

DEFENCE

COURT DETAILS

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|-------------|----------------------------------|
| Court | Supreme Court of New South Wales |
| Division | Common Law |
| List | Representative Proceedings |
| Registry | Sydney |
| Case number | 2023/00124390 |

TITLE OF PROCEEDINGS

| | |
|------------------|---|
| First Plaintiff | Mark Fahey |
| First Defendant | Anglican Community Services Trading as Anglicare Sydney (ABN 39 922 848 563) |
| Second defendant | Nepean Blue Mountains Local Health District |

FILING DETAILS

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|--------------------------------|--|
| Filed for | Nepean Blue Mountains Local Health District |
| Legal Representative | Karen Smith, Crown Solicitor for NSW |
| Legal Representative Reference | PCN: 24565 202203599 T03 |
| Contact name and telephone | Abby Talbot (02) 9474-9462 |
| Contact email | crownsol@csso.nsw.gov.au |

PLEADINGS AND PARTICULARS

The second defendant relies on the following facts and assertions in relation to the Amended Statement of Claim filed on 25 August 2023:

1. The second defendant admits paragraph 1.
2. The second defendant admits paragraph 2.
3. In relation to the allegations in paragraph 3, the second defendant:
 - a. admits that the plaintiff's mother was a permanent resident of the Newmarch House aged care facility ("Newmarch House") from 14 December 2017, but otherwise does not admit the sub-paragraph;
 - b. admits sub-paragraph b);
 - c. admits sub-paragraph c);

- d. admits that the plaintiff's mother was admitted to the Hospital in the Home ("HITH") Service provided by the second defendant, but otherwise does not admit the sub-paragraph;
 - e. admits sub-paragraph e); and
 - f. admits that the plaintiff's, mother died of COVID-19 related pneumonia on 2 May 2020 at Nepean Hospital, but otherwise does not admit the sub-paragraph;
4. The second defendant does not admit paragraph 4.
5. In relation to the allegations in paragraph 5, the second defendant:
 - a. does not admit sub-paragraph a);
 - b. admits sub-paragraph b); and
 - c. admits sub-paragraph c).
6. In relation to the allegations in paragraph 6, the second defendant:
 - a. admits sub-paragraph a) and further pleads it is a public authority within the meaning of that term in Part 5 of the *Civil Liability Act 2002* (NSW) (**CLA**); and
 - b. admits the second defendant provided medical care to residents through the HITH and Virtual Aged Care Service ("VACS") model of care from the time of their individual admissions, but otherwise does not admit the remainder of sub-paragraph b).
7. The second defendant does not admit paragraph 7.
8. The second defendant does not admit paragraph 8.
9. The second defendant does not admit paragraph 9.
10. The second defendant does not admit paragraph 10.
11. The second defendant does not admit paragraph 10A.
12. The second defendant does not admit paragraph 10B.
13. The second defendant does not admit paragraph 11.
14. The second defendant does not admit paragraph 12.
15. The second defendant does not admit paragraph 13.
16. The second defendant denies paragraph 14.
17. In relation to the allegations in paragraph 15, the second defendant:

- a. admits that between 11 April and 7 May 2020 34 staff members of Newmarch House and 37 Residents returned positive results to COVID-19 testing;
- b. does not admit that the period pleaded in paragraph 15 represents the entirety of the COVID-19 outbreak at Newmarch House;
- c. denies that particulars a) and b) are accurate as to the number of Residents that had tested positive to COVID-19 because by 13 April 2020 1 Resident had tested positive for COVID-19;
- d. otherwise does not admit the balance of the paragraph.

18. In relation to paragraph 16, the second defendant:

- a. admits that on 23 April 2020, the Aged Care Quality Safety Commission (“ACQSC”) administered a direction to the first defendant that required the first defendant to appoint by the close of business on 24 April 2020 an advisor and supporting team with recent experience in infection control, as well as the appropriate skills, qualifications and background to assist the service to manage the COVID-19 outbreak; and
- b. and otherwise denies the paragraph.

19. In relation to paragraph 17, the second defendant:

- a. admits that the ACQSC issued a ‘Notice to agree to requirement’ that required the first defendant to agree in writing by 5pm on 5 May 2020 to:
 - i. not admit any new care recipients to the Service until it can demonstrate to the Commission that the serious risk to care recipients at the Service has been effectively addressed;
 - ii. immediately appoint, at the expense of the approved provider, an independent adviser, as nominated by the Commission, to ensure the safety and well-being of care recipients;
 - iii. ensure that any directions and advice given by the adviser are actioned immediately and without delay;
 - iv. provide regular reporting to the Commission on specified matters; and
- b. otherwise does not admit the paragraph.

20. In relation to the allegations in paragraph 18, the second defendant:

- a. admits that between 18 April 2020 and 19 May 2020, 19 Residents died on the dates particularised; and

b. otherwise does not admit the paragraph.

21. The second defendant does not admit paragraph 19.

22. The second defendant admits paragraph 20.

23. The second defendant admits paragraph 21.

24. The second defendant does not admit paragraph 22.

25. The second defendant does not admit paragraph 23.

26. The second defendant does not admit paragraph 24.

27. The second defendant admits paragraph 25.

28. The second defendant does not admit paragraph 26.

29. In relation to the allegations in paragraph 27, the second defendant:

- a. admits on 14 April 2020, the ACQSC advocated for cohorting of residents;
- b. denies that the second defendant was present at the meeting on 14 April 2020;
- c. denies cohorting includes removal of residents, which is referred to as decanting;
- d. admits cohorting included grouping or zoning of positive or negative residents;
and
- e. otherwise denies the paragraph.

30. In relation to the allegations in paragraph 28, the second defendant:

- a. admits that at meetings on 16 and 17 April 2020:
 - i. Dr Branley opposed decanting or removing residents en masse from Newmarch House;
 - ii. Dr Branley raised concerns about whether residents who had tested negative in the first round of testing were “true negatives”;
 - iii. Dr Branley advocated for the cohorting of residents within the facility; and
 - iv. the decision taken at the senior meeting on 17 April 2020 attended by Michael Lye (Deputy Secretary, C’tth Department of Health) and Dr Jenny Firman (C’tth Department of Health), Janet Anderson (ACQSC), Dr Nigel Lyons (Deputy Secretary, NSW Health), Dr Bradley Forssman (NBMLHD Public Health Unit), Dr Branley (NBMLHD) and Professor Lyn Gilbert, who acted as an independent clinical advisor was that it was in the best

interests of the residents not to move residents out of facility but to adopt an internal cohorting approach; and

v. otherwise denies the paragraph.

31. The second defendant does not admit paragraph 29.

32. The second defendant does not admit paragraph 30.

33. The second defendant does not admit paragraph 31.

34. The second defendant does not admit paragraph 32.

35. The second defendant does not admit paragraph 33.

36. The second defendant does not admit paragraph 34.

37. In relation to the allegations in paragraph 35, the second defendant:

a. admits Gavin Taylor, grandson of Barry Jehan, contacted the second defendant on or about 22 April 2020 in relation to whether there was a Public Health Order that prevented residents of Newmarch House who had not tested positive for COVID-19, leaving the facility; and

b. otherwise does not admit the paragraph.

38. In relation to the allegations in paragraph 36, the second defendant:

a. admits an employee of the second defendant had a conversation with Gavin Taylor on or about 22 April 2020 confirmed by email in which he provided advice similar to the following in effect:

...there is no broad Public Health Order that relates to close contacts. However under the Public Health Act, we can issue an order on an individual if they are a contact and we think that they will breach isolation. If they were to breach this order, the penalties would apply (\$11,000 for an individual or 6 months imprisonment).

Close contacts must remain where they are isolated, except for medical care or emergencies. There is risk of transmission to you or your family members if you/they were to drive your grandfather to your/their home (and possibly within the home). There is also a risk of deterioration in his general health if he is moved to another environment,

This situation has arisen in other aged care facilities with outbreaks and we gave this same advice to the families in those situations.

Particulars

i. Email from Bradley Forssman to Gavin Taylor sent 22 April 2020 at 6:34pm.

b. otherwise denies the paragraph.

39. The second defendant denies paragraph 37.

40. In relation to the allegations in paragraph 38, the second defendant:

a. admits that the first defendant experienced staff shortages up to and including 20 April 2022; and

b. otherwise does not admit the paragraph.

41. In relation to the allegations in paragraph 39, the second defendant:

a. admits that the first defendant engaged "Mable"; and

b. otherwise does not admit the paragraph.

42. The second defendant admits paragraph 40.

43. The second defendant does not admit paragraph 41.

44. In relation to the allegations in paragraph 42, the second defendant:

a. admits that the first defendant experienced staff shortages up to and including 20 April 2022; and

b. otherwise does not admit the paragraph.

45. The second defendant does not admit paragraph 43.

46. The second defendant does not admit paragraph 44.

47. The second defendant does not admit paragraph 45.

48. The second defendant does not admit paragraph 46.

49. The second defendant does not admit paragraph 47.

50. The second defendant does not admit paragraph 48.

51. The second defendant does not admit paragraph 49.

52. The second defendant does not admit paragraph 50.

53. The second defendant does not admit paragraph 51.

54. The second defendant does not admit paragraph 52.

55. In relation to the allegations in paragraph 53, the second defendant:

- a. admits that it did not implement daily PCR testing to screen residents for COVID-19 at Newmarch House;
- b. denies that it was possible to PCR test all residents on the same day; and
- c. otherwise does not admit the paragraph.

56. In relation to the allegations in paragraph 54, the second defendant:

- a. admits that it did not cause daily PCR testing to be undertaken of all staff presenting at Newmarch House until 3 or 4 May 2020;
- b. does not admit that it was the responsibility of the second defendant to PCR test all staff members and/or third-party contractors and/or clinical agency workers on a daily basis; and
- c. otherwise does not admit the paragraph.

57. In relation to the allegations in paragraph 55, the second defendant:

- a. denies that it had power to direct or permit Newmarch House staff members and/or third-party contractors and/or healthcare agency workers;
- b. admits that it advised that Newmarch House staff members should avoid providing care to both COVID-19 positive and negative residents if possible; and
- c. otherwise does not admit the paragraph.

58. In relation to the allegations in paragraph 56 the second defendant:

- a. admits that its advice was that residents should remain isolated in their rooms and stay isolated from other residents during the COVID-19 outbreak; and
- b. otherwise does not admit the paragraph.

59. In relation to the allegations in paragraph 57, the second defendant:

- a. denies the allegation insofar as they are related to it; and
- b. otherwise does not admit the paragraph.

60. In relation to the allegations in paragraph 58, the second defendant:

- a. says that it provided advice in relation to the use of Personal Protective Equipment (“PPE”) and infection control on and from 12 April 2020;
- b. denies it had power to implement a standardised protocol;

- c. denies it had the ability and responsibility to supervise a standardised protocol regarding the use of PPE in Newmarch House for all staff and healthcare agency workers to adhere to; and
- d. otherwise does not admit the paragraph.

61. In relation to the allegations in paragraph 59, the second defendant:

- a. admits that it provided surgical masks to the first defendant on and from 14 April 2020;
- b. admits that it provided P2 masks to the first defendant on and from 16 April 2020;
- c. denies that it was its role to issue appropriate PPE, including N95 masks to staff (other than its own employees) and/or residents;
- d. admits that it advised that N95 masks should be used;
- e. does not admit that N95 masks were not available for use;
- f. does not admit that N95 masks were necessary to constitute appropriate PPE; and
- g. otherwise does not admit the paragraph.

62. In relation to the allegations in paragraph 60, the second defendant:

- a. admits that it conducted PCR testing of residents;
- b. admits that it was a body that conducted PCR testing of agency works and third-party contractors;
- c. admits that it was a body that reported on PCR testing that it conducted of residents, agency workers and third party contractors; and
- d. otherwise does not admit the paragraph.

63. In relation to the allegations in paragraph 61, the second defendant:

- a. admits that all residents were not PCR tested on the same day;
- b. denies that it was possible to PCR test all residents on the same day; and
- c. otherwise does not admit the paragraph.

64. In relation to the allegations in paragraph 62, the second defendant:

- a. admits that not all COVID-19 PCR tests were processed and communicated within 24 hours;

- b. denies that it was responsible for all of the PCR testing, processing and communication that was undertaken;
- c. denies that it was possible to process and communicate all PCR test results within 24 hours; and
- d. otherwise does not admit the paragraph.

65. In relation to the allegations in paragraph 63, the second defendant:

- a. admits the allegations in relation to the PCR tests it processed; and
- b. otherwise does not admit the paragraph.

66. The second defendant does not admit paragraph 64.

67. The second defendant does not admit paragraph 65.

68. In relation to the allegations in paragraph 66, the second defendant:

- a. admits that residents who tested positive to COVID-19 were admitted to HITH;
- b. admits that residents were not taken to hospital (with some exceptions); and
- c. otherwise does not admit the paragraph.

69. In so far as it relates to it, the second defendant admits paragraph 67.

70. In relation to the allegations in paragraph 68, the second defendant:

- a. admits insofar as it relates to it, that it was responsible for the care, control and management of the VACS service during the period 13 April 2020 to 31 May 2020; and
- b. otherwise does not admit the paragraph.

71. In relation to the allegations in paragraph 69, the second defendant:

- a. admits that prior to 13 April 2020, the second defendant's HITH service had not been involved in treating COVID-19 patients from an aged care facility; and
- b. otherwise does not admit the paragraph.

72. In relation to the allegations in paragraph 70, the second defendant:

- a. admits there was a lead clinician for the HITH service;
- b. admits there was a lead clinician for VACS; and
- c. otherwise does not admit the paragraph.

73. The second defendant admits paragraph 71.

74. In relation to the allegations in paragraph 72, the second defendant:

- a. admits that the correct title of the NSW Health HITH Guideline was “Adult and Paediatric Hospital in the Home Guideline”;
- b. denies there was a NBMLHD Nepean Hospital in the Home Policy 2017;
- c. admits there was a 2018 policy entitled, “Nepean Hospital in the Home Policy”, which applied to paediatric patients cared for under the HITH model of care; and
- d. otherwise denies the paragraph.

75. In relation to the allegations in paragraph 73, the second defendant:

- a. admits that the HITH Guideline provides for the matters set out at sub-paragraphs a)-d), f), g), and h);
- b. denies that the HITH Guideline provides that the HITH Service should establish a written agreement in regard to the roles and responsibilities of the Residential Care Facility and the HITH Service as set out in sub-paragraph e);
- c. denies the HITH Guideline provides that medical, nursing and allied health staff must be trained and competent in recognising and responding to signs of deterioration in children, adults and older people as set out in sub-paragraph i);
- d. denies the HITH Guideline provides that vital signs should be recorded on a standardised observation chart such as the Standard Adult General Observation (SAGO) Chart or the age specific Standard Paediatric Observation Chart (SPOC) during home visits and kept in the clinical record as set out in sub-paragraph j);
- e. denies that the HITH Guideline was binding; and
- f. otherwise denies the paragraph.

76. In relation to the allegations in paragraph 74, the second defendant:

- a. says that the NBMLHD 2017 HITH Policy is a paediatric policy;
- b. admits that the principles of the HITH Policy apply to the HITH model more generally; and
- c. otherwise does not admit the paragraph.

77. In relation to the allegations in paragraph 75, the second defendant:

- a. says that the care provided to the residents was a hybrid model that included the HITH service, VACS and other services;
- b. denies that the HITH Guideline was binding;

- c. denies that the HITH policy pleaded was applicable;
- d. admits that the principles of the HITH Policy apply to the HITH model more generally; and
- e. otherwise does not admit the paragraph.

78. In relation to the allegations in paragraph 76, the second defendant:

- a. admits that the two documents were created;
- b. states that there were multiple versions of the two documents;
- c. denies that the Step-Up Plan was created by HITH; and
- d. otherwise does not admit the paragraph.

79. In relation to the allegations in paragraph 77, the second defendant:

- a. admits sub-paragraphs a), b), e) and f);
- b. denies sub-paragraph c); and
- c. denies sub-paragraph d).

80. In relation to the allegations in paragraph 78, the second defendant:

- a. does not admit that the palliative care team did not get involved until 28 April 2020; and
- b. otherwise denies the paragraph.

81. In relation to the allegations in paragraph 79, the second defendant:

- a. admits that the initial version of the Step-up Plan was approved in late March 2020;
- b. denies that the document version approved in March 2020 was specific to Newmarch House;
- c. admits that the Step-Up Plan states that:
 - i. referrals will be triaged into telehealth consultations or face to face home visits; and
 - ii. visits to residential aged care facilities would be arranged within 24 hours; and
- d. otherwise does not admit the paragraph.

82. In relation to the allegations in paragraph 80, on the assumption that “Set-Up Plan” should refer to “Step-Up Plan”, the second defendant:

- a. admits that the March 2020 version of the Step-Up Plan included (among other things):
 - i. the matters set out at sub-paragraphs a) and c);
 - ii. denies that the March 2020 version of the Step-Up Plan provided that the VACS team would provide intravenous fluids and antibiotics rather than the HITH team, and to assist the Newmarch House staff members of the as set out in sub-paragraph b); and
- b. otherwise does not admit the paragraph.

83. In relation to the allegations in paragraph 81, the second defendant:

- a. says that the care provided to the residents was a hybrid model that included HITH, VACS and other services;
- b. denies that the Step-Up Plan dated 30 March 2020 was specific to Newmarch House;
- c. denies that a plan can be breached;
- d. admits that employees of the second defendant were present at Newmarch House on and from 12 April 2020;
- e. denies sub-paragraph a);
- f. in relation to sub-paragraph b):
 - i. admits that face to face consultations from VACS were not recorded until 17 April 2020;
 - ii. does not admit that they were extremely rare;
 - iii. notes that “V” in “ VACS” stands for virtual;
- g. does not admit sub-paragraph c);
- h. does not admit sub-paragraph d);
- i. in relation to sub-paragraph e):
 - i. says that the VACS team delivered IV fluids and IV cannulas; and
 - ii. otherwise does not admit the sub-paragraph;
- j. does not admit sub-paragraph f); and
- k. does not admit sub-paragraph g).

84. In relation to the allegations in paragraph 82, the second defendant:

- a. admits that Newmarch House was not a hospital; and
 - b. otherwise does not admit the paragraph.
85. The second defendant denies paragraph 83.
86. The second defendant denies paragraph 84.
87. The second defendant admits paragraph 85.
88. In relation to the allegations in paragraph 86, the second defendant:
- a. denies that morphine and midazolam were prescribed to all of the residents who passed away; and
 - b. denies that morphine and midazolam were the only crisis medications prescribed.
89. In relation to the allegations in paragraph 87, the second defendant:
- a. admits that it prescribed crisis medications;
 - b. denies that morphine and midazolam were the only crisis medications prescribed; and
 - c. denies that the second defendant's employees were the only people who prescribed crisis medications.
90. The second defendant denies paragraph 88.
91. The second defendant does not admit paragraph 89.
92. In relation to the allegations in paragraph 90, the second defendant:
- a. denies that there was active treatment available at the time for COVID-19 before 15 May 2020 when Dexamethasone was administered (off label) to Alice Bacon;
 - b. admits palliative care was provided to some Residents;
 - c. says that supportive care was provided; and
 - d. otherwise denies the paragraph.
93. In relation to the allegations in paragraph 91, the second defendant:
- a. admits that various residents had various forms of advanced care documentation as at 11 April 2020;
 - b. admits that it directed that advanced care documentation be reviewed after COVID-19 was identified at Newmarch House; and
 - c. otherwise does not admit the paragraph.

94. In relation to the allegations in paragraph 92, the second defendant:

- a. denies that the second defendant conducted all of the consultations and reviews;
and
- b. otherwise does not admit the paragraph.

95. In relation to the allegations in paragraph 93, the second defendant:

- a. denies that the second defendant was the provider of all of the advice pleaded to
all of the Residents and Family; and
- b. otherwise does not admit the paragraph.

96. In relation to the allegations in paragraph 94, the second defendant:

- a. denies that the second defendant provided all of the information pleaded; and
- b. otherwise does not admit the paragraph.

97. In relation to the allegations in paragraph 95, the second defendant:

- a. denies that the second defendant provided all of the advice or information
pleaded;
- b. admits that where employees of the second defendant provided the advice or
information, it conveyed the benefits of residents elderly, infirm and in some cases
impaired residents remaining in familiar surroundings at Newmarch House; and
- c. otherwise does not admit the paragraph.

98. The second defendant denies paragraph 96.

99. The second defendant does not admit paragraph 97.

100. The second defendant does not admit paragraph 98.

101. The second defendant does not admit paragraph 99.

102. The second defendant does not admit paragraph 100.

103. The second defendant does not admit paragraph 101.

104. The second defendant does not admit paragraph 102.

105. The second defendant does not admit paragraph 103.

106. The second defendant does not admit paragraph 104 on the basis that it has no content
and:

- a. notes that NSW Directions were under s. 7 of the *Public Health Act 2010* (NSW);

- b. in addition to the NSW Directions at paragraphs 105-107, the NSW Directions also included the *Public Health (COVID-19 Self-Isolation) Order 2020*.

107. In relation to paragraph 105 (on the basis that it is intended to be a sub-paragraph of 104), the second defendant:

- a. admits the orders applied;
- b. does not admit that the order is accurately set out in the pleading; and
- c. refers to the order as set out in full.

108. In relation to paragraph 106 (on the basis that it is intended to be a sub-paragraph of 104), the second defendant:

- a. admits the orders applied;
- b. does not admit that the order is accurately set out in the pleading;
- c. states that the order was amended during the course of the COVID-19 outbreak at Newmarch House; and
- d. refers to the order as set out in full.

109. In relation to paragraph 107 (on the basis that it is intended to be a sub-paragraph of 104), the second defendant:

- a. admits the orders applied;
- b. does not admit that the order is accurately set out in the pleading;
- c. states that the order was amended during the course of the COVID-19 outbreak at Newmarch House; and
- d. refers to the order as set out in full.

110. The second defendant admits paragraph 108, in so far as it relates to it, and otherwise does not admit the paragraph.

111. The second defendant admits paragraph 109.

112. The second defendant does not admit paragraph 110.

113. The second defendant does not admit paragraph 110A.

114. The second defendant does not admit paragraph 110B

115. The second defendant does not admit paragraph 110C.

116. The second defendant does not admit paragraph 110D.

117. The second defendant does not admit paragraph 111.

118. The second defendant does not admit paragraph 112.
119. The second defendant does not admit paragraph 113.
120. The second defendant does not admit paragraph 114.
121. The second defendant does not admit paragraph 115.
122. The second defendant does not admit paragraph 116.
123. In relation to the allegations in paragraph 117, the second defendant:
- a. admits it owed a duty to each of the Residents to exercise reasonable care and skill against foreseeable risks of harm when providing medical care to residents of Newmarch House;
 - b. denies the second defendant was under a duty to exercise functions in a particular way, aside from exercising reasonable care and skill in the provision of medical care to residents of Newmarch House.

Particulars

- i. Section 46 of the *Civil Liability Act 2002* (NSW).
 - c. otherwise does not admit the paragraph.
124. The second defendant does not admit paragraph 117A.
125. The second defendant does not admit paragraph 117B.
126. The second defendant does not admit paragraph 117C.
127. In relation to the allegations in paragraph 118, the second defendant:
- a. does not admit the duty pleaded in 117B; and
 - b. otherwise does not admit the paragraph.
128. The second defendant does not admit paragraph 119.
129. The second defendant does not admit paragraph 120.
130. The second defendant does not admit paragraph 121.
131. The second defendant denies paragraph 122.
132. The second defendant does not admit paragraph 123.
133. In relation to the allegations in paragraph 124, the second defendant:
- a. denies the paragraph in so far as it relates to it; and
 - b. otherwise does not admit the paragraph.

134. The second defendant does not admit paragraph 125.
135. The second defendant does not admit paragraph 126.
136. In so far as paragraph 127 relates to it, the second defendant:
- a. does not admit the allegations in relation to Ann Fahey and Alice Bacon;
 - b. denies in relation to the balance of the Residents;
 - c. otherwise does not admit the paragraph.
137. In so far as paragraph 128 relates to it, the second defendant:
- a. does not admit sub-paragraphs a) and b);
 - b. in relation to sub-para c):
 - i. does not admit in so far as the allegations relate to Ann Fahey and Alice Bacon; and
 - ii. otherwise denies in relation to the balance of the Residents.
138. In relation to paragraph 129, the second defendant:
- a. denies the allegations in so far as they relate to it; and
 - b. otherwise does not admit the paragraph.
139. The second defendant denies paragraph 130.
140. The second defendant does not admit paragraph 131.
141. In relation to paragraph 132, the second defendant:
- a. denies the allegations in so far as they relate to it; and
 - b. otherwise does not admit the paragraph.
142. The second defendant does not admit 132A.
143. In relation to paragraph 132B, the second defendant:
- a. denies the allegations in so far as they relate to it; and
 - b. otherwise does not admit the paragraph.
144. In relation to paragraph 133, the second defendant:
- a. denies the allegations in so far as they relate to it; and
 - b. otherwise does not admit the paragraph.
145. In relation to paragraph 134, the second defendant:

- a. denies the allegations in so far as they relate to it; and
- b. otherwise does not admit the paragraph.

146. In relation to paragraph 135, the second defendant:

- a. denies the group members are entitled to damages as alleged or at all; and
- b. otherwise does not admit the paragraph.

147. In relation to paragraph 136, the second defendant:

- a. admits sub-paragraphs a), b), e), f), and g);
- b. does not admit sub-paragraph c) and d); and
- c. admits h), in so far as it relates to the pathophysiology of COVID-19 and the then proper protocols to detect, prevent, contain and manage and treat the disease, and otherwise does not the sub-paragraph.

148. In answer to the whole of the Amended Statement of Claim, the second defendant:

- a. denies that the plaintiff is entitled to the relief claimed, including any entitlement to damages, interest and costs;
- b. denies that it breached its duty of care to the plaintiff as alleged or at all;
- c. relies on Part 2 of the CLA in relation to the plaintiff's claim for damages, interest and costs;
- d. denies that any conduct of the second defendant was a necessary condition of the occurrence of harm to the plaintiff's alleged injury, loss or damage as required by s. 5D(1)(a) of the CLA;
- e. denies that it is appropriate for the scope of the second defendant's liability (which is denied) to extend to the plaintiff's alleged injury, loss and damage as required by s. 5D(1)(b) of the CLA, and says that that responsibility for the plaintiff's alleged injury, loss and damage should not be imposed on the second defendant;

Particulars

- i. the outbreak of COVID-19 at Newmarch House occurred early in the pandemic, and at a stage when the pandemic was of unknown severity and duration;
- ii. there were 29 residential aged care facilities within the second defendant's local health district;

- iii. At the time of the outbreak at Newmarch House, and without being exhaustive:
 - i. the understanding of, and guidance in relation to, how to most appropriately care for those who contracted COVID-19 was developing;
 - ii. there was no active treatment, other than supportive care, available to those who contracted COVID-19;
 - iii. there was no available vaccination/s for COVID-19;
 - iv. the capacity to test for COVID-19 was developing;
 - v. the understanding of, and guidance in relation to, modes of transmission and contracting COVID-19 was developing;
 - vi. all residents of NSW were subject to the Public Health Orders pleaded at paragraphs 106 to 109 above, as a matter of public safety;
 - vii. pursuant to those Public Health Orders there were restrictions on visitors at places of residence and medical facilities, including residential aged care facilities and hospitals.
- f. reserves its right to amend its defence to plead reliance on further statutory defences on receipt of expert evidence, including s. 50 of the CLA.

149. Further and in answer to the whole of the Amended Statement of Claim, the second defendant says:

Public Authority

150. For the purposes of the defence of *Resource Allocation* pleaded below at paragraphs 151 to 152, the second defendant says:

- a. The second defendant is a public authority as defined in s. 41 of CLA and pleaded in paragraph 6(a) above.

Particulars

- i. the second defendant is a public health organisation within the meaning of s. 7 of the *Health Services Act 1997 (NSW) (HSA Act)*;
- ii. the second defendant is a body corporate, constituted by s. 17 of the HSA Act;
- iii. the second defendant is, accordingly:

- i. a public authority for the purposes of s. 41(c) of the CLA.

Resource Allocation

151. The functions required to be exercised by a public authority are limited by the financial and other resources reasonably available to it and the second defendant relies on s. 42 of the CLA in the allocation of those resources.

152. Accordingly, the second defendant pleads:

- a. That the steps the second defendant might have taken so as to avoid possible consequences of the exercise of its functions during the outbreak at Newmarch House were at all material times constrained by the resources reasonably available to it:

Particulars

- i. between 3 March 2020 and 5 May 2020, ward 5A at Nepean Hospital operated to accept COVID-19 positive patients from the community. Ward 5A:
 - i. was a 30 bed ward in total;
 - ii. had 2 negative pressure rooms and 6 single rooms;
 - iii. otherwise had shared rooms comprising 4 beds in each;
 - iv. had no doors on the shared rooms;
 - v. had shared bathroom facilities;
- ii. between 3 March 2020 and 5 May 2020, ward 4A at Nepean Hospital operated to accept undifferentiated respiratory cases from the community (those awaiting COVID-19 test results). Ward 4A:
 - i. was a 30 bed ward in total;
 - ii. had 2 negative pressure rooms and 6 single rooms in total;
 - iii. otherwise had shared rooms comprising 4 beds in each;
 - iv. had no doors on the shared rooms;
 - v. had shared bathroom facilities;
- iii. the ICU ward at Nepean Hospital had 5 negative pressure rooms available for COVID-19 positive patients;
- iv. as at 12 April 2020, 3 of the 5 negative pressure rooms in the ICU were occupied by COVID-19 positive patients;

- v. use of High Flow Nasal Oxygen (HFNO) at Nepean Hospital was confined to negative pressure rooms;
 - vi. 6 HFNO machines were purchased for the Nepean Hospital ICU negative pressure rooms on 26 March 2020;
 - vii. as at 12 April 2020, fittings for HFNO machines were not available on ward 5A and ward 4A;
 - viii. 10 additional HFNO machines were ordered by Nepean Hospital on 28 May 2020; and
 - ix. between April and June 2020, Nepean Hospital had a reduction in staff of around 35 FTE (full time equivalent);
- b. that the second defendant's general allocation of resources is not open to challenge by the plaintiff for the purposes of determining the reasonableness of the second defendant's conduct the subject of these proceedings;
 - c. that the second defendant's functions required to be exercised by it are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate).

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the [Legal Profession Uniform Law Application Act 2014](#) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

Karen Smith, Crown Solicitor for NSW
Solicitor for the second defendant

Capacity

Signed in my capacity as a solicitor
employed in the office of the said
Karen Smith

Date of signature

1 December 2023