HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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STEWART V METRO NORTH HOSPITAL AND HEALTH SERVICE

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

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

1. The conclusions at SC [138], [140], [145] and [186] CAB 30, 31 create a tension between the reasonableness of the appellant's life choice, to live in his own home with the company of his son and dog, and the considerably greater expense that choice would visit on the respondent in order to provide the level of special care that the appellant uncontroversially needed because of the respondent's tort. **(AWS [43], [44])**

2. The CA's decision failed to correct the first instance error in seeking to resolve that tension, by failing to give proper regard to the significance of the appellant's choice, not to live in the institution where he was so unhappy. The CA reasons at [85]-[95] CAB 75 in particular elide the significance of the choice of the appellant, and to the contrary govern the assessment of damages by preferring the least expensive available course for the respondent, the wrongdoer. **(AWS [48] – [51])**

3. Before the respondent's negligence ruined his health, the appellant lived at home. The respondent's wrongdoing created the need for special care, which could be provided at home or in an institution. The appellant preferred the former and manifested his choice by the claimed measure of damages. At this stage in the litigation, the need for the special care and the measure of damages to fund its costs (at home or in the institution with appropriate enhancements) are not controversial. If anything, the accepted greater motivation for the appellant if he lived at home to obtain the health benefits of that special care, would favour home over institution, notwithstanding the health benefits of the special care to be provided was held to be more or less equivalent at home or in the institution. **(AWS [6] – [8], [50] – [53])**

4. The CA reasons (eg [85], [86], [93]) CAB 75 appear to depend on a misreading of *Sharman v Evans*. There is no rule let alone principle to be found in the reasons for that decision which justify (or require) ignoring an injured plaintiff's reasonable choice to receive requisite special care at home rather than in an institution. That choice was unavailable to Miss Evans. But among the various reasons the passage in those of Gibbs and Stephen JJ at 138 CLR 571 - 575, (agreed in principle by Jacobs J at 590) strongly suggests that, had Miss Evans been able to make the choice of care at home, the high cost to the defendant through damages would not have prevented such a plaintiff from recovering it by application of "the criterion of reasonableness". **(AWS [30], [31])**

5. Because money can provide special care at home rather than in an institution, damages payable by the wrongdoer may be appropriately measured by the cost of the former rather than the latter, if the choice to be at home is "reasonable". On the findings in this case, and probably typically, there will be no deficiency of health benefit if the care is provided at home compared to in an institution. That exposes the illegitimate use of the greater expense to the defendant of care at home as the basis for the erroneous decision in this case. **(AWS [50] – [56])**

6. This Court should now improve the "clarity of analysis" attempted by Gibbs, Stephen and Jacobs JJ in *Sharman v Evans* (at 575, 590) in particular in relation to the way in which damages for loss of amenity "must interact with other heads of damages" including the cost of future care. Given the paramount principle for compensatory damages payable by a negligent defendant, a choice as reasonable as preferring home to an institution should suffice to require damages to be measured by the cost of restoring, on that basis, so far as money can the position of an injured person who prefers to be cared for at home. **(AWS [26] – [32]; AWR [8], [11])**

7. It is illogical to limit a component of damages necessary to pay for requisite care to the cost of doing so in an institution when a plaintiff has made the choice of being cared for at home, on the unattractive basis that it is merely a matter of "amenity" to prefer to be at home. It is also contrary to the approach taken on

the facts of *Sharman v Evans*, to a component of damages which was avowedly a matter of amenity, in order to fund the high cost of Miss Evans going home "every few weeks". **(AWS [30] – [32])**

8. None of this argument is precluded by the course and content of the arguments in the courts below, such as to bar it by application of *Suttor v Gundowda*. **(AWR [9], [12], [14], [15])**

10 June 2025

Bret Walker