew the following matters about those voyages before the embarkation of passengers on the *Ruby Princess* for RU2007:

(1) by 4 March 2020 at least one passenger from the first round trip had tested positive for COVID-19 and at least one had died from the virus. On or about 4 or 5 March 2020, after Princess was notified of the positive test, it commenced cancelling all social activities planned for the remainder of the second round trip and by 5 March 2020, the United States Centers for Disease Control and Prevention (**CDC**) had reported another positive case from the first round trip and that one of the individuals was being treated in an intensive care unit: PJ[65];

(2) by 6 March 2020 over 20 passengers on the second round trip had tested positive for COVID-19 and by 7 March 2020 there were 11 positive cases from the first round trip: PJ[66]; and

(3) on 7 March 2020 at 5.00 pm CT (9.00 am on 8 March 2020 in Sydney) Princess reported to the press that of 45 guests and crew who were tested for the virus on the second round trip, 21 people had tested positive, comprising two guests and 19 crew. Those 45 people had been selected for testing on the basis that they had presented with influenza-like illness (**ILI**) on the voyage and were regarded as the highest risk cohort and required by the CDC to be tested. It was also reported that it was believed that the index case on the vessel, ie, the person who took the virus onto the vessel, was a guest on the first round trip and that the virus had spread from that person to other guests and crew. The problem for the second round trip was that the crew remained on board: PJ[67].

66 The primary judge found that these matters were relevant to the questions of whether the purpose guarantee and result guarantee had been breached, because they showed that there was a significant risk that one or more passengers or crew on RU2007 were infected, irrespective of whether they displayed symptoms: PJ[501]-[502].

67 His Honour also examined what happened after cruise RU2007, including the many cases of COVID-19 and the deaths that developed and occurred in the days and weeks that followed it.

While in any individual case the source of transmission may be open to question, looked at as a population (PJ[503]):

> it is highly probable that a very substantial number of people contracted COVID-19 on the cruise, and some of those people died. That speaks to the services not being reasonably fit for the safety purpose. To put it rhetorically, how can the services have been reasonably fit to keep passengers safe when so many became infected with COVID-19?

68 The primary judge held that "in light of what was known about the virus at the time" it was doubtful that it was possible to provide cruising services that were reasonably fit for the purpose of providing a cruise that was safe *and* relaxing and pleasurable. Quarantining everyone in their cabins might have achieved the first objective but not the second and third: PJ[504].

69 The primary judge considered that this conclusion was supported by measures that were taken during cruise RU2007. These were (PJ[504]):

> (1) the respondents' decisions, first, to offer full refunds on cancellations of cruises departing from 9 March 2020 and thereafter and, second, to suspend all cruises worldwide from 13 March 2020;
>
> (2) the CDC's "No Sail Order" on 14 March 2020, including its recordal of its prior advice and that of the US Department of State against cruise travel; and
>
> (3) the Australian Government's decision on 15 March 2020 to, in effect, stop all cruising from and to Australian ports.

70 From the respondents' decision to adduce no evidence to explain their decision to cancel all cruises, his Honour inferred that the evidence would not have assisted them by showing that they took that measure for any reason other than that it was not possible to provide safe cruises. At that point his Honour said (PJ[506]):

> To the extent that any hindsight reasoning applies here, it is permissible given that information known at the time of trial is to be taken into account in considering whether services were fit for purpose at the time they were supplied. In the weeks and months following the cruise, a lot more was learnt about the virus, its modes of transmission, steps that should be taken to guard against its transmission (eg, far more rigorous screening, physical distancing and masks), and the drastic measures of social control that would be implemented. The legislator put the risk of such matters becoming known only after the relevant services were provided at the door of the service provider, not the consumer. In that sense, the purpose and result guarantees are a little like statutory warrantees of merchantable quality allocating the risk of latent defects to the vendor – to the extent that it could not have been known at the time of the cruise that the services were inadequate to keep the passengers safe from coronavirus, the services were latently defective for which the supplier is liable under the statutory guarantees. Thus, even if there was no negligence by the respondents in their provision of the services, by the statutory provisions they bore the risk of the services not being reasonably fit or not being of the requisite nature and quality.

71 The primary judge did not consider that the difference between the cruise and the proposed itinerary meant that the purpose guarantee was not met. Essentially, "the substance of the cruise was maintained" and it was only cut short through third party government action: PJ[508].

72 As for specific shortcomings in particular measures, such as pre-embarkation screening and hand hygiene and cleaning, the primary judge would have found a deficiency in screening only, "if it were necessary": PJ[509]. However, his Honour did not consider it useful to evaluate each alleged shortcoming in isolation. Rather, he concluded:

> The point is that the services as a whole were required to be reasonably fit for the purpose of providing a relaxing, safe and pleasurable cruise, and they were not. They failed to keep the passengers safe, and they could not reasonably have been expected to keep the passengers safe in light of what we know about the virus and what occurred in the days and weeks following the cruise.

73 The primary judge thus found that in the circumstances the respondents had failed to comply with the purpose and result guarantees.

The respondents' submissions on the cross-appeal

74 We pass over the first part of the respondents' submissions, which proceed on the assumption that they succeed on ground 2. Setting that aside, the respondents submit that the primary judge erred by using hindsight reasoning in his construction of the word "reasonably" in s 61 of the ACL. They submit, relying on *Scenic CA (No 1)*, that that word makes due allowance for the inevitable vicissitudes that can affect the ability to fulfil a purpose. This means that "reasonably" means something more than "approximately". In the context of s 61(2), the respondents submit, it modifies expectations, "a concept intertwined with then-known circumstances": RWS [16]. According to the respondents, this can only be an assessment of those circumstances at the time the services were supplied.

75 The respondents then say that the same meaning must apply for the purposes of ACL s 61(1) so that for the purposes of both s 61(1) and s 61(2), whether services are reasonably fit or what one might reasonably expect must be assessed "in light of *then-known* circumstances": RWS [17] (emphasis added). Later in their written submissions, and correspondingly, the respondents submit that his Honour erred by taking into account a number of matters arising after the initial supply of the services.

76 Still later, the respondents criticise hindsight reasoning in the course of a submission that *Medtel* does not support that reasoning. It was concerned with the implied condition of

merchantability of goods, which was not qualified by reasonableness. It is logical that knowledge acquired after the time of supply about the state of the goods at that time would be relevant. But it is said to be different for services.

77 In any event, according to the respondents, one looks at the position from the point of view of the consumer. In oral submissions, senior counsel for the respondents submitted that the analogy here of the approach endorsed in *Medtel* was to ask:

> when Mrs Karpik acquired these services, if she had known everything about the services, not seeing the future, not knowing whether the risk of COVID eventuated, but if she had known everything about the services that was known at trial, would she have purchased them?

Senior counsel emphasised the finding that Mrs Karpik knew at this time that there was a risk of acquiring COVID-19.

78 The respondents also give as an example of why hindsight reasoning cannot be used that a ship might sink due to a freak event and for reasons unconnected with any deficiency in services. They characterise the primary judge's approach as sanctioning reasoning, in such a case, that the mere fact of the sinking meant that the services were not fit for the safety purpose.

79 The respondents also submit that the primary judge misconstrued "reasonably" as only allowing a small departure from the permitted purpose or desired result. It was on this footing, they say, that his Honour found that the number of people who contracted COVID-19 on the cruise meant that the services were not reasonably fit for the purpose of providing a safe cruise.

80 The respondents assert that, for the primary judge, the fact that the cruise turned out not to be safe meant, without more, that the services were not fit for the safety purpose.

81 Overall, the respondents criticise the primary judge for declining to analyse the services provided and their nature and quality and the circumstances surrounding their provision to assess whether those services were reasonably fit for the purpose of safety and such that they could reasonably be expected to achieve that result. That, they say, was the analysis required.

Consideration

82 There are three themes in the respondents' submissions under ground 3: that things occurring and matters that become known after the time of provision of the services cannot be taken into account for the purpose of assessing compliance with the purpose and result guarantees; that the primary judge wrongly reasoned that the adverse (and tragic) consequences of the cruise meant, without more, that the guarantees had not been met; and that his Honour wrongly

considered that the question was whether there were more than small departures from the purpose or result that were the subject of the guarantees. We will take each in turn.

83 As to whether it is permissible to take into account matters arising and knowledge acquired after the provision of the services, the respondents' argument depends: *first* on positing that the Court is to look at it from the point of view of a reasonable consumer; *secondly*, on attributing to that hypothetical person the actual knowledge of Mrs Karpik; and *thirdly*, concluding that since she knew there was a risk of COVID-19 on board, she could not reasonably expect a safe, pleasurable and relaxing cruise. According to the respondents, this line of reasoning leads to the conclusion that knowledge about the circumstances acquired after the time of provision of the services cannot be taken into account, because what is required is to place the reasonable consumer into the position and knowledge of the actual consumer.

84 To approach it in that way would be wrong. As to the first step in the respondents' argument, the purpose guarantee in s 61(1) is expressed in terms that do not require consideration of the matter from any particular person's point of view. The guarantee is expressed in purely objective terms: it is that the services that are supplied, and any product resulting from them "will be reasonably fit" for the purpose that has been made known. Questions as to the state of mind and knowledge of the supplier and the consumer may come into the inquiry mandated by s 61(1)(b), concerning what the consumer expressly or impliedly has made known to the supplier about the consumer's subjective purpose in acquiring the services. But once that inquiry is over and the purpose has been identified, the terms of the guarantee, and so the test of whether it has been met, are objective. They are not said to be assessed from the point of view of any actual or hypothetical person.

85 Similar things may be said of the result guarantee in s 61(2). Once it is established that the consumer has made known expressly or by implication that they wish for a particular result, the question that the section poses is an objective one. It is whether, at the time of provision of the services, they and any product resulting from them "will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result". The nature and quality, state or condition of the services must be assessed, so as to determine whether the services might reasonably be expected to achieve the result.

86 We do not accept that this last requirement means that the reasonable expectations of any person need to be identified. It is purely an objective standard which is to be judged by reference to the actual nature and quality, state or condition of the services, regardless of what the supplier or the consumer might know about them at the time of the supply.

87 *Gharibian* is consistent with this view of s 61, albeit it concerned a statutory precursor, s 74 of the *Trade Practices Act 1974* (Cth) (**TPA**). That section relevantly imposed an implied warranty that any materials supplied in connection with services "will be reasonably fit for the purpose for which they are supplied". The services in question were the provision of tobogganing and the materials supplied were the toboggan and toboggan run. As has already been mentioned at [40] above, Ipp JA (with whom Mason P agreed and Tobias JA agreed on the s 74 issue) had no difficulty with a finding that the purpose for which the materials were supplied was to undertake the toboggan run safely. The toboggans supplied by the respondent had brakes that stopped working in wet conditions, and the appellant was injured when she was using one of the toboggans on the toboggan run and it started to rain. The respondents were not negligent, due to the presence of warnings, weather checks and other measures. But it was held unanimously that the materials supplied were not reasonably fit for purpose (Mason P at [2], Ipp JA at [57] and Tobias JA at [81]).

88 It is not necessary to describe in any detail Ipp JA's dispositive reasoning on this point, which may be found in *Gharibian* at [54]-[57]. That reasoning concerned the particular facts of the case. It is only necessary to observe that the inquiry his Honour conducted was focused exclusively on the objective characteristics of the toboggan and the toboggan run. What might, or might not have been reasonably expected, by the consumer, the supplier or anyone else did not come into it. That is especially salient in view of the prominent warnings given by the supplier, which may be taken to have modified the reasonable expectations of the consumer at the time of supply, and indeed helped to save the supplier from the claim of negligence.

89 *Gharibian* is therefore inconsistent with the respondents' argument (and was not addressed by them). Further, as the primary judge found, the Court of Appeal endorsed as well-established the principle that liability (as it then was) under s 74 of the TPA was strict, and not dependent on whether the supplier exercised reasonable care: at [62].

90 As to the second step in the respondents' argument, it is based on an assertion (drawn from other areas of the law) that "reasonable expectations" is "a concept intertwined with then-known circumstances": RWS [16]. That may be so in respect of the reasonable person who is central to the law of negligence. But as *Gharibian* confirms, the question here is not what was required in order to take reasonable care, in view of the knowledge that any person had (or ought to have had) at the relevant time. The question concerns the qualities of particular services and any product resulting from those services. Mrs Karpik's subjective state of

knowledge is not relevant to that question; if any person's knowledge is relevant, it is that of a hypothetical reasonable consumer in all the circumstances.

91 The respondents' submissions seek to insert the subjective element of what a reasonable person would know or do in an actual person's position, into the different concept of what can reasonably be expected based on the actual state of services (or goods) at the time of supply. That would in turn limit the matters that could be taken into account to those which were known (or ought to have been known) at the time of supply. But there is no warrant in s 61 to apply a semi-subjective test taken from a different area of the law.

92 Since, contrary to that semi-subjective approach, compliance with the purpose guarantee in s 61(1) depends on the objective characteristics of the services, it is a short step to find that those characteristics are to be assessed on the basis of all the evidence available at trial, not solely by reference to what any party knew or should have known at the time of supply. To the extent that this exposes the supplier to liability for things that were not known at the time, that is readily explicable by a policy choice by the legislature that the risk of loss arising from matters that could not have been anticipated is better placed on the supplier than the consumer: see *Scenic CA (No 1)* at [184].

93 It is necessary, however, also to consider the authority of *Medtel*, on which the respondents relied heavily. That case concerned the supply of a pacemaker which was one of four models that had been the subject of a hazard alert issued by the Therapeutic Goods Administration. The alert had warned that for those models, there was an increased risk of early battery depletion due to potential short circuit. But the evidence was that the pacemaker that was supplied to the appellant did not have that defect and was unlikely to develop it in the foreseeable future. The question was whether the pacemaker was nevertheless not of merchantable quality for the purposes of s 74D of the TPA. The increased risk of malfunction that led to the issue of the hazard alert only became known after the appellant was fitted with the pacemaker.

94 In view of the argument advanced by the respondents here, it is relevant to note that s 74D(3) of the TPA specified when goods were not of merchantable quality in the following terms:

> Goods of any kind are of merchantable quality within the meaning of this section if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:
>
> (a) any description applied to the goods by the corporation;
>
> (b) the price received by the corporation for the goods (if relevant); and

(c) all the other relevant circumstances.

95 The Full Court held unanimously that the pacemaker supplied to the appellant was not of merchantable quality. It was common ground that this was to be determined as at the time of supply of the goods to the consumer. It was also common ground that at least some information that was not available at that time could be taken into account at the time of trial for the purpose of making that determination.

96 Nevertheless, Branson J (Jacobson J agreeing) examined as a "critical question" (at [57]) how much later acquired information could be taken into account. In the course of that examination, Branson J held that a requirement that was defined by what it was "reasonable to expect" was concerned with what it was objectively reasonable to expect at the time of supply to the consumer. Her Honour did not frame this by reference to what a reasonable person in the position of the consumer or the supplier would expect; rather, the fitness for purpose of the goods was to be measured against "what was objectively reasonable to expect, in terms of fitness for purpose, in all the relevant circumstances": *Medtel* at [64]. As s 74D(3) required, this included the description applied to the goods by the manufacturer. This was not because of the effect that description might have on the state of mind of the consumer, or of a hypothetical reasonable consumer. Rather, it was because "[w]hat it is objectively reasonable to expect in terms of fitness for purpose of goods of one description may be quite different from what it would be reasonable to expect of goods of another description": *Medtel* at [64].

97 Justice Branson then considered *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 (the ***Hardwick Game Farm*** case). In that case, a toxic substance found in meal fed to poultry led to fatalities and other ill effects in the birds; the presence of that substance was not known, and could not reasonably have been expected to be known, at the time of supply of the meal. The House of Lords was split on the extent to which after-acquired knowledge was relevant; some of the Law Lords held that all such knowledge was relevant (Lord Reid at 75-76, Lord Morris of Borth-y-Gest at 92 and Lord Guest at 108-109).

98 Justice Branson, however, preferred the approach of Lord Pearce (with whom Lord Wilberforce agreed) in *Hardwick Game Farm*. His Lordship would have taken into account qualities of the goods that were inherent in them at the time of the supply, but not knowledge (for example) of techniques that were only discovered after the event, that might have transformed the goods. The example Lord Pearce gave of something that could not be taken into account was a simple antidote, discovered two years after supply, that would have easily

rendered harmless goods that were in fact toxic at the time of supply. Justice Branson summarised the position thus (at [70]):

> In my view, in the context of s 74D of the Act, the approach of Lord Pearce to the use of after-acquired knowledge in the *Hardwick Game Farm* case is compelling. Section 74D, as is mentioned above, calls for the quality, or fitness for purpose, of the goods to be measured against what it was reasonable to expect in that regard at the time of the supply of the goods to the consumer. That measurement must be undertaken, in my view, in the light of information concerning the goods available at the time of trial. However, the issue remains whether the goods were as fit for the relevant purpose as it was reasonable to expect at the time of their supply to the consumer.

99 In his separate concurring judgment, Moore J was content to accept the common position of the parties that merchantability at the time of supply could be determined by reference to the facts known at the time of the hearing: *Medtel* at [28], [36]. His Honour did not appear to consider Lord Pearce's particular reservation germane, observing (at [45]) that facts now known should not be drawn on selectively, there being "no rational basis, nor any basis evident from the Act, for suggesting the court should do anything other than consider all the facts and conclude the goods were not of merchantable quality". His Honour also noted that while it was again common ground that condition of the pacemaker was to be assessed as at the time of supply, its condition after that time was relevant to the extent that it might enable an inference to be drawn about its condition at the time of supply: *Medtel* at [39]-[40].

100 In *Medtel* at [43] Moore J noted that in the Full Court judgment of *Graham Barclay Oysters Pty Ltd v Ryan* [2000] FCA 1099; 102 FCR 307 (***Graham Barclay FC***) it was held that the court must consider the reasonable expectations of a reasonable consumer placed in the position of the actual consumer. His Honour seemed to be referring to the following passage in the judgment of Lindgren J (Lee J agreeing):

> 533 The words "as it is reasonable to expect" suggests a question as to the identity of the person or persons, the reasonableness of whose expectation is in question and is to be determined by the court. Possible contenders are:
>
> (1) the consumer or other person who suffers loss or damage;
>
> (2) a reasonable consumer placed as that actual consumer or other person was;
>
> (3) a reasonable bystander (in effect, the court).
>
> 534 In my opinion consistently with both the objective nature of the standard aimed for and the consumer protection purpose of the provision, it is the second or third category of person whose reasonable expectation is called into service by the statute, and in my opinion a reasonable bystander would seek to put himself or herself in the position of a reasonable consumer placed as the actual consumer or other person was. Accordingly, it is right to inquire into the reasonable expectations of a category (2) person.

101 Like *Medtel*, this part of Lindgren J's judgment concerned s 74D of the TPA (the subsequent High Court appeal did not concern that aspect of the case). In any event, after referring to this authority in *Medtel* at [43], Moore J concluded that the assessment of the state or condition of goods at the time of supply was one to be made objectively.

102 For ourselves, whatever the authority of that passage of *Graham Barclay FC* might be in relation to the proper construction of s 74D of the TPA, we doubt that it necessarily carries through to the differently drafted provisions of s 61 of the ACL. In the reasoning leading up to the paragraphs above, Lindgren J emphasised not only the words "as it is reasonable to expect" in s 74D(3), but also the fact that regard was to be had to "all the other relevant circumstances", which have no equivalent in s 61.

103 For the purposes of this appeal, it is not necessary to determine whether the passage from *Graham Barclay FC* has any ongoing relevance. Even if it does, it does not assist the respondents. Whether or not the question of compliance with the guarantees under s 61 is to be answered from the point of view of a hypothetical reasonable consumer, the test remains objective.

104 Contrary to the respondents' submissions, *Medtel* confirms both the objective nature of the test and the need to have regard to all relevant matters known at trial (the reservation stated by Lord Pearce has no potential application in this case). The respondents submit that *Medtel* was concerned with the implied condition of merchantability of goods which, they say, was not qualified by any standard of reasonableness. With respect, that is simply wrong: under s 74D(3) of the TPA, set out above and considered in *Medtel*, the question of merchantability depended entirely on reasonable expectations, just like the result guarantee in ACL s 61(2). And yet, the respondents attempt to trace the concept of merchantability back to older authorities under the sale of goods legislation, and then assert that for services it is quite different because there is no "absolute guarantee of the kind seen in s 54 of the ACL" (which now concerns "acceptable quality" for goods).

105 To begin with, in s 54 the guarantee is not, in fact, absolute because s 54(2) introduces the views of a reasonable consumer. It is, however, unnecessary to embark on a refutation of everything that is wrong with the respondents' argument on this point. In *Medtel* at [63]-[64], Branson J noted, and followed, the cautious approach of the primary judge to older authorities about the common law concept of merchantable quality. Any attempt to confine the authority of *Medtel* to an illumination of that concept fails. The import of the case as summarised above is clear: in assessing what is reasonable to expect, knowledge of the quality of the goods (or

in this case, services) gained up to trial can be taken into account. For reasons explained above, the text of s 61 provides no reason to take any different approach. We reject this first and main theme of the respondents' argument.

106 The second theme is that the primary judge wrongly reasoned that the adverse consequences of the cruise meant, without more, that the s 61 guarantees had not been met. This can be dealt with briefly, for it does not do justice to his Honour's reasoning. In truth, what his Honour did was to draw an inference from the fact that there was an outbreak of COVID-19 on RU2007 causing 559 cases and eight deaths, which figures do not include a significant number of people who left New South Wales after the cruise before testing positive: PJ[503].

107 The inference was based not merely on that fact, but also on the state of the pandemic up to the time of departure, the experiences aboard the *Diamond Princess* and *Grand Princess*, and decisions made by the authorities and the respondents themselves after the *Ruby Princess* set sail. That process – making inferences about the state of the services when supplied, from facts and events both before and after that supply – is a permissible, indeed commonplace, approach to fact finding: see [102] above. It was not a simplistic approach in which the mere fact of catastrophe meant that the services were not fit for purpose. It involves no error.

108 Similarly, the third theme of the respondents' submissions does not do justice to the primary judge's reasoning. His Honour did not approach the purpose and result guarantees on the basis that the question was whether there were more than small departures from achievement of the purpose or result. To say that he did is to take two passages of the primary judgment out of context. Whilst at PJ[490], his Honour summarised the reasoning of Garling J in *Scenic TJ (No 2)* as showing that not every small lapse or shortfall in the provision of services would result in a breach of the purpose guarantee, that was followed by a wholistic, and correct, statement of principle drawn from *Scenic TJ (No 2)*:

> A supply of services will not be in breach of such a guarantee unless the services are not reasonably fit for the identified purpose. The use of the term "reasonably" also introduces an objectively referable measure. It is a qualitative rather than a quantitative one. It requires an overall evaluation of the services provided, and a determination of their fitness for purpose, qualified by the word reasonable.

109 At PJ[493] the primary judge said, "[s]ave that 'reasonably fit' does not mean 'absolutely fit' and thus a small departure may be permitted, the guarantee is that the services will be fit to achieve the desired purpose". There is nothing incorrect in saying that small departures may be permitted, and his Honour was not suggesting that this was the sole test. His Honour went on, at PJ[494], to draw on *Scenic CA (No 1)* for illustrations, not only of the kind of minor

variations from the promised services which would not amount to them not being "reasonably fit for [purpose]", but also of "the role of events outside the control of the service provider". Read in context, his Honour was making the negative point, favourable to the respondents, that not every departure from that which was promised means that the services were not reasonably fit for purpose or such as might reasonably be expected to achieve the result. It does not follow that his Honour thought that anything that was more than minor would involve a breach of the guarantees.

110 That the primary judge did not take this approach is confirmed by his reiteration of the correct wholistic approach at PJ[497], particularly (3) and (4), and by his Honour's dispositive reasoning, which plainly did not stop as soon as it was determined that the respondents' departures from the promised services were more than minor.

Conclusion on ground 3 of the cross-appeal

111 Ground 3 is not made out.

Ground 4: causation and the purpose and result guarantees

112 By ground 4 of the cross-appeal, the respondents contend that the primary judge erred in finding that Mrs Karpik had proved that the breaches of the purpose and result guarantees caused the loss or damage claimed for the purposes of s 267(4) of the ACL in respect of the loss or damage claimed by the appellant.

113 Section 267 is set out above. Section 267(4) provides that a relevant consumer may recover damages from a relevant supplier for any loss or damage suffered by the consumer "because of" a failure to comply with a guarantee (including those in s 61) "if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure".

The primary judge's reasons

114 The primary judge commenced his analysis of the causation question by stating the well-established principle that the words "because of" when used in the ACL "import the traditional notion of causation as a question of fact to be determined by reference to commonsense and experience into which policy considerations and value judgements often enter": PJ[766].

115 The primary judge noted that it was not seriously contested that the loss or damage that flowed from the failure to comply with the guarantees was not reasonably foreseeable. His Honour also recorded that the respondents' submissions in opposition to causation on the ACL s 61

claims were principally directed at contending that Mr Karpik did not contract COVID-19 on RU2007 and that Mrs Karpik did not contract it at all. His Honour had already rejected those contentions, and there is no challenge to that in the cross-appeal.

116 The primary judge next recorded that the respondents submitted that causation in relation to the s 61 guarantees was infected by the same fallacy as causation for negligence. That fallacy was said to be that an increase in probability of harm is sufficient to prove causation as a matter of fact to the civil standard. We deal with that submission in the context of negligence under ground 16 below. His Honour similarly said that he would come later to deal with causation for the negligence claim, but (PJ[769]-[770]):

> the question of causation for the s 61 claims is quite different. Once it is concluded, as I have, that the services were not reasonably fit for purpose or that they were not of such a nature and quality that they might reasonably be expected to achieve the known desired result, it is necessary to ask what loss or damage was suffered "because of" those failures. It is not necessary to analyse each specific shortcoming in the services, such as pre-embarkation screening and physical distancing, and ask whether, had those individual shortcomings not occurred, the loss and damage would still have been suffered.
>
> As I explained in section E.6 above, the services as a whole failed to keep the passengers safe, and they could not reasonably have been expected to keep the passengers safe in light of the evolving pandemic at that time. The quite foreseeable consequences of that failure include Mr and Mrs Karpik contracting COVID-19.

117 In response to a submission made by the respondents that does not arise in the cross-appeal, his Honour described as an "obvious point that had the guarantees been complied with, Mr and Mrs Karpik would not have contracted COVID-19 and Mrs Karpik would therefore not have suffered the consequential loss and damages that she did suffer": PJ[771].

118 His Honour concluded (at PJ[772]) that:

> Mrs Karpik's claimed loss and damage arising from her COVID-19 infection and Mr Karpik's COVID-19 infection were "because of" the respondents' failure to comply with the purpose and result guarantees.

The respondents' submissions on the cross-appeal

119 The respondents criticise the primary judge's view that it was unnecessary to analyse each specific shortcoming in the services and ask whether, had those individual shortcomings not occurred, the loss and damage would still have been suffered. This, they say, is the approach mandated by s 267(4) of the ACL. They submit that this was influenced by errors they had already identified under previous grounds, in that his Honour considered that it was sufficient that the services as a whole failed to keep the passengers safe and it was obvious that had the guarantees been complied with "by cancelling the cruise", Mrs Karpik would not have

contracted COVID-19: RWS [22]. They also submit that the mere fact that there was a breach of the guarantee does not of itself establish causation.

120 The respondents also appear to submit that the approach the primary judge took to causation was to pose a counterfactual, not where the guarantees were complied with, but where the services were never supplied at all, that is, the cruise was cancelled. This, they say, is wrong, since s 61(1) and s 61(2) only apply if services are supplied.

Consideration

121 There was no error in the approach of the primary judge to refrain from analysing each specific shortcoming in the services provided.

122 In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; 247 CLR 613 at [43], French CJ, Hayne and Kiefel JJ said: "Causation is largely a question of fact, to be approached by applying common sense to the facts of the particular case". This means that it is an evaluative question, to be assessed in a practical manner: see ***Fisher*** *v Nonconformist Pty Ltd* [2024] NSWCA 32; 114 NSWLR 1 at [107] (Kirk JA, Meagher JA and Simpson AJA agreeing). Just as the High Court has traditionally discouraged directions to juries on the point "containing theoretical analysis and exposition" (*Amaca Pty Ltd v Booth* [2011] HCA 53; 246 CLR 36 at [65], quoted in *Fisher* at [107]), so too would it be wrong to hem in the trial judge's fact finding function with prescriptive rules as to how the issue of causation is to be approached. It must also be recalled that in cases of statutory causation under the ACL and the TPA, "the relevant question is whether the contravention was *a* cause of (in the sense of materially contributed to) the loss": *I & L Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited* [2002] HCA 41; 210 CLR 109 at [62] (McHugh J) (emphasis in original).

123 Bearing all that in mind, it cannot be said to be necessary in all cases of breach of consumer guarantees involving services to compare the services delivered with the services promised, point by point, especially since the breaches are not found in a simple failure to deliver what was promised. Properly understood, all the primary judge here was doing in this part of his Honour's reasons was to point out that it would not answer the overall evaluative question to determine that any given difference between a service promised and a service delivered was, or was not, a "but for" cause of the alleged loss. There is no error in that approach.

124 Since we have found that the errors alleged under the previous grounds have not been made out, the submission that the primary judge's approach was affected by those errors falls away. More substantively, though, we do not accept the apparent suggestion that his Honour erred in

inferring that, had the consumer guarantees been complied with, Mr and Mrs Karpik would not have contracted COVID-19 on board the *Ruby Princess*.

125 It must be recalled that the essence of the breaches involved a failure to provide services that were reasonably fit for the purpose of delivering a safe cruise, and a failure to provide services that might reasonably be expected to achieve a safe cruise. It is likely that services that were reasonably fit to achieve a safe cruise would have achieved that result and that if the cruise had been safe, the Karpiks would not have contracted COVID-19 while aboard. It is likely that if the services could reasonably have been expected to keep passengers safe, they would have kept them safe – the safety risk that was the subject of the breaches was the very risk that eventuated: COVID-19.

126 To reason thus is not to reason that the mere fact of the breach establishes causation. It is to infer that the nature of the breaches together with the fact that it was followed by loss or damage of a kind that is likely to follow breaches of that kind, means that the breaches materially contributed to the loss.

127 Lastly, and with great respect, the respondents' submission that the primary judge found causation on the hypothesis that without the breaches the cruise would have been cancelled is mystifying. Nowhere does that hypothesis appear in his Honour's discussion of causation under the ACL s 61 consumer guarantees. The reference in the respondents' written submissions, as quoted above, to compliance with the guarantees "by cancelling the cruise" is found nowhere in the primary judgment. Nor does a reading of the section on causation as a whole suggest that the primary judge approached the question on that basis.

Conclusion on ground 4 of the cross-appeal

128 Ground 4 is not made out.

Misleading or deceptive conduct: grounds 5-8

129 For reasons best explained at the end of this judgment, it is not necessary to address the grounds of the cross-appeal that seek to overturn the primary judge's findings that the respondents engaged in misleading or deceptive conduct in breach of s 18 of the ACL.

Negligence and s 60 ACL: grounds 1 and 9-16

130 Grounds 1 and 9-16 concern the primary judge's findings in relation to the claims by Mrs Karpik that the respondents breached their duty of care owed to her and breached s 60 of the ACL.

131 At trial Mrs Karpik claimed in negligence for her COVID-19 infection, Long COVID and her adjustment disorder suffered as a consequence of Mr Karpik's infection and illness. She alleged that the COVID-19 infection and consequential Long COVID (together **COVID injuries**) were caused by a breach of the duty of care owed to her as a passenger on the *Ruby Princess* which was owned and operated by the respondents and that the adjustment disorder injury was consequential on Mr Karpik's infection, rather than her own, making it "pure mental harm" (see s 27 CLA). Mrs Karpik contended that the duty owed and breached by the respondents in relation to the adjustment disorder was owed to all close family members of passengers: PJ[513].

132 Mrs Karpik alleged that the breaches constituted by the respondents' failure to cancel the cruise, warn passengers of the heightened risk on board, screen passengers for COVID-19 symptoms and introduce physical distancing on board the vessel caused her loss and that the remaining alleged breaches are argued for the benefit of Group Members: PJ[514].

133 The respondents denied that each of the elements of Mrs Karpik's claim in negligence was satisfied. They also relied on a number of "defences", namely that there is no duty to warn of an obvious risk, that they were not liable for the materialisation of an inherent risk and alleged contributory negligence: PJ[515].

134 As to her claim for damages under s 267 of the ACL, reliant on establishing a breach of s 60 of the ACL, Mrs Karpik contended that, save for the fact that the respondents owed her a statutory duty to provide services with due care and skill, the question of breach of s 60 was to be resolved with the question of the breach of the common law duty of care. The respondents accepted the latter proposition but did not accept that the question of the duty of care was to be resolved in the way contended for by Mrs Karpik. The respondents submitted that s 60 of the ACL invites a determination of what "due care and skill" required and, if the common law would not have imposed a duty to exercise the due care and skill, then no due care and skill is required: PJ[517].

135 Ultimately, because of the conclusion the primary judge reached in relation to the existence and scope of a duty of care at common law, he did not have to resolve the parties' disagreement about whether s 60 of the ACL imposes a duty of care where the common law does not: PJ[518].

Grounds 9 and 10: scope of the duty of care

136 It is necessary to address grounds 9 and 10 first given that they challenge the primary judge's findings as to the scope of the duty of care owed by them to Mrs Karpik and other group members.

137 By those grounds the respondents contend that the primary judge erred in finding that they owed Mrs Karpik a duty to take reasonable care for her health and safety, with that duty extending to the risk of harm from COVID-19 (ground 9) and in failing to find that, in circumstances where the common law would not impose a duty on the respondents to take reasonable care in respect of a risk of harm, the guarantee to exercise due care and skill in s 60 of the ACL would not impose a requirement on them to take measures to address that same risk (ground 10).

The primary judge's reasons

138 The primary judge addressed the question of the scope of the duty of care owed by the respondents to Mrs Karpik at PJ[519]-[559]. We summarise his Honour's reasoning below.

139 It was not in dispute that the respondents owed Mrs Karpik and other passengers a duty of care. However, the respondents were not required to take reasonable care to avoid all risks of harm to Mrs Karpik. The relevant inquiry was whether the scope of the duty owed by the respondents to Mrs Karpik extended to the kind of harm for which she claimed in negligence: PJ[523].

140 The respondents accepted that cruise ships are analogous to airlines. In that context the primary judge referred to *Qantas Airways Ltd v Cameron* [1996] FCA 349; 66 FCR 246 (***Cameron Appeal***). His Honour observed that in that case the harm for which damages were claimed was discomfort and ill-health caused by the inhalation of tobacco smoke produced by other passengers in circumstances where they had requested seats in the non-smoking section and the duty of care was framed as a duty to take reasonable care for the health and safety of passengers. The primary judge also observed that it was not Qantas that produced the tobacco smoke, nonetheless the duty extended to the risk of harm caused by tobacco smoke produced by other passengers: PJ[524]-[525].

141 The primary judge recorded the effect of the respondents' submissions (at PJ[526]), namely that they sought to "cast the duty posited by Mrs Karpik as a duty 'to prevent the spread of contagious disease' or a duty to 'protect patrons from one another'", each of which they contended was foreclosed by the authorities. The primary judge said at PJ[527]:

> Each of those characterisations is wrong as it is addressed at an inappropriate level of

> specificity. By characterising the relevant duty with such specificity, the determination of Mrs Karpik's case would be circumvented by having the issues decided at the duty stage in circumstances where the crux of the dispute in the negligence case is whether they failed to take reasonable care and whether that failure caused her harm.

142 After referring to the authorities on the question of existence of a duty of care, the primary judge held that the respondents were not correct to characterise the duty as one requiring them to prevent the spread of contagious disease or in terms of protection of patrons from one another: at PJ[531]-[532].

143 The primary judge distinguished the facts before him to those in ***Modbury Triangle*** *Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; 205 CLR 254, on which the respondents relied in relation to their characterisation of the duty as one of protecting patrons from one another, finding that, insofar as the duty can be characterised as one involving the control of third party conduct, it was far removed from the circumstances in *Modbury Triangle*. His Honour relevantly said at PJ[535]:

> Unlike the occupier of an unsecured car park that had no relevant control over the conduct of the thugs or knowledge of their actions, the respondents in the present case had direct control over at least the following: who they let on board the vessel and the conditions on which they did so; how many people they let on board; the cabins assigned to both the passengers and crew; the number of entertainment events being held and the conditions of entry to those venues; the systems and policies in place to reduce contact between people; cleaning regimes; conditions of service of food; provision of PPE and measures such as face masks and hand sanitiser; etc. Indeed, the respondents accept in their submissions that they had the power to create and implement policies on board directed at addressing the risk of coronavirus.

144 His Honour found that the respondents' submission that their duty did not extend to controlling the conduct on board the vessel sat awkwardly with their actual policies and conduct of confining ill passengers to their cabins, was contradicted by cl 32 of the applicable terms and conditions which provided that "if a guest seriously affects the safety or well-being of any other person on board, the master had the right to confine, sedate or disembark the guest" and sat awkwardly with the power at common law of a master of a ship to detain and confine passengers or crew where the master has reasonable cause to believe, and does in fact believe, that the relevant detention or confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property on board, citing *Royal Caribbean Cruises Ltd v Rawlings* [2022] NSWCA 4; 107 NSWLR 51 at [20]-[23].

145 After referring to *Smith v Leurs* [1945] HCA 27; 70 CLR 256 at 262, the primary judge noted (at PJ[539]) that a person may be responsible for harm done to another the direct cause of which was the actions of a third party and that such a duty arises out of a "special relationship" of an exceptional kind which, in his Honour's view, includes the relationship between a ship's

operator, being the party in possession or having the management and control of the ship, and its passengers.

146 The primary judge found that, like passengers on an aircraft, passengers on a ship are "captives", referring to *Cameron Appeal* at 290E, and that the respondents accepted that aircraft are relevantly similar to cruise ships. His Honour observed that, in contrast to airline passengers, cruise ship passengers are generally "captives" for a longer period and that certainly was the case with voyages of the kind supplied as a service by the respondents. His Honour said that "[o]nce passengers have boarded, they are necessarily reliant on the ship's operator to provide all services, from basic shelter from the elements and necessities such as food and water, to medical assistance" and "on the ship operator to take them safely back to shore": PJ[540]-[541]. His Honour also noted that "the peculiar nature of a ship influences the nature and content, including the scope, of a duty of care that is owed in a maritime context" which "reflects the realities of maritime activities and commerce" referring to *CSL Australia Pty Ltd v Formosa* [2009] NSWCA 363; 261 ALR 441 at [64]: PJ[543].

147 At PJ[544]-[545] the primary judge relevantly said:

> 544 The reliance by the passengers of the *Ruby Princess* on the respondents for their safety cannot be negated merely because the passengers voluntarily decided to board the vessel. The necessity of such reliance is what gives rise to the power of a master to arrest, detain and confine passengers and crew in certain circumstances (see *Rawlings* at [25]-[26] and the authorities there cited), as well as the scope of a ship operator's duty of care for the safety of its passengers extending to rescuing them from overboard …
>
> 545 There is also the fact of the respondents' peculiar knowledge (as compared with ordinary passengers such as the Karpiks) of facts relevant to: the nature of the virus, its transmissibility and consequences of infection by it; the absence of a vaccine and limited treatment options; the risk of the spread of coronavirus on cruise ships, and on the *Ruby Princess* voyage RU2007 in particular; the precautions actually being taken by the respondents; the developing situation worldwide, including relevant protocols, guidance and advice. Those matters have been canvassed at length in sections B.4 and B.5 above. That knowledge means that the respondents were in a special position to appreciate the risks facing their passengers, and the facts underlying the knowledge establish that it was reasonably foreseeable that passengers might contract COVID-19 on board from other passengers or crew.

148 The primary judge held that each of those matters strongly supported the conclusion 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 the duty extended to Mr Karpik as another passenger on the cruise: PJ[546], [559].

The respondents' submissions on the cross-appeal

149 The respondents accept, as they did below, that they owed a common law duty to Mrs Karpik to take reasonable care in supplying services during the voyage but submit that, because the law of negligence operates by imposing a duty to take reasonable care to avoid a foreseeable risk of injury, it is necessary also to identify the foreseeable risk of injury that materialised in this case, recognising that a common law duty may not require the exercise of reasonable care to avoid all risks of harm to that other person.

150 The respondents submit that the risk of harm that materialised was the risk of harm from contracting a serious communicable disease from another invitee and that the question that needed to be asked was whether the respondents owed a duty to Mrs Karpik to avoid that risk. They contend that the risk of harm is expressed with greater specificity than merely "physical injury" or "physical harm" but that is no objection as the risk was expressed with the same level of specificity in *Modbury Triangle* at [36] (per Gleeson CJ).

151 The respondents submit that the primary judge did not ask that question but instead found that the respondents were under a duty to take reasonable care for Mrs Karpik's health and safety, including with regard to the risk of harm caused by COVID-19 infection. They note that the primary judge regarded that duty to be one already recognised by existing case law, in particular *Cameron Appeal* where the Court found that Qantas owed a duty to passengers with respect to adverse health effects from tobacco smoke coming from a smoking section of the aircraft. They submit that case did not concern harm from communicable disease brought on board by other invitees and is not authority for the scope of duty found.

152 The respondents submit that no authority establishes that a cruise ship operator, or any owner of premises, owes a duty to take care to persons who board the ship, or enter the premises, to take reasonable care to avoid the risk of those persons suffering physical harm by contracting communicable diseases from other invitees. They contend that the extension of a recognised duty of care to a foreseeable but novel risk of harm requires the Court to undertake substantially the same "salient features" analysis as where a novel duty is alleged, referring to *Collins v Insurance Australia Ltd* (2022) 109 NSWLR 240 at [16]. They contend that no extension should be made in this case and that, while several salient features were canvassed in argument before the primary judge, the key consideration is control, which is of fundamental importance in the duty inquiry.

153 The respondents submit that, as in many analogous commercial settings, they, as occupants, exercised some control over the premises, for example they could (and did) implement

screening controls, and enforce hygiene measures, but the scope of the control was significantly constrained by the sphere of personal autonomy to which all individuals are entitled. The respondents contend that communicable diseases are transmitted between humans and, to the extent that they are said to be a risk of harm within the scope of their duty of care to passengers, that duty must encompass a duty to control the conduct of individuals which may cause adverse health effects to others. They submit that such duties have always been regarded as exceptional.

154 The respondents submit that in the event that no relevant duty of care is found, then s 60 of the ACL would also not apply.

Consideration

155 As the primary judge recognised (at PJ[512]) to succeed in her action in negligence Mrs Karpik first had to establish that the respondents owed her a duty of care.

156 There was a debate between the parties as to whether the duty alleged by Mrs Karpik was novel. The respondents allege that the duty which the primary judge found was owed to Mrs Karpik is novel.

157 There was no dispute between the parties about the applicable principles.

158 The law of negligence operates by imposing a duty to take reasonable care to avoid foreseeable risks: see *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 (***Graham Barclay HC***) at [66] (Gaudron J).

159 The relevant inquiry has two stages. At the first stage, identifying whether there is a duty, the inquiry "relates to the foreseeability of harm resulting to the plaintiff from the conduct of the defendant, considered quite generally". The next stage, the breach inquiry, is different and more particular. It concerns the foreseeability of harm resulting from the acts or omission of the defendant proved to have occurred: see ***Shirt*** *v Wyong Shire Council* [1978] 1 NSWLR 631 at 639-640 (Glass JA).

160 In *Shoalhaven City Council v Pender* [2013] NSWCA 210, after referring to the decision in *Shirt* at 639-640, McColl JA (with whom Barrett JA agreed) continued at [59]-[61]:

> 59 … Thus, the foreseeability inquiry at the duty and breach stages raises different issues which progressively decline from the general to the particular: *Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd* [1983] 2 NSWLR 268 (at 295) ("*San Sebastian"*) per Glass JA; see also *Vairy v Wyong Shire Council* (at [70]-[73]) per Gummow J.
>
> 60 Glass JA explained in *San Sebastian* (at 295-296) how the different issues are

analysed as follows:

> The proximity upon which a *Donoghue* type duty rests depends upon proof that the defendant and plaintiff are so placed in relation to each other that it is reasonably foreseeable as a possibility that careless conduct of *any* kind on the part of the former may result in damage of some kind to the person or property of the latter: *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112, at 120, 121. The breach question requires proof that it was reasonably foreseeable as a possibility that *the kind* of carelessness charged against the defendant might cause damage of some kind to the plaintiff's person or property: *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd; The Wagon Mound (No 2)* [1966] UKPC 1; [1967] AC 617, at 642, 643, *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 54 ALJR 283, at 285, 286 … Of course, it must additionally be proved that a means of obviating that possibility was available and would have been adopted by a reasonable defendant, ibid. The remoteness test is only passed if the plaintiff proves that *the kind* of damage suffered by him was foreseeable as a possible outcome of *the kind* of carelessness charged against the defendant: *Mount Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383, at 390.

(Emphasis in original)

61 Despite the demise of proximity as an informing principle on the question whether a duty of care is owed (*Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 (at [59]) per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) reasonable foreseeability of harm of the kind suffered remains a necessary, although not sufficient, condition of the existence of a legal duty of care: *Tame v State of New South Wales* [2002] HCA 35; (2002) 211 CLR 317 (at [12]) per Gleeson CJ; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 (at [9]) per Gleeson CJ. Glass JA's explanation of the declining continuum of particularity of the foreseeability inquiry remains germane.

161 Thus, questions of duty and breach are distinct. As the primary judge recognised, framing a duty by reference to what happened introduces "the vice of retrospective over-specificity" and conflates the two inquiries: PJ[531]. The primary judge referred to *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47; 239 CLR 390 where Hayne J said at [68]:

> Because the duty relied on in this Court was framed so specifically, it merged the separate inquiries about duty of care and breach of duty. The merger that resulted carried with it the vice of retrospective over-specificity of breach identified in *Romeo v Conservation Commission (NT)* and in the diving cases of *Vairy v Wyong Shire Council*, *Mulligan v Coffs Harbour City Council*, and *Roads and Traffic Authority (NSW) v Dederer*. The duty alleged was framed by reference to the particular breach that was alleged and thus by reference to the course of the events that had happened. Because the breach assigned was not framed prospectively the duty, too, was framed retrospectively, by too specific reference to what had happened. These are reasons enough to reject the formulation of duty advanced in argument in this Court.
>
> (Footnote omitted.)

To like effect see *Graham Barclay HC* at [192] (Gummow and Hayne JJ).

162 In alleging that the primary judge erred in finding the relevant duty of care and in identifying the scope of the duty, the respondents fall into that same error. They attempt to frame the duty by reference to what in fact happened and thereby introduce "the vice of retrospective over-specificity" and merge the separate inquiries of duty of care and breach of duty.

163 We can discern no error in the primary judge holding (at PJ[546]) that the respondents owed passengers a duty to take reasonable care for their health and safety. As Mrs Karpik submits, it is undeniable that a cruise ship operator owes a duty to all passengers to take reasonable care to prevent reasonably foreseeable physical injury in relation to the physical condition of the vessel, its operation and navigation risk. If that duty does not include reasonably foreseeable injury in the form of disease, it is a small incremental step to extend the recognised category of an "injury" under s 11 of the CLA to include it.

164 In a number of cases in Australian courts, cruise ship operators have admitted or conceded that they owe a duty of care to prevent reasonably foreseeable injury to passengers: see for example *Langdon v Carnival PLC* [2024] NSWCA 168; 115 NSWLR 78 at [4]; *Cruise Group Pty Ltd v Fullard* [2005] NSWCA 161 at [8], [27] and [62]; ***Smith*** *v Carnival Plc trading as P&O Cruises Australia* [2018] NSWSC 782 at [1]. True it is that these cases concerned different facts, injury caused by the condition of the vessel, eg the collapse of timber decking or tripping over a raised coaming, but in each case the alleged injury occurred on a vessel and there was no dispute that the operator of the vessel owed passengers a duty of care. Despite the concession in each case, as Mrs Karpik observes the first step, that is the question of whether there is a duty, is a question of law about which a court must be positively satisfied: see *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 342-343; *Jones v Bartlett* [2000] HCA 56; 205 CLR 166 at [166]-[167].

165 The Australian position is consistent with authorities in other jurisdictions. The primary judge referred to two cases where the duty challenged by the respondents has been recognised: *Nolan v TUI (UK) Ltd* [2016] 1 Lloyd's Rep 211 (Central London County Court) and ***Swift*** *v Fred Olsen Cruise Lines* [2016] EWCA Civ 785. The respondents are critical of the primary judge's reliance on these cases because they did not involve a dispute as to scope of duty, which was conceded. However, those cases concerned outbreaks of norovirus on board the vessel in each case with the relevant question for the court being whether the cruise operator had breached its duty. They at the very least demonstrate a recognition of the existence of a duty.

166 The respondents submit that no Australian authority establishes that a cruise ship operator (or any owner of premises) owes a duty of care to persons who board a ship (or enter premises)

to take reasonable care to avoid the risk of those persons suffering physical harm from contracting a communicable disease from other invitees. That may be so. However, it is well established that an occupier of premises owes a duty of care to avoid a foreseeable risk of injury to lawful entrants: see *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488.

167 In that regard, there is an analogy to be drawn between cruise ship operators and airlines for the purpose of incremental development of the law of negligence. As the primary judge observed, like airline passengers, passengers on cruise ships are "captive" but for a longer period of time. *Cameron Appeal*, as the primary judge explained at PJ[524], concerned a group of passengers who claimed damages from Qantas for discomfort and ill health caused by inhaling environmental tobacco smoke on an aircraft in circumstances whether they had requested seats in a non-smoking section of the aircraft but were sat in a designated smoking section or adjacent to or close to a smoking section. At first instance, the Court found that Qantas owed the passengers a duty of care: see ***Cameron*** *v Qantas Airways Ltd* [1995] 55 FCR 147 at 187-188. While Qantas was successful on appeal, this finding was not disturbed and in fact was affirmed: *Cameron Appeal* at 290 (Beaumont J with whom Lehane J agreed).

168 In *Cameron*, Beaumont J said the following in relation to the question of whether Qantas owed Mrs Cameron and the other nine passengers on whose behalf she brought the claim a duty of care at 187:

> As the WHO noted in the context of passive smoking on aircraft, passengers are, in a real sense, "captive". The position may, in truth, be seen to be analogous to the situation in *Howard v Jarvis* (1958) 98 CLR 177 where, during a period of detention in custody, it was held (at 183) that those in control were subject at common law to a duty to exercise reasonable care for the safety of a prisoner during his detention in custody, those persons having deprived the prisoner of his personal liberty and assumed control of his person (see R P Balkin and J L R Davis, *The Law of Torts*, pp 222-223; cf *Donald L Helling v William McKinney* 125 L Ed 2d 22 (1993)).

169 After referring to Art 6(1) of the *Tokyo Convention* on which Qantas relied, his Honour concluded on the question of whether a duty was owed at 188:

> In my opinion, the provisions of the Treaty cannot, in any relevant sense, in the private, as distinct from a public law context (see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 423 at 430) detract from the common law "neighbourhood" principle which underpins the existence of a duty of care in an occupier's situation such as the present (see *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 per Windeyer J at 316; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479).

170 In *Cameron Appeal* Lindgren J characterised the duty as a duty owed to all passengers to take reasonable care for their health and safety. The respondents once again submit that *Cameron Appeal* did not concern harm from communicable disease. While that is so, *Cameron Appeal* did recognise a duty owed by a carrier, in analogous circumstances, to take reasonable care for passengers' health and safety. The primary judge did not say otherwise or rely on *Cameron Appeal* alone in determining that a duty was owed and its scope.

171 The respondents submit that in extending the duty owed to the risk of harm caused by a communicable disease, ie COVID-19, his Honour extended the duty to a foreseeable but novel risk of harm, that to do so requires the Court to undertake substantially the same "salient features" analysis as where a novel duty is alleged and, on that basis, there should be no extension.

172 The "salient features" analysis referred to by the respondents is explained in ***Caltex*** *Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649. In that case Allsop P (with whom Simpson J agreed) observed (at [102]) that at common law there was no particular formula to determine, in any given circumstance, the existence of a duty of care. His Honour continued at [102]:

> If the circumstances fall within an accepted category of duty, little or no difficulty arises. If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.

173 At [103]-[104] of *Caltex* Allsop P identified some of the "salient features", noting that the list was not exhaustive and that the cases did not suggest that it was compulsory to make findings about all of the features in any given case. Relevantly the "salient features" include:

> (a) the foreseeability of harm;
>
> (b) the nature of the harm alleged;
>
> (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
>
> (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
>
> (e) the degree of reliance by the plaintiff upon the defendant;
>
> (f) any assumption of responsibility by the defendant;
>
> …

174 The primary judge held that the duty owed by the respondents was to take reasonable care for the health and safety of their passengers and that, although the risk to health and safety will take many forms, there was nothing indeterminate about the nature of the harm they might face. Relevantly, his Honour observed that the risk of harm must be reasonably foreseeable for a duty to arise: PJ[554]. COVID-19 is an example of such a risk, namely a communicable disease in relation to which the risk of harm is reasonably foreseeable. Indeed, the respondents knew that was the case. As the primary judge found the respondents were aware of the nature of the virus, its transmissibility, the consequences of infection by it, the limited treatment options and the absence of a vaccine, the risk of spread of COVID-19 on cruise ships and the developing situation worldwide: at PJ[545]. In those circumstances, as the primary judge found the respondents were in a special position to understand the risks facing their passengers.

175 On the other hand, if the risk of harm is considered to be novel, in our view, it plainly satisfies the "salient features" test identified in *Caltex*. The foreseeability of harm, the nature of the alleged harm, the degree and nature of the control which the respondents could exercise to avoid harm, the degree of vulnerability on the part of Mrs Karpik to harm resulting from the respondents' conduct, Mrs Karpik's incapacity to take steps to protect herself from harm, the degree of Mrs Karpik's reliance on the respondents and the respondents' assumption of responsibility in relation to the risks to passengers posed by COVID-19, all support the conclusion 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 the virus. In *BNL20 v Minister for Home Affairs* [2020] FCA 1180 the Court reached a similar conclusion, albeit in relation to the duty owed to an applicant who was held in immigration detention.

176 The respondents argue that the key consideration is control, referring to *Graham Barclay HC* at [150]. However, there the High Court was considering the question of a common law duty of care on the part of a public authority. In that context it was said that the factor of control was of fundamental importance. The respondents also refer to *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361 at [24]-[30] where French CJ and Gummow J considered the duty owed by **WOMA** (Australia) Pty Ltd, the provider of a vacuum truck, vacuum hose and other equipment related to the vacuum system used to clean out reactors at a plant operated by BHP Billiton in Port Hedland, to Mr Kuhl, who was employed to clean the reactor grid floors using, among other things, the vacuum system. Their Honours held that WOMA owed "a duty to take reasonable care to provide a hose, truck and vacuuming facility that would not subject foreseeable users of the hose to an unreasonable risk of injury": at [27]. As to control, their Honours said at [26]:

> From this evidence it can hardly be said that it was not reasonably foreseeable, in light of the power of the hose, that a person using the hose might suffer injury if WOMA did not take reasonable care in providing appropriate equipment. It can also be inferred that WOMA had assumed some responsibility in relation to the vacuuming facility above and beyond that of a nonmanufacturing distributor of a product to an end user; it provided operators and ongoing assistance with the running of the vacuuming system. WOMA exercised a level of control over the vacuuming facility both in its ability to turn the truck off and with its responsibility for clearing blockages. WOMA was not responsible for the training of Mr Kuhl nor was Mr Kuhl subject to WOMA's control. However, the supervision of the vacuuming facility by WOMA's servants, and its obvious knowledge that persons like Mr Kuhl would be using the vacuuming hose for the purpose for which WOMA provided the hose, indicates that it was reasonable to require WOMA to have persons like Mr Kuhl in contemplation as people who might be put at risk by WOMA's negligence in providing and operating the vacuuming facility. There are also no considerations of indeterminacy or incoherence that tend against a finding of duty on the part of the WOMA.
>
> (Footnote omitted.)

177 That is, as a matter of fact, French CJ and Gummow J found that WOMA exercised a degree of control over the vacuuming facility, but their Honours did not say, nor is it apparent that control is the key consideration. In any event, as the primary judge pointed out at PJ[535] and [536], the respondents did enjoy a substantial measure of control over significant aspects of RU2007, including who was allowed on board, who might be quarantined, and policies as to distancing and sanitation and the like.

178 In other cases, the Courts have considered the question of vulnerability of a plaintiff as a relevant factor. In *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 McHugh J relevantly said at [100]:

> Except in cases where a statutory authority has assumed responsibility, taken control of a situation or is under a statutory obligation to act, it seems an essential condition for imposing a duty of care on an authority that the plaintiff is vulnerable to harm unless the authority acts to avoid that harm. I use the term "vulnerable" in the sense that, as a practical matter, the plaintiff has no or little capacity to protect himself or herself. In earlier cases, it was common to refer to the concept of general reliance or dependence as a necessary condition for imposing a duty of care on a statutory authority. As I remarked in *Perre v Apand Pty Ltd*, however, while the concept of general reliance has been criticised, properly understood, the concept was merely one way of testing for an important requirement in the determination of duty of care – how vulnerable is the plaintiff as the result of the defendant's acts or omissions. In the context of the common law liability of statutory authorities, general reliance is a combination of the requirements of the existence of powers in the statutory authority to ameliorate harm and the vulnerability of the plaintiff to that harm.
>
> (Footnote omitted.)

See too *State of New South Wales v Napier* [2002] NSWCA 402 at [15] (Spigelman CJ).

179 The passengers on the *Ruby Princess* were captive. The primary judge held (at PJ[470]) that given certain characteristics of a ship, passengers "must look to those who operate the ship to be responsible for protecting and maintaining their health". They were vulnerable and reliant on the respondents for their health and safety.

180 There was no error in the primary judge's finding that the respondents owed Mrs Karpik and the other passengers on board the *Ruby Princess* a duty to take reasonable care for their health and safety including in relation to the risk of harm caused by COVID-19 infection. It follows that s 60 of the ACL also applies.

Conclusion on grounds 9 and 10 of the cross-appeal

181 Grounds 9 and 10 of the cross-appeal are not made out.

The remaining negligence grounds

182 The remaining grounds of the cross-appeal that concern negligence challenge the primary judge's findings that the respondents breached their duty of care. In support of those grounds and for context the respondents referred to and relied on evidence that was before the primary judge and reproduced in the appeal books. It is thus convenient, before turning to the grounds, to provide a summary of the evidence to which we were taken by the respondents. That evidence falls into three categories: public health announcements and guidelines; the respondents' communications with New South Wales Health (**NSW Health**) and internally; and some expert evidence.

Public health announcements

183 The primary judge referred to the public health authorities' guidelines and protocols at PJ[81]-[93]. His Honour observed that the CDC guidance was relevant because it is a leading public health authority and because the respondents are headquartered in the United States of America (**USA**) and so monitored statements and advice issued by the CDC relevant to a cruise ship operator: PJ[82]. The primary judge also referred to guidelines issued by WHO, NSW Health and the Australian Federal Government, including the Federal **Department of Health**. At PJ[666] the primary judge found that the respondents had adduced evidence that their policies and procedures were responsive to certain guidelines and policies issued by the relevant health authorities and that they were aware of the guidelines issued by NSW Health at the time. The respondents embrace the primary judge's finding at PJ[667] that "[e]ven well resourced cruise operators like the respondents would be in danger of failing to keep up with relevant developments in the state of knowledge about the virus and appropriate

measures to guard against its spread unless they drew on the knowledge and resources of leading public health authorities".

184 The respondents referred to the following public health announcements, guidelines and protocols:

(1) on 30 January 2020 the WHO issued "Director General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)" by which the Director-General declared a "public health emergency of international concern over the global outbreak of novel coronavirus". The statement included:

> In total, there are now 7834 confirmed cases, including 7736 in China, representing almost 99% of all reported cases worldwide. 170 people have lost their lives to this outbreak, all of them in China.
>
> …
>
> More important than the declaration of a public health emergency are the committee's recommendations for preventing the spread of the virus and ensuring a measured and evidence based response.
>
> I would like to summarize those recommendations in seven key areas.
>
> First, there is no reason for measures that unnecessarily interfere with international travel and trade. WHO doesn't recommend limiting trade and movement.
>
> …

(2) on 4 February 2020 the WHO issued a document titled "Strategic Preparedness and Response Plan" for COVID-19;

(3) on 6 February 2020 the Department of Health issued an "Information Sheet for the Cruise Industry" in relation to COVID-19 which, among other things, provided:

> **What is Australia doing?**
>
> Australia has put in place extra border measures, health screening and isolation recommendations for people and vessels travelling to Australia from mainland China.
>
> …
>
> On 1 February 2020, Australia introduced isolation and additional border recommendations for people arriving in Australia who have left or transited through mainland China on or after this date.
>
> For the cruise industry, these new requirements only apply to vessels which meet the additional coronavirus requirements listed below
>
> **What vessels have additional coronavirus requirements?**
>
> - Vessels that have left, or transited through, mainland China on or after 1 February 2020 and less than 14 days ago.

- Vessels with crew or passengers who have left, or transited through, mainland China on or after 1 February 2020 and less than 14 days ago.
- Vessels that have had ill crew or passengers on board in the past 14 days.
- Vessels that have crew or passengers who have been in contact with a confirmed case of novel coronavirus in the past 14 days

…

How can I reduce the risk to passengers and crew?

Crew should be advised to continue to follow existing employer infection prevention work instructions when in contact with ill passengers, including the use of personal protective equipment (PPE) when recommended by employer work instructions.

Person to person spread of the coronavirus is reported as occurring, but it is not yet understood how easily this happens. The following measures will help reduce the risk of illness on board vessels:

- Vessels should promote good cough and sneeze hygiene among crew and passengers.
- Vessels should undertake appropriate cleaning and disinfection activities.
- People should wash their hands frequently with soap and water or use alcohol-based hand sanitiser.
- People should avoid touching their mouth, eyes, and nose with unwashed or gloved hands.
- If personal protective equipment (PPE) is recommended, it should be worn properly.
- Where possible, people should stay one metre or more away from passengers or crew with symptoms of coronavirus unless wearing appropriate PPE as per employer work instructions.
- Follow the interim Australian guidelines for nCoV where appropriate.

…

(4) on 7 February 2020 the Department of Health issued a document titled "Australian Health Sector **Emergency Response Plan** for novel Coronavirus (COVID-19)" which was the first Australian health sector emergency response plan for the virus and was designed to guide the Australian health sector response (see PJ[684]). It included:

> Australia will approach this novel coronavirus outbreak by undertaking activities to:
>
> - monitor and investigate outbreaks as they occur;
> - identify and characterise the nature of the virus and the clinical severity of the disease;
> - research respiratory disease-specific management strategies;

- respond promptly and effectively to minimise the novel coronavirus outbreak impact;
- undertake strategies to minimise the risk of further disease transmission; and
- contribute to the rapid and confident recovery of individuals, communities and services.

> The activities required to support our community during this novel coronavirus outbreak will involve state and territory governments, the Australian Government and many other health sector parties. Coordination and communication at the national level will be particularly important during our current active response.

The Emergency Response Plan also set out the bodies involved in decision making for a novel coronavirus outbreak which included Communicable Diseases Network Australia (**CDNA**) which would "provide leadership in surveillance, the analysis of epidemiological information and strategies related to management of communicable disease";

(5) on 21 February 2020 CDNA published national guidelines for public health units for COVID-19 which summarised "interim recommendations for surveillance, infection control, laboratory testing and contact management for coronavirus disease 2019 (COVID-19)" and which were said to "capture the knowledge of experienced professionals, and provide guidance on best practice based upon the best available evidence at the time of completion". These guidelines included the following case definition for a confirmed case and suspected case of COVID-19:

> ***Confirmed case***
>
> A person who tests positive to a validated specific SARS-CoV-2 nucleic acid test or has the virus identified by electron microscopy or viral culture.
>
> ***Suspect case***
>
> If the patient satisfies epidemiological and clinical criteria, they are classified as a suspect case.
>
> *Epidemiological criteria*
>
> - Travel to (including transit through) mainland China in the 14 days before the onset of illness.
>
> OR
>
> - Close or casual contact (see Contact definition below) in 14 days before illness onset with a confirmed case of COVID-19.
>
> *Clinical criteria*
>
> - Fever.
>
> OR

- Acute respiratory infection (e.g. shortness of breath or cough) with or without fever.

The guidelines recommended that clinicians should consider testing people with a clinically compatible illness who travelled to any of Hong Kong, Indonesia, Japan, Singapore or Thailand in the 14 days before onset of symptoms.

The guidelines also dealt specifically with cruise ships under the heading "special situations" as follows:

> ***Cruise ships***
>
> ***Risk assessment and identification of contacts***
>
> Classification of contacts on cruise ships with one or more confirmed cases of COVID-19 should be made on a case-by-case basis.
>
> ***Hospital transfer of suspect or confirmed cases***
>
> If suspect or confirmed cases on board require transfer to a hospital, the Commonwealth Biosecurity Officer will notify the port authority to provide access for medical transport. The jurisdictional Human Biosecurity Officer will then coordinate transfer of the person to an appropriate medical facility for further management, via the most appropriate means that adheres to necessary precautions.
>
> ***Quarantine for passengers and crew after arrival at a port***
>
> Self-quarantine at home should be recommended for close contacts where this is feasible (e.g. persons with a residence nearby) ensuring appropriate PPE precautions are employed during travel. For close contacts for whom this is not possible, matters of self-quarantine should be addressed jurisdictionally.
>
> ***Disembarking and embarking***
>
> After all suspect and confirmed cases have been managed appropriately and the Human Biosecurity Officer has determined that no other passengers or crew have symptoms consistent with COVID-19, remaining passengers and crew will be allowed to disembark. The vessel may be permitted to commence embarking once it is certain there is no risk of ongoing transmission.

(6) on 22 February 2020 Dr Kerry Chant PSM, the New South Wales Chief Health Officer, wrote to cruise ship industry representatives providing the first in a series of documents setting out "enhanced **COVID-19 procedures for the cruise line industry**". In her covering letter Dr Chant referred to the recent outbreak of COVID-19 on the *Diamond Princess* cruise ship noting that it demonstrated the serious impact the virus could have in cruise ship environments. Her letter continued:

> To further reduce the risk in NSW, NSW Health has instituted a number of enhanced measures to assess the risk of COVID-19 in cruise ships entering NSW ports, and manage any cases detected in passengers or crew. These are in addition to existing requirements under the *Biosecurity Act (2015) (Commonwealth)*.
>
> To assist in protecting cruise ship passengers and crew, I seek your urgent

> assistance to confirm that each cruise ship docking in NSW is able to meet the attached guidance, *Enhanced COVID-19 Procedures for the Cruise Line Industry*. Please make sure this is shared with relevant staff, particularly the medical team for each ship.
>
> Should any sample test positive for SARS-CoV-2, the virus causing COVID-19, then a major public health response will be mounted to investigate and manage a potential outbreak and to reduce the risk of further infection among passengers, crew and the broader community.
>
> …

(7) on 24 February 2020 WHO issued a document titled "[o]perational considerations for managing COVID-19 cases and outbreaks on board ships" (see PJ[673]). Among other things the WHO's guidelines recommended pre-boarding screening by providing passengers with general information on COVID-19 and preventative measures and so as to defer or reschedule the boarding of any passenger identified through a questionnaire as being a close contact of someone with COVID-19, ensure proper management by port health authorities and provide guidance on managing a suspected case on board a ship. As to the latter the respondents emphasised that the guidelines defined a suspected case as having both clinical and epidemiological criteria;

(8) the Department of Health issued its fifth epidemiological report for COVID-19 for the week ending 29 February 2020 reporting that there were 25 confirmed cases of COVID-19 as at 29 February 2020 in Australia, nine of which were among the *Diamond Princess* cruise ship passengers repatriated from Japan and 15 of which had direct or indirect links to Wuhan, China. Insofar as it concerned domestic cases, the report concluded by stating that "[t]here is currently no evidence of community transmission within Australia". The report also included an "Australian COVID-19 case definition as of 29 February 2020" which for a suspect case provided both epidemiological and clinical criteria;

(9) on 2 March 2020 the Hon Greg Hunt MP, Minister for Health, and Professor Brendan Murphy, Chief Medical Officer, issued a joint statement which included:

> Australia has seen its first case of community transmission of COVID-19. Bringing the total of confirmed cases to 33.
>
> This case underlines the fact that Australia is not immune from COVID-19. COVID-19 represents a significant risk to Australia – and we continue to manage that risk based on the best and latest medical advice.
>
> …
>
> We will continue upgrade our travel advice and remind people that:
>
> - if they are returning from mainland China or Iran they should self isolate for 14 days; and

- if they are returning from Italy or South Korea and they work as a healthcare worker or as a residential aged care worker, they should not attend their workplace for 14 days.

…

The message for Australians is that it is perfectly safe to go about their daily business and do exactly what they would normally do.

(10) on 4 March 2020 the CDC issued an updated guidance for "[e]valuating and reporting persons under investigation (PUI)" for COVID-19 which provided, among other things, that decisions on who should receive testing should be based on "local epidemiology of COVID-19, as well as the clinical course of illness". The epidemiological factors included persons who had travelled from selected geographic areas within 14 days of symptom onset. At the time those areas were China, Iran, Italy, Japan and South Korea;

(11) on 4 March 2020 NSW Health issued an updated version of its COVID-19 procedures for the cruise line industry which specified that the procedures set out in it should be applied to all cruise ship voyages;

(12) on 5 March 2020 the Australian Government announced new travel restrictions, updated its travel advice and implemented new screening measures in relation to people arriving from the Republic of Korea and Italy;

(13) on 6 March 2020 the Department of Health issued an updated "[i]nformation for the cruise industry" which applied to all international voyages entering Australia and which included:

(a) under the heading "[w]hat is the cruise industry required to report?":

As per the normal pre-arrival reporting requirements, all cruise vessels entering Australian territory are legally required to report ill passengers and crew on the pre-arrival report via the Maritime Arrivals Reporting System (MARS). The pre-arrival report has been updated to include questions around travel history to mainland China, Iran, Republic of Korea and Italy.

If an ill traveller is reported through MARS, a biosecurity officer will liaise with the vessel to screen for COVID-19 and other serious infectious diseases. Biosecurity officers do this by administering the Traveller with Illness Checklist (TIC) to the ill passenger or crew member, or by discussing case diagnoses with the ship's doctor. A biosecurity officer or human biosecurity officer may then issue directions for the management of a suspected case of COVID-19 which are legally required to be followed.

All international cruise vessels are required to deliver on-board announcements to travellers prior to the vessel docking at an Australian seaport to encourage self-reporting of ill health. DAWE will provide internationally operating cruise ships with pre-recorded messages for the on-board verbal announcement in a number of languages.

(b) recommendations on how cruise providers could reduce the risk to passengers and crew including the following measures which would "help reduce the risk of illness on board cruise vessels":

- Crew and passengers should be encouraged to practise good hand hygiene and good sneeze/cough hygiene:
- Wash hands often with soap and water, or use alcohol-based hand sanitiser, before and after eating as well as after going to the toilet; and
- Cough and sneeze into the elbow or a clean tissue, dispose of the tissue and use alcohol based hand sanitiser.
- Crew and passengers should be encouraged to avoid touching the face (mouth, eyes, and nose) with unwashed or gloved hands.
- Crew should use appropriate PPE if close contact with an ill passenger is required.
- If PPE is used, it should be fitted and worn properly.
- Cruise ships should ensure appropriate cleaning and disinfection activities are undertaken.

(14) either on 3 or 6 March 2020 NSW Health issued a further version of its COVID-19 procedures for the cruise line industry. There is an issue as to the date of this document. It records that it was "[u]pdated 3 March 2020" but also includes at footnote 1 a note that it was "[a]s of 6 March 2020". The primary judge found that the document was issued by NSW Health on 3 March 2020 (PJ[87]). The respondents submit that this Court should find that it was issued on 6 March 2020. Ultimately, nothing turns on the day of its issue. That is because, insofar as the *Ruby Princess* is concerned, it was issued before the disembarkation of passengers from the *Ruby Princess* on voyage **RU2006** immediately before Mrs Karpik's cruise, RU2007, and the embarkation of passengers for RU2007. The updated procedures were expressed to apply to all cruise ship voyages, not just international voyages, and required among other things:

(a) that each cruise ship should ensure it had sufficient supplies of specified materials to manage a respiratory outbreak on board;

(b) that each cruise ship should collect and retain for 14 days after each cruise a log of where passengers and crew had travelled in the 14 days prior to embarkation and an accurate electronic contact list for all passengers and crew after disembarkation;

(c) that procedures be put in place to identify and manage cases of respiratory infection including for all people with ILI and those with acute respiratory infection (**ARI**) with a history of travel to countries on the Australian list of

countries at risk of COVID-19 transmission, the collection and storage of two swabs – one nasopharyngeal and one oropharyngeal – and that passengers with ARI/ILI who may be infectious are appropriately isolated and provided with alcohol rub and face masks;

(d) reporting to NSW Health;

(e) prearrival preparations for health screening;

(f) procedures as to what to do if COVID-19 testing is recommended; and

(g) procedures as to what will happen if COVID-19 testing is positive including that if a traveller is confirmed as a COVID-19 case, he or she will be hospitalised in isolation with procedures for close contacts to then be implemented by NSW Health;

(15) on 9 March 2020, the day after the *Ruby Princess* set sail on RU2007, the Australian Health Protection Principal Committee (**AHPPC**) published "coronavirus (COVID-19) statement on 8 March 2020" which included the following as recommendations in relation to public events:

> As of 8th March 2020, the AHPPC advises that the risk to the general Australian population from COVID-19 is low, with the majority of confirmed COVID-19 cases in Australia in returned travellers.
>
> At this time the AHPPC consider that public events should proceed, but strongly recommend that people that are unwell with cough or fever or other respiratory symptoms should not attend public events or gatherings. This is particularly so for people who have recently travelled from overseas.
>
> …
>
> It is difficult to predict how the outbreak will evolve in Australia and the situation may change rapidly.

(16) on 11 March 2020 WHO announced that it had assessed that COVID-19 could be characterised as a pandemic;

(17) on 13 March 2020 a joint media release by the Prime Minister, the Minister for Health and the Chief Medical Officer announced that, based on the advice of AHPPC, Commonwealth, State and Territory governments had agreed to provide public advice against holding non-essential, organised public gatherings of more than 500 people from Monday, 16 March 2020;

(18) also on 13 March 2020 the CDC issued a "Notice of No Sail Order and Other Measures related to Operations" which applied to all commercial, passenger carrying vessels subject to the jurisdiction of the USA with capacity to carry 250 or more people and with an itinerary anticipating an overnight or 24 hour stay on board; and

(19) on 15 March 2020 the Commodore of the *Ruby Princess* made an announcement informing passengers and crew that, because of new travel restrictions announced by the New Zealand and Australian governments on 14 and 15 March 2020 including that the Australian Government had informed them that ships returning to Australia must do so immediately, the ship would be sailing directly to Sydney and not visiting remaining destinations in New Zealand.

The respondents' communications with NSW Health and internally

185 We turn to the respondents' communications with NSW Health and consequent internal communications in relation to RU2006.

186 On 6 March 2020 Kelly-Anne Ressler, epidemiologist at the public health unit of NSW Health, sent an email to Dr Ilse von Watzdorf, senior physician, and Captain Pomata on board the *Ruby Princess* informing them that NSW Health had instituted a protocol for COVID-19 screening of all cruise ships arriving in New South Wales ports. Ms Ressler sought assistance in undertaking a risk assessment for RU2006 scheduled to arrive in Sydney on 8 March 2020. She sought particular information, to be provided by 9 am on 7 March 2020, after review of which NSW Health would advise if an onboard public health assessment was required. Ms Ressler's email continued:

> In the interim, you should make an announcement to your passengers and crew that anyone with respiratory symptoms or fever should present to your medical centre for assessment. Please collect respiratory swabs, hold at fridge temperature and we will arrange for CoVID-19 testing in a NSW Health Pathology reference laboratory if appropriate. If you have collected respiratory swabs throughout this cruise (e.g. for rapid flu testing), we are also able to test these if not discarded.
>
> Please ensure any passengers or crew with current respiratory symptoms are appropriately isolated and provide them with masks and alcohol hand rub for onward travel.
>
> SHOULD AN ON BOARD PASSENGER/CREW ASSESSMENT BY THE NSW PUBLIC HEALTH TEAM BE REQUIRED YOU WILL NEED TO DO THE FOLLOWING:
>
> - Make a series of announcements to all passengers that anyone with current respiratory symptoms and those who were in Thailand, Indonesia, China (including Hong Kong), Singapore, South Korea, Iran, Japan, Italy or Cambodia in the 14 days before embarkation (excluding brief transits) will need to be assessed prior to the ship beginning disembarkation;
> - Provide a Letter and Traveller Record Form (will be emailed to you if required) to all passengers and crew asking those who need assessment by the Public Health Team to complete as much of the form as they can beforehand and to bring it with them,
> - Medical clinic to ensure that patients seen at the clinic with fever and/or ARI are also requested to attend for assessment,

- Ensure all passengers and crew with respiratory symptoms/relevant travel history are advised to be at the designated location (see below) during the period advised by the public health team
- Arrange a suitable large, open space (e.g. ballroom, large gym) on the ship for the assessment area capable of holding at least 60 people, set up with 4 stations consisting of a desk and 3 chairs; provide seating and bottled water for those waiting for assessment; hand rub dispensers at entry and exit monitored by crew
- Have medical and other staff available to facilitate assessment process, including bilingual staff if relevant (wearing surgical masks)
- Ensure all passengers/crew requiring assessment are wearing a surgical mask
- Assign sufficient crew to request all people requiring assessment to complete traveler record form, for crowd control and to manage flow

187 Dr von Watzdorf forwarded Ms Ressler's email to a number of other people on the vessel as well as "FOC/Shore Side Medical". Thereafter, Charles Verwaal, *Ruby Princess*' hotel general manager, suggested a meeting in order to review and respond to Ms Ressler's request.

188 On 6 March 2020 *Ruby Princess*' entertainment director, Richard Joseph, circulated the text of an announcement to be made to all persons on board the vessel, we infer the following day, which was in the following terms:

> Good Afternoon Ladies & Gentleman – May I have your attention please for an important announcement, your attention if you please.
>
> We have just been advised by New South Wales Public Health, out of an abundance of caution, it is being requested that any guests or crew with any sort of respiratory symptoms or fever should present themselves straight away to the Medical Centre located on Deck 4 midship, if you have not done I repeat - We have just been advised by New South Wales Public Health, it is being requested that any guests or crew with any sort of respiratory symptoms or fever should present themselves straight away to the Medical Centre located on Deck 4 midship.
>
> We would like to reassure all on board that this is strictly a precautionary measure, and we have no reason to believe that we have any cause for concern on board. This is being done to be certain that we have a smooth arrival tomorrow morning in Sydney.

189 On the evening of 6 March 2020 Mr Verwaal arranged for a questionnaire seeking the information requested by Ms Ressler in her email to be delivered to each passenger and crew member on board the *Ruby Princess*.

190 On 7 March 2020:

(1) Dr von Watzdorf responded to Ms Ressler's 6 March 2020 email providing the information requested;

(2) Dr Vicky Sheppeard, Deputy Director, Public Health Unit NSW Health, sent an email to Dr von Watzdorf and others in which she wrote:

> thank you for this information.
>
> The NSW Health expert panel has had an initial review of the information you have provided and there is concern about your two UK passengers who spent several days in Singapore and developed cough +/- runny nose during the voyage. We note they are flu swab negative and remain in isolation.
>
> As a priority can you please:
>
> - advise us of their current clinical status - current symptoms, temperature?
>
> - either retain or re-collect and retain a nose and throat swab from each of those passengers
>
> Please ensure they remain in isolation.
>
> Could you please also obtain and retain any swabs from other passengers and crew who may present between now and tomorrow morning with ARI or ILI.
>
> Once we receive the update on those two passengers and the availability of swabs we will consult with our panel and advise you of procedures for tomorrow.

(3) Ms Ressler sent a further email to Dr von Watzdorf and Captain Pomata noting that an expert public health panel had reviewed the information provided on RU2006 and recommended an on board public health assessment. Ms Ressler requested that they take a number of further steps including that they make a series of announcements to all passengers that anyone with current respiratory symptoms and those who were in Thailand, Indonesia, China (including Hong Kong), Singapore, South Korea, Japan, Cambodia or Italy in the 14 days before embarkation (excluding brief transits) would need to be assessed prior to the ship beginning disembarkation and that a letter and traveller record form in the form attached be delivered to each passenger and crew member; and

(4) in the evening the *Ruby Princess* entertainment director made a further announcement to passengers and crew which was in the following terms:

> Good Evening Ladies & Gentleman – We apologize for this late night announcement, however we have just received communication from Australia Public Health that we must share with all Guests and Crew.
>
> We will be delivering to your staterooms an important letter and Traveller Record Form from Australia Public Health.
>
> In this letter it states that on-board screening will take place upon arrival tomorrow morning in Sydney based upon the completion of this form and until this process is complete, we will not be cleared for disembarkation.
>
> If you currently have any respiratory symptoms (fever, cough, difficulty breathing, runny nose) OR have been in China (including Hong Kong), Thailand, Singapore, Japan, Cambodia, Indonesia, Iran, Italy or South Korea in the 14 days before joining the ship, please complete the traveller record form and you will be required present for screening as advised by Australia Public Health. Also any Guests who attended the Medical Clinic yesterday following

> our previous announcement are required to complete this form as well.
>
> We kindly request you return this form tonight before 11pm to the Guest Services Desk on deck 6 midship or the Conference Rooms on Deck 6 Forward just before the Princess Theatre. Please carefully read this letter and follow all instructions I repeat:
>
> If you currently have any respiratory symptoms (fever, cough, difficulty breathing, runny nose) OR have been in China (including Hong Kong), Thailand, Singapore, Japan, Cambodia, Indonesia, Iran, Italy or South Korea in the 14 days before joining the ship, please complete the traveller record form and you will be required present for screening as advised by Australia Public Health. Also any Guests who attended the Medical Clinic yesterday following our previous announcement are required to complete this form as well.
>
> We kindly request you return this form this evening before 11pm to the Guest Services Desk on deck 6 midship or the Conference Rooms on Deck 6 Forward just before the Princess Theatre.
>
> As a result of this screening process by Australia Public Health, the disembarkation process will obviously and unfortunately be affected.
>
> At this point we do not have a projected time table of tomorrows disembarkation process, but rest assured we will keep you informed as the morning progresses.
>
> Ladies & Gentleman we thank you in advance for your full cooperation, patience and understanding.

191 On 8 March 2020 emails were exchanged by senior crew members on board the *Ruby Princess*. As at 2.10 am Mr Verwaal reported that a total of 321 passengers who had delivered their forms qualified to be seen and 17 other guests would attend the NSW Health screening, although the latter group had not yet submitted their forms, making a total of 338 guests who would report to the designated area at 5.30 am on 8 March 2020 to be screened. In addition, 18 crew members were identified to attend the screening process.

192 Mr Verwaal was present at the screening process undertaken by NSW Health and gave evidence about it. The screening process commenced at 5.30 am on 8 March 2020 and passengers attended progressively. Mr Verwaal observed that once crew guided guests to the check-in station, NSW Health managed the remainder of the process and that there was only one entrance into the room and guests and crew were not permitted to leave until they had completed their assessment with NSW Health.

193 On the evening of 8 March 2020 Ms Ressler sent an email to Valerie Burrows, Sydney Port Agency Manager, Carnival in which she informed Ms Burrows that NSW Health had assessed approximately 360 people on the *Ruby Princess* who reported either respiratory symptoms or had travelled to a country considered at risk of COVID-19 and had tested nine of those people for COVID-19. She informed Ms Burrows that the results of testing of all nine people were

negative and that the ship had been cleared to release any passengers or crew in isolation and could embark new passengers.

194 On 9 March 2020 Ms Ressler sent an email to, among others, Dr von Watzdorf giving thanks for the assistance she and others had provided with the health screening undertaken on the *Ruby Princess* on 8 March 2020 prior to the disembarkation of RU2006. Ms Ressler reported that they had screened 365 people and provided swabs to a laboratory in Randwick for nine people, three of which were for crew members. Ms Ressler confirmed that, as reported the previous day, all specimens were negative.

Expert evidence

195 The third category of evidence is expert evidence which, as explained below, the respondents contend the primary judge overlooked in making some of his findings.

196 The respondents referred to the joint report dated 29 July 2022 of three of their experts, Professor Catherine Bennett, Professor James McCaw and Associate Professor Hassan Vally, all of whom have expertise in epidemiology of infectious or communicable disease (**29 July Joint Report**). The primary judge summarised expertise of those (and other) experts at PJ[28].

197 One of the questions addressed in the 29 July Joint Report was "[r]isk particular to the Ruby Princess". In addressing that question, at [101] to [120] Professors Bennett and McCaw and Associate Professor Vally considered RU2006 ILI events as "a predictor of seeding on RU2007". At [101]-[103] they said:

> 101. **The previous voyage of the Ruby Princess (RU2006) ILI events as a predictor of seeding on RU2007**: Professor Wilder-Smith suggests [paragraph 49] that the most likely source of the Ruby Princess outbreak (on voyage RU2007) was at least one infected crew member from the previous cruise, RU2006, relying on ARI (no fever) being undetected COVID-19 cases. This suggestion is based on the fact that the majority of crew stayed on board following the previous voyage where ILI had been reported, noting that only three of the 1080 crew were tested [Rocklov paragraph 49]. Professor Rocklov also concludes that the history of ILI on the previous voyage represents a "substantial risk" that potentially multiple people (crew and passengers) were already infected with SARS-COV-2 [Rocklov paragraph 41]. This is pertinent to the assertion in FASOC paragraph 41A that there was heightened risk of contracting a Coronavirus infection on the Ruby Princess voyage on 8 March when compared to cruise ships generally because of the ILI cases reported on RU2006.
>
> 102 Professor Wilder-Smith makes the claim of a high risk of seeding from the crew [Wilder-Smith paragraph 49] based on earlier observations [Wilder-Smith paragraph 48] that the ARI reported on RU2006 was high (5.2% attack rate in passengers and 0.9% in crew respectively). In stating this, Professor Wilder-Smith compared RU2006 with two "large" influenza outbreaks (3.7 to 6.2% among passengers and 3.1% to 4.7% of crew of

"medically attended acute respiratory illness").

> 103. In the assumptions provided to us (paragraph 2.8 of the Letter of Instruction), only 30 passengers and crew in total presented with Acute Respiratory Infection (ARI – cough or sore throat without fever) or influenza like illness (ILI – cough or sore throat and temperature ≥ 100◦F) by 6 March 2020). This equates to overall ILI attack rate of 0.72% on RU2006 up to the point prior to the announcement actively encouraging people to come forward (5pm on 6 March 2020, see paragraph 2.8 of the Letter of Instruction), beyond which a comparison with the other cruises, where no such call outs were made, is inappropriate.

Grounds 1 and 12: error in heightened risk of COVID-19 on board RU2007 as compared with cruise ships generally

198 By grounds 1 and 12 of the cross-appeal, the respondents contend that the primary judge erred in finding that there was a heightened risk of COVID-19 on board RU2007 compared with other cruise ships generally (ground 1) and that the primary judge erred in finding that the respondents breached their duty of care, and the guarantee of due care and skill in s 60 of the ACL, by failing to warn Mrs Karpik that there was a heightened risk of COVID-19 on board RU2007 as compared to other cruise ships (ground 12).

The primary judge's reasons

199 These grounds principally concern the primary judge's findings at PJ[80] but also his Honour's findings at PJ[608], [624]-[625], [702], [750], [820] and [1051].

200 Commencing at PJ[56], under the heading "[c]oronavirus risk", the primary judge made a number of findings of fact. His Honour first observed that there had been cases of COVID-19 on board the *Diamond Princess* and the *Grand Princess,* both of which were cruise ships owned by Princess. The primary judge considered those outbreaks to be relevant because of the respondents' knowledge of the material circumstances of those outbreaks. His Honour also observed that there had been an outbreak of ARI and ILI on board the *Ruby Princess* on RU2006. The primary judge considered this to be relevant because of what it might say about the risk of COVID-19 being on the *Ruby Princess* and being carried over to RU2007.

201 As has already been said, at PJ[57]-[63] the primary judge described the circumstances of the *Diamond Princess* which, by the time of the departure of RU2007, had over 700 passengers who had tested positive (around 40% of whom were asymptomatic at the time of specimen collection) with seven deaths: see [64] above.

202 It will also be recalled that at PJ[64]-[68] the primary judge described how it was known by the time of the embarkation of RU2007 that an outbreak on the *Grand Princess* had likely been

caused by a passenger on the first round trip, but crew who became infected were on board for the second round trip: see [65] above.

203 Commencing at PJ[70] the primary judge addressed the facts in relation to RU2006. His Honour found:

(1) during the cruise, 162 people, comprising 150 guests and 12 crew, presented to the ship's medical centre with ARI:

(a) of the 12 crew members, 10 were recorded as having ARI, two as having ILI and only four were tested for influenza A and B, all testing negative; and

(b) of the 150 guests, 134 were recorded as having ARI, 16 as having ILI and 26 guests were tested for influenza A and B, with seven testing positive and 19 testing negative: PJ[71]-[73]; and

(2) when the *Ruby Princess* docked in Sydney on 8 March 2020 at the conclusion of the cruise, 360 passengers (8.8%) presented in response to an announcement calling for anyone with a travel history of concern or respiratory symptoms to present themselves for screening by NSW Health. Of those passengers, only nine, three crew and six guests, were tested by NSW Health for COVID-19. All the tests were negative: PJ[74].

204 The primary judge found that it was unclear what role the ARI/ILI outbreak on RU2006 had in the outbreak of COVID-19 on RU2007 but made the following observations:

(1) symptoms of ARI and ILI are also symptoms of COVID-19 so passengers and crew reporting with those symptoms may have had COVID-19, particularly considering that only nine people were tested for the virus and a person with COVID-19 may have no symptoms or mild symptoms such that they would not have been selected for testing, a matter which was known to the respondents because of their *Diamond Princess* experience: PJ[76];

(2) over 1,100 of the approximately 1,200 crew on RU2006 stayed on board for RU2007. Therefore there was a considerable risk that if any of the crew on RU2006 was carrying the virus, they would take it onto RU2007. Again, this was a matter known to the respondents because of their *Diamond Princess* experience: PJ[77];

(3) although fomite transmission (from objects contaminated with infected respiratory droplets) is not a principal means of transmission of COVID-19, if it was present on RU2006, there is a risk that it would cause an outbreak on RU2007, which the respondents knew: PJ[78]; and

(4) while health screening was taking place on the *Ruby Princess* on 8 March 2020 at the end of RU2006, the respondents prepared a draft media statement in case any of the passengers or crew tested positive for COVID-19. From the draft statement and the email exchanges between officers of the respondents, it was apparent that the respondents planned to cancel RU2007 in the event that there was a positive case on RU2006, a 100% refund and 100% future cruise credit would be offered to passengers in the event of a cancellation, as well as hotel accommodation in Sydney and "some incidentals" which was said to be in line with what the respondents were offering for guests also impacted by cancellations of cruises on the *Grand Princess* and the *Royal Princess*. As to the latter the primary judge explained that the *Royal Princess* had its cruise departing a USA port on 7 March 2020 cancelled because one crew member had transferred to it from the *Grand Princess* and the CDC required the crew member to be tested for COVID-19, which could not be done sufficiently quickly: PJ[79].

205 At PJ[80] the primary judge said:

> The telling observation is that the respondents planned to immediately cancel RU2007 on one positive test being returned from RU2006, yet apparently did not consider cancelling RU2007, or even offering the passengers the possibility to cancel with a refund, even though there was a substantial ARI/ILI outbreak on RU2006. The respondents knew that a person could be infectious with very mild symptoms or even no symptoms at all and hence not be caught by the screening on RU2006, and only nine people from RU2006 were being tested for coronavirus. **In other words, the respondents knew or ought to have known that there was a substantial risk of COVID-19 on RU2006 and that the testing of only nine people from the voyage was not likely to identify all positive cases, with the result that there was a heightened risk of the virus being on RU2007 compared with cruise ships generally**.
>
> (Emphasis added.)

206 The respondents challenge the primary judge's finding at PJ[80] of the heightened risk of COVID-19 being on RU2007. That finding is referred to and relied on in other parts of the primary judge's reasons (see [199] above and below).

207 At PJ[608], in considering whether a reasonable person in the position of the respondents would have cancelled RU2007, his Honour also referred to the outbreak on the *Grand Princess* and the heightened risk on the *Ruby Princess* in view of the outbreak of ARI/ILI on RU2006. We set that passage out in full further below.

208 At PJ[624]-[625] in considering Mrs Karpik's alternative case, whether a reasonable person in the respondents' position would have warned her that the risk of contracting COVID-19 on board the *Ruby Princess* was heightened compared to the community generally, and/or cruise

ships generally, and/or that they would not or could not implement the pre and post boarding precautions she alleges they ought to have taken, his Honour said:

> 624 The heightened risk of contracting COVID-19 on board the *Ruby Princess* when compared to other cruise ships is analogous to a hidden danger. Unlike the heightened risk on cruise ships generally, the risk on board the *Ruby Princess* was further heightened by reason of the outbreak of ARI/ILI on board RU2006, an outbreak of which Mrs Karpik was not aware. As mentioned, the respondents knew that a person could be infectious with mild symptoms or with no symptoms and that, of the 366 passengers who presented for screening, only nine were tested for COVID-19 by NSW Health. Despite none of those nine returning a positive test, there was nonetheless a substantial risk that there was a COVID-19 case on board RU2006. Indeed, the respondents had prepared for that eventuality by preparing to cancel the next cruise if one of those nine returned a positive test.
>
> 625 In my view, Mrs Karpik ought to have been warned of the heightened risk of COVID-19 on board RU2007 because of there being an outbreak of ARI/ILI on board the previous voyage, most of the crew remaining on board for the next voyage and that only nine of the 366 individuals that presented themselves in response to a call for screening were tested for COVID-19. That information was vital to understanding that there was a heightened risk of COVID-19 on board the *Ruby Princess*. The respondents had access to that information, but the passengers did not. Mrs Karpik was entitled to make an informed choice regarding whether or not she accepted that heightened risk before embarking on a 13-day journey, mostly in the confines of the vessel. There would have been no burden to the respondents in affording her that choice.

209 At PJ[702] the primary judge summarised his findings on the respondents' breach of their duty of care as follows:

> For the reasons I have given, I find that the respondents breached their duty of care by failing to:
>
> (1) cancel the cruise;
>
> (2) warn passengers about the heightened risk of contracting COVID-19 on board the *Ruby Princess* as compared with other cruise ships (by reason of the outbreak of ARI/ILI on the previous voyage and the insufficient quantity of face masks available for use on board);
>
> (3) provide temperature screening of passengers and crew prior to boarding the *Ruby Princess* for RU2007;
>
> (4) ask all passengers and crew whether they were experiencing symptoms consistent with COVID-19 and deny boarding to those who answered yes;
>
> (5) encourage passengers and crew to physically distance (ie, remain 1.5 metres from other people) on board the vessel;
>
> (6) limit numbers of people within all parts of the ship so as to allow for physical distancing (ie, 1.5 metres per person) and closing such parts which could not permit it;
>
> (7) isolate all passengers and crew who presented with ARI or ILI until 24 hours after their symptoms subsided;

(8) from 11 March 2020, isolate passengers and crew who had travelled from or through designated countries and who presented with ILI or ARI for 14 days (ie, for the remainder of the cruise); and

(9) provide roommates of isolated passengers with face masks, alcohol hand rub and information on how they could protect themselves from disease.

210 At PJ[750] in the context of considering whether the respondents had engaged in conduct that was misleading or deceptive or likely to mislead or deceive the primary judge addressed the "Best Practices Representation" stating:

> As I have found in relation to the negligence case, although the respondents did introduce some monitoring, screening and sanitation protocols to protect passengers that were in accordance with various guidelines and protocols, the respondents were aware as at 5 March 2020 and until the time of embarkation that those protocols were ineffective in protecting the health of passengers. Prior to embarkation, the respondents were aware (and the passengers were not) of an outbreak of ARI/ILI on the previous voyage, that the monitoring and screening processes on that voyage had been ineffective, and that there was a heightened risk of COVID-19 on board the vessel. The respondents were also aware of internal operational and resourcing issues which meant that they were unable to implement specific monitoring, screening and sanitation protocols that could protect the passengers in accordance with best practice, such as introducing temperature screening and maintaining adequate supplies of face masks for crew and passengers.

211 In considering factual causation on the failure to implement reasonable precautions case the primary judge said at PJ[820]:

> The relevant facts and findings I have made are as follows. The prevalence of COVID-19 in New South Wales at the time of the voyage RU2007 was very low – there were only 40 reported cases. In absolute terms, the risk of exposure within the general community was also very low. Assuming a positive case on board, the risk of transmission on a cruise ship is heightened. The risk was further heightened on the *Ruby Princess* voyage RU2007 because of the previous outbreak of ARI/ILI and the want of an adequate supply of face masks for those who were assessed as having ARI/ILI. Nonetheless, in absolute terms, the risk was still low, as its materialisation depended necessarily on the virus being introduced on board. As it turned out, there was at least one positive case on board the vessel and Mr Karpik was infected.

212 Finally, at PJ[1051] the primary judge summarised his findings on Mrs Karpik's negligence and s 60 ACL claims as follows:

(1) 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 coronavirus infection (at [546]).

(2) The respondents also owed Mrs Karpik a duty of care with respect to a recognised psychiatric illness arising from Mr Karpik contracting COVID-19 on the voyage. In respect of the claim in negligence, the "normal fortitude" test or requirement in CLA s 32(1) is satisfied (at [579]).

(3) The respondents breached their duty of care in various respects, namely by

failing to:

(a) cancel the cruise (at [609]);

(b) warn of the heightened risk of the virus being on board RU2007 compared to cruise ships generally (at [625]), but not the heightened risk of infection from the virus on a cruise ship compared to the community generally because that was an obvious risk (at [618]);

(c) implement better pre-embarkation screening, namely temperature screening for passengers and crew and requiring all passengers and crew to record whether they were suffering from any symptoms of COVID-19 and to deny them boarding if they were (at [649]);

(d) implement a system of physical distancing on board (ie, in accordance with the 1.5m rule) (at [665]);

(e) from 11 March 2020, isolate passengers who presented with ARI and ILI on the cruise and failing to provide roommates of those passengers with face masks, alcohol hand rub and information on how they could protect themselves from disease (at [681]).

The respondents' submissions on the cross-appeal

213 The respondents submit that the primary judge's finding that RU2007 was subject to a heightened risk of COVID-19 compared to cruise ships generally formed an essential step in his Honour's findings on breach of duty, misleading and deceptive conduct and factual causation. The respondents' submissions are focused on ground 1 but they say that it follows that if they are successful on ground 1, they must succeed on ground 12.

214 The respondents observe that the primary judge found that there was a heightened risk of COVID-19 on RU2007 because of elevated cases of ARI and ILI on RU2006, as disclosed by the acute respiratory diseases log (**ARD log**) maintained by *Ruby Princess*' medical centre. The respondents refer to the primary judge's findings at PJ[71]-[74] and [76]-[80] (see [203] and [204]-[205] above, respectively). They submit that his Honour's reasoning in that part of the judgment involved error for the following reasons.

215 First, the respondents submit that the primary judge did not say what was meant by "cruise ships generally" or give any indication of the degree or extent of the increased risk, or how it affected the absolute risk. The respondents ask: "was the comparator cruise ships globally (including those sailing from high risk countries) or cruise ships sailing from Australia only, and over what time period?" They contend that, even assuming the comparator was cruise ships sailing from Australia which otherwise had the same characteristics as the *Ruby Princess*, was the previous voyage to be assumed to be a voyage without any ARI/ILI (which would not be an appropriate comparator) or a voyage with typical ARI/ILI, and what level of investigation of the previous voyage was to be assumed.

216 The respondents submit that the parties led expert evidence and made submissions on the impact of the cases of ARI/ILI on RU2006 on the risk of COVID-19 occurring on RU2007, but the experts used different comparators and the primary judge did not refer to any of the expert evidence or submissions. They contend that the primary judge made various findings about the absolute risk of COVID-19 being on RU2007 which are difficult to reconcile, and gave no indication of how, if materially at all, the absolute risk for RU2007 was affected by the ARI/ILI cases on RU2006, referring to PJ[590] and PJ[820]. The respondents submit that without better identification of the comparator, or the level of increase in absolute risk, the finding was too nebulous to support the further findings made by the primary judge.

217 Secondly, the respondents submit that if the primary judge is to be taken to have drawn a comparison between the risk of COVID-19 occurring on RU2007 given the circumstances of RU2006, as compared to a scenario where the previous voyage was one with a typical incidence of ARI/ILI and typical investigations, it would logically have been necessary to compare the incidence of ARI/ILI disclosed in the ARD log with data from other cruise ships, which the primary judge did not do. The respondents contend that the evidence indicated the opposite to what his Honour found. That is, until shortly before the scheduled disembarkation of RU2006, the reported incidence of ARI/ILI was well within ordinary range and comparable to the *Ruby Princess* voyage prior to RU2006. The respondents say that it was only after all persons with respiratory symptoms or fever were asked to present to the medical centre prior to disembarkation for assessment by NSW Health officials that higher numbers began reporting. The respondents submit that there could be no appropriate comparison of the incidence of ARI/ILI reported on RU2006 following the special announcement with that reported on other cruises where no such announcement was made and that such comparative data as there was indicated that RU2006 was unexceptional in terms of ARI/ILI incidence.

218 Thirdly, the respondents submit that a key part of the primary judge's reasoning in reaching the conclusion at PJ[80] was that they had in place a plan to cancel RU2007 if the laboratory testing for COVID-19 for RU2006 returned a single positive result. The respondents contend that the adoption of a contingency plan for RU2007 in that event said nothing about their appreciation of the risk that RU2007 would be affected by COVID-19 present on RU2006 when none was detected by testing. The respondents submit they are different risks. The former depends on the materialisation of the risk of transmission of found COVID-19 to RU2007 from RU2006, a risk the respondents appropriately recognised as significant, hence the plan to cancel. The latter depends on that transmission risk, together with the risk that COVID-19 was on RU2006 in the first place, despite it not being detected by testing. They

submit that the primary judge's description of the two risks as "nearly identical" (at PJ[600]) cannot be accepted.

219 Fourthly, the respondents submit that the observations on the ARD log at PJ[76]-[80] entirely ignore the expert evidence on the issue. They note that their expert, Professor Bennett, opined that: the high proportion of ARI cases as compared to ILI cases was consistent with an outbreak of influenza rather than COVID-19; the positive diagnoses amongst the ILI cases decreases the chance of undetected COVID-19; and the fact that New South Wales public health officials selected nine ILI cases to undergo laboratory testing for COVID-19 and all returned negative results, would have strongly suggested that COVID-19 was not in circulation on RU2006. The respondents contend that therefore a cruise operator in their position, acting reasonably, would have identified the illness on board RU2006 as a "well-managed and suppressed influenza outbreak". The respondents submit that the primary judge's failure to engage with the expert evidence on this issue is inexplicable.

220 Finally, the respondents submit that the finding that RU2007 was subject to "heightened risk" as compared to "other cruise ships" was too vague to be of any forensic utility, illogical, and contrary to the evidence. They contend that the primary judge erred in making and relying on that finding to make subsequent findings on liability.

221 In oral submissions the respondents emphasised that in making the "heightened risk finding" the primary judge ignored both the lay and expert evidence as further explained below.

Consideration

222 The respondents' challenge to the finding at PJ[80] centres on a complaint that the primary judge did not identify a specific comparator for the heightened risk finding. They say in essence that the primary judge could not have made the "heightened risk" finding without undertaking an evidentiary analysis of the circumstances prevailing on all other vessels globally or, alternatively sailing from Australia, or as to the rates of acute respiratory diseases (**ARD**) on other cruise ships. Those submissions fail to grapple with the primary judge's analysis and ultimate finding at PJ[80]. His Honour reasoned that because of the identified risks on RU2006 and, critically, the respondents' awareness of those risks, they should have been aware of the risk of COVID-19 on RU2007.

223 As Mrs Karpik submits that finding does not turn on a quantitative analysis of circumstances prevailing on other cruise ships globally or in Australia at the time. The appropriate comparator

is a cruise ship that did not have an outbreak of ARI/ILI on board the immediately preceding cruise on the same vessel.

224 A review of the primary judge's reasons demonstrates that is how his Honour approached his task: see for example PJ[624]-[625] (at [208] above). In his reasons the primary judge identified at a number of points the risk posed by the fact that the *Ruby Princess* had returned on RU2006 with an outbreak of ARI: see for example PJ[56] and [77]-[80]. We consider that if PJ[80] is read fairly in context, the "comparator" his Honour had in mind was cruise ships that had not had a substantial ARI/ILI outbreak or, if they had, had engaged in comprehensive testing with no positive case of COVID-19 identified.

225 Even if the primary judge was wrong in the way alleged in reaching the finding that there was a heightened risk of COVID-19 on RU2007 as compared to cruise ships generally, it does not follow that his Honour's findings on breach of duty, misleading and deceptive conduct and factual causation are impugned as the respondents allege.

226 For example, in relation to breach of duty generally, in considering the probability of harm occurring, his Honour found at PJ[589]-[590]:

> 589 In respect of the probability of harm occurring, although the risk of harm in the general community was at the time very low, the risk was not inherently unlikely to materialise. The virus was highly contagious. As I have found in section B.5.3 above, cruise ships are peculiarly susceptible to coronavirus infection and transmission when compared to the community generally, including by reason of the demographics of those on board. Indeed, there had already been confirmed cases on board two Princess vessels over three voyages prior to the departure of RU2007, which outbreaks led to the deaths of numerous people. There had also been an outbreak of ARI/ILI on board RU2006, which, as I have found at [80] above (see also items (7) and (8) at [122]), further increased the risk of coronavirus on board RU2007.
>
> 590 In those circumstances, although the probability of harm was not such as to be an inevitability, the risk and its grave consequences were nonetheless inherently likely to materialise unless the respondents took precautions against the materialisation of that risk. Given the probability and seriousness of harm, the standard of care imposed upon the respondents could not have been anything other than high. The respondents admit that the factors relevant to determining their standard of care include the fact that they are specialists in providing passenger cruises that employed medical professionals on board the vessel, and that they employed medical staff who had specialised knowledge tailored to their business operations in which outbreaks of various viruses were a constant risk.

227 That finding refers to the finding at PJ[80] in relation to the outbreak of ARI/ILI on board RU2006 which his Honour observed "further increased the risk" of COVID-19 on RU2007. The primary judge was focused on the fact of the outbreak of ARI/ILI on RU2006 and not on

the specific finding that there was a heightened risk of COVID-19 on RU2007 compared to cruise ships generally or any comparator. The same can be said for the findings at PJ[608] and [624]-[625] (see [208] above). Those findings sit alongside the primary judge's findings at PJ[750] (and see PJ[1051]) that the respondents were aware that their pre-embarkation protocols had been ineffective on RU2006 and were also aware of internal operational and resourcing issues which meant that they were unable to implement specific monitoring, screening and sanitation protocols that could protect passengers in accordance with best practice. In each case the finding at PJ[80] of a heightened risk of COVID-19 on RU2007 as compared to cruise ships generally was not an essential step in the primary judge's reasoning.

228 Relatedly, the respondents do not dispute that the risk of transmission of the virus was heightened on cruise ships compared to the community generally because of the socialisation between passengers and crew and the confined spaces (see for example PJ[501], [589]) and there was a not insignificant risk that one or more passengers or crew who had been on RU2006 had been infected with COVID-19 and that, as at 8 March 2020, there were active contagious virus particles on the *Ruby Princess* (PJ[122](7) and (8)).

229 Before leaving these grounds, it is necessary to address the respondents' oral submission that the primary judge's findings about the outbreak on RU2006 were very brief and overlooked much of the lay evidence and the expert evidence on the topic. A like submission is made in relation to ground 11 of the cross-appeal (see [243] below).

230 The respondents rely on the guidance given by NSW Health in relation to RU2006, with which they say they complied, the decision made by NSW Health in relation to pre-disembarkation screening and testing and the conflicting expert evidence about what can be drawn from RU2006. As to the former, the respondents submit that contrary to the primary judge's finding (at PJ[80]) there was nothing telling about their plan to cancel RU2007 if there was one positive test of COVID-19 for passengers or crew on RU2006. Rather that approach was consistent with the approach of NSW Health.

231 It is clear that the primary judge was aware of the national and international guidance about COVID-19 in early 2020, both generally and specifically in relation to the cruise industry and the rapidly evolving landscape. His Honour referred to the various regulatory bodies and the guidance provided at the time in his reasons.

232 There is no issue that the respondents complied with NSW Health's requirements for disembarkation of passengers from RU2006 and the proposal to test and screen passengers and crew who presented in response to the announcement calling for anyone with respiratory

symptoms or a travel history of concern to present themselves for screening. Nor can it be said that the primary judge overlooked the communications between the respondents and NSW Health about the disembarkation of RU2006 in making his findings and his observations about the outbreak of ARI/ILI on RU2006. It is apparent from a reading of the whole of his Honour's reasons that he had regard to what transpired and the outcome of the pre-disembarkation screening process for RU2006.

233 Relevantly his Honour found (at PJ[75]) that it was unclear what role the ARI/ILI outbreak on RU2006 had in relation to the outbreak of COVID-19 on RU2007. His Honour then proceeded to make some observations (at PJ[76]-[79]), each of which was open on the evidence and which the respondents do not seek to challenge. His Honour's conclusion about heightened risk at PJ[80] followed from those observations.

234 Relatedly, the respondents submit that the decision to test only nine of the 360 passengers who presented for screening in answer to the announcement on the eve of disembarkation of RU2006 was a decision of NSW Health and that no negative inference can be drawn from it. However, it matters not that NSW Health made the decision about the number of people to be tested. Rather, it was that fact, viewed in the context of other facts known to the respondents as at 8 March 2020, that led the primary judge to make his finding about the heightened risk of COVID-19 on board RU2007.

235 As for the expert evidence, as the respondents acknowledge there was disagreement between the experts about the effect of RU2006 on the outbreak of COVID-19 on RU2007. That being so, it is difficult to see how the primary judge can be criticised for not referring to that competing evidence. There is no support for the proposition that his Honour overlooked the expert evidence. Indeed, his Honour's observation at PJ[75] that it was unclear what role the outbreak of ARI/ILI on RU2006 had in the outbreak of COVID-19 on RU2007 suggests the contrary conclusion. In any event the opinions were competing. The primary judge did not find that Professor Bennett's view that RU2006 did not lead to a heightened risk should not be accepted or was unreasonable. Equally his Honour made no finding about the competing view of Mrs Karpik's expert, Professor Annelise Wilder-Smith.

Conclusion on grounds 1 and 12 and of the cross-appeal

236 The respondents have not made out ground 1, namely that there was any error in the primary judge's finding that there was a heightened risk of COVID-19 on board RU2007 compared with other cruise ships generally. It follows that ground 12 is not made out.

Ground 11: failure to cancel the cruise

237 By ground 11 the respondents contend that the primary judge erred in finding that they breached their duty of care, and the guarantee in s 60 of the ACL, by failing to cancel the cruise.

The respondents' submissions on the cross-appeal

238 The respondents refer to "Australia's policy settings" reflected in the material summarised at [184] above including that as at 8 March 2020 the public policy settings in Australia permitted ordinary activities to continue while placing controls on international travellers from high risk countries, there were no restrictions placed on indoor or outdoor gatherings and physical distancing in the form of the "1.5 metre rule" had not yet been imposed or even recommended by WHO, CDC or AHPPC.

239 The respondents submit that their decision to proceed with RU2007, provided COVID-19 was not positively detected on RU2006, was in keeping with Australia's policy settings as at 8 March 2020 and the premises were that there was a "very low" risk of persons contracting COVID-19 in the general community in the absence of any known community transmission (PJ[820]) and the prospect of infiltration of COVID-19 from outside Australia could be managed by restrictions on international arrivals.

240 The respondents contend that their pre-boarding screening requirements adhered to or exceeded the CDC and WHO guidelines and protocols and were stricter than those adopted by the Australian Government for the purposes of border control at the time. They observe that the primary judge found that embarkation on *Ruby Princess* on 8 March 2020 was consistent with pre-boarding screening requirements with 34 people being denied boarding based on their application (at PJ[131]-[132]) They also submit that the primary judge did not find, by reference to the calculus required by s 5B(2) of the CLA, that a reasonable cruise operator would have suspended all cruising by 8 March 2020 and that the expert evidence and circumstances as at that date could not sustain such a conclusion.

241 The respondents submit that, against that background, the primary judge's ultimate reasoning on the issue of breach was that the particular circumstances applying to RU2007 as at 8 March 2020 involved "heightened risk" so that it was unreasonable for them to treat RU2007 consistently with other ordinary activities taking place in Australia at the time, including recreational cruising (at PJ[608]). The respondents observe that the primary judge referred to two matters: a COVID-19 outbreak on the *Grand Princess*, which should have put the respondents on notice that "their procedures for screening were deficient"; and the heightened

risk of COVID-19 occurring on board RU2007 given the cases of ARI/ILI on RU2006. They submit that both findings involve error.

242 In oral submissions the respondents additionally submitted that, even if this Court agrees with all the findings made by the primary judge in relation to breach of duty, the true finding should be that the respondents breached their duty of care by not taking the pre and post boarding precautions which the primary judge found were reasonable. They contend that conclusion flows from PJ[610] and s 5B(1)(c) of the CLA. The respondents submit that a reasonable person in their position would have issued a warning and adopted pre and post boarding precautions and thus found it unnecessary to take the more burdensome course of cancelling the cruise and the primary judge ought to have concluded that a reasonable person in all the circumstances would have taken those precautions and, for that reason, not cancelled the cruise. The respondents submit that a reasonable person could not do both which is why the two cases were presented as alternatives, but his Honour did not, in stating his findings at PJ[702], enliven the alternative case as to cancellation. The respondents rely on ***Morris*** *v Leaney* [2022] NSWCA 95 as an alternative way of making the same point.

243 The respondents also repeat their submissions that, while there were different views as between the experts about the significance of what occurred on RU2006 and whether it led to a heightened risk of COVID-19 being present on RU2007, where the primary judge did not reject or find that Professor Bennett's view that RU2006 did not lead to a heightened risk was unreasonable, it must be understood to be within the spectrum of reasonable views. The respondents say that the same view about the effect of RU2006 was taken by the expert epidemiologist in NSW Health at the time. They submit that those matters combined are sufficient for this Court to find that the primary judge erred in finding that it was unreasonable for the respondents not to cancel the cruise because of the asserted heightened risk.

The primary judge's reasons

244 The primary judge addressed the question of breach of duty commencing at PJ[580] referring first to s 5B and s 5C of the CLA and observing that it was common ground both that those sections applied in the determination of whether the respondents were in breach of their duty of care to Mrs Karpik and that the applicable principles with respect to breach of duty for Mrs Karpik's claim pursuant to s 60 of the ACL are the same (PJ[581]). His Honour then referred to some of the relevant authorities including *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2022] HCA 11; 273 CLR 454. The principles did not appear to be in dispute between the parties.

245 The primary judge identified the relevant risk of harm to be a passenger contracting COVID-19 and becoming seriously ill or dying and a close family member of such a passenger suffering a recognised psychiatric injury as a result. His Honour found those matters to be plainly foreseeable (PJ[584]). The primary judge identified the question to be whether, in the circumstances, a reasonable person in the respondents' position would have taken the precautions against the risk that Mrs Karpik said they should have taken, which required consideration of the factors in s 5B(2) of the CLA (at PJ[586]).

246 The primary judge first addressed the factors for consideration at s 5B(2)(a), (b) and (d) of the CLA, the probability of harm and its seriousness, and the social utility of cruising, which his Honour observed were the same for each of the precautions that Mrs Karpik alleged a reasonable person in the position of the respondents ought to have taken (PJ[587]-[591]).

247 At PJ[592] the primary judge set out the reasonable precautions which Mrs Karpik said a person in the respondents' position would have taken. There were three alternatives, but his Honour found (at PJ[612]) that it was only necessary to address the first two of those: cancel the cruise; or in the alternative warn passengers that the risk of contracting COVID-19 on board the cruise was heightened compared to the community generally and to cruise ships generally and take the specified pre- and post-embarkation steps.

248 Mrs Karpik's principal case was cancellation of the cruise. She argued that a reasonable person in the position of the respondents would have cancelled RU2007. Thus, the primary judge addressed that case first. His Honour summarised, addressed and rejected the respondents' submissions on cancellation (PJ[598]-[602]). Those submissions are, to an extent, repeated before us.

249 The primary judge then turned to address the question of the burden of taking the precaution of cancelling the cruise, a matter which the primary judge observed the respondents had not addressed in any of their evidence or submissions. After referring to the authorities relied on by Mrs Karpik the primary judge said at PJ[606]-[610]:

> 606 Those cases make it plain that the fact that the respondents in the present case adduced no evidence of, and by their counsel asked no questions about, the burden and practicability of cancellation is relevant in that it is *open to infer* that any burden that would have attended the cancelling of the cruise is not outweighed by the probability of grave harm. Whether that inference should be drawn is an altogether different question.
>
> 607 In my view, the fact that the respondents decided to suspend cruising worldwide merely five days later is relevant, and it shows that the burden of cancelling the cruise would not have been intolerable; it was clearly within the scope of available options. Although cancellation is a drastic measure, to

> cancel one cruise at the last minute is a very minor measure compared to suspending all cruising worldwide. It is also to be recalled that the respondents later refunded all the passengers on RU2007 in full, so the ultimate outcome was comparatively financially worse for the respondents. That is, the respondents incurred expenses that even a last-minute cancellation would have saved – bunker fuel being an obvious one as well as non-perishable food and beverages – and lost all income for the cruise.
>
> 608 As against that must be weighed the probability of grave harm. What the respondents as at 8 March 2020 knew of the likelihood of that probability eventuating on RU2007, as compared to other voyages, was as follows. First, although the outbreak on the *Grand Princess* was then taking place, the true extent of it was not yet known. Nonetheless, the respondents ought to have known that their procedures for screening of passengers and crew were deficient. Secondly, there was a heightened risk on board the *Ruby Princess* given the outbreak of ARI/ILI on board voyage RU2006. That was a lesson that was already clear from the *Grand Princess* experience.
>
> 609 In those circumstances, in my view, the reasonable cruise operator would have cancelled RU2007 on 8 March 2020. The respondents were in breach of their duty of care to the passengers, including Mr and Mrs Karpik, in not doing so.
>
> 610 That said, there is an interaction between cancellation and other protective measures because if sufficient other measures had been taken, cancellation would not have been necessary. However, for whatever reason, protective measures that could have significantly reduced the risk of infection on RU2007 were not taken – I will go on to consider some of these measures shortly. Since they were not taken, the voyage should have been cancelled.
>
> (Emphasis in original.)

250 After considering Mrs Karpik's alternative case, that is warn passengers that the risk of contracting COVID-19 on board the cruise was heightened compared to the community generally and to cruise ships generally and take the specified pre- and post-embarkation steps, the primary judge summarised his findings at PJ[702]:

> For the reasons I have given, I find that the respondents breached their duty of care by failing to:
>
> (1) cancel the cruise;
>
> (2) warn passengers about the heightened risk of contracting COVID-19 on board the *Ruby Princess* as compared with other cruise ships (by reason of the outbreak of ARI/ILI on the previous voyage and the insufficient quantity of face masks available for use on board);
>
> (3) provide temperature screening of passengers and crew prior to boarding the *Ruby Princess* for RU2007;
>
> (4) ask all passengers and crew whether they were experiencing symptoms consistent with COVID-19 and deny boarding to those who answered yes;
>
> (5) encourage passengers and crew to physically distance (ie, remain 1.5 metres from other people) on board the vessel;

(6) limit numbers of people within all parts of the ship so as to allow for physical distancing (ie, 1.5 metres per person) and closing such parts which could not permit it;

(7) isolate all passengers and crew who presented with ARI or ILI until 24 hours after their symptoms subsided;

(8) from 11 March 2020, isolate passengers and crew who had travelled from or through designated countries and who presented with ILI or ARI for 14 days (ie, for the remainder of the cruise); and

(9) provide roommates of isolated passengers with face masks, alcohol hand rub and information on how they could protect themselves from disease.

Consideration

251 It is convenient first to address the respondents' additional argument. That is, that for the purposes of s 5B(1)(c) of the CLA it would have been sufficient for the respondents to have given the warning and to have taken the pre- and post-embarkation steps and the primary judge should have found that a reasonable person in the respondents' position would have taken those precautions and accordingly not cancelled the cruise.

252 This argument proceeds on a misreading of the primary judge's reasons. First, at PJ[610] his Honour referred to the interaction between "cancellation and other protective measures" observing that "if sufficient other measures had been taken cancellation would not have been necessary". It is clear that what was required was sufficient effective measures to minimise the risk of harm, that is the risk of a passenger contracting COVID-19 and becoming seriously ill or dying. His Honour found that protective measures that could have significantly reduced the risk of infection on RU2007 were not taken and indeed could not have been taken (PJ[750]). That being so, the voyage should have been cancelled.

253 There is nothing at PJ[610] which would lead to the conclusion on negligence urged by the respondents. His Honour was clearly satisfied (PJ[609]) that a reasonable cruise operator would have cancelled RU2007. At PJ[610] his Honour referred to the role of other protective measures and, in effect, Mrs Karpik's alternative case. But as we have already observed there needed to be sufficient other measures to minimise the risk of harm, ie infection. The requirement was for the risk of infection to be sufficiently reduced. His Honour was not satisfied that was the case.

254 Secondly, when read in context, PJ[702] is no more than a summary of the primary judge's findings on Mrs Karpik's two alternative cases. It was not necessary for his Honour to expressly say so or to state that he was considering the alternative case of warning and pre- and

post-embarkation measures against the possibility that his Honour was wrong about the cancellation case. Clearly that was so.

255 Thirdly, the respondents relied on *Morris* to make the same point. In that case, the appellants had renovated their house. The defendant was an architect who, it was found, was negligent in the advice he had given before the building contract was signed as to the likely costs of the renovations. The primary judge had found breach of contractual and tortious duties of care by the architect, but only awarded nominal damages because he found that in building the renovations, the appellants "got exactly what they paid for". Beech-Jones JA (with whom Payne and White JJA agreed) considered a ground of appeal attacking the assessment of damages as nominal. His Honour rejected the case as primarily articulated by the appellants, because he found that they knew at the relevant time that they could not achieve their objectives within their chosen budget. Then in the passage on which the respondents here rely, his Honour considered an alternative argument as follows:

> 66 In any event, the only specific means of discharging the relevant duty that was identified by the primary judge was that, in the event that [the respondent] "felt himself unable or unqualified to give an accurate estimate of costs, he should have warned of that in writing and advised the plaintiffs to obtain an estimate from a properly qualified professional." If this was sufficient to discharge the duty of care in negligence and it was not demonstrated that, if it had been adopted, loss would have been occasioned then "factual causation" was not established (*Civil Liability Act 2002* (NSW), s 5D(1)(a); *Varipatis v Almario* [2013] NSWCA 76 at [98] and [106] per Meagher JA with whom Ward JA agreed).
>
> 67 An analogous principle is applicable in assessing damages for breach of contract, namely that where the party in breach could have performed the contract in one of several ways, "damages are assessed assuming performance in the way least onerous to the defendant", although "this mode of assessment will not be employed where the least onerous method of performance is in fact highly unlikely to have been selected by the defendant" (*Martinez as trustee for Martinez HWL Practice Trust as representative of the partners trading as HWL Ebsworth Lawyers v Griffiths as trustee for the Griffiths HWL Practice Trust* [2019] NSWCA 310 at [31] citing J D Heydon, *Heydon on Contract* (2019, Lawbook Co) at [26.200]). Although this principle is usually applied where the express terms of the contract confers on the party in breach alternative methods of performance or termination (see *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64; [1991] HCA 54 at 93; "Amann Aviation"; *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 154 and 156; "Hayden"), I can see no reason in principle where it would not apply to a circumstance where a professional adviser could discharge their duty to advise by either proffering advice or disclaiming their ability to do so and advising the client to obtain advice elsewhere.

256 It is difficult to see how *Morris* assists the respondents. The question before the New South Wales Court of Appeal concerned the primary judge's approach to the assessment of damages.

The analogous principle referred to at [67] of *Morris* is in relation to the assessment of damages for breach of contract where the contract could have been performed in one of several ways and damages are to be assessed assuming performance of the contract in the way least onerous to the defendant. Justice Beech-Jones was satisfied that the same principle could be applied where a professional adviser could discharge their duty in one of two ways: either by proffering the advice or disclaiming their ability to do so and sending the client elsewhere.

257 Here, the question before the primary judge was whether the respondents had breached their duty of care owed to Mrs Karpik on one of the two alternative bases set out at [247] above. In determining whether that was so his Honour was not concerned with the question of the assessment of damages for breach but with the anterior question: had the respondents breached their duty of care owed to Mrs Karpik by failing to cancel the cruise or, in the alternative, failing to warn and take necessary precautions both prior to and after embarkation of passengers.

258 If the respondents here seek to argue, by analogy with *Morris*, that we should find that they could have taken the "least onerous" course of proceeding with the cruise with adequate precautions in place, we reject that argument. The question relevant to this ground of appeal is that posed by s 5B(1)(c) of the CLA; in the circumstances facing the respondents, what precautions would a reasonable person in their position have taken? It would not be correct to confine that by importing, by analogy, a rule established in a different context.

259 The primary judge's main answer to that question was that, in the circumstances that actually faced the respondents, a reasonable person would have cancelled the cruise. Significant among those circumstances were the heightened risk on board the *Ruby Princess* in view of the outbreak of illness on RU2006, and the fact of the outbreak on the *Grand Princess* despite the pre-boarding screening that had taken place there: see PJ[608]. As we explain below, the primary judge was correct to find that those circumstances existed at the time that RU2007 set sail, and was also correct to ascribe to them the significance that he did.

260 It is therefore not to the point that, hypothetically, the respondents could have implemented sufficient measures to make it sufficiently safe to embark on RU2007. Those measures, in particular pre-boarding screening adequate to protect against the heightened risk from RU2006, were not proposed to be carried out, and were not carried out. A reasonable person in those circumstances would have taken the precaution of cancelling the cruise. Those findings were sufficient in themselves to establish liability in negligence and for breach of the guarantee in s 60 of the ACL.

261 The respondents' contention that, because the Court found that they breached their duty on both bases, the Court's ultimate finding should be only in relation to the less onerous duty is therefore not sustainable, particularly given the way in which Mrs Karpik put her case.

262 We turn to consider the balance of the respondents' submissions.

263 The respondents criticise the two matters relied on by the primary judge at PJ[608].

264 The first matter relied on by the primary judge at PJ[608] was the COVID-19 outbreak on the *Grand Princess* which the primary judge said should have put the respondents on notice that "their procedures for screening of passengers and crew were deficient". In referring to that as a matter informing his conclusion, the primary judge did not rely on the extent of the outbreak on the *Grand Princess* which his Honour noted was not yet known as at 8 March 2020. Rather, the primary judge relied on the fact that any outbreak indicated that even screening carried out in accordance with guidelines issued by public health authorities was not completely effective (see PJ[633]) so that there was a real risk of at least one passenger coming onboard with COVID-19 undetected. As Mrs Karpik submits it was this fact, including when weighed with the probability of grave harm, and that identification of a positive case would have led to the cruise being cancelled, which informed the primary judge's conclusion. There was no error in his Honour's reliance on that matter.

265 The second matter was the finding that there was heightened risk on board RU2007 given the outbreak of ARI/ILI on RU2006 which his Honour observed was "a lesson that was already clear from the *Grand Princess* experience". The respondents again submitted that the fact that there was no finding that Professor Bennett's opinion that the outbreak on RU2006 was a well-controlled outbreak of influenza, which is also the basis on which NSW Health proceeded, was unreasonable or should not be accepted is sufficient to find error in the finding that it was unreasonable for the respondents not to cancel the cruise because of the asserted heightened risk. We have addressed the finding concerning the heightened risk of COVID-19 occurring on board RU2007 given the outbreak of ARI/ILI on RU2006 in relation to grounds 1 and 12 (see [224]-[227] above).

266 The lack of any express finding in relation to Professor Bennett's opinion of the effect of the outbreak of ARI/ILI on RU2006 is not sufficient to find error in the primary judge's finding about cancellation of the cruise. As we have already observed, there were competing views before the primary judge in relation to this issue, of which Professor Bennett's opinion was but one. Further, the primary judge's finding about heightened risk was but one element in the

primary judge's conclusion about cancellation, as is evident from an analysis of his Honour's reasons summarised above.

267 More generally, as at 8 March 2020 the respondents knew that there was a heightened risk of contracting COVID-19 on board RU2007 compared with the risk in the community generally, there were reports that significant numbers of people who tested positive for COVID-19 had no symptoms at the time of testing, there was a risk that passengers on board RU2007 could be infected with COVID-19 by a crew member from RU2006, there was a not insignificant risk that one or more passengers or crew who had been on RU2006 might have been infected with COVID-19 and there was a not insignificant risk that there were active contagious virus particles on the *Ruby Princess* (PJ[122]). Added to this was the respondents' knowledge as at 8 March 2020 about the outbreaks of COVID-19 on the *Diamond Princess* and the *Grand Princess* and the prediction of Dr Grant Tarling, the respondents' senior vice president and chief medical officer, as at 23 February 2020 that COVID-19 would soon become a pandemic (PJ[54]). As Mrs Karpik submits, a reasonable cruise operator armed with this knowledge would have cancelled RU2007 no later than 8 March 2020.

268 Finally, while the public health and government guidelines and adherence to them is a relevant factor in considering whether a defendant has breached its duty of care, they are not determinative of the content and the breach of any duty of care, as his Honour recognised at PJ[632] by reference to the authorities there cited and see too *Francis v Lewis* [2003] NSWCA 152 at [42]-[43].

Conclusion on ground 11 of the cross-appeal

269 Ground 11 is not made out.

Grounds 13, 14 and 15: pre- and post-embarkation procedures

270 Grounds 13 to 15 concern the primary judge's findings that, by failing to implement adequate pre-boarding screening and post-boarding procedures, the respondents breached their duty of care and the guarantee of due care and skill under s 60 of the ACL.

271 We have explained how the findings that we have already upheld are sufficient to support the conclusion that the respondents should have cancelled the cruise. Further, as the respondents observed, correctly with respect, the measures to which grounds 13 to 15 were directed were alternatives to the primary case – that the cruise should have been cancelled. It follows that these later grounds are not dispositive and need not be addressed: see *Boensch v Pascoe* [2019] HCA 49; 268 CLR 593 at [7].

Causation of loss and damage: ground 16

Ground 16: causation

272 By ground 16 of the cross-appeal, the respondents challenge the findings that Mrs Karpik discharged her onus of proving that her loss was caused by the particular breaches of duty challenged by grounds 11 and 12, namely failure to cancel the cruise and failure to warn of heightened risk, and by grounds 13 to 15, namely failure to implement pre-embarkation screening, failure to implement on board physical distancing, and failure to isolate passengers with symptoms of ARI and ILI. As we have decided it is unnecessary to deal with the substantive challenges to the primary judge's findings raised in grounds 13 to 15, it is similarly unnecessary to address his Honour's findings in respect of the causative effect of those breaches.

The respondents' submissions on the cross-appeal

273 As to the failure to cancel and the failure to warn, the respondents contend that the primary judge's findings that these failures were causative of Mrs Karpik's loss are insufficient to establish normative causation pursuant to s 5D(3)(b) of the CLA. That is because, they submit, both the failure to cancel and the failure to warn were in respect of a distinct risk that did not materialise, being the transmission of COVID-19 via RU2006. They submit, therefore, it is inappropriate for the scope of the respondents' liability to extend to the harm caused to Mrs Karpik.

Consideration

274 This submission is misconceived. The risk factors identified by the primary judge, which would have compelled a reasonable operator to cancel or to warn of heightened risk, were not limited to a traceable transfer from RU2006 to RU2007 – albeit the primary judge found that "there was at least one positive case on board the vessel and Mr Karpik was infected" (PJ[82]). The outbreak of ARI/ILI on RU2006 was but one of a series of factors taken into account by the primary judge.

275 First, the respondents knew that the symptoms of ARI and ILI are also symptoms of COVID-19 so passengers and crew from RU2006 reporting such symptoms may have had COVID-19, particularly given only nine were tested. This was known by them because of their previous experience on board *Diamond Princess* (PJ[76]). Secondly, the respondents could be taken to have known from their previous experience on board *Grand Princess* that there was a considerable risk that if anyone amongst the 1,100 crew who had stayed on board between RU2006 and RU2007 was carrying the virus, they would take it on board RU2007 (PJ[77]).

Thirdly, the presence of the virus on any surface on RU2006 risked an outbreak on RU2007 through fomite transmission (PJ[78]). Fourthly, the respondents knew, or ought to have known, that there was a substantial risk of COVID-19 on RU2006 because of the substantial ARI/ILI outbreak and that testing of only nine people was not likely to identify all positive cases (PJ[80]).

276 In light of these factors, the primary judge found that the cruise should have been cancelled because, as at 8 March 2020, the respondents knew from the outbreak on board the *Grand Princess* that their screening procedures were deficient, **and**, on the basis of their experience with *Grand Princess*, the outbreak of ARI/ILI on board RU2006 heightened the risk that there was COVID-19 on board RU2007 (PJ[608]) because of the similarity in symptoms and the paucity of testing for COVID-19 specifically. Further, his Honour found that the burden of cancellation would not have been intolerable. That was established by the respondents' decision to suspend cruising worldwide merely five days later (PJ[607]).

277 The respondents seek to rely on ***Wallace v Kam*** [2013] HCA 19; 250 CLR 375 in support of their submission that they should not be liable for failing to warn of a risk that did not materialise. They refer also to the statement of this Court in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1997) 77 FCR 307 at 324 that, "if the only consequence of a respondent's negligence is that the applicant was present at the particular time and place at which an injury occurs, the negligence is not causally related to the injury". The respondents argue that the failure to warn case meets this description.

278 Neither of those cases assists the respondents. As the High Court said in *Wallace v Kam* at [24] (footnotes omitted), referring to *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 214 and *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 444-445 [76]-[77] following the appeal to the High Court:

> "a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action" but "only for the consequences of the information being wrong." A useful example, often repeated, is that of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche. His injury is a "foreseeable consequence of mountaineering but has nothing to do with his knee".

279 In the present case, it was a foreseeable consequence of Mrs Karpik's boarding RU2007 that she would be exposed to the heightened risk of there being COVID-19 on board the *Ruby Princess*. The respondents did not provide the relevant information to enable Mrs Karpik to

decide a course of action by which she might have avoided the risk. Whether it was possible to trace her contraction of COVID-19 from a person on board RU2006 is wholly irrelevant. As the primary judge found, correctly with respect, she would not have been on board had she received the warning. His Honour accepted that Mrs Karpik believed that if there was "a significant risk of coronavirus on board, then the respondents would have either cancelled the voyage or informed passengers so they could make their own decision as to whether to board" (PJ[785]). Similarly, had the cruise been cancelled, Mr Karpik would not have contracted COVID-19 on board the *Ruby Princess* and Mrs Karpik would not have suffered the personal injury consequent upon her husband's illness. The analogy with *Wallace v Kam* sought to be drawn by the respondents is simply not apt in these circumstances. Had Mrs Karpik suffered injury in the course of the voyage by the *Ruby Princess*, for example, being hit by a freak wave which no reasonable precautions would have prevented, the respondents may well have been able to argue that their negligence was not causally related to the injury.

280 As the primary judge explained (PJ[836]):

> The harm which Mrs Karpik suffered was within the scope of the respondents' duty of care. That is to say, the respondents had a duty of care for the health and safety of their passengers which extended to the risk of harm caused by COVID-19 infection. As the High Court pointed out in *Wallace v Kam* at [26], a tortfeasor's scope of liability is often coextensive with the content of their duty that has been breached. There is no reason why that is not so in the present case.

281 No error is shown in the primary judge's analysis of the requisite causative element of Mrs Karpik's claim for negligence arising from a breach of duty in failing to cancel the cruise or in failing to warn of the heightened risk of the cruise.

Conclusion on ground 16 of the cross-appeal

282 Ground 16 cannot succeed.

MRS KARPIK'S APPEAL

283 Mrs Karpik appeals on certain issues concerning damages. The primary judge assessed damages in the following amounts. *First*, nil damages were awarded for her personal injury claims under ss 60, 61(1) and 61(2) of the ACL or in negligence because the primary judge assessed her case as being 8% of a MEC (PJ[1007]), which is below the statutory threshold of 15% as provided for in s 16 of the CLA. Mrs Karpik challenges that assessment of her non-economic loss. *Secondly*, out-of-pocket expenses were awarded on the personal injury claims under ss 60, 61(1) and 61(2) of the ACL, and the negligence claim, in the sum of $4,423.48 plus interest (PJ[1042]). There is no challenge to that award. *Thirdly*, the primary judge held

that no damages were payable for distress and disappointment because, although they would be available on all the causes of action, they do not exceed the sum of the refund paid by the respondents (PJ[1028]-[1029]). The primary judge also found that most of Mrs Karpik's feelings of distress and disappointment "are tied up in her adjustment disorder" and so were compensable as personal injury damages (PJ[1026]). Further, his Honour found that her feelings of stigmatisation were not compensable under this head of damages (PJ[1027]). Mrs Karpik challenges each of those findings.

Dillon **damages**

284 Damages for distress and disappointment are commonly referred to as "*Dillon* damages" following the decision of the High Court in ***Baltic Shipping*** *Co v Dillon* (1993) 176 CLR 344. Before addressing the grounds of appeal, it is convenient to discuss the general principles applicable to this head of damage.

285 In *Baltic Shipping*, Mrs Dillon suffered injury when the cruise ship, *Mikhail Lermontov*, on which she was a passenger sank ten days into a 14-day cruise between Sydney and New Zealand. Having dismissed Mrs Dillon's claim for a refund of the fare on the basis that there had been no total failure of consideration, the High Court held that she was nevertheless entitled to compensation for disappointment and distress. Chief Justice Mason, with whom Toohey and Gaudron JJ agreed, grounded that conclusion on the rule in *Hadley v Baxendale* (1854) 9 Ex 341 at 354; 156 ER 145 at 151 per Alderson B (damages are recoverable if they arise naturally from the breach of contract itself or may reasonably be supposed to have been in the contemplation of both parties at the time of contracting) as interpreted by the House of Lords in *C. Czarnikow Ltd v Koufos* [1969] 1 AC 350. In the latter case, the House of Lords held that damage in the reasonable contemplation of the parties must be "a serious possibility", "a real danger", "liable to result", or "not unlikely to occur". Chief Justice Mason said, at 365, "[t]he merits of this approach to the problem are obvious. Damages for disappointment and distress are put on precisely the same footing as other heads of damage in cases of breach of contract". After observing that an innocent party will usually be disappointed if a contract is not performed, but that such disappointment is seldom so significant as to attract an award of damages, the Chief Justice said:

> 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.
>
> (Emphasis added.)

286 Similarly, Brennan J held, at 372, that the disappointment and distress consequent upon the shipwreck "was such an inevitable and direct result of [the] breach that it is proper to hold that it flowed naturally from the breach".

287 Subsequently, in *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; 268 CLR 326 (***Scenic HC***) the High Court plurality (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ) observed at 341 that in *Baltic Shipping*, every member of the Court accepted that disappointment and distress 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. The plurality referred, at 342, to Brennan J's statement in *Baltic Shipping*, at 368, that "where disappointment of mind is no more than a mental reaction to a breach of contract and damage flowing therefrom, the law has treated such a mental reaction as too remote", before his Honour continued, at 369-370:

> If I have correctly apprehended the policy underlying the contractual rule, it is clear that the *Hamlin v Great Northern Rly Co.* principle has no application when (to adopt the words of Pollock C.B.) the **"disappointment of mind" is itself the "direct consequence of the breach of contract**". In such a case **the disappointment is not merely a reaction to the breach** and resultant damage **but is itself the resultant damage**.
>
> (Emphasis added.)

288 The plurality in *Scenic HC* held, at [46], that disappointment and distress of this kind is not non-economic loss (ie, loss caused by personal injury) under Pt 2 of the CLA.

289 Mrs Karpik did not cavil with the primary judge's statement of the principles relevant to the assessment of *Dillon* damages as they had been stated by Garling J in *Moore v Scenic Tours Pty Ltd (No 4)* [2022] NSWSC 270; 409 ALR 259 (***Scenic TJ (No 4)***) at [84], and upheld on appeal in *Scenic Tours Pty Ltd v Moore* [2023] NSWCA 74. She contended, however, that the primary judge had misapplied the principles. The principles are as follows (PJ[1013]):

> (1) The damages awarded in "holiday cases" such as this compensate a plaintiff for what they were promised when the expectation of a happy, joyous, peaceful and contented holiday has been unfulfilled. That involves a comparison between the expectations of the individual traveller and the reality of what the traveller was provided.
>
> (2) Although, in a shorthand way, these damages are described as being for "distress and disappointment", a survey of the authorities shows that what is assessed ranges across all kinds of mental distress, inconvenience, anxiety,

disappointment, frustration or vexation arising because the services to be provided were not provided, or else the purpose of the acquisition of the services failed.

(3) Whilst each group member is entitled to have their damages assessed on an individual basis to reflect their particular experience, distress and disappointment, it is nevertheless appropriate to have regard to the objectively determined facts about the extent to which the respondents failed to achieve the purpose and result guarantees.

(4) The commencement point of the analysis is to identify the services which the respondents promised to supply.

(5) The assessment of damages for distress and disappointment in all of the circumstances is a very fact-rich and individual assessment.

(6) Each claim is assessed individually by reference to that individual's expectation, their particular circumstances, and the experience which they individually had. What was a disappointment for one traveller to miss out on a particular experience may have been a blessing for another traveller who felt relief when the experience was not available. Some passengers are more robust and resilient than others when coping with adversity, and some may have had much lower expectations. Hence, the extent of distress and disappointment may be quite different.

(7) An award for *Dillon* damages should not only be made in a token or nominal sum. The assessment of the sum for this head of damages is undertaken in the individual case by an evaluative process applying a sense of fairness and justness to the circumstances proved.

(8) As a general proposition, the distress and disappointment occurs during the cruise and then continues after the cruise has ended for varying periods depending on the individual, and the impact which the breach of the consumer guarantees have had on that person.

(Citations omitted.)

Ground 1: assessment of Dillon damages

290 By ground 1, Mrs Karpik contended that the primary judge erred in assessing *Dillon* damages at no more than the cost of the ticket price for the cruise.

291 There was no challenge to the primary judge's findings as to the scope of the services that were to be provided by the respondents to Mrs Karpik. In short, the primary judge found (PJ[463]):

> [T]he services to be provided by the respondents to Mrs Karpik were the benefits and facilities of the 13-day cruise identified in the Karpiks' booking confirmation and described in the respondents' brochures, and consistent with the respondents' pre-cruise communications. That is to say, everything necessary to provide a 13-day recreational cruise including accommodation, meals, transportation and amenities, onboard activities, cleaning services, medical services and the provision of relevant information before embarkation, during the voyage and during disembarkation about circumstances that may affect those services including with regard to the risk posed by coronavirus. The services included those necessary to safeguard and protect the health and safety of the passengers.

292 Further, the contract as a whole contained the purpose and result guarantees in s 61 which have been addressed above.

293 In arriving at his assessment that Mrs Karpik suffered no more than $4,400.00 worth of *Dillon* damages (PJ[1028]), the primary judge found that the complaint about the respondents' having failed to provide what was promised related "only to precautions against COVID infection. There [was] otherwise no complaint about the panoply of cruising, hotel and vacation-type services that were provided" (PJ[1022]). His Honour found (PJ[194], [210], [1023]) that Mrs Karpik:

- participated, with her travel companions, in a range of activities (trivia, bingo, art auctions);
- dined at the Da Vinci Dining Room every night;
- attended the Crooner's Bar and the International Café approximately six times with her friends;
- engaged in shopping;
- went to the theatre to see a Rod Stewart impersonator perform;
- undertook several excursions in New Zealand; and
- attended dinner on board with her friends on the final evening of the voyage.

294 There was no challenge to these findings. Rather, Mrs Karpik identified the primary judge's error to be in comparing what was promised with what was supplied. Mrs Karpik drew attention to passages in the judgment of Gordon and Edelman JJ in *Young* in which their Honours emphasised that the court is ultimately concerned with "the promisee's state of mind" (at [71]) and that the court must "focus upon the contract as a whole" (at [72]). Although concurring with the majority as to the outcome of the appeal in *Young*, Gordon and Edelman JJ reached that conclusion via a different route. The majority (Kiefel CJ, Gageler, and Gleeson JJ) held that the common law principles of remoteness were not imported by s 122 of the *Residential Tenancies Act 1999* (NT) into the assessment of compensation under that Act. Justices Gordon and Edelman took the contrary view and, in so doing, applied *Baltic Shipping*.

295 As was explained by Gordon and Edelman JJ at [68], the High Court in *Baltic Shipping* restricted the recovery of damages for disappointment and distress to two categories. The first was where the disappointment and distress was consequent upon physical inconvenience caused by the breach; the second was where the disappointment and distress was not too remote and was within the scope of the duty assumed by the promisor.

296 As to the first category, their Honours noted that "[t]hese are modest damages that reflect the inevitable mental element consequential upon the physical inconvenience suffered". Their Honours gave as an example the decision in *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111 in which it was held, on appeal, that the plaintiff could recover for the "suffering" associated with the personal inconvenience of his family having to walk four to five miles in the cold and rain when, in breach of contract, the defendant's train did not stop at the promised station. The Court nevertheless held that the usual considerations of remoteness of damage still applied so that the plaintiff could not recover for the consequences of medical expenses and loss of assistance in his business when his wife caught a cold following the incident (Cockburn CJ at 117, Blackburn J at 121, Mellor J at 124, Archibald J at 124-5).

297 As to the second category, their Honours observed (at [70]) that the limitations upon recovery for disappointment and distress that is *not* consequent upon physical inconvenience are concerned "not merely with requirements of remoteness but also with the scope or objects of the duty (and therefore the risk) assumed by the promisor". This observation is of course consistent with Mason CJ's articulation of the rule for the recovery of damages for disappointment and distress as he explained in *Baltic Shipping* at 365.

298 Justices Gordon and Edelman noted, at [71]:

> The precise formulation of the object of the contract varied slightly between the members of the Court in *Baltic Shipping*. Toohey J and Gaudron J agreed with Mason CJ on this point. Brennan J, Deane and Dawson JJ, and McHugh J focused upon whether the contract contained an express or implied promise that the promisor will, as variously expressed: "protect the promisee from …disappointment of mind" and ensure "the promised peacefulness and comfort"; or "provide pleasure, entertainment or relaxation or to prevent molestation or vexation"; or "provide pleasure or enjoyment or personal protection for the promisee". Each of these formulations of the object of the contract — pleasure, enjoyment, entertainment, relaxation, freedom from molestation, peacefulness, comfort, protection from disappointment of mind, personal protection — is concerned with **the same underlying criterion: the promisee's state of mind**.
>
> (Emphasis added.)

299 Mrs Karpik submitted that the Court is not required to undertake "a minutiae [sic] examination of each item on the itinerary". That submission may be accepted. But merely so doing does not answer the question, by reference to the contract as a whole and taking into account the promisee's state of mind, whether the damage suffered is within "the scope or objects of the duty (and therefore the risk) assumed by the promisor".

300 With respect, that task was properly understood by the primary judge. His Honour, in referring to the various activities and excursions undertaken by Mrs Karpik during the course of the

voyage, did not merely compare the minutiae of what was supplied with what was promised. His Honour examined the contract as whole before taking into account Mrs Karpik's state of mind. In that context, his Honour took account of the ways in which Mrs Karpik's cruise experience was detrimentally impacted by Mr Karpik's becoming ill three days into the cruise. This included having to care for her husband, which to some degree restricted what she could do. This is an example of a physical inconvenience as referred to by Gordon and Edelman JJ. It also included losing the benefit of his company from time to time when, for example, he cut an excursion short or when, once isolated, he could not join her in restaurants and cafes, and generally worrying about his health. In relation to the latter concern, however, his Honour noted Mrs Karpik's evidence that she was "rather pleased that he had influenza A", not COVID-19, and that she was "almost celebrating that he had been diagnosed with influenza A" (PJ[1025]). These other two circumstances were not consequent upon any physical inconvenience to Mrs Karpik and so fell to be assessed by reference to remoteness and the scope of the duty. The primary judge compensated Mrs Karpik for these circumstances in his assessment of *Dillon* damages.

301 The primary judge was, with respect, correct to conclude that the circumstances in which Mrs Karpik found herself during the cruise were very different from those in *Moore v Scenic* cases, where the promised cruise was replaced by an uncomfortable bus tour, with overnight stops in hotels, attended by all the inconvenience that such trips entail. As his Honour said (PJ[1022]), in the *Moore v Scenic* cases "a completely different experience was provided in substitution for the promised experience". No doubt Mrs Karpik did not have the experience she had hoped for because her husband fell ill, but the cruise itself was, as the primary judge found, "essentially as planned".

302 The primary judge also, correctly with respect and consistent with the principles set out by Garling J in *Scenic TJ (No 4)*, found that Mrs Karpik suffered some disappointment and distress, compensable by *Dillon* damages, in the period from disembarkation on 19 March 2020 until Mr Karpik was admitted to hospital on the morning of 21 March 2020 (PJ[1026]). As Garling J observed in *Scenic TJ (No 4)* at [118], "the great bulk of the distress and disappointment occurs during the [cruise] and immediately after the cruise finishes". Such is the usual experience of people whose holiday experience, in whatever form the holiday took, did not live up to hopeful expectations.

303 Having made these findings, the primary judge did not, contrary to Mrs Karpik's submissions, simply adopt "the simplistic promise/supply approach" to assessing her *Dillon* damages, nor did he artificially limit her *Dillon* damages to the price of the ticket.

304 Mrs Karpik submitted that the primary judge had erroneously used the price of the holiday as a benchmark for damages, contrary to remark by Ward LJ in ***Milner*** *v Carnival plc* [2010] EWCA Civ 389; 3 All ER 701 at [59], and that it "follows that *Dillon* damages ordinarily exceed the relevant ticket price". But in *Milner*, Ward LJ's observation in that regard was made in the context of *reducing* the trial judge's total award from £22,000 to £12,000, notwithstanding trial counsel's submission that "damages … ought to be getting on for the full cost of the cruise and … an appropriate figure would be £50,000" – the price of the cruise having been £59,052.20. In truth, his Lordship was *rejecting* that argument. Lord Justice Ward was making the point that something much *less* than the ticket price was likely to reflect an appropriate award of damages for disappointment and distress in that case.

305 Having concluded that whilst on the cruise Mrs Karpik had "essentially enjoyed the experience that she had purchased and paid for", the primary judge then carried out an assessment of the general damages to which he considered Mrs Karpik was entitled "for the disappointment [she] suffered": *Jarvis v Swans Tours Ltd* [1973] QB 233 at 238 (Lord Denning MR). As the primary judge said (PJ[1028]), "[t]o a substantial extent she lost the benefit of the cruise in the sense that she was worried, distressed, disappointed and so on thereafter rather than feeling refreshed and reinvigorated". On that basis his Honour assessed *Dillon* damages at "no more than $4,400". Contrary to Mrs Karpik's submission, this was not because the primary judge treated the cost of the cruise as a benchmark for the damages. His Honour was merely observing that the damages did not exceed that amount. Since Mrs Karpik did not dispute that the refund could be taken as a credit against the *Dillon* damages, no award above and beyond the refund of the ticket prince was warranted.

306 Mrs Karpik's experience was no doubt distressing and disappointing. So too was the experience for Mrs Dillon, whose ship sank 10 days into the cruise. In that case, the norm provided by the trial judge for damages for distress and disappointment was $3,000: *Baltic Shipping Co v Merchant; "Mikhail Lermontov"* (***Mikhail Lermontov NSWCA Damages Appeal***) (unreported, NSW Court of Appeal (1994) BC9402491 at 3). For present purposes, and contrary to the approach suggested by Mrs Karpik at the hearing, today's equivalent monetary value of that sum is irrelevant. What is relevant are the circumstances identified by the trial judge as tending to reduce or increase the sum awarded below or above the norm.

These included the disappointment not only of losing the balance of the cruise but of future cruises because a man's wife refused to go on another (*Mikhail Lermontov NSWCA Damages Appeal* at 34). What was expressly held by the New South Wales Court of Appeal *not to be compensable* included: the personal and emotional effects on a woman who lost her husband, who had suffered a stressful and demanding time after their evacuation from the ship, to an apparent heart attack five weeks after their return (*Mikhail Lermontov NSWCA Damages Appeal* at 50-51); and the consequences for a woman of her husband's personality change following the incident (*Mikhail Lermontov NSWCA Damages Appeal* at 45). As the primary judge found, Mrs Karpik's "terrible distress" about her husband's condition arose after Mr Karpik was hospitalised, which feelings were "tied up in her adjustment disorder" (PJ[1026]). Those feelings were not properly compensable as *Dillon* damages. That distinction between distress and disappointment due to a spoiled holiday and distress arising from physical or psychiatric injuries is implicit in several passages of the judgments in *Baltic Shipping*: see Mason CJ at 366 (where his Honour is careful to refer to damages "for disappointment and distress consequential on physical *inconvenience*" (emphasis added)); Deane and Dawson JJ at 383; Gaudron J at 387; McHugh J at 405.

307 Mrs Karpik submitted that her circumstances were much worse than those endured by the passengers in *Scenic HC*, and indeed worse than those on board the sinking *Mikhail Lermontov* considered in *Baltic Shipping*. Mrs Karpik submitted that "[h]aving to travel by bus for a few days and stay in a series of hotels instead of on a boat cannot compare with the trauma that [she] endured for months". The plight of the *Scenic Tours* passengers was described as a "pale shadow of the distress that Mrs Karpik suffered". Similarly, she submitted that "no one on the *Mikhail Lermontov* suffered any significant physical injury" whereas she "endured far more traumatic events and over a longer period of time than what occurred for a few hours in *Baltic Shipping*".

308 These submissions were made in support of Mrs Karpik's submission that the primary judge failed to have regard to the two-week period of compulsory self-isolation on returning from the cruise and the harrowing experience of watching her husband's significant suffering. Mrs Karpik submitted that the factual matrix far exceeds the factual circumstances considered by previous authorities where *Dillon* damages have been assessed. However, we are conscious of the salutary words of caution of Cumming-Bruce LJ in *Adcock v Blue Sky Holidays Ltd* (unreported, Court of Appeal, 13 May 1980) referred to by Ward LJ in *Milner* at [34]:

> Contracts for holidays vary on their facts very greatly. The facilities offered by the tour company vary enormously from case to case. It would be a grave mistake to look

> at the facts in, for example, the *Jackson* case or the *Jarvis* case and compare those facts with the facts in another case as a means of establishing the measure of damages.

309 The question which arises is whether Mrs Karpik's compulsory self-isolation at the conclusion of the cruise, and her experience of witnessing her husband's illness, are circumstances the avoidance of which was within the scope of the risk assumed by the respondents, such that they are liable to compensate her for disappointment and distress suffered beyond 21 March 2020.

310 The respondents contend that any claim to *Dillon* damages extending beyond 21 March 2020 encompassing Mrs Karpik's self-isolation and her distress at her husband's circumstances was not Mrs Karpik's case before the primary judge. Indeed, her closing submissions below differentiated clearly between these matters and the disappointment and distress she suffered up to 21 March 2020, which she submitted should be compensated by an award for distress and disappointment damages. She submitted that "[f]rom 22 March 2020 up to June 2020 when the adjustment disorder injury was clinically significant, *Mrs Karpik experienced distress that was clearly associated with the adjustment disorder injury*" (emphasis added). Somewhat confusingly, Mrs Karpik also submitted that she continued to experience distress and disappointment which was not a consequence of her injuries *after* she commenced to suffer from the adjustment disorder.

311 We are acutely conscious of the advantage the primary judge had over our position as an appellate court in undertaking the "very fact-rich and individual assessment" of Mrs Karpik's distress and disappointment. The primary judge had the opportunity to hear and see Mrs Karpik give her evidence in her own words and to assess her demeanour. It is relevant that his Honour made findings: that her affidavit evidence and her evidence in cross-examination were, at times, inconsistent; that her recollection may have been superimposed with things she learnt later including from the public inquiry; that her "clear belief in the justness of her case" may have infected the reliability of her evidence; and that, at times, both her affidavit evidence and her oral evidence was inaccurate and even false (PJ[162]-[163]). We would arrive at the same conclusion on the basis of the evidence adduced at trial. His Honour was, with respect, correct to find that Mrs Karpik's distressing experiences beyond 21 March 2020 were outside the scope of the risk assumed by the respondents.

312 No error in the primary judge's approach to the assessment of *Dillon* damages, nor any appellable error as to quantum, has been demonstrated.

Conclusion on ground 1 of the appeal

313 Ground 1 cannot succeed.

Ground 2: relationship between Dillon damages and personal injury

314 Similarly, ground 2 of the appeal cannot succeed.

315 By ground 2, Mrs Karpik contended that the primary judge erred in finding that almost all of her feelings of distress, disappointment, anxiety, frustration, and so on arose out of personal injury either to her or to her husband, with the result that his Honour incorrectly concluded that those feelings are not compensable by an award of *Dillon* damages.

316 The parties were agreed that it is necessary to distinguish between distress and disappointment that was consequent upon Mrs Karpik's injuries (the adjustment disorder) and that which was not. Having found that Mrs Karpik did not suffer from Long COVID (a finding not challenged on appeal), the primary judge found that many of the symptoms she relied on for the Long COVID diagnosis may have arisen from her adjustment disorder, which is compensated separately, or from some other cause or ailment. As his Honour said (PJ[1020]), "[t]hey all manifest physically and are not compensable as *Dillon* damages". The primary judge held that, as a consequence, there was very little left to compensate Mrs Karpik for by way of *Dillon* damages, because "almost all of those feelings, or experiences of hers … arise out of personal injury to her (COVID infection and adjustment disorder) or to her husband (COVID infection)" (PJ[1021]). Mrs Karpik submitted that this is his Honour's error.

317 Contrary to Mrs Karpik's submission, the primary judge did not erroneously conflate *Dillon* damages with distress and disappointment consequent upon personal injury and so fail to award *Dillon* damages post the onset of her adjustment disorder. His Honour distinguished clearly between her distress and disappointment consequent upon her cruise experience and the matters which arose after 21 March 2020.

318 Mrs Karpik submitted that the primary judge should have awarded *Dillon* damages for the "rational" distress and disappointment she suffered in response to her cruise holiday being ruined, alongside an award of personal injury damages in respect of the "irrational" distress subsumed by her adjustment disorder.

319 There are two difficulties with the case advanced by Mrs Karpik on appeal.

320 *First*, to the extent that Mrs Karpik may have continued to suffer "rational" feelings of disappointment and distress after 21 March 2020, those feelings were not consequent upon any breach by the respondents of promises in relation to the cruise. In particular, it is apparent from Mrs Karpik's own evidence that her distress about her husband's condition after 21 March 2020 was caused in large part by the lack of communication from the hospital staff

on 22 March 2020 about his intubation and induced coma (PJ[220]), followed by the circumstances of 27 March 2020, "the worst day of her life" (PJ[222]), when she was told he likely would not live. These are not circumstances that flow naturally from any breach of the respondents' promises to provide an enjoyable and relaxing cruise.

321 Mrs Karpik's evidence as to her period of self-isolation was largely confined to the distress she suffered as a result of being unable to be with her husband. The primary judge found that the period from when Mr Karpik was intubated on 22 March 2020 until he began to show small improvements sometime in the last week of March was "incredibly distressing for Mrs Karpik, made worse by not being able to see her husband or speak face to face with his ICU team" (PJ[220]). Again, this is not a consequence that can be visited upon the respondents. It was not until 15 March 2020, almost a week after the *Ruby Princess* had departed Sydney, that the Australian Government announced that all international arrivals would need to self-isolate for a period of 14 days irrespective of symptoms and that the Australian borders were going to be closed. The closure of Australia's borders was unprecedented. Prior to 15 March 2020, only Australian citizens and permanent residents returning from mainland China and Iran had been required to self-isolate. In light of what was known at the time, it cannot be said that the respondents had, by their contractual terms, assumed the risk that all returning passengers would be required to self-isolate, regardless of symptoms, for a period of 14 days. In any event, Mrs Karpik's evidence was that she was "very relieved" when she heard of the Government's announcement (PJ[204]), so it cannot be said that the prospect of self-isolation caused her any particular distress or disappointment.

322 Further, despite Mrs Karpik's having received instructions to go into home isolation for 14 days upon returning, she did not immediately follow those instructions. Her affidavit evidence, as referred to by the primary judge, is that shortly after arriving home on 19 March 2020, she drove Mr Karpik to the Coronavirus Testing Clinic at Wollongong Hospital (Karpik Affidavit at [164]). After subsequently taking him to the Emergency Department, Mrs Karpik drove Mr Karpik home (Karpik Affidavit at [166]). Once Mr Karpik was hospitalised on 21 March 2020, Mrs Karpik commenced self-isolation at home (Karpik Affidavit at [171]). Mrs Karpik said that she remained alone in the downstairs area of the house whilst her daughter and grandson remained in the upstairs area (Karpik Affidavit at [172]). To that extent, she was not entirely isolated. Despite Mrs Karpik's distress at being unable to be with her husband, it might reasonably be inferred that it was some comfort to Mrs Karpik to know that she was not completely alone at this difficult time. Even if Mrs Karpik had not been required to self-isolate, it is far from clear that she would have been able to visit her husband.

Her affidavit attests that it was not until after Mr Karpik had returned two negative COVID-19 tests, on 12 April 2020, that Mrs Karpik was permitted to visit him (Karpik Affidavit at [194]). Her mandatory 14-day period of isolation had ended a week earlier on 5 April 2020.

323 *Secondly*, there does not appear to have been any evidence before the primary judge which could have led his Honour to conclude that Mrs Karpik had "rational" feelings of distress and disappointment in relation to the cruise over and above the factors that arose after 21 March 2020 (set out in PJ[219]-[233]). In particular, his Honour accepted the expert psychiatric evidence that Mr Karpik's admission to the ICU and his near-death experience were a substantial contributing factor to Mrs Karpik's post-cruise adjustment disorder which constituted her personal injury (PJ[918]).

324 Having assessed the evidence given by Mrs Karpik and the expert psychiatric evidence, the primary judge held that Mrs Karpik, "a person vulnerable to experiencing depressive and anxiety symptoms, suffered from a new adjustment disorder as a consequence of the voyage and its aftermath," and "[f]rom March to June 2020" she was "very distressed and depressed and required professional psychiatric treatment" (PJ[938]).

325 No error is shown in the primary judge's conclusion that Mrs Karpik's distress and disappointment after 21 March 2020 "was clearly associated with the adjustment disorder injury".

Conclusion on ground 2 of the appeal

326 There is no substance to the complaint agitated by ground 2.

Ground 3: damages for feelings of stigmatisation

327 By ground 3, Mrs Karpik contends that the primary judge erred in excluding her feelings of stigmatisation from the scope of any award for *Dillon* damages for the reason that "it is an injury to dignity or reputation rather than being distress and so on caused by a failure to comply with a guarantee" (PJ[1027]).

328 Mrs Karpik's evidence was that on a number of occasions upon mentioning that she was a passenger on the *Ruby Princess*, "the person or people whom I am addressing will immediately move away from me and act in a fearful manner" (Karpik Affidavit at [254]). Regardless of whether or not, with the benefit of having lived through the COVID-19 pandemic, one would consider such behaviour to be peculiar to persons who had been on board a ship which had experienced an outbreak of COVID-19, the question of principle to be determined on this appeal is whether feelings of stigmatisation generally fall within the scope of *Dillon* damages.

329 Mrs Karpik relied on the decision of the New South Wales Court of Appeal in ***Russell*** *v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2008] NSWCA 217; 72 NSWLR 559 in which an employee of the Church was found to have been wrongfully dismissed without notice. The Court of Appeal held, however, that damages for injury to reputation or to feelings arising from the breach were not recoverable. In the passage specifically relied upon by Mrs Karpik as authority for the proposition that distress damages can be the result of loss of esteem, Basten JA said, at [54]:

> What is meant by the concept of injury to reputation is not entirely clear in these circumstances. This was not a case in which the appellant sued for defamation based upon a statement published by the respondent. Rather, it seems to have fallen into one of two separate categories identifiable from the case-law relating to damages for breach of contract. Thus, on one view it could constitute part of the distress suffered by the appellant as the result of loss of esteem of friends, colleagues and acquaintances. However, damages on that account have been treated as generally unrecoverable for breach of contract: see *Fink v Fink* [1946] HCA 54; 74 CLR 127 at 144, where Dixon and McTiernan JJ stated:
>
> > Resentment, disappointment and the loss of esteem of friends are not proper elements [of loss, recoverable in an action on contract].

330 Whilst Basten JA acknowledged the exceptions to the general rule recognised in *Baltic Shipping*, the exception is that the damage flows directly from the breach of a contract to ***provide*** enjoyment, relaxation or freedom from molestation (*Baltic Shipping* at 365 (Mason CJ)). It was, therefore, not relevant to the case advanced in *Russell*.

331 The subsequent decision of the New South Wales Court of Appeal in ***Shaw*** *v State of New South Wales* [2012] NSWCA 102; 219 IR 87 suggests that "actual financial loss" is required before damages for loss of reputation are recoverable.

332 In *Shaw*, five members of the Court (Beazley JA, McColl JA, Macfarlan JA, Barrett JA and McClellan CJ at CL) took the opportunity to reconsider *Russell* because of the possibility of an inconsistent outcome (at [6]). The claims in contract did not seek damages for distress or injured feelings, nor for damage to reputation. Rather, damages were claimed for financial loss actually sustained (in the form of salary or other remuneration not obtained) which, it was pleaded, flowed from the breach of the employment contract.

333 Barrett JA, with whom all members of the Court agreed, surveyed the jurisprudence of England, Canada, New Zealand, Fiji, Samoa, Trinidad and Tobago and Hong Kong dealing with the recovery of damages in contract for loss of reputation (and the chances of obtaining new employment). In particular, his Honour referred (at [72]-[73]) to the decision of the House of Lords in *Malik v Bank of Credit & Commerce International SA* [1997] UKHL 23; [1998]

AC 20 where, with the concurrence of Lords Goff of Chieveley, Mackay of Clashfern and Mustill, Lord Steyn said, at 52:

> Provided that a relevant breach of contract can be established, and the requirements of causation, remoteness and mitigation can be satisfied, there is **no good reason why in the field of employment law recovery of financial loss in respect of damage to reputation caused by breach of contract is necessarily excluded**.
>
> Earlier, I drew attention to the fact that the implied mutual obligation of trust and confidence applies only where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or *seriously* damage the relationship of trust and confidence. That circumscribes the potential reach and scope of the implied obligation. Moreover, even if the employee can establish a breach of this obligation, it does not follow that he will be able to recover damages for injury to his employment prospects. **The Law Commission has pointed out that loss of reputation is inherently difficult to prove**: Law Commission, Consulation [sic] Paper No. 132 on Aggravated, Exemplary and Restitutionary Damages, p. 22, para 2.15. It is, therefore, **improbable that many employees would be able to prove "stigma compensation"**. The limiting principles of causation, remoteness and mitigation present formidable practical obstacles to such claims succeeding. But difficulties of proof cannot alter the legal principles which permit, in appropriate cases, such claims for financial loss caused by breach of contract being put forward for consideration.
>
> (Emphasis added.)

334 In considering the Australian jurisprudence, Barrett JA (at [95]-[96]) drew specific attention to the exception to the general rule recognised in *Baltic Shipping* but noted that all members of the High Court had quoted Lord Loreburn's observations in *Addis v Gramophone Co Ltd* [1909] AC 488 at 491 to the effect that damages awarded to a dismissed employee for breach of contract "cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment". However, Barrett JA went on to observe that "*Baltic Shipping* itself was concerned with only compensation for injured feelings. There was no occasion to deal directly with the compensability of 'the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment'". His Honour said, at [117]:

> At large in both *Baltic Shipping* and *Russell* was the question whether, if a dismissed employee establishes breach of contract on the part of the employer and shows that he or she, despite reasonable efforts, did not find new employment for a particular period, the **financial loss actually sustained through unemployment** for that period is compensable (assuming that a causal link is proved). It is **arguable that loss of that kind** is, in the words of Alderson B in *Hadley* (at 355), loss which "may fairly and reasonably be considered" as arising "according to the usual course of things" or "may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it".
>
> (Emphasis added.)

335 It is uncontroversial that Mrs Karpik did not suffer any actual financial loss because of her perceived stigmatisation. Nor can the terms of the contract reasonably be construed to have promised to protect, or at least not harm, passengers' reputations, and thereby (potentially) bring them into the scope of the exception recognised in *Baltic Shipping*. We leave open the issue of whether, in different circumstances, a contract to provide enjoyment and/or pleasure may also have as one of its objects that of not causing harm to a person's reputation. One example might be a contract to participate, for enjoyment, in a reality television show.

336 The primary judge was correct, in the circumstances of this case, to deny the inclusion of Mrs Karpik's feelings of stigmatisation within the assessment of *Dillon* damages. Plainly, those feelings were not occasioned by a failure on the part of the respondents to comply with a guarantee, but rather were caused by the observations and actions of third parties towards Mrs Karpik which were associated with her having been a passenger on the *Ruby Princess*.

337 In any event, the evidence which was said to have given rise to Mrs Karpik's feelings of stigmatisation was so insignificant that it could not reasonably be considered to have made any material difference to the quantum of *Dillon* damages arrived at by the primary judge.

Conclusion on ground 3 of the appeal

338 Ground 3 cannot be sustained.

Ground 4: reduction in damages for refund of ticket price

339 By ground 4, Mrs Karpik contends that the primary judge's reduction of the quantum of *Dillon* damages by the amount of the refunded ticket price is without precedent and wrong as a matter of fact and law.

340 It was submitted by the respondents at trial that, "[w]ere the Court to find it necessary to assess distress and disappointment damages, the Court would take account of the refund already provided and, thus, would not award further damages for 'distress and disappointment'". Oral submissions to the same effect were also made. The primary judge noted that Mrs Karpik did not dispute that the refund can properly be taken as credit against the *Dillon* damages (PJ[1029]), though she later contended on appeal that no express concession had been made on this point at trial. On appeal, Mrs Karpik submitted that the refund should be taken as credit against any reduction in value damages claimable under s 267(3) of the ACL, rather than against her *Dillon* damages, or that it should be characterised as an ex gratia payment that cannot be credited against any of her damages. This is not the way in which Mrs Karpik presented her case below.

341 No evidence was led as to the precise nature of the refund. On appeal, Mrs Karpik contends that the onus lies on the respondents to establish the extent to which any amount received was in diminution of her claim and, in the absence of any evidence having been led by the respondents, *prima facie* the refund was gratuitous. That point could have been raised before the primary judge. Despite being on notice from the respondents' written and oral submissions, it was not.

342 Moreover, the reality is that Mrs Karpik has received a full refund for a cruise which, as the primary judge found, took place almost exactly as promised, unlike the circumstances in the *Moore v Scenic* cases or *Baltic Shipping*. There was no total failure of consideration. There was no entitlement to a refund of the fare (*Baltic Shipping* at 353). In *Baltic Shipping*, Deane and Dawson JJ (at 382) also emphasised the need to avoid double compensation where both restitution of the fare and damages for disappointment and distress had been claimed. A similar point was made by the Court of Appeal of England and Wales in *Milner*. In that case, the claimants were disappointed when their promised "legendary experience" became less so when their chosen cabin amidships became unusable after bad weather, and they were moved around the ship without any certainty as to when a suitable cabin might be made available. The claimants were offered, and accepted, a refund of approximately 80% of the fare paid.

343 In assessing damages, Ward LJ said, at [42]:

> In approaching the task of assessing damages, I accept that it is permissible to make the assessment under two heads, first the diminution in value and then the distress and disappointment. I do, however, stress that judges should always be alert to ensure that there is no duplication of damages and so it is always salutary to stand back and look at the sum of the two elements in the round before arriving at the figure to award.

344 In the present circumstances, as was acknowledged by Mrs Karpik during oral submissions, she has received recompense in the form of a 100% refund of the fare, despite there being no total failure of consideration. As the primary judge recorded, Mrs Karpik did not claim any reduction in value damages under ACL s 267(3) (PJ[1029]). As has already been observed, the primary judge assessed her distress and disappointment as being equivalent to having lost the entire experience for which she had paid. Accordingly, were the refund not to be credited against the *Dillon* damages, Mrs Karpik would be doubly compensated.

Conclusion on ground 4 of the appeal

345 There was no error by the primary judge in reducing the *Dillon* damages to nil because of the refund. Ground 4 cannot succeed.

Grounds 5-7: non-economic loss and the 15% threshold under the CLA

346 Grounds 5-7 challenge the primary judge's assessment of Mrs Karpik's non-economic loss. In particular, Mrs Karpik contends by ground 5 that the primary judge erred in finding that the severity of her non-economic loss was 8% of the MEC for the purposes of s 16 of the CLA. She contended further that the primary judge failed to give adequate reasons for arriving at his assessment of 8% (ground 6) and maintained that he erred in failing to find that the severity of her non-economic loss is at least 15% of the MEC (ground 7). We deal with these grounds together.

347 Mrs Karpik did not challenge the primary judge's factual findings in relation to her personal injuries. Those findings were (PJ[1000]):

(1) Mrs Karpik contracted COVID-19, although her symptoms were mild; and

(2) Mrs Karpik suffered an adjustment disorder of moderate severity and relatively short duration.

348 In respect of the latter injury, the evidence, accepted by the primary judge, was that from March to June 2020, Mrs Karpik was very distressed and depressed and required professional psychiatric treatment. Although her symptoms were medically significant, she did not report ever experiencing thoughts of self-harm or suicidal ideation. The primary judge found (PJ[938]) that:

> [her] mental health improved from June 2020 when her social functioning returned to normal and she has returned to her baseline state of psychological health and appears to be working and socialising at the level that she was prior to the cruise.

349 As to her COVID-19 symptoms, the primary judge summarised (PJ[892]):

> her symptoms were mild or, as submitted on her behalf in closing, "relatively minor". She started suffering from headaches and diarrhoea from about 18 March. On 19 March, she was feeling unwell. On 21 March, she was very tired, had headaches and diarrhoea and did not sleep well. By 24 March, she had a "scratchy" throat. She appears to have recovered thereafter.

350 There is no basis for Mrs Karpik's complaint that inadequate reasons were given by the primary judge for his assessment. His Honour had previously made detailed findings about her injuries (PJ[298]-[313] and [875]-[938]) and his Honour summarised these at PJ[1000] and [1005]. His Honour then set out in some detail (PJ[1006]) the comparator cases he had found of some assistance. Contrary to Mrs Karpik's submission that the primary judge failed to identify a most extreme case against which he compared her injuries, his Honour explained (PJ[1003]) the task he was required to undertake by reference to the decision in *Kurrie v Azouri* (1998) 28

MVR 406. His Honour was clearly cognizant that a MEC includes cases involving, for example, quadriplegia, serious brain damage, and perhaps also serious scarring and disfigurement, especially to young children.

351 Mrs Karpik sought to rely on two cases, brought by plaintiffs who suffered an injury on a cruise which resulted in an adjustment disorder, in support of her contention that the primary judge's assessment of 8% was too low. To the contrary, both cases tend to support the primary judge's assessment.

352 The first, *Smith*, concerned injuries suffered by a 14-year-old girl when three ceiling panels collapsed on her during a cruise. By the time of trial, she was 21. The trial judge found that she had suffered permanent neck injuries, involving ongoing pain and interference with the normal activities of her life, including her principal hobby of dancing (at [74]). These symptoms were expected to worsen with age, and she would continue to have ongoing psychological symptoms in response to her pain (at [80]). The Court assessed her damages at 33% of a MEC (at [81]).

353 The second, *Waine v Carnival Plc trading as P&O Cruises Australia* [2022] NSWDC 650, concerned a plaintiff who suffered a traumatic miscarriage in her second trimester during and after a cruise. The ship was unequipped to deal with her condition and the ship's doctor failed to advise the plaintiff of, inter alia, the risks of travelling during an incomplete abortion. The plaintiff suffered a serious form of PTSD which continued at the time of trial, some four years later. In assessing her non-economic loss at 30% of a MEC, the trial judge observed (at [185]), "[t]he experts agree that it seems likely to persist and only can be improved rather than healed by treatment and medication. It is a condition that … impacts much of her daily life, social interactions, spousal connection, and work and career".

354 Given the unchallenged findings of the primary judge set out above, in particular that, within three months of the onset of the adjustment disorder, Mrs Karpik's "social functioning returned to normal" and that by trial, she had "returned to her baseline state of psychological health and appear[ed] to be working and socialising at the level that she was prior to the cruise", the submission that the severity of her non-economic loss should, by reference to these cases, have been assessed as at least 20% of a MEC must be rejected.

Conclusion on grounds 5-7 of the appeal

355 No basis has been shown for disturbing the primary judge's assessment of Mrs Karpik's non-economic loss. Grounds 5-7 cannot succeed.

DISPOSITION

356 For these reasons, each of the cross-appeal and the appeal are dismissed. Specifically, we have upheld the primary judge's conclusions that:

(1) the respondents breached the consumer guarantees in s 61 of the ACL, and those breaches caused the losses to Mrs Karpik that were consequent on the COVID-19 that she and Mr Karpik suffered, including *Dillon* damages;

(2) the respondents breached their common law duty of care and the guarantee of due care and skill imposed by s 60 of the ACL by failing to cancel cruise RU2007 and failing to warn Mrs Karpik of the heightened risk of COVID-19 on board the cruise, and those breaches caused the physical and psychiatric injuries that were consequent on her and on Mr Karpik's COVID-19;

(3) the primary judge was correct, however, to conclude that Mrs Karpik's *Dillon* damages consequent on the breaches of the s 61 consumer guarantees did not exceed the refund of the ticket price which the respondents have made to her, and that the refund was properly treated as a credit against those damages; and

(4) the primary judge was also correct to conclude that the severity of Mrs Karpik's non-economic loss within the meaning of s 16 of the CLA was less than 15% of the most extreme case, meaning that Mrs Karpik is not entitled to personal injury damages under that head.

357 It remains only to explain why it has not been necessary to deal with the grounds of appeal that concern misleading or deceptive conduct under s 18 of the ACL. At PJ[863]-[866] the primary judge put the damages claimed by Mrs Karpik into two categories: personal injury damages and distress and disappointment (*Dillon*) damages. Save for the finding under s 16 of the CLA, the personal injury damages would have been awarded for both the consumer guarantee breaches and negligence. Mrs Karpik was entitled to *Dillon* damages for the breaches of the s 61 consumer guarantees and for the breaches of s 18 of the ACL: see PJ[1025], [1043].

358 None of the parties have challenged these aspects of the primary judge's reasoning. It follows that the grounds of the cross-appeal that we have upheld are sufficient to support Mrs Karpik's entitlement to *Dillon* damages and the entitlement she would have had to personal injury damages were it not for s 16 of the CLA. Upholding or dismissing the grounds of the cross-appeal concerning misleading or deceptive conduct therefore could not have made any difference to the outcome of the cross-appeal taken together with the appeal.

COSTS

359 Each of the appeal and the cross-appeal have failed in their entirety. There is no reason why the costs of each should not follow the event. There will be orders for those costs to be taxed by a Registrar of the Court.

360 However, there will be liberty to apply in the event that a party wishes to apply for different orders, for example for the assessment to take place on a lump sum basis.

I certify that the preceding three hundred and sixty (360) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Markovic, Sarah C Derrington and Jackson.

Associate:

Dated: 29 July 2025