HIGH COURT OF AUSTRALIA

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Details of Filing

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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 REPLY

PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: REPLY

2. Paragraph 4 of the Respondent's Submission (**RS**) correctly details the legal ownership of the Appellant's premises in Redcliffe. It was the home in which, as noted in the Appellant's Submissions (**AS**) at [7], that Jesse regularly stayed with the Appellant immediately prior to the events giving rise to the claim.

3. With respect to RS [5] to [7], the Appellant notes the findings of the CA that the Appellant "had been and remained, unhappy"[1] because he resides at Ozanam. The Respondent submits that the CA, in summarising the findings of facts made by the primary Judge, appear to have adopted the Appellant's framing of the facts found which went beyond those actually determined below.[2]

4. Irrespective of whether the trial Judge expressly found that the Appellant "has been and remains unhappy", the trial Judge clearly accepted the evidence of Dr Rotinen Diaz to that effect.[3] Dr Rotinen Diaz gave evidence that he asked the Appellant "if he was happy living at the Ozanam Villa and he produced a very strong and clear 'no'. At the same time his body language changed, and he appeared angry and agitated."[4]

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[1] CAB69; CA [52].
[2] RS [5].
[3] For example, CAB 30; SC [136].
[4] CAB 17; SC [74].

Dr Rotinen Diaz repeated the question three times and obtained the same answer on all three occasions.[5] The Appellant repeats the matters set out at AS [9] to [13].

5. The assertions at RS [7] that the Appellant's aphasia has rendered him incapable of consequential or abstract thinking, and that he is in the '*here and now*', are contrary to the undisturbed findings of the trial Judge. The Appellant's brain damage has caused him receptive and expressive aphasia, which is an impairment of his ability to comprehend and produce language.[6] The trial Judge rejected neuropsychological evidence suggesting that the appellant had broader cognitive deficits.[7] The evidence cited by the respondent at RS [7][8] is that of Marnie Cameron, a speech pathologist, who was referring to the appellant's ability to *converse* beyond the 'here and now' (and was understood by the trial Judge as such).[9] Ms Cameron did not opine on the authenticity of the Appellant's expressions of a desire to live independently as interpreted by other witnesses including Dr Rotinen Diaz, a rehabilitation physician.[10]

6. The evidence as a whole supported the finding (not assumption)[11] by the trial Judge that the Appellant would prefer to live in his own residence. The trial Judge did not find – contrary to what is put at RS [7] – that the Appellant did not appreciate the potential negative aspects of moving to a private residence. Rather, it was not possible for his Honour to determine whether he appreciated those matters. This did not need to be determined because his Honour was comfortable proceeding on the basis that the Appellant would prefer to live independently rather than at Ozanam even if he did not appreciate all such difficulties.[12] It must be inferred from this that his Honour did not consider that a full appreciation of the possible downsides of moving would have relevantly altered the Appellant's preference or choice. The Respondent's submission at RS [7] (that the Appellant's expressions of a desire to move are meaningless) is an attempt at rewriting the trial Judge's findings.

7. At RS [11], the Respondent submits that application of the compensatory principle requires "identification of a Plaintiff's living arrangements prior to the injury, what

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[5] CAB 17; SC [74].
[6] CAB 9; SC [26].
[7] CAB 19, 20; SC [84].
[8] ABFM 111; Transcript SC 3-101 l 33.
[9] CAB 17; SC [69].
[10] CAB 17; SC [74].
[11] See AS [13].
[12] CAB 20; SC [87].

realistic living arrangement, post-injury, would as best as possible restore those living arrangements, and assessing whether requiring a tortfeasor to pay damages for the latter is within the bounds of reasonableness." The Respondent's submission as to the proper application of the compensatory principle does not appear to include reference to the choice or desire of where the Appellant would like to live.

8. At RS [12], the Respondent submits that the Appellant, at AS [30] to [32], conflates the proper approach to the application of the compensatory principle and ignores the "primacy given to the compensatory principle within it". The Appellant submits that the "choice" as to where the Appellant would like to live is centrally relevant to the identification task outlined above and is relevant to identifying the claimed restorative living arrangements against which reasonableness is to be measured. Where the "choice" as found by the trial Judge was that the Appellant wished to live independently, the central question became whether that choice was reasonable and not the cost associated with that choice. The Appellant otherwise relies upon his submissions in AS [49] to [57].

9. At RS [26], the Respondent submits that the Appellant did not "articulate to the Primary Judge the approach now posited". Of course, this appeal to this Court is from the decision of the Court of Appeal; nonetheless, the Appellant did expressly submit at trial that a factor weighing in favour of damages reflecting the cost of independent living was that the Appellant's "desire to live independently is, of itself, a relevant factor in favour of independent living."[13] Moreover, the Appellant submitted at trial that while the "central focus is on health benefits, matters of amenity can also be taken into account."[14] The Appellant's expressed wish to live in his own residence was raised in the CA Notice of Appeal and was again advanced in the Appellant's submissions before the CA.[15] There is no basis for any suggestion of unfairness to the Respondent.

10. As to RS [27], the Appellant led evidence at trial about the ready availability of rental properties in the Redcliffe area.[16] Absent the funds to leave Ozanam, the Appellant

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[13] RBFM (Volume 1) 437; Appellant's Submissions at trial, paragraph [22].
[14] RBFM (Volume 1) 435; Appellant's Submissions at trial, [18] and the relevant authorities cited therein.
[15] Supplementary Book of Further Materials (**SBFM**) 16, 19, 21, 36, 38; Notice of Appeal, [5](a); Appellant's Amended Outline of Argument in Reply (CA), [4], [12]; Transcript CA 1-4 line 34, 1-6 lines 27 to 47.
RBFM (Volume 2) 519; Appellant's Amended Outline of Argument, [9](a), [33].
[16] RBFM (Volume 1) 286, 288; Transcript SC 5-62 line 35, 5-64, lines 28 to 34.

had no option other than to present the case in a hypothetical. That was in the context of evidence of expert witnesses engaged in facilitating care arrangements where 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.[17]

11. As to RS [29], the Appellant accepts that the Primary Judge started by finding in the Appellant's favour that his "choice" was that his living arrangements be restored as near as possible to his pre-injury living arrangements so that he could reside in a private rental residence. But nowhere in the ultimate reasoning process[18] was there any consideration or independent 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.[19]

12. As to RS [32] and the submission that the 'Court of Appeal was not asked to consider the factors upon which the Appellant now relies "*independently of whether they provided any particular health benefit*"', the Appellant expressly referred to those matters in submissions to the Court of Appeal,[20] and as otherwise referred to in the reply to RS [27] above.

13. As to RS [38] and the suggestion that the evidence did not support a finding that there were significant "psychological and emotional benefits" to the Appellant moving into his own residence, the trial Judge accepted the evidence of Dr Rotinen Diaz to the effect that there would be significant physical and psychological benefits from exercising, living in his own home environment, establishing some control in his own environment, being provided with his own personal carers and sharing his living space with his family and animals, including his dog.[21]

14. As to RS [39], the unhappiness the Appellant experienced living at Ozanam (and his desire to live elsewhere) was a significant feature of the Appellant's case from the commencement. The Amended Statement of Claim pleaded the appellant's desire to

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[17] ABFM 64, 65, 87, 249, 305, 318; Transcript SC 3-54; 3-55; 3-77, 45 – 47; transcript SC 6-15; 4-8, transcript SC 6-71, 4-10, Exhibit 57; report of John Hart, page 5.
[18] CAB [38] – [39]; SC [185] – [186].
[19] See also CAB 75, 76; CA [89] to [95].
[20] RBFM (Volume 2) 524, 525; Appellant's Amended Outline of Argument (CA), [32] to [35].
[21] CAB 25, 26, 28, 30; SC [114] to [119]; [131]; [136] to [140].

leave Ozanam for various reasons consistent with him being unhappy with his situation and the Appellant's Amended Reply pleaded that residence at Ozanam had been 'distressing' for him and that he does not wish to reside there any longer.[22] The Appellant submitted at trial that the Appellant was unhappy at Ozanam, by reference to the evidence of him screaming, refusing to leave his bed unless his family are present, and declining to participate in activities at Ozanam.[23]

15. As to RS [45], the Respondent submits that it was "no part of the Appellant's case at trial that in the course of assessing reasonableness, weight ought to be given to the fact that delivering therapy and care at a private residence was commonly undertaken in the community". The issue was advanced in evidence,[24] and was argued (without objection) in the Court of Appeal below.[25]

Dated 15 May 2025

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[22] RBFM (Volume 1) 104, 105; Amended Statement of Claim, [30], [31].
SBFM 13; Amended Reply, [37](d).
[23] RBFM 493, 494; Transcript SC 9-12 ll 44-48, 9-13 ll 1-10 (incorrectly marked 4-12 and 4-13).
[24] 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.
[25] SBFM 17; Notice of Appeal, ground 5(c).