HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MICHAEL STEWART BY HIS LITIGATION GUARDIAN CAROL SCHWARZMAN
Appellant

and

METRO NORTH HOSPITAL AND HEALTH SERVICE
(ABN 184 996 277 942)
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES ARISING

2. The Court of Appeal (**CA**) erred at CAB 75; CA [88] to [95][1] in finding that the trial judge did not err in failing to award the appellant an amount of damages that permitted him to live in his own home in that in determining whether it was reasonable for the respondent to pay the additional costs of therapy in the appellant's own residence as opposed to the provision of additional therapy and care in the nursing home in which the appellant resided, the CA should have taken into account that the appellant had lived in the community prior to sustaining his injuries, his expressed wish to live in the community, his unhappiness living in the institution, the enhancements to his life of sharing his residence with his son

[1] CAB 75, 76.

and a dog and that the living, care and therapy arrangements sought by the appellant were of a kind commonly undertaken in the community.

PART III: SECTION 78B NOTICE

3. No notice is required under s78B of the *Judiciary Act* 1903 (Cth).

PART IV: CITATIONS

4. The primary judgment is unreported. The medium neutral citation is: *Stewart v Metro North Hospital and Health Service* [2024] QSC 41.

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5. The judgment of the Court of Appeal is unreported. The medium neutral citation is: *Stewart v Metro North Hospital and Health Service* [2024] QCA 225.

PART V: FACTS

6. The appellant was born on 26 August 1952.[2] He worked for much of his adult life as an artist, including working for major advertising firms in New York City. While living in New York, he developed a relationship with Carol Schwarzman. Ms Schwarzman gave birth to their son, Jesse, on 23 June 2001. Jesse is the appellant's only child.[3] The family came to Australia in 2005 and lived in the Redcliffe area in Queensland.[4] The appellant
20 and Ms Schwarzman separated in 2008 but remained on good terms, sharing the parenting of Jesse.[5]

7. The appellant subsequently lived with his brother in the family home at Redcliffe, a property the appellant holds a life interest in. He maintained a close relationship with Jesse. Jesse regularly stayed at the appellant's residence on weekends. The appellant also visited Ms Schwarzman and Jesse during the week, frequently sleeping on their couch so that he could spend time with Jesse. They went camping on school holidays and shared the care of a dog.[6]

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[2] CAB 6; SC [5].
[3] CAB 7; SC [9].
[4] CAB 7, 64; SC [8] - [12], CA [16].
[5] CAB 65; CA [5].
[6] CAB 23, 69; SC [107], CA [52].

8. On 22 March 2016, the appellant, then aged 63, presented to the Redcliffe Hospital complaining of nausea and general abdominal pain.[7] Within one month, as a consequence of the respondent's admitted negligence, the appellant suffered from brain damage, hemiparesis, confusion, severe expressive and receptive aphasia, dysphasia and other injuries.[8]

9. As a result of his injuries, the appellant was unable to return to his home. In March 2017, he was moved to Ozanam Village Aged Care Facility (**Ozanam**) where he has been, and remains, unhappy.[9]

10. For years, the appellant has refused to be transferred out of bed.[10] He is agitated and screams if carers bring a hoist into his room to take him out of bed. The notable exception to this behaviour is when it is explained to him that he is going out with Jesse or Ms Schwarzman. He is happy to be transferred out of bed to his wheelchair to go out with them.[11]

11. The appellant eats all his meals in his room. He spends a great deal of time looking at photographs from his earlier life, including photographs of his family.[12] He has only rarely participated in Ozanam's group activities.[13]

12. Evidence was led from several lay and medical witnesses as to the capacity of the appellant to communicate his desire to live independently, given his expressive and receptive aphasia. Several witnesses gave evidence that the appellant had the capacity to communicate by making noises and nodding or shaking his head in response to yes/no questions. Using these methods, he has expressed a strong desire to live in a private residence where Jesse and a dog could stay with him.[14]

13. The evidence of the appellant's living preferences was challenged at trial, including by cross-examination about the extent to which the details of what moving residences might entail had been explained to him.[15] While it was not possible, given the appellant's aphasia, to determine whether he appreciates all of the possible difficulties moving might

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[7] CAB 8; SC [14].
[8] CAB 64; CA [14], [15].
[9] CAB 69; CA [52].
[10] CAB 20; SC [88].
[11] CAB 17; SC [68].
[12] CAB 21; SC [89].
[13] CAB 22, 24; SC [98], [109].
[14] CAB 16 - 18; SC [65] - [78].
[15] CAB 20; SC [86].

pose for him, the trial judge proceeded on the basis that the appellant would prefer to live independently rather than at Ozanam even if he did not appreciate all such difficulties.[16]

14. Jesse gave evidence that, if the appellant moved to his own home, his desire was to live with his father for at least the first months to get him set up and then to live back and forth between his mother's and his father's houses like he did when he was younger. He wanted to 'try and make his father's life as good as it could possibly be.'[17] The trial judge accepted that, given the close relationship between the appellant and Jesse, it is entirely understandable that Jesse would now want to provide as much assistance to the appellant as he can, including by living with him if that became possible.[18]

15. The evidence of expert witnesses engaged in facilitating care arrangements was that it was common for people with the appellant's disabilities, particularly after the introduction of the National Disability Insurance Scheme, to live in the community with carers.[19]

16. The medical and allied health experts called at trial recommended that the appellant receive much more therapy than he had been before, provided predominantly by a physiotherapist instructing the appellant and his carers to perform exercises intermittently over the course of each week.[20]

17. His Honour accepted:

    (a) that the environment in which therapy is provided is a factor which impacts the appellant's motivation to engage; [21]

    (b) that Jesse's desire to live with his father and that Jesse's presence acts as a strong motivator to the appellant to participate in activities; [22]

    (c) there was clear evidence of the appellant's love of animals;[23] and

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[16] CAB 20; SC [87].
[17] CAB 22; SC [101].
[18] CAB 23; SC [107].
[19] ABFM 64 – 65, 87, 249, 305, 318; Transcript SC 3-54 - 3-55, 3-77 ll 45-47, Transcript SC 6-15 ll 4-8, Transcript SC 6-71 ll 4-10, exhibit 57 Report of John Hart p 5.
[20] CAB 34; SC [158].
[21] CAB 30; SC [138].
[22] CAB 30; SC [138].
[23] CAB 38; SC [182].

(d) if appropriate arrangements could be made for a dog to live at the appellant's home that would also be likely to have a motivating effect on him[24] (the evidence being that the dog could be used in the physical therapy).[25]

18. It followed that the provision of care and therapy to the appellant in his own home would increase the appellant's willingness to engage.[26] His Honour concluded:[27]

> [140] In the end, I am satisfied that the provision of comprehensive care and therapy to Mr Stewart in his own home would result in health benefits for Mr Stewart. I do not consider that those health benefits can properly be characterised as slight or speculative. This is not a case where the benefit to Mr Stewart of receiving care and therapy in his own home is entirely one of amenity.

19. The trial judge then considered the alternative of the appellant receiving therapy and care at Ozanam. His Honour accepted that, prima facie, additional therapy could be provided to the appellant at Ozanam and that, while the space was much less than would likely be available in his own home, such constraints would not prevent the appellant from receiving additional therapy at Ozanam.[28] His Honour further accepted that the therapy program recommended by the experts could be met if the appellant had his own care assistants engaged to attend him at Ozanam.[29]

20. His Honour concluded that the appellant was likely to receive the same health benefits, or at least a very similar level of health benefits, if engaged in a similar amount of additional therapy and exercise at Ozanam with the additional assistance provided by an external care assistant attending for six hours per day.[30]

21. His Honour ultimately concluded:[31]

> [185] I can see no reason to conclude that securing the services of an external care assistant capable of forming the necessary positive rapport with Mr Stewart would be an insurmountable obstacle. The consistent provision of additional care from external care assistants who develop a positive rapport with Mr Stewart would be likely to engage him to a much greater degree than has been the case under the present arrangements at Ozanam. Even though Mr Stewart's interaction with these external care assistants would necessarily be

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[24] CAB 37, SC [180].
[25] ABFM 161; Transcript SC 4-37 ll 16-24.
[26] CAB 30; SC [138].
[27] CAB 30; SC [140].
[28] CAB 33; SC [153], [154].
[29] CAB 34; SC [158].
[30] CAB 37; SC [181].
[31] CAB 38; SC [185] - [186].

> different than his interactions with Ms Schwarzman and Jesse, I consider that his increased level of engagement under enhanced care arrangements at Ozanam would be likely to improve his mood and increase his motivation to engage in more frequent exercise and to participate in activities in the community and, consequently, provide health benefits similar to those which he had received if he was to be cared for in his own home.
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> [186] For these reasons, it seems to me that, although living in his own home with Jesse and a dog would enhance Mr Stewart's quality of life in an overall sense when compared with his continued residence at Ozanam, I am not satisfied that it would be likely to result in health benefits for Mr Stewart that are significantly better than those likely to be achieved at Ozanam with additional therapy and a dedicated external care assistant. In those circumstances, I do not consider it reasonable to require that the MNHHS pay the significant additional cost that would be involved in Mr Stewart moving from Ozanam into his own home.

22. His Honour assessed damages in the sum of $2,195,505.48 before damages for fund management fees.[32] The trial judge did not find that the award of damages sought by the plaintiff was excessive or unreasonable. Rather, His Honour found that he did not consider it reasonable to require that the respondent pay the significant additional costs that would be involved in the appellant moving from Ozanam into his own home.

23. The appellant, on appeal, relevantly submitted that the trial judge should have assessed damages on the basis that the appellant would reside in his own residence. The parties agreed that, if the appeal were allowed on that basis, damages should have been assessed in the sum of $5,883,688.85 before damages for fund management fees.[33]

24. The facts found by the trial judge were not disturbed on appeal.

25. The Court of Appeal dismissed the appeal but allowed a cross-appeal in part to amend a calculation error (agreed by the parties) resulting in damages being ordered in the sum of $2,171,244.03 plus damages for fund management fees (which were agreed and ordered separately).[34]

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[32] CAB 50; SC [269].
[33] ABFM 4; Re-calculation of Damages if Appeal allowed p 1.
[34] CAB 78; CA [110].

PART VI: ARGUMENT

The Court of Appeal erred in principle

Paramount Principle

26. The common law recognises the paramount principle that a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money that will, as nearly as possible, put him in the same position as if he had not sustained the injuries (the **paramount principle**).[35]

27. In the application of that principle, the Court takes an approach that recognises community values, standards and expectations. Windeyer J. observed in *Skelton v. Collins*[36] that the law of damages was a branch of the law in which further developments and fresh refinements in the application of principle was ongoing. Various circumstances, locally known as existing in any community, such as welfare services, pensions, hospital aid, sick bay pay, rates of wages and so forth, are "taken into account directly or indirectly, deliberately or unconsciously, by Judge and juries when assessing damages for personal injuries."[37]

Sharman v Evans

28. In *Sharman v. Evans*,[38] the High Court considered an award of damages to a young woman who suffered catastrophic injuries in a motor vehicle accident. When 20 years of age, the plaintiff suffered "calamitous injuries" whilst a passenger in the motor vehicle accident.[39] She suffered catastrophic brain damage, lost her power of speech and was rendered a quadriplegic.[40]

29. Relevantly, Barwick C.J., Gibbs and Stephen J.J. allowed an appeal against the award of damages. On one ground relating to future care, the majority determined that the allowance

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[35] *Todorovic v Waller* (1981) 150 CLR 402 at 412; *Haines v. Bendall* (1991) 172 CLR 60 at 63.
[36] (1966) 115 CLR 94 at 135.
[37] Also observed in *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317, 332 (Gleeson C.J.), "… They go directly to the question of reasonableness, which is at the heart of the law of negligence. Reasonableness is judged in the light of current community standards. As Lord Macmillan said in Donoghue v Stevenson, 'conception[s] of legal responsibility …adap[t] to … social conditions and standards'.
[38] (1977) 138 CLR 563.
[39] (1977) 138 CLR 563 at 564 per Barwick C.J.
[40] (1977) 138 CLR 563 at 569 per Gibbs and Stephen J.J.

by the trial judge of an award of damages for future nursing care at the plaintiff's mother's residence was excessive.[41]

30. The appellant submits that *Sharman v. Evans* establishes no point of principle. Rather, it reflects a problematic application of the paramount principle. The findings are nothing other than a determination by the High Court as to what was reasonably required to place the particular plaintiff back into the position she would have been had the injury not occurred. This assessment was performed in the context of community standards and values almost half a century ago.

31. It is wrong for *Sharman v. Evans* to be cited as an authority to support the proposition that an award of damages payable by the defendant is to be diminished on the basis that the cost of providing care based on a reasonable choice by the plaintiff as to where he wished to live was perceived to be excessive.

32. In the decades after *Sharman v Evans*, single judge and appellate courts have taken into account medical evidence that institutionalised care in some circumstances should be regarded as an option of last resort,[42] the desire of the plaintiff to live independently and to have privacy,[43] and the availability of family who might share accommodation with the plaintiff.[44]

Canada

33. In a trilogy of cases delivered at about the same time as *Sharman v. Evans*[45], the Canadian Supreme Court confirmed the application of the paramount principle in the assessment of

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[41] Note however that Barwick CJ, although expressing the opinion that the allowance of a sum in the damages for the plaintiff to live at home from time to time with her mother was excessive, did not disturb the award as counsel for the defendant had conceded the claim was reasonable at trial: *Sharman v Evans* (1977) 138 CLR 563 at 567.

[42] *GIO NSW v Mackie* (1990) Aust Torts Reports 81-053 at 68,212 (where the plaintiff was young and severely disabled); *McNeilly v Imbree* (2007) 47 MVR 536 (NSWCA) at [155]; *Burford v Allan* (1992) Aust Torts Reports 81-184 (SASC) at 61,616 ("… the evidence given by several defence witnesses … (indicated) there has been a swing in community attitudes in favour of deinstitutionalisation, in favour of independent living and in favour of reintegration into the community as soon as possible of gravely disabled people"); *Rosecrance v Rosecrance* (1995) 129 FLR 310 at 334 (NTSC).

[43] *Sailes v Nominal Defendant* (Unreported, QSC 3259/98), Byrne J, 18 August 1993) (where the trial judge considered the plaintiff had "lost so much" and the opportunities presented by living in his own house assumed great importance); *Wieben v Wain* (1990) Aust. Torts Reports 81-051 (QSC) at 68,188 ("To one person being permanently in the best of institutions might be as unpleasant as being permanently in a prison, while to another the same institution might be the most desirable of safe havens.")

[44] *Rosecrance v Rosecrance* (1995) 129 FLR 310 (plaintiff cared for at home by his wife before trial); *Wieben v Wain* (1990) Aust. Torts Reports 81-051 (plaintiff's marriage given significant weight).

[45] *Andrews v. Grand & Toy Alberta* (1978) 2 S.C.R 229; *Thornton v. Board of Trustees of School District No. 57* (1978) 2 S.C.R. 267; *Arnold v. Teno* (1978) 2 S.C.R. 287.

damages for personal injuries.[46] Dickson J. noted[47] that an award of damages must be fair to both parties. The ability of the defendant, however, to pay damages has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by ensuring that the claims raised against him or her are justifiable.

34. The gravamen of the approach in the Supreme Court of Canada is illustrated in the reasons of Dickson J. in *Thornton*,[48] who observed that the large award of damages in that case was warranted by reason of a change in medical evidence and practice, not change in legal principles. It recognised the revolution in rehabilitative and physical medicine in the recent years prior to the judgment: "the current enlightened concept is to dignify and accept the gravely injured person as a continuing, useful person of the human race, to whom every assistance should be afforded with a view to his reintegration in society."[49]

England

35. Seven years after the decision in *Sharman v Evans*, the Court of Appeal of England and Wales in *Rialis v. Mitchell*[50] considered a claim by an infant plaintiff who had sustained severe brain damage resulting in quadriplegia as a consequence of the negligence of the defendant. The child lived at home with his parents and siblings. It was accepted that the home, a council house, was inadequate to adapt to make it suitable for looking after a quadriplegic. The contest was whether it was reasonable for the plaintiff to be compensated on the basis that he would be cared for at home.

36. Stephenson L.J.[51] observed that the first issue the Court must consider is not whether other proposed treatment or care is reasonable but whether the treatment chosen and claimed for by the plaintiff was reasonable. The defendant was answerable for what was reasonable human conduct and if the plaintiff's parents' choice was reasonable, the defendant was no

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[46] *Andrews v. Grand & Toy Alberta* (1978) 2 S.C.R 229 at 240, 241.
[47] *Andrews v. Grand & Toy Alberta* (1978) 2 S.C.R 229 at 240 at 242.
[48] *Thornton v. Board of School Trustees* (1978) 2 S.C.R. 267 at 276.
[49] *Thornton v. Board of School Trustees* (1978) 2 S.C.R. 267 at 276.
[50] [1984] SJ 704; (Court of Appeal of England and Wales, Lord Justice Stephenson, Lord Justice O'Connor and Sir Denys Buckley, 6 July 1984).
[51] *Rialis v. Mitchell* (Court of Appeal of England and Wales, Lord Justice Stephenson, Lord Justice O'Connor and Sir Denys Buckley, 6 July 1984) 14. See also *Robshaw (a child) v. United Lincolnshire Hospitals NHS Trust* [2015] EWHC 923 (QB) at [162] to [164]; *Ellison v. University Hospitals of Morecambe Bay NHS Foundation Trust* [2015] EWHC 366 (QB) at [18] to [20]; *Heil v. Rankin* [2001] 2 QB 272; *Whiten v. St Georges* [2011] EWHC 2066 (QB) at [5].

less answerable and obliged to pay damages even if he was able to point to a cheaper treatment which was also reasonable.

37. O'Connor L.J. agreed. He observed[52] that the starting point was not to assess the reasonableness of living in a private house and institution as alternatives such that the calculation would be one largely relating to cost and benefit. The starting point was the circumstances of the plaintiff immediately prior to the injury and the choice that was made by the plaintiff (or those responsible for him) as to what their living arrangements might be following the award of damages. The reasonableness of that choice was the starting point in the calculation as to whether the damages were reasonable or otherwise.

38. Two critical matters emerge from the reasons in *Rialis* as being significant in the assessment of damages for future care.

39. First, the importance of respecting and evaluating the choice of the plaintiff as to why he or she might wish to live privately in the community and determining whether that choice was reasonable. Second, the fact that living in his own residence may increase his enjoyment of life is a factor that should be taken into account.

40. *Rialis* was applied in *Sowden v. Lodge, Crookdake v. Drury*[53] where Pill L.J. observed[54] that the test to be applied was not what was in the "best interests" of the injured plaintiff but that which "most nearly restores her to the position in which she would be but for the accident". His Honour concluded that "paternalism did not replace the right of a claimant, or those with responsibility for the claimant, making a reasonable choice."

Court of Appeal Error

41. Boddice JA identified at CAB 75; CA [85] the paramount principle that compensatory damages are awarded to restore a plaintiff to the position that person would have been in had the wrong not been committed. Accordingly, expenses which may be reasonably incurred by a plaintiff in the nature of medical and nursing expenses, are recoverable, subject to a touchstone of reasonableness.[55]

42. His Honour wrote at CAB 75; CA [86] that "reasonableness is to be viewed in the context of health benefits to the plaintiff". Where the health benefits to the plaintiff are significant,

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[52] At page 8.
[53] [2005] 1 WLR 2129.
[54] [2005] 1 WLR 2129 at [38].
[55] CAB 75; CA [85].

damages for medical and nursing expenses are properly to be awarded, even if the cost is great. Conversely, if the cost is great and the benefits to health are slight or speculative, awarding the costs of such treatment would be unreasonable. Cost is not a sufficient ground for automatically excluding matters of amenity. For that reason, any assessment of reasonableness turns primarily on the factual circumstances of the particular case.[56]

43. The holding in CAB 75; CA [86] that reasonableness was to be viewed in the context of the "health benefits to the plaintiff" contains a risk of deflection from the paramount principle that the plaintiff should be awarded a sum of money that will, as nearly as possible, put him in the same position as if he had not sustained the injuries.

44. The notion that reasonableness is simply to be viewed in the context of the so-called health benefits to the plaintiff omits to identify that matters of amenity, including the choice that the plaintiff has made to live in his own residence, with people he chooses to live with, is an important feature in the application of the paramount principle. The choice a plaintiff has made in such a case is the unexceptionable human wish to suffer as little destruction of the amenity of the plaintiff's way of life, which would likely have continued but for the wrongful injury.

45. At CAB 75; CA [89], Boddice J.A. noted the undisturbed finding at trial by which "… the primary judge expressly recognised that living in a private home, with Jesse and a dog, was likely to increase Mr Stewart's motivation to engage in therapy and exercise."[57] The appellant bore no onus to establish that he would engage in additional therapy and exercise only if he were to move into his own home. Even if, contrary to the undisturbed finding, there were no better prospects of successful therapy at home compared to an institution, that would leave the manifest and reasonable benefit to the appellant of receiving the therapy at home as the state of affairs according to which damages should be measured.

46. At CAB 75; CA [90], His Honour notes that the trial judge concluded that it had not been established, on the balance of probabilities, that living in his own home with Jesse and a dog would be likely to result in health benefits for the appellant that were "significantly better" than those likely to be achieved at the care facility.

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[56] CAB 75, CA [86].
[57] CAB 30, 31; SC [138], [145].

47. Again, the appellant bore no onus to prove that any health benefits would be "significantly better" were he to move to his own home in the context of the benefits likely to be achieved at Ozanam in an ameliorated environment of therapy and care.

48. Nowhere in the reasoning process at CAB 75, 76; CA [89] to [95] was there any consideration or weight given to the reasonableness of the appellant's choice to live in the community with his son and his dog, the amenity to his life as a consequence, and the fact that the type of care arrangements being sought were common in the community.

49. The appellant submits that the failure to weigh those factors into the consideration of determining the award of damages was an error.

10 50. First, the value of being at home with family was an important amenity to the appellant. For a person to choose where they live, who they live with and the environment in which they live, are important features in recognising the dignity of the individual.[58]

51. The determination as to whether it was reasonable for the respondent to pay the additional cost of therapy and care in the appellant's own residence as opposed to the provision of additional care and therapy in Ozanam should have included consideration of the appellant's express wish to live in the community and the fact that he had lived in the community prior to sustaining his injuries. The appellant's choice was reasonable.

52. Second, matters of amenity were relevant to the choice of the plaintiff. While Boddice J.A. identifies that "cost is not a sufficient ground for automatically excluding matters of
20 amenities (*sic*)", matters of amenity were largely ignored in the ultimate analysis of whether it was reasonable for the respondent to pay the additional costs associated with the appellant living in his own residence in the community.

53. The appellant was and is unhappy living at Ozanam. There were significant health, psychological and emotional benefits to him in moving to his own residence. The enhancement to his life of sharing his residence with his son, Jesse, and a dog were important matters that should have been considered independently of whether they provided any particular health benefit.

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[58] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1, 12, 17 and 23; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 19.

54. Third, the living, care and therapy arrangements sought by the appellant were of a kind commonly undertaken in the community, particularly for persons receiving benefits under the National Disability Insurance Scheme. These were not extravagant claims beyond what would ordinarily be provided in the community for persons in a similar situation. Community standards and expectations have surely changed significantly since *Sharman v Evans*.

55. Moreover, once the appellant had established the matters identified in by the trial judge at CAB 30; SC [140],[59] that the provision of comprehensive care and therapy to him in his own home would "result in health benefits for Mr Stewart", the appellant had satisfied the *Sharman* test. This was not a case where the "cost is very great and benefits to health slight or speculative". The appellant was not obliged to demonstrate that the health benefits would be "significantly better". There is no "principle" in *Sharman v. Evans* that requires the Court to prefer an alternative plan for the plaintiff's provision that would be less expensive albeit with less amenity for the plaintiff than would have been enjoyed by him but for the wrongful injury.

56. As was identified in *Rialis*[60], the issue to be determined was whether the choice by the appellant to live in his own home with his family was a reasonable choice in the circumstances. The issue is not whether other treatment, or less expensive treatment, was reasonable.

57. The decision that the trial judge had therefore not erred was, with respect, an erroneous application of the paramount principle.

PART VII: ORDERS

58. Appeal allowed;

59. Set aside the Orders of the CA and order that:

    (a) The appeal to the CA be allowed;

    (b) The matter be returned to the trial judge for the determination of the quantum of damages;

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[59] Extracted at paragraph [18] above.
[60] [1994] SJ 704.

(c) Order that the respondent pay the appellant's costs in this court and the courts below.

PART VIII: TIME ESTIMATE

60. It is estimated that up to two hours will be required for the appellant's oral argument (including the reply).

Dated 17 April 2025

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