HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, KIEFEL AND BELL JJ

INSIGHT VACATIONS PTY LTD T/AS INSIGHT VACATIONS APPELLANT

AND

STEPHANIE YOUNG RESPONDENT

Insight Vacations Pty Ltd v Young [2011] HCA 16
11 May 2011
S273/2010

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

J E Sexton SC with D I Talintyre for the appellant (instructed by Lee & Lyons Lawyers)

M J Joseph SC with A P L Naylor for the respondent (instructed by Gerard Malouf & Partners)

Intervener

M G Sexton SC, Solicitor-General for the State of New South Wales with H El Hage intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

CATCHWORDS

Insight Vacations Pty Ltd v Young

Trade practices – Conditions and warranties in consumer transactions – Implied warranties – Limitation or preclusion of liability for breach of implied warranty – Section 74(1) of *Trade Practices Act* 1974 (Cth) ("TPA") provided that in every contract for supply by corporation of services there was an implied warranty that services will be rendered with due care and skill – Section 74(2A) of TPA provided that, where implied warranty breached and law of State was proper law of contract, that State law applied to limit or preclude liability for breach of implied warranty in same way as for breach of another term of contract – Section 5N(1) of *Civil Liability Act* 2002 (NSW) ("Civil Liability Act") provided that term of contract for supply of recreation services may exclude, restrict or modify liability for breach of implied warranty – Appellant and respondent entered contract for supply by appellant to respondent of tourism services in Europe – Proper law of contract was law of New South Wales – Contract contained clause exempting appellant from liability for claims arising from accident where passenger occupied motor coach seat fitted with safety belt if safety belt not being worn – While travelling by coach respondent left seat to retrieve item from overhead shelf – Coach braked suddenly causing injury to respondent – Respondent claimed damages for breach of implied warranty by appellant – Whether s 74(2A) of TPA picked up and applied State laws as surrogate federal laws – Whether s 74(2A) of TPA picked up and applied s 5N of Civil Liability Act – Whether s 5N a law that applies to limit or preclude liability for breach of contract.

Negligence – Civil Liability Act – Whether provision of transport services in the course of tourism constitutes "recreation services" for purposes of s 5N.

Statutes – Acts of parliament – Interpretation – Geographical limitation on legislative power of State parliament – Whether s 5N of Civil Liability Act subject to geographical limitation – Whether, if picked up by s 74(2A), s 5N applied to contract for supply of recreation services where supply occurred wholly outside New South Wales.

Contracts – General contractual principles – Construction and interpretation of particular contracts – Exemption from liability – Whether appellant could rely on exemption clause in contract as answer to respondent's claim.

Words and phrases – "applies to limit or preclude liability", "contract for the supply of recreation services", "geographical limitation", "recreational activity".

Civil Liability Act 2002 (NSW), ss 5A, 5J, 5K, 5N.

Interpretation Act 1987 (NSW), s 12(1)(b).
Trade Practices Act 1974 (Cth), ss 68, 74(1), 74(2A).

1 FRENCH CJ, GUMMOW, HAYNE, KIEFEL AND BELL JJ. The respondent (Mrs Young) decided to go to Europe for a holiday with her husband. In February 2005, she bought a European tour package from the appellant (Insight Vacations Pty Ltd –"Insight"). In October 2005, Mrs Young and her husband joined the tour in London. While travelling by coach from Prague to Budapest, Mrs Young got out of her seat to get something from a bag she had stowed in the overhead luggage shelf. The coach braked suddenly; Mrs Young fell backwards and suffered injury.

2 After returning to Australia, Mrs Young sued Insight in the Local Court of New South Wales. She alleged that by force of s 74(1) of the *Trade Practices Act* 1974 (Cth) ("the TPA")[1] it was an implied term of her contract with Insight that the services Insight supplied would be rendered with due care and skill, that Insight had not done that, and that as a result she had suffered injury.

3 The contract Mrs Young had made with Insight provided that it was to be governed by the law of New South Wales. The contract contained an exemption clause providing that:

> "Where the passenger occupies a motorcoach seat fitted with a safety belt, neither the Operators nor their agents or co-operating organisations will be liable for any injury, illness or death or for any damages or claims whatsoever arising from any accident or incident, if the safety belt is not being worn at the time of such accident or incident."

Insight relied on that exemption clause as an answer to Mrs Young's claim. Insight asserted that it could rely on the exemption clause because, first, its supply of the service of transportation by coach was a supply of "recreation services" within the meaning of s 5N of the *Civil Liability Act* 2002 (NSW) ("the Civil Liability Act") and second, s 5N of the Civil Liability Act was picked up and applied, as a surrogate federal law, by operation of s 74(2A) of the TPA, with the consequence that the exemption clause could be, and was, given effect.

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1 Section 74(1) provided, at the times relevant to this matter: "In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied."

4 For reasons that are not now material, Mrs Young's claim was heard in the District Court of New South Wales (Rolfe DCJ)[2]. Mrs Young succeeded in her claim and judgment was entered in her favour for $22,371 with costs.

5 Insight's appeal to the Court of Appeal of the Supreme Court of New South Wales (Spigelman CJ, Basten JA and Sackville AJA) against the quantum of damages awarded at trial was allowed by all members of the Court, and the damages reduced, but by majority (Basten JA and Sackville AJA, Spigelman CJ dissenting) Insight's appeal against liability was dismissed[3]. By special leave, Insight appealed to this Court alleging that it should have had judgment against Mrs Young.

6 Insight's appeal should be dismissed.

Issues and conclusions

7 The issues that arose in the appeal can be identified as being:

1. How does s 74(2A) of the TPA operate? Is it, as Insight submitted, a law which picks up and applies, as surrogate federal law, the State laws which meet the description given in that sub-section?

2. If "yes" to 1, is s 5N of the Civil Liability Act a law which meets the description given in s 74(2A) of the TPA and is thus picked up and applied?

3. If s 5N does meet the description given in s 74(2A), does it apply to a contract, such as that in issue in this case, for the supply of recreation services where the supply is to occur outside New South Wales?

4. If s 5N of the Civil Liability Act is engaged, and if in consequence Insight may rely on its exemption clause, does that clause operate, on its proper construction, as an answer to Mrs Young's claim?

8 These reasons will show that s 74(2A) of the TPA picks up and applies certain State laws as surrogate federal laws. Section 5N of the Civil Liability

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2 *Young v Insight Vacations Pty Ltd* (2009) 8 DCLR (NSW) 369.

3 *Insight Vacations Pty Ltd v Young* (2010) 268 ALR 570.

Act, however, is not a law of a kind picked up and applied by s 74(2A). Section 5N does not itself provide any exclusion, restriction or modification of liability. It permits parties to contract for the exclusion, restriction or modification of liability. That is reason enough to conclude that Insight's appeal should be dismissed.

9 In any event, s 5N, had it been picked up and applied by s 74(2A), would not have engaged with the facts and circumstances of this case. Section 5N applies only to contracts for the supply of recreation services in New South Wales. Insight's contract with Mrs Young was to supply recreation services to her outside New South Wales. And in any event, on its true construction, the exemption clause did not apply to the events that happened. The exemption clause should be construed as engaged only when a passenger was seated, and as having no application when the passenger was standing or moving about the coach.

Section 74(2A) of the TPA

10 Section 74(2A) of the TPA was inserted in that Act by the *Treasury Legislation Amendment (Professional Standards) Act* 2004 (Cth)[4] and commenced operation on 13 July 2004. Section 74(2A) provided:

> "If:
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> (a) there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and
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> (b) the law of a State or Territory is the proper law of the contract;
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> the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract."

11 The conditions stated in pars (a) and (b) of s 74(2A) were, of course, met in this case. Mrs Young alleged, and the trial judge found, that there had been a breach of the warranty implied by operation of s 74(1) in her contract with Insight. The law of New South Wales was the proper law of that contract.

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4 s 3 and Sched 1, item 8A.

12 The consequence of satisfaction of those conditions was identified in s 74(2A) as being that a law of New South Wales would apply "to limit or preclude liability for the breach, and recovery of that liability ... in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract" if the State law was a law that met the description given in s 74(2A). That is, s 74(2A) picked up and applied, as a surrogate federal law, a relevant law of New South Wales. The law of New South Wales that was picked up and applied was a law of that State that "applies to limit or preclude liability ... for breach of another term of the contract" (a term of the contract *other* than the term implied by s 74(1)). The State law that applied to limit or preclude liability was then applied, by force of s 74(2A), to limit or preclude liability for breach of the term implied by s 74(1) in the same way as that law applied to limit or preclude liability for breach of another term of the contract.

13 This being the way in which s 74(2A) operated, did it pick up and apply s 5N of the Civil Liability Act? To answer that question it is desirable to say a little about not only the Division of the Civil Liability Act of which s 5N forms a part, but also the Act as a whole.

The Civil Liability Act and s 5N

14 As is well known, the Civil Liability Act (and generally similar legislation of other States and Territories) was enacted in 2002 in response to the final report of the Ipp Committee[5]. The Civil Liability Act was taken to have commenced on 20 March 2002[6]. Part 1A of the Act made provisions governing "any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise"[7]. All claims of that kind were treated in the Act as if they were claims for the tort of negligence.

15 Section 3A(2) of the Civil Liability Act provided that the Act (except for Pt 2, which deals with the fixing of damages that relate to the death of or injury to a person) "does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with

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5 Australia, *Review of the Law of Negligence: Final Report*, September 2002.

6 s 2.

7 s 5A(1).

respect to any matter to which [the] Act applies and does not limit or otherwise affect the operation of any such express provision". Section 3A(3) provided that the provision just set out "extends to any provision of [the] Act even if the provision applies to liability in contract".

16 The Civil Liability Act made no express provision for any extra-territorial operation[8]. It made no provision which dealt directly with whether the Act's provisions were to apply to claims for breach of a contract whose proper law was not the law of New South Wales or to other claims where the application of choice of law rules would result in the lex causae being a law other than that of New South Wales. It may be – it is not possible to be certain – that the unstated assumption of the provisions was that, because all kinds of claims, however based, were treated as if they were species of a claim for a tort of negligence, the Act would apply to cases in which New South Wales would be the lex causae because it was the lex loci delicti[9]. Or it may be that the unstated assumption was that the provisions would apply to any claim for negligence that was brought in any of the courts of New South Wales. It is neither possible nor profitable to explore those questions further.

17 Division 5 of Pt 1A of the Civil Liability Act (ss 5J-5N), together with certain other provisions whose detail need not be noticed now, were introduced into the Act by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW)[10]. The provisions of Div 5 of Pt 1A were directed to liability arising from a "recreational activity". The term "recreational activity" was defined in s 5K as including:

> "(a) any sport (whether or not the sport is an organised activity), and
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> (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
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> (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure."

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8 cf *Trade Practices Act* 1974 (Cth), s 5.

9 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36.

10 s 3 and Sched 1, item 1.

18 Section 5J(1) provided that Div 5 applied "only in respect of liability in negligence for harm to a person (***the plaintiff***) resulting from a recreational activity engaged in by the plaintiff". The term "negligence" was defined in s 5 as "failure to exercise reasonable care and skill". And because s 5A applied Pt 1A of the Act "to any claim for damages for harm resulting from negligence", no matter how the claim was framed, Div 5 could be engaged in respect of claims in contract.

19 There may be some doubt whether travel by coach (or any other form of transport) readily falls within the definition of recreational activity. Resolving that question would depend upon whether being transported from one place to another, in this case by coach, was a pursuit or activity engaged in for enjoyment, relaxation or leisure or otherwise a "recreational activity". It is not necessary to decide in this case, however, whether the Cunard Line slogan "Getting there is half the fun" could apply to Mrs Young's coach trip, or if it did, whether that brought the coach trips Insight was to provide to her within the definition of "recreational activity". That issue, about what is a "recreational activity", need not be decided because s 5N of the Civil Liability Act made provision for the making of an agreement to exclude, restrict or modify any liability to which Div 5 of Pt 1A of the Civil Liability Act applied by reference to "recreation services": "services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity"[11]. And of course the provision of transport services in the course of tourism would be the supply of services in connection with or incidental to the recreational activity of tourism as an "activity engaged in for enjoyment, relaxation or leisure".

20 More particularly, s 5N(1) provided that:

> "Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which [Div 5 of Pt 1A] applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill."

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11 s 5N(4).

Section 5N(2) further provided that:

> "Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term."

In its terms, then, s 5N permitted parties to a contract for recreation services to provide by their contract for an exclusion, restriction or modification of liability and was thus consonant with the general provision made by s 3A to the effect that the Act does not prevent parties to a contract making their own provisions about rights, obligations and liabilities under the contract. But s 5N did not itself work any such exclusion, restriction or modification of liability.

Did s 74(2A) pick up s 5N?

21 A contract for the supply of transport services to a tourist on holiday being a contract for services to be supplied in connection with or incidental to the pursuit by the tourist of what the Civil Liability Act identified as a recreational activity, would s 74(2A) of the TPA give effect to an exemption clause in that contract? There are two reasons for concluding that the exemption clause in Insight's contract with Mrs Young was not given effect by s 74(2A): one founded in Div 2 of Pt V of the TPA (ss 66-74), the other in s 5N of the Civil Liability Act.

22 Section 74(2A) of the TPA hinged about the identification of a law of a State or Territory as one which, on being picked up and applied as a surrogate federal law, "applies to limit or preclude liability for the breach" of either the warranty about due care and skill implied by s 74(1) or the warranty about fitness for purpose implied by s 74(2). It provided that the relevant State or Territory law applies "in the same way as it [that is, the State or Territory law] applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract".

23 This drafting may be contrasted with s 68A and s 68B of the TPA. Section 68A was inserted in the Act in 1977[12], several years before s 74(2A) was inserted; s 68B was inserted in 2002[13].

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12 *Trade Practices Amendment Act (No 2)* 1977 (Cth), s 5.

13 *Trade Practices Amendment (Liability for Recreational Services) Act* 2002 (Cth), s 3 and Sched 1, item 1.

24 Both s 68A and s 68B (and s 74(2A)) are to be understood against the background provided by s 68 of the TPA. Section 68 provided, in effect, that any term of a contract that purports to exclude, restrict or modify the application of, the exercise of a right conferred by, or any liability for breach of a condition or warranty implied by any of the provisions of Div 2 of Pt V of the TPA, or is a provision that has that effect, is void. Sections 68A, 68B and 74(2A) qualified the general avoiding provisions made by s 68. More particularly, s 68A and s 68B qualified s 68 by excluding from its avoiding effect a term of a contract that meets the description given in the relevant provision. Thus s 68A(1) excluded from the general avoidance worked by s 68 a term of a contract for supply of certain kinds of goods or services that limits the liability for breach of a condition or warranty (other than the undertakings as to title, encumbrances and quiet possession implied by s 69) to liability to replace or repair goods (or pay for repair or replacement) or, in the case of services, to liability to supply the services again (or pay for supplying the services again). The exclusion worked by s 68A(1) was itself subject to the exception identified in s 68A(2) but that need not be examined.

25 Section 68B qualified the general avoiding effect of s 68(1) in respect of a term of a contract (made after s 68B commenced operation) for the supply of "recreational services" by excluding from that general avoiding effect a term that excludes, restricts or modifies the application of s 74 in respect of death or personal injury. Section 68B(2) defined "recreational services". That definition differed from the definitions of "recreational activity" and "recreation services" in the Civil Liability Act and no party submitted that s 68B was engaged in this matter.

26 For present purposes it is important to notice that both s 68A and s 68B dealt directly with a *term of a contract* (where the term meets certain criteria). By contrast, s 74(2A) dealt with a State or Territory *law* which satisfies relevant criteria. In these circumstances, s 74(2A) should not be construed as picking up and applying as a surrogate federal law a provision, such as s 5N of the Civil Liability Act, which in its terms does not limit or preclude liability for breach of contract. In terms, s 5N does no more than permit the parties to certain contracts to exclude, restrict or modify certain liabilities[14] and limit the operation of any other part of the written law of New South Wales that would otherwise apply to

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14 s 5N(1).

avoid or permit avoidance of such a term[15]. That is not a law of the kind described in s 74(2A) of the TPA. Section 68 therefore operated to render the exemption clause void in so far as the clause applied to the warranties implied by s 74.

Did s 5N apply to this contract?

27 As already indicated in these reasons, s 5N of the Civil Liability Act did not apply to the particular contract Mrs Young made with Insight. The reference in s 5N(1) to "a term of a contract for the supply of recreation services" should be read as subject to a geographical limitation to its application. Although the contract between Mrs Young and Insight was governed by the law of New South Wales it was to be performed wholly outside the State.

28 Section 12(1)(b) of the *Interpretation Act* 1987 (NSW) ("the Interpretation Act") provided that:

> "In any Act or instrument:
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> ...
>
> (b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales."

This provision, which is, of course, subject to contrary intention[16], may be reason enough to read s 5N as subject to a geographical limitation. Whether s 12(1)(b) has this consequence would require consideration of s 31(1) of the Interpretation Act and its provision that Acts are to "be construed as operating to the full extent of, but so as not to exceed, the legislative power" of the State Parliament. But as was explained by Kitto J in *Kay's Leasing Corporation Pty Ltd v Fletcher*[17], the question of geographical limitation arises regardless of the engagement of a provision such as s 12(1)(b) of the Interpretation Act[18]. Section 12(1)(b) does not

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15 s 5N(2).

16 *Interpretation Act* 1987 (NSW), s 5(2).

17 (1964) 116 CLR 124 at 142-144; [1964] HCA 79.

18 See also *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 600 per Dixon J; [1934] HCA 3.

identify which of the several possible elements of s 5N is to be read as a "matter or thing in and of New South Wales". So, is it the reference to a "contract" in s 5N that is limited? Is the reference to a "contract" to be read as limited to contracts that are made in the State, or to contracts, wherever made, whose proper law is that of the State? Or is there some geographical limitation to be applied by reference to the compound notion of "a contract for the supply of recreation services"? That is, is s 5N limited to those supplies that are to be made in New South Wales?

29 As Kitto J pointed out in *Kay's Leasing*[19], it is necessary to reconcile the generality of the language used in a provision like s 5N with the geographical limitation to which the legislative power of a State parliament is subject. And that reconciliation must be undertaken upon a consideration of the context and the subject matter of the Act in question.

30 In some cases, of which *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society*[20] is, perhaps, the pre-eminent example, the reconciliation is achieved by limiting the operation of the relevant provision to contracts whose proper law is that of the enacting State. But that is not the only form of geographical limitation that may be adopted and it may not be the form of limitation that an Act, on its proper construction, should be found to bear. As Kitto J pointed out in *Kay's Leasing*[21]:

> "Such cases [as the *Wanganui-Rangitikei* case] have dealt with legislation modifying or making void contractual rights and obligations of specified descriptions; but in each instance the modification or avoidance was enacted *as an end in itself* and not as a sanction for contravention of statutory requirements." (emphasis added)

It could be presumed, in circumstances of the kind considered in the *Wanganui-Rangitikei* case, that the legislative intention was to affect rights and obligations the discharge of which was governed by the law of the enacting country (or State). And in such a case to construe the relevant Act as applying only to contracts whose proper law was the law of the enacting country or State would take proper account of the Act's context and subject matter.

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19 (1964) 116 CLR 124 at 142.

20 (1934) 50 CLR 581.

21 (1964) 116 CLR 124 at 142.

31 The statutory provisions at issue in *Kay's Leasing* avoided an agreement for non-compliance with statutory requirements. To hold, in that case, that the provision was engaged only in respect of contracts whose proper law was that of the enacting State (New South Wales) would have permitted easy evasion of the reach of the avoiding provision (by the parties contracting for a different proper law)[22]. Accordingly, Kitto J concluded[23] that the contracts to which the provisions in question in *Kay's Leasing* were directed should be understood as being contracts entered into in New South Wales regardless of what the parties chose to identify as the proper law of the contract. And in *Akai Pty Ltd v People's Insurance Co Ltd*[24], the Court considered a provision of the *Insurance Contracts Act* 1984 (Cth) that sought to deal directly with the problem identified by Kitto J by taking, as its criterion of operation, the law that was, or absent express contractual provision to the contrary would be, the proper law of the contract.

32 More recently, in *Old UGC Inc v Industrial Relations Commission (NSW)*[25], this Court considered a question about the territorial reach of unfair contract provisions of the *Industrial Relations Act* 1996 (NSW). Six members of the Court held[26] that because the central conception upon which the relevant provisions fastened was the performance of work in an industry, and the work in question in that case was performed within the jurisdiction, the fact that the relevant contract was not governed by the law of New South Wales was irrelevant and that no question of reading down the operation of the section according to territorial limitations arose.

33 What geographical limitation is there to the operation of the Civil Liability Act? The central focus of the whole of Pt 1A of that Act is liability for negligence (an act or omission involving a failure to exercise reasonable care and

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22 (1964) 116 CLR 124 at 143 per Kitto J.

23 (1964) 116 CLR 124 at 144; see also at 134-135 per Barwick CJ, McTiernan and Taylor JJ.

24 (1996) 188 CLR 418; [1996] HCA 39.

25 (2006) 225 CLR 274; [2006] HCA 24.

26 (2006) 225 CLR 274 at 278 [1] per Gleeson CJ, 282-283 [22]-[23] per Gummow, Hayne, Callinan and Crennan JJ, 292 [59] per Kirby J.

skill). As noted earlier, s 5A(1) provides that Pt 1A applies to any claim for damages for harm resulting from negligence, regardless of how the claim is framed. As also noted earlier, one natural geographical limitation that could be given to s 5A(1) is to read "any claim" as "any claim in the courts of New South Wales", leaving the applicability of the provisions of the Act in a claim brought in a court of another jurisdiction to the application of principles governing the choice of law[27]. Or, "any claim" could be read as "any claim where the law governing that claim is the law of New South Wales". It is not necessary in this case to decide whether those are the only available constructions or to choose between them. The relevant geographic limitation is to be identified in the provisions of Div 5 of Pt 1A.

34 Unlike the statutory provisions in issue in the *Wanganui-Rangitikei* case, Div 5 of Pt 1A of the Civil Liability Act does not modify or make void contractual rights and obligations of specified descriptions. Unlike the provisions in issue in *Kay's Leasing*, Div 5 of Pt 1A does not seek to avoid any agreement for non-compliance with statutory requirements. Rather, Div 5 of Pt 1A, and s 5N in particular, is directed to limiting liability for negligence in relation to recreational activities, among other things by permitting parties to contracts to stipulate effectively for the exclusion, restriction or modification of any liability to which the Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

35 In considering Div 5 of Pt 1A it is first to be recalled that s 5J(1) limits the application of the Division to "liability in negligence for harm to a person (***the plaintiff***) resulting from a recreational activity engaged in by the plaintiff". Some, but not all, elements of the definition of "recreational activity" are identified in s 5K by reference to where the activity occurs: "any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in" certain kinds of pursuit or activity. There is no reason to read those references to place as extending beyond places in New South Wales. Taken together, ss 5J(1) and 5K point decisively to reading s 5N as reaching all cases in which the contract in question (wherever it is made and by whatever law it is governed) is for the supply of recreation services in New South Wales.

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27 *Koop v Bebb* (1951) 84 CLR 629; [1951] HCA 77.

36 That construction of the provision reads "contract for the supply of recreation services" as a compound expression. The relevant geographical limitation of the compound expression directs attention to the place of performance of the contract. Where are the relevant recreation services to be supplied? And once that reading is adopted, it follows that it is neither necessary nor appropriate to construe the sub-section as importing any other geographical limitation (or extension) of its operation. More particularly, if s 5N(1) is read, as it should be, as a provision which is hinged about the place of performance of the relevant contract, there is no satisfactory basis upon which the provision could be construed as including, in the class of contracts to which s 5N(1) applies, contracts that are to be performed outside New South Wales but whose governing law is the law of that State. Reading s 5N(1) as hinging on the place of performance of the contract best gives effect to the purposes and text of the provision when it is read in its statutory context.

37 Although it is not necessary to decide the final question identified at the start of these reasons (about the proper construction of the exemption clause in the contract between Mrs Young and Insight), it is desirable to say something shortly about that matter.

The exemption clause

38 The text of the clause was set out earlier. It will be recalled that the first part of the clause read: "Where the passenger *occupies* a motorcoach *seat* fitted with a safety belt" (emphasis added). That element of the clause should be given its ordinary meaning[28]. It limits the times to which the clause applies to the times when the passenger occupies a seat. That is, it should be read as referring only to times when the passenger is seated, not to times when the passenger stands up to move around the coach or to retrieve some item from an overhead shelf or for some other reason. The contract of carriage did not require passengers to remain seated at all times while the coach was in motion. The provision of a lavatory at the rear of the coach shows that the operator accepted that a passenger could, and sometimes would, get out of his or her seat.

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28 See, for example, *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11]; [2001] HCA 70; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 581-582 [32], [36]; [2008] HCA 57; *Public Trustee (Qld) v Fortress Credit Corporation (Aus) 11 Pty Ltd* (2010) 241 CLR 286 at 294 [22]; [2010] HCA 29.

39 If the introductory words of the exemption clause had omitted the word "seat", it might have been possible to say that the exemption clause applied to any occasion when the passenger was aboard (or "occupie[d]") a motorcoach fitted with seat belts, regardless of whether and why the passenger got out of the seat. But that is not how the clause was cast. The words "occupies a motorcoach seat" should be understood as meaning sitting in the seat and able to wear the safety belt. Mrs Young was not sitting in her seat when she fell. The exemption clause did not apply.

40 The appeal should be dismissed with costs.