HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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# Form 27D—Respondent's submissions

Note: See rule 44.03.3.

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

## RESPONDENT'S SUBMISSIONS

### PART I: CERTIFICATION

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

### PART II: STATEMENT OF ISSUES

2. Mr Stewart claimed damages to be assessed on the basis he would reside and receive care and therapy in an unidentified private rental property. The sole issue is whether the Court should have taken (but did not take) into account each of the following matters when applying the moderating test of reasonableness to Mr Stewart's claim:

   (a) Mr Stewart had lived in the community prior to sustaining his injuries;

   (b) Mr Stewart's (assumed) expressed wish to live in the community;

   (c) Mr Stewart's (asserted) unhappiness living at Ozanam;

   (d) the enhancements to Mr Stewart's life of sharing his residence with his son and a dog;

(e) the living, care and therapy arrangements claimed by Mr Stewart were *"of a kind commonly undertaken in the community"*.

## PART III: SECTION 78B NOTICES

3. Notice does not need to be given under s 78B of the *Judiciary Act 1903* (Cth).

## PART IV: STATEMENT OF FACTS

4. The Respondent, **M**etro **N**orth **H**ospital and **H**ealth **S**ervice agrees with the facts stated in paragraphs [6] and [7] of the **A**ppellant's **S**ubmissions but, to avoid confusion with respect to the reference to *"family home"*, adds that this was the two-bedroom house the Appellant shared with his brother at the time of his injuries (in 2016), rather than a home he shared with Ms Schwarzman and Jesse. It had been the family home when he was a child. His parents had left the house on a testamentary trust for the use and benefit of the Appellant and his brother, Peter, during their lives. If, and only if, they vacated the house during their lifetimes could it be sold, and then the proceeds shared between the Appellant, Peter and another brother, David.[1]

5. With respect to AS[9] (and AS[53]), on 29 November 2016, Mr Stewart was discharged to Zillmere Interim Care, a nursing home, then transferred to Regis nursing home. Since March 2017, he has resided at **Ozanam** Villa Aged Care Facility at Clontarf. The **P**rimary **J**udge made no finding that Mr Stewart *"has been and remains unhappy"* because he resides at Ozanam. The **C**ourt of **A**ppeal, in summarising the findings of facts made by the primary judge at CAB 69; CA[52] appears to have adopted the Appellant's framing of the facts found, which went beyond those actually determined below.[2] As the Appellant had pre-existing chronic depression and anxiety[3] it is accepted that he may from time to time be

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1 The Appellant did not own this residence. He held, jointly with his brother, a life interest in the residence which permitted his joint use and benefit of it, free of all duties, but subject to the payment by him and his brother of all rates, levies, taxes, insurance premiums, repairs and other outgoings: Last Will and Testament of Noreen Frances Stewart dated 12 April 1995; Last Will and Testament of David Alphonsus Stewart dated 12 April 1995: ABFM 339 to 342. Pre-incident, the Appellant's only source of income was the Disability Support Pension. He had no assets or savings. He had personal debt of about $15,000 and paid his brother, Peter, $100 per week for rent and utilities: RBFM 19 (Statutory Declaration of Ms Schwarzman executed 16 September 2021).

2 RBFM 521 (Plaintiff's Appeal Submissions in CA4488/24 at [13]).

3 In respect of which he received Disability Support Pension payments from Centrelink. Dr Jeff Karrasch, General Physician, in his report dated 16 June 2020 provided the following summary

*"unhappy"*,[4] but no finding was made by the primary judge that Mr Stewart *"had been and remained, unhappy"* at Ozanam (or, indeed, was unhappy *because* of his living arrangements at Ozanam). The Respondent took issue with this framing of the findings by the Primary Judge in its submissions in the Court of Appeal.[5]

6. With respect to AS[10] and [11], the evidence of Ms Orr is relevant: for some time Mr Stewart attended music concerts and was taken outside for a walk (CAB 20, 21; PJ[88]), Mr Stewart has the opportunity to, but does not, share meals with other residents and engage in the *"family environment"* that exists[6] including with others his age,[7] to host friends and family at locations at Ozanam other than within his room,[8] to agree with management to have a budgerigar or a cockatiel in his room[9] and to spend time with animals belonging to visiting volunteers and staff members.[10] Ms Schwarzman gave evidence that Trudi, from Ozanam's activities team, had taken Mr Stewart out on a regular basis for a couple of months (CAB 22; PJ[98]).

7. While the Respondent agrees that several witnesses gave evidence of Mr Stewart's capacity to communicate (AS[12]), it is incorrect to characterise Mr Stewart as expressing a strong desire to live in a private residence where Jesse and a dog could stay with him. It would import a misperception that Mr Stewart conveyed a reason for any desire he may have for his responses.[11] Importantly, it may also incorrectly, with respect, convey that his responses involved a consideration of the potential disadvantages of moving from Ozanam as well as

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concerning Mr Stewart's depression: "There is a long history of what is described as severe depression going back to 2009, and in 2013 he was diagnosed by a psychiatrist as suffering a major depressive disorder (chronic) with anxiety. There are further multiple references to anxiety, panic attacks, and at least one report of contemplation of suicide. In 2015 the plaintiff is described as having visual hallucinations in association with his anxiety and depression, which would, in my opinion, indicate significant severity. An exacerbation of depression and anxiety was recorded in February 2016 shortly before the incident.": RBFM 10.

4 Ms Emma Orr, Mr Stewart's carer at Ozanam who engages with him five out of seven days of the week (CAB 16; PJ[67]), described Mr Stewart as happy, though he misses his family: RBFM 285 (Transcript of Proceedings, 3 November 2023 P-61 lines 12-16).

5 RBFM 533, 539, 540 (Defendant's Appeal Submissions in CA4488/24 at [4], [22]).

6 RBFM 255, 257 (Transcript of Proceedings, 3 November 2023 P-31 lines 6-13; P-33 lines 18-28 (Emma Orr)).

7 RBFM 257 (Transcript of Proceedings, 3 November 2023 P-33 lines 15-16 (Emma Orr)).

8 RBFM 256 (Transcript of Proceedings, 3 November 2023 P-32 lines 24-30 (Emma Orr)).

9 RBFM 259 (Transcript of Proceedings, 3 November 2023 P-35 lines 1-7 (Emma Orr)).

10 RBFM 282 (Transcript of Proceedings, 3 November 2023 P-58 lines 1-6 (Emma Orr)).

11 The primary judge made an express assumption (favourable to the Appellant) that he would prefer to live in his own residence: CAB 20; PJ[87].

what he is said to have perceived as advantages (*viz*., Jesse's presence and a dog). His aphasia has rendered him incapable of consequential or abstract thinking: he is very much in the *"here and now"*,[12] and each of Ms Schwarzman, Ms Coles and Dr Rotinen Diaz confirmed in cross-examination that they had not discussed potential disadvantages (and realities) of that arrangement with Mr Stewart when each of them separately asked if he wished to move out of Ozanam.[13] Absent any understanding of those negative considerations, any expression by Mr Stewart of a desire to move – taking into account only an idealised, illusory arrangement – is meaningless.

10 8. MNHHS agrees with the facts stated in AS[8] and [13] to [25].

## PART V: RESPONDENT'S ARGUMENT

### Summary of the Respondent's Argument

9. In summary, the appeal ought to be dismissed because:

(a) the principles relied on by the Appellant were consistent with the principles understood and applied by the primary judge and the Court of Appeal;

(b) the outcome was not the result of any error but rather, the result of the way the Appellant's case was conducted at trial;

(c) the factors raised by the Appellant were either taken into account or were not raised by him at trial; and

20 (d) there is no plain injustice or clear error. The finding, in the specific circumstances of this case, that it was not reasonable for the Respondent to pay the significant additional cost for the Appellant to reside and receive care and therapy in an unidentified private rental property instead of Ozanam was open on the evidence and absent error.

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12 ABFM 111 (Transcript of Proceedings, 1 November 2023 P-101 line 33 (Marnie Cameron)).
13 CAB 20; PJ[86].

**Principles**

10. Damages awarded to an injured person by reason of the negligence of another *"so far as money can do, will put* [the injured] *party in the same position as he or she would have been in if...the tort had not been committed"*[14] and is *"a fair and reasonable compensation for the injuries received"*.[15] In making that assessment all relevant factors and considerations particular to the plaintiff's circumstances are to be taken into account.[16]

11. Application of the compensatory principle requires identification of a plaintiff's living arrangements prior to the injury, what 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 process requires judgment, not calculation.[17] These are questions of fact to be determined on admissible evidence.[18] That is, once the identification exercise has been undertaken, the focus shifts to the question of reasonableness. The reasonableness test permits flexibility in approach *"to the multifarious situations of tortious compensation"* and imposes no rigid or inflexible rule.[19]

12. The Appellant's submissions at AS[30]-[32] conflate this approach, ignoring the primacy given to the compensatory principle within it. The "choice" as to where a plaintiff would like to live is centrally relevant to the identification task outlined above; and it is relevant to identifying the claimed restorative living arrangement against which reasonableness is to be measured. Properly understood, *Sharman v Evans* does not *"reflect a problematic application of the paramount principle"*

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14 *Todorovic v Waller* (1981) 150 CLR 402 at 412 (Gibbs CJ and Wilson J), 431 (Stephen J); *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

15 *Arthur Robinson (Grafton) Pty Limited and Anor v Cater* (1968) 122 CLR 649 at 656 (Barwick CJ); *Chulcough v Holley* (1968) 41 ALJR 336 at 338 (Windeyer J); *Sharman v Evans* (1977) 138 CLR 563 at 568 (Barwick CJ), 573 (Gibbs and Stephen JJ); *Todorovic v Waller* (1981) 150 CLR 402 at 413 (Gibbs CJ and Wilson J), 442 (Mason J); *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5; (2023) NSWLR 557 at [92] (Kirk JA and Griffiths AJA).

16 *Chulcough v Holley* (1968) 41 ALJR 336 at 337 (Barwick CJ); *Weideck v Williams* [1999] NSWCA 346 at [10] (Davies AJA).

17 *Amaca Pty Ltd v Latz* (2018) 264 CLR 505 at 534 [92] (Bell, Gageler, Nettle, Gordon and Edelman JJ).

18 *Sharman v Evans* (1977) 138 CLR 563 at 573 (Gibbs and Stephen JJ).

19 *Port Stephens Shire Council v Tellamist Pty Ltd* [2004] NSWCA 353; (2004) 135 LGERA 98 at [186] (Santow JA).

(AS[30]) and rather provides common sense guidance, as to the assessment of the reasonableness as a *"reality check"*[20] of the identified restorative living arrangement:[21]

> The touchstone of reasonableness in the case of the cost of providing nursing and medical care for the plaintiff in the future is, no doubt, cost matched against health benefits to the plaintiff. If cost is very great and the benefits to health slight or speculative the cost-involving treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits. When the factors are more evenly balanced no intuitive answer presents itself and the real difficulty of attempting to weigh against each other two incomparables, financial cost against relative health benefits to the plaintiff, becomes manifest. The present case is however one which does to our minds allow of a definite answer; it is a case of alternatives in which the difference in relative costs is great whereas the benefit to the plaintiff of the more expensive alternative is entirely one of amenity, in no way involving physical or mental well-being. This may be demonstrated from the evidence.

13. Assessing reasonableness where an alternative living arrangement exists may be informed by asking, for example, *"…What are the relevant benefits? If the more expensive approach is adopted, what would be the benefit to the respondent and would the benefits be commensurate with the extra cost?"*[22] The tempering effect of reasonableness means that *"*[i]*t does not follow that every expenditure which might be advantageous for a plaintiff as an alleviation of his or her situation or which could give him or her happiness or satisfaction must be provided for by the tortfeasor."*[23] Perfect compensation may be unreasonable[24] as the reasonableness test provides *"a restraint on extravagant awards"*.[25] The end result of proper application of the test is therefore not to identify *"the ideal requirements but … the reasonable requirements"* of the plaintiff.[26] What is reasonable is quintessentially a question of fact.[27]

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20 *Diamond v Simpson (No 2)* [2003] NSWCA 67; (2003) Aus Tort Reports 81-695 at [23] (Stein and Ipp JA and Young CJ In Eq).
21 *Sharman v Evans* (1977) 138 CLR 563 at 573-574 (Gibbs and Stephen JJ).
22 *Farr v Schultz* (1988) 1 WAR 94 at 113 (Wallace J).
23 *Chulcough v Holley* (1968) 41 ALJR 336 at 338 (Windeyer J).
24 *Uzabeaga v Town of Cottesloe* [2004] WASCA 57; (2004) Aust Tort Reports 81-739 at [58].
25 *Northern Territory of Australia v Griffiths* (2017) 256 FCR 478 at [376] (North ACJ, Barker and Mortimer JJ).
26 *Sharman v Evans* (1977) 138 CLR 563 at 573 (Gibbs and Stephen JJ) citing *Chulcough v Holley* (1968) 41 ALJR 336 at 338 (Windeyer J).
27 *Arthur Robinson (Grafton) Pty Limited and Anor v Cater* (1968) 122 CLR 649 at 655-556 (Barwick CJ); *Chulcough v Holley* (1968) 41 ALJR 336 at 337 (Windeyer J); *Sharman v Evans* (1977) 138 CLR 563 at 573 (Gibbs and Stephen JJ).

14. The legal onus of proving the quantum of damage always rests with the plaintiff.[28]

15. It is a misapplication of principle to submit that, provided the Appellant could prove more than slight or speculative health benefits in a private residence, then damages *must* be awarded on that basis (AS[55]). The touchstone is reasonableness. A relevant consideration to that is whether there is an alternative and relatively inexpensive mode of treatment affording equal or only slightly lesser benefits. A further relevant (and separate) consideration is the cost.[29]

16. The Canadian and English authorities relied upon by the Appellant exemplify, rather than derogate from, these principles. There is no inconsistency of approach.

10 17. In the trilogy of Canadian cases referred to by the appellant: (a) each involved a young severely injured claimant; (b) the touchstone of the recoverability of future expenses was reasonableness (rather than complete or perfect compensation);[30] (c) the inquiry was fact specific;[31] (d) all evidence in each case supported only one outcome: the provision of future care in a private residence[32] – that arrangement being productive of health benefits;[33] and, (e) there was no evidence adduced as to the existence of any satisfactory alternative arrangement.[34] It was in that context (with the defence to each claim being focussed on cost rather than realistic alternatives) that Dickson J made the observation cited in AS[33] (which is irrelevant: the MNHHS' ability to pay damages was no part of its case at trial
20 or on appeal).

18. Further, the remark of Dickson J cited in AS[34] was made in the context where (prior to 1978) the *"gravely handicapped were relegated to institutions where they could look forward to little other than an early demise."*[35] In making that

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28 *Purkess v Crittenden* (1965) 114 CLR 164 at 167, 168.
29 *Sharman v Evans* (1977) 138 CLR 563 at 573-574.
30 ***Andrews*** *v Grant & Toy Alberta* (1978) 2 SCR 229 at 241-242; ***Arnold*** *v Teno* (1978) 2 SCR 287 at 332-333; ***Thornton*** *v Board of Trustees of School District No 57* (1978) 2 SCR 267 at 280-281.
31 *Andrews* (1978) 2 SCR 229 at 246-248; *Arnold* (1978) 2 SCR 287 at 322; *Thornton* (1978) 2 SCR 267 at 277-278.
32 *Andrews* (1978) 2 SCR 229 at 244-245; *Arnold* (1978) 2 SCR 287 at 322; *Thornton* (1978) 2 SCR 267 at 273, 278, 280.
33 *Andrews* (1978) 2 SCR 229at 238, 244-245; *Arnold* (1978) 2 SCR 287 at 322; *Thornton* (1978) 2 SCR 267 at 271, 273, 278, 280.
34 *Andrews* (1978) 2 SCR 229 at 244-245 (at 248 Dickson J referred to there being no "middle ground" between home care and auxiliary hospital care, identified); *Arnold* (1978) 2 SCR 287 at 322-323; *Thornton* (1978) 2 SCR 267 at 276-277, 281.
35 *Thornton* (1978) 2 SCR 267 at 276.

observation, the Court was referring to *young* gravely disabled persons and was doing so in the context where the only alternative to a private residence was an auxiliary hospital. There was no *"middle ground"* (as there is in the present case). The Court did not deny that something *other* than a private home environment could be reasonable. Rather, to establish that care in a private home was unreasonable on the grounds of cost, the Court (unexceptionally) identified that evidence was required that proper care could be provided in an appropriate environment at a *"firm figure"* less than the sum sought claimed.[36]

19. The Appellant's repeated emphasis as to the *reasonableness* of a plaintiff's *"choice"* as seemingly importing a different test (AS[36], [37], [39], [44], [51], [52], [56]) as opposed to it being relevant to identifying the restorative living arrangements against which reasonableness is measured, is not supported by the English authorities, properly understood.

20. The question on appeal in *Rialis v Mitchell*[37] was whether, as a matter of law, damages for future expenses and care ought to be confined to what a reasonable person (who was injured) would spend on themselves if they did not have access to exceptional financial resources.[38] That was (rightly) rejected. It was in that context that the Court observed the assessment of damages for future expenses was not that of a reasonable person but rather what was reasonable for the injured person.[39] The reference to a *"choice"* by Stephenson LJ was a reference to what is claimed by the injured person (i.e. what they say would be, as best as possible, restorative living arrangements) and directs the reasonableness inquiry to that choice and their circumstances.[40]

21. *Rialis* laid down no new test. It confirmed the relevant inquiry as being whether the plaintiff had proven, as a matter of fact,[41] that what he or she had claimed was reasonably necessary (not what was best or ideal) for his or her injuries,[42] and that

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36 *Thornton* (1978) 2 SCR 267 at 280-281.
37 ***Rialis*** *v Mitchell* (Court of Appeal of England and Wales, Lord Justice Stephenson, Lord Justice O'Connor and Sir Denys Buckley, 6 July 1984) (summarised at [1984] SJ 704).
38 *Rialis* at pages 8 to 9.
39 *Rialis* at pages 16 to 17 (O'Connor LJ), 25 to 26 (Stephenson LJ), 29 to 30 (Sir Denys Buckley).
40 *Rialis* at pages 25 to 26.
41 *Rialis* at page 18 (O'Connor LJ).
42 *Rialis* at pages 15 (O'Connor LJ), 23 to 24 (Stephenson LJ), 28 (Sir Denys Buckley).

*"*[t]*here may well be cases in which it would be right to conclude that it is unreasonable for a plaintiff to insist on being cared for at home…".*[43]

22. *Rialis* has not been held to establish any point of principle as to the *"importance of respecting and evaluating the choice of the plaintiff… and determining whether that choice was reasonable"* nor that *"living in* [one's] *own residence may increase… enjoyment of life is a factor that should be taken into account"* (*cf* AS[39]). Rather, post *Rialis*, the relevant test in England remains *"what are the plaintiff's reasonable requirements in all of the circumstances?".*[44] That assessment: (a) is fact dependant;[45] (b) requires, where there are reasonable alternatives, a need to examine the overall proportionality of the cost as against the benefit to be derived and to determine whether the same or a substantially similar result could be achieved by other, less expensive, means;[46] and (c) requires the demonstration of some *"real and tangible"* benefits – the provision of pleasure or potential pleasure (AS[39]) will not ordinarily be sufficient.[47] That is consistent with the Australian authorities outlined above.

23. That is, neither *Rialis* nor any other authority stands for the proposition that any assessment of the reasonableness of the plaintiff's choice requires one to ignore the existence of alternatives, the derivation or otherwise of health benefits, and the relative cost or whatever other factors are relevant to assessing reasonableness in the particular circumstances of any given case (*cf* AS[44], [48], [51], [52], [56]).

24. Otherwise, to the extent that it is submitted by the Appellant that the Canadian and English authorities deviate from the approach outlined above and demonstrate error in principle (AS[33]-[40]), they are irrelevant. The established

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43 *Rialis* at page 16 (O'Connor LJ).

44 ***Sowden v Lodge****; Crookdale v Drury* [2004] EWCA Civ 1370; [2005] 1 WLR 2129 at [38]-[41], [61] (Pill LJ), [90], [94] (Longmore LJ), [101] (Scott Baker LJ); ***Robshaw*** *(a child) v United Lincolnshire Hospitals NHS Foundation Trust* [2015] EWHC 923 (QB) at [162]; ***Whiten*** *v St Georges Healthcare NHS Trust* [2011] EWHC 2066 (QB) at [5]; ***Ellison*** *v University Hospitals of Morecambe Bay NHS Foundation Trust* [2015] EWHC 366 (QB) at [12]-[15].

45 *Sowden v Lodge* [2004] EWCA Civ 1370 at [38]-[41], [61]; *Robshaw* [2015] EWHC 923 at [295]; *Whiten* [2011] EWHC 2066 at [5]; *Ellison* [2015] EWHC 366 at [12].

46 *Sowden v Lodge* [2004] EWCA Civ 1370 at [41]; *Ellison* [2015] EWHC 366 at [13], [80], [130]; *Robshaw* [2015] EWHC 923 at [166]; *Whiten* [2011] EWHC 2066 at [5].

47 *Robshaw* [2015] EWHC 923 at [294].

principles outlined at paragraphs 10 to 14 above are not open to question in the context of the ground of appeal in respect of which special leave was granted.[48]

**The principles were understood and applied by the primary judge and the Court of Appeal**

***The Appellant's case at trial***

25. At trial, the Appellant identified five separate issues to be resolved by the primary judge including, relevantly:[49]

    (a) whether the Appellant should be awarded damages on the basis of the costs of him moving to independent living in the community, supported by his own carers and in appropriately modified accommodation (**Accommodation Issue**);[50]

    (b) whether the Appellant reasonably requires therapy – largely physiotherapy, speech therapy, and occupational therapy – and, if so, the cost of that therapy (**Therapy Issue**).[51]

26. Before the primary judge, the Appellant submitted that the principles referred to in paragraphs 10 to 14 above applied.[52] The Appellant did not articulate to the primary judge the approach now posited (AS[43]-[48]). Rather, on behalf of the Appellant it was submitted that *"…what your Honour will need to decide is whether the increased cost of independent living outweighs the health benefits to be derived from that change in circumstance."*[53] Contrary to AS[48] and [53], the

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48 Leave to appeal was not granted in respect of the proposed appeal ground 1(b) that "The Court of Appeal (CA) erred at {CA [88] to [95]} in determining that the trial judge did not err in failing to award the applicant an amount of damages that permitted him to live in his own home in that: the primary principle established in *Haines v Bendall* (1991) 172 CLR 60 that compensatory damages are awarded to restore a plaintiff to the position they would have been in had the wrong not been committed is not eroded by the principles in *Sharman v Evans* (1977) 138 CLR 563.": CAB 85, 86.

49 RBFM 434, 435 (Plaintiff's Trial Submissions at [15]); RBFM 124 (Transcript of Proceedings, 30 October 2023 P-5 line 22-23 (Plaintiff's Opening Address)).

50 RBFM 434 (Plaintiff's Trial Submissions at [15(a)]); RBFM 124 (Transcript of Proceedings, 30 October 2023 P-5 lines 24-26 (Plaintiff's Opening Address)).

51 RBFM 434 (Plaintiff's Trial Submissions at [15(c)]); RBFM 124 (Transcript of Proceedings, 30 October 2023 P-5 lines 37-39 (Plaintiff's Opening Address)).

52 RBFM 435, 436 (Plaintiff's Trial Submissions at [16]-[19]).

53 RBFM 124 (Transcript of Proceedings, 30 October 2023 P-5 lines 26-28 (Plaintiff's Opening Address)).

primary judge was not asked to consider the factors the Appellant now relies upon *"independently of whether they provided any particular health benefit."*

27. In respect of the Accommodation Issue, it was accepted by Mr Stewart that he is fully dependent on others for all of his care needs and that he could not return to his living arrangements immediately prior to his injuries.[54] It was ultimately[55] proposed that in order to restore him, as close as possible to his pre-injury living arrangements, he ought to be compensated to enable him to reside in an unidentified rental property[56] that would require modification to an uncertain extent[57] sourced from a restricted market[58] within an unspecified period of time.[59] That is, the way Mr Stewart's case was articulated reflected his choice of living arrangements.

28. It was submitted on behalf of Mr Stewart that *"*[t]*he touchstone of reasonableness in the case of the costs of providing nursing and medical care for the plaintiff in the future is the cost matched against health benefits to the plaintiff"*[60] (contrary to the way it is now submitted the issue is to be approached). The significant additional cost burden of that restorative arrangement was said, at trial, to be reasonable because (*cf* AS[2]):

(a) it was Mr Stewart's wish to leave Ozanam and live in his own home;[61]

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54 RBFM 466, 467 (Plaintiff's Trial Submissions at [152]-[159]).

55 In the Amended Statement of Claim at [33] (RBFM 105), the Appellant claimed the cost of $881,994.60 for home modifications or, alternatively, $1,500 per week for rental accommodation. In the Statement of Loss and Damage, the plaintiff claimed damages to a disability accessible, purpose-built house and pool (p 24) (as opposed to modifying his parent's house): RBFM 43. The total damages claimed in the Statement of Loss and Damage was $15,185,969.23 + standard costs + funds management fees: RBFM 65. The total damages relied on in the Plaintiff's Trial Submissions was $7,094,523.87: RBFM 468.

56 RBFM 466 (Plaintiff's Trial Submissions at [152]). Ms Helen Coles, Occupational Therapist could find nothing available on the rental market that would suit Mr Stewart: ABFM 88 (Transcript of Proceedings, 1 November 2023 P-78 lines 46-48).

57 RBFM 466, 467 (Plaintiff's Trial Submissions at [153]-[154]).

58 RBFM 467 (Plaintiff's Trial Submissions at [157]).

59 RBFM 288, 292 (Transcript of Proceedings, 3 November 2023 P-64 lines 28-40, P-68 lines 12-17 (Angela Morris)).

60 RBFM 435 (Plaintiff's Trial Submissions at [17]).

61 RBFM 436 (Plaintiff's Trial Submissions at [20(a)]); RBFM 485 (Transcript of Proceedings, 9 November 2023 P-4 lines 34-35 (Plaintiff's Closing Address)).

(b) Mr Stewart's quality of life will substantially improve in his own residence because he will be able to spend substantially greater time with his family, in particular Jesse, and he will be able to keep a dog;[62]

(c) the likely improvement to Mr Stewart's mood and psychological health which would in turn lead to Mr Stewart engaging more in activities, both recreational and therapeutic;[63] and

(d) the likely significant physical health benefits from living in his own home because the majority of therapy proposed is to be carried out by dedicated carers who will be attending upon Mr Stewart in his own home, overseen by allied health professionals which was contrasted with the kind of care that could be provided in the nursing home setting, where carers have responsibilities to multiple residents.

***Primary judge's reasons***

29. The primary judge correctly recognised that Mr Stewart's case was that *"damages should be assessed based on the costs of him moving to his own home so that he is able to live in the community in appropriately modified accommodation supported by his own carers"*.[64] That is, the primary judge started by assuming in Mr Stewart'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. His Honour then applied the *"reality check"* of reasonableness in the circumstances of Mr Stewart's case.[65] In light of the way Mr Stewart's case was advanced (see paragraph 27 above), it was an orthodox application of the moderating test of reasonableness, and in accordance with the way the parties advanced their cases, for the primary judge to consider whether that arrangement was reasonable in circumstances where: (1) Mr Stewart could continue to live at Ozanam; (2) Ozanam was the residence chosen for him by Ms

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62 RBFM 436 (Plaintiff's Trial Submissions at [20(b)]); RBFM 503, 504 (Transcript of Proceedings, 9 November 2023 P-22 line 47 to P-23 line 4 (Plaintiff's Closing Address)).
63 RBFM 436 (Plaintiff's Trial Submissions at [20(c)]).
64 CAB 6, 7; PJ[6].
65 See the heading above PJ[58] (CAB 14, 15).

Schwarzman and where he had lived for the previous seven years;[66] and, (3) where he would receive the same level of enhanced care at a much lower cost.

30. The primary judge understood the submission advanced by Mr Stewart referred to in paragraph 27 above[67] and weighed each of those matters in the course of ultimately deciding that it was not reasonable for MNHHS to make compensation upon the much more expensive basis that Mr Stewart reside in a private residence. The primary judge found with respect to each of those issues:

(a) Mr Stewart would prefer to live in his own home rather than at Ozanam.[68]

(b) living at a private residence would positively impact Mr Stewart's life in an overall sense including if appropriate arrangements were made for a dog to live with him.[69] Jesse's presence works as a powerful motivator for Mr Stewart to get out of bed and engage in therapy,[70] a finding made in the context of Jesse's intention to live with Mr Stewart while the new arrangements were settled and then, rather than live permanently with Mr Stewart, he would live back and forth with Mr Stewart and Ms Schwarzman.[71]

(c) it was desirous that efforts be made to improve and benefit, to the extent possible, Mr Stewart's health but the prospect of that occurring was dependant, according to Dr Rotinen Diaz, whose evidence the primary judge accepted, on Mr Stewart receiving additional care and therapy.

(d) Mr Stewart would likely experience mental health benefits if he were aided by greater engagement in therapy, activities and outings and, in that context, Mr Stewart's mental health would benefit in the medium to long term by moving to a private residence.[72]

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66 A clear distinction from the factual circumstances arising in *Rialis* where the injured child was 6 years of age and lived with his parents at the time he was injured and after a lengthy hospital admission, continued to live with his parents for four and a half years at the time of trial: *Rialis* at pages 15 to 16.

67 CAB 15, 16; PJ[62].

68 CAB 20; PJ[87].

69 CAB 37, 38; PJ[180], [186].

70 CAB 23, 30, 37; PJ[102], [138], [180].

71 CAB 22; PJ[101].

72 CAB 27, 28, 30; PJ[125], [126], [136].

(e) increased care and therapy would be likely to result in physical health benefits to Mr Stewart.[73] Mr Stewart is willing to undertake therapy and has the necessary level of understanding to do so.[74]

(f) dedicated carers, of the kind sought by Mr Stewart, could be provided both at Ozanam and at a private residence.[75]

(g) the provision of care and therapy to Mr Stewart in a private residence would increase his willingness to engage in therapy and other activities[76] and would result in health benefits for him which are not slight or speculative.[77]

(h) it was not the case that Mr Stewart would only engage in additional therapy and exercise and activities in the community if he resided at a private residence where he would enjoy the advantages that would come with him living in his own home.[78] Mr Stewart is likely to receive the same health benefits, or at least a very similar level of health benefits, if he engages in a similar amount of additional therapy and exercise at Ozanam.[79]

(i) as such, the primary judge was 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 and so it was not reasonable for MNHHS to pay the significant additional cost of $3,828,446.96[80] that would be involved in Mr Stewart residing in a private residence.[81]

***Appeal to the Queensland Court of Appeal***

31. By ground five of his appeal to the Queensland Court of Appeal, Mr Stewart contended that the primary judge erred in failing to have regard to the health benefits to be afforded by obtaining treatment whilst living independently, such as enhancing his quality of life in an overall sense. Those considerations, it was

73 CAB 30, 37; PJ[136], [180].
74 CAB 30; PJ[137].
75 CAB 24, 25, 33, 34, 38; PJ[113], [154], [158], [183].
76 CAB 30; PJ[138].
77 CAB 30; PJ[140].
78 CAB 37, 38; PJ[181], [182], [185].
79 CAB 37, 38; PJ[180], [185].
80 CAB 37; PJ[179].
81 CAB 38, 39; PJ[186].

submitted, supported a conclusion that the health benefits afforded by treatment at home, were greater than the benefits of additional care and therapy in a care facility.[82] The ground of appeal, therefore, was consistent with the Appellant's contention at trial that central to application of the reasonableness test in the circumstances of this case, were the provision of health benefits to Mr Stewart from being cared for in a private residence.

32. Boddice J (with whom Mullins P and Ryan J agreed) could discern no error in the findings of the primary judge, properly understood in that context. CAB 75; CA[85]-[87] was a recitation of the approach to be taken in the context of the way the issues were approached at trial and on appeal. The criticism of the Court of Appeal at AS[43]-[44], [48]-[49], [52], [53], [57] is unjustified in these circumstances. Contrary to AS[53], 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."*

33. Further, matters of amenity were not *"largely ignored"* (*cf* AS[52]). The Court of Appeal recognised that *"cost is not a sufficient ground for automatically excluding matters of amenities"* and for that reason *"any assessment of reasonableness turns primarily on the factual circumstances of the particular case"* (CAB 75; CA[86]). The Court of Appeal then identified those matters of amenity which were agitated by the Appellant at trial as relevant to his health and which were considered by the primary judge (CAB 69, 70; CA[52]-[55]) and, after a consideration of the *"evidence as a whole"*, did not disturb the relevant finding of the primary judge (CAB 75, 76; CA[88]-[95]).

34. With this in mind, for the reasons explained below, the Court of Appeal was correct in discerning no error in the reasoning of the primary judge.

**No error**

***Mr Stewart's pre-injury living arrangements were relevant to identifying the restorative living arrangement, not the reasonableness test and, in that context, were taken into account***

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[82] CAB 75; CA[87].

35. In identifying the relevant restorative living arrangement claimed by the Appellant, the primary judge, as outlined in paragraph 29 above, approached resolving the issue from the premise of restoring Mr Stewart as near as possible to his pre-injury living arrangements (i.e. his pleaded and claimed choice to reside in a private residence) and asked whether that was reasonable in the circumstances. Implicit in identifying a private residence as the standard against which reasonableness was measured, was recognition that Mr Stewart had lived in his own home prior to sustaining his injuries. It was a factor relevant to identifying what, as near as possible, restoration of Mr Stewart's pre-injury living arrangements would constitute. It is not, and nor was it said to be by the Appellant at trial, a factor that is only relevant to, or is to be separately revisited for the purposes of applying the reasonableness test. Contrary to AS[44] and [51], it was a factor that was taken into account in the application of the compensatory principle.

***Mr Stewart's assumed wish to live in the community was taken into account***

36. The Appellant's case before the primary judge was limited to establishing why he ought to be compensated to enable him to live in a private residence. There was no evidence that Mr Stewart expressed a wish to live *"in the community"*.[83] What there was evidence of, and what the primary judge and the Court of Appeal did take into account in assessing whether the substantial additional costs of him residing at a private residence were reasonable, was Mr Stewart's preference to live in his own home rather than at Ozanam.[84] That is why Mr Stewart residing in a private rental premises constituted, as best as possible, restoration of his pre-injury living arrangements and was the arrangement against which reasonableness was measured (*cf* AS[45], [51]).

37. The primary judge explained at CAB 20; PJ[86]-[87], why it could not simply be accepted that there were unilateral *"manifest and reasonable benefits"*[85] to Mr Stewart receiving therapy at home and concluded that because his Honour could

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83 To the extent that it is suggested that a person residing in Ozanam (or similar residences) is not "living in the community" misunderstands that kind of living arrangement and is unnecessarily exclusionist, particularly when viewed from the perspective from those that have no other choice.

84 CAB 20; PJ[87].

85 AS[45].

not be satisfied of the extent to which Mr Stewart understood what relocating to a private residence would entail, the relative importance of this evidence was reduced in terms of conducting the weighing exercise involved in assessing reasonableness. That is, consistently with the way the parties had run their cases at trial, relative health benefits were a more reliable indicator of reasonableness in the circumstances. This was understood by the CA and informed its approach to identifying whether the primary judge had fallen into error (CAB 69; CA[53]).

***The Appellant did not rely on Mr Stewart's unhappiness living at Ozanam before the primary judge as a matter relevant to the reasonableness test but, in any event, any unhappiness was taken into account in applying the compensatory principle***

38. There is a preliminary point: the primary judge did not find that the Appellant was unhappy residing in Ozanam (*cf* AS[9], [53]). The high point of any finding was the express assumption (favourable to the Appellant) that he would prefer to live in his own residence (CAB 20; PJ[87]). And the evidence did not support a finding that there were significant *"psychological and emotional benefits"* to the Appellant moving into his own residence (*cf* AS[53]). The only evidence was the unchallenged expert evidence of Dr Gray,[86] namely that: (a) Mr Stewart suffered a long-standing pre-existing psychiatric condition; (b) there was a reasonable chance that condition could relapse wherever he was cared for; (c) a transfer to a private residence could carry a risk that his psychiatric condition would worsen, at least in the short to medium term; (d) his psychological wellbeing would be aided by greater engagement with therapy, activities and outings; and (e) Mr Stewart's feelings and quality of life would likely materially improve with the provision of a dedicated carer (CAB 27, 28; PJ[125]-[126]). Those matters were expressly taken into account by the primary judge (CAB 30, 37, 38; PJ[136], [181]) and were not challenged on appeal.

39. Further, it was not part of Mr Stewart's case at trial that, in assessing reasonableness, any unhappiness he experienced living at Ozanam was to be taken into account. That likely explains why the primary judge made no finding

[86] RBFM 77 to 81.

about this because he was not asked to: *"*[t]*he judge could not have been expected to write reasons responsive to submissions that were not made to* [him] *at trial."*[87]

40. To the extent that any unhappiness of Mr Stewart is consistent with, or was otherwise encapsulated in, his assumed preference to reside at a private residence, it was taken into account by the primary judge (for the reasons stated in paragraphs 35 to 37 above). The primary judge identified the difficulty in assessing what the reality of moving away from Ozanam would mean for Mr Stewart and what impact it would have on him which, consequently, reduced the relative importance of Mr Stewart's desires in undertaking the assessment of reasonableness.[88] Giving that factor limited weight does not mean that it was not taken into account.

***The enhancements to Mr Stewart's life of sharing his residence with his son and a dog were taken into account***

41. Having a dog live with Mr Stewart was not a restorative factor; prior to his injuries, Mr Stewart did not live with a dog. Rather, prior to his injuries, two dogs lived with Jesse (at Ms Schwarzman's residence) that Mr Stewart would regularly see.[89] Both of those dogs have died. Prior to trial, Ms Schwarzman had purchased a puppy.

42. The primary judge found that living at a private residence would positively impact Mr Stewart's life in an overall sense including if appropriate arrangements were made for a dog to live with him.[90] That was an unquantifiable benefit, particularly because the extent to which Jesse and a dog would live with Mr Stewart was ill-defined and it was not in dispute that Mr Stewart could not independently care for a dog.[91]

43. While it was not in dispute that Mr Stewart could not keep a dog at Ozanam, it was accepted that Mr Stewart could be (and was) visited by a dog at Ozanam.

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87 *Seltsam Pty Ltd (Formerly Wunderlich Ltd) v Maria Irene Reid* [2021] VSCA 326 at [80] (Beach, Kaye and Niall JJA).
88 CAB 20; PJ[86]-[87].
89 RBFM 433 (Plaintiff's Trial Submissions at [9], citing ABFM 199: Transcript of Proceedings, 2 November 2023 P-75 lines 37-47 (Jesse Stewart)).
90 CAB 37, 38, 39; PJ[180], [186].
91 ABFM 74 (Transcript of Proceedings, 1 November 2023 P-64 lines 45-46 (Helen Coles)).

That may have explained the Appellant's forensic choice at trial to rely on the evidence about the influence of Jesse and a dog on Mr Stewart's motivation to engage in therapy and activities, thereby resulting in health benefits.[92] Those benefits were considered by the primary judge (*cf* AS[53]). The Court of Appeal's reasons at CAB 75; CA[89]-[90] must be read in that context and reveal no error.

***The Appellant did not rely on the living, care and therapy arrangements involved in living at home were of a kind commonly undertaken in the community, as an issue relevant to reasonableness***

44. Consistent with the Appellant's acceptance at AS[27], community values, standards and expectations are relevant to the compensatory principle and are thereby taken into account in benchmarking, for any particular plaintiff, what would constitute living arrangements as near as possible to restoration. In that way, this factor was taken into account in applying the compensatory principle.

45. Otherwise, it was no part of the Appellant's case at trial that in the course of assessing reasonableness, weight ought be given to the fact that delivering therapy and care at a private residence was commonly undertaken in the community and that doing so was, as a matter of fact, representative of *"community values, standards and expectations"* and therefore outweighed factors supporting Mr Stewart's ongoing residence at Ozanam. *"It is elementary that a party is bound by the conduct of his case"*.[93] This is a rule that is strictly applied.

46. Receiving therapy and being cared for at a private residence is not the only kind of care *"commonly undertaken in the community"*; it was the Appellant's own expert, Dr Rotinen Diaz, who identified the medically appropriate alternative of enhancing the care and therapy provided to Mr Stewart while he continued to reside at Ozanam.[94] Had this argument been made at trial, MNHHS would have

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92 ABFM 161 (Transcript of Proceedings, 2 November 2023, P-37 lines 16-24 (Jennie McCorkell)).

93 *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71 (applied with approval in subsequent cases such as *Coulton v Holcombe* (1986) 162 CLR 1 at 8–9 (Gibbs CJ, Wilson, Brennan and Dawson JJ) and *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at 484 [149] (Callinan J); *Liftronic Pty Ltd v Unve* (2001) 179 ALR 321 at 331 [44] (McHugh J) and *Water Board v Moustakas* (1988) 180 CLR 491 at 496–7.

94 CAB 30; PJ[140]; CAB 67, 71, 73, 74; CA[39], [60], [69], [72], [80]-[83].

sought to lead evidence[95] as to the ubiquitous and legitimate choice of people aged in their 70s to reside in aged care and nursing home residences, like Ozanam, and that for people of that age, with or without significant disabilities, it was a common living arrangement, particularly post the industry-wide improvements made as a consequence of the Aged Care Royal Commission completed in March 2021, and that residing in such places also reflects *"community values, standards and expectations."*

47. The postulated reference point of the **N**ational **D**isability **I**nsurance **S**cheme is inapt (AS[54]) because the NDIS only applies to persons who apply to enter the scheme *before* they turn 65 years of age[96] and the Appellant does not qualify. In any event, references made during the course of the trial to provision of care under the NDIS model was in respect of applicable rates and models of care, not, as a matter concerning living, care and therapy arrangements of a kind commonly undertaken in the community for people in their 70s, and therefore a reason why it was reasonable for Mr Stewart to live in the community.[97]

48. For the reasons outlined above, the appeal should be dismissed with costs.

## PART VII: TIME ESTIMATE

49. It is estimated that the Respondent will require up to 2 hours for oral argument.

Dated 8 May 2025

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95 Factual evidence from, for example, the Australian Department of Health and Aged Care, the Australian Bureau of Statistics, the Australian Institute of Health and Welfare, and Queensland Health as well as lay evidence from those working in the industry.

96 s 22 *National Disability Insurance Scheme Act 2013* (Cth).

97 RBFM 114 (Pre-Trial Conference with Mr Hart dated 26 October 2023 at [11(a)]); RBFM 107 to 109 (Supplementary report of Mr Hart dated 25 October 2023); ABFM 303, 305, 306 (Transcript of Proceedings, 6 November 2023 P-69 lines 21-36, P-71 lines 4-20, P-72 lines 12-15 (Ms Coventry)).