IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S142 of 2014

BETWEEN:

HUNTER AND NEW ENGLAND LOCAL HEALTH DISTRICT
Appellant

and

MERRYN ELIZABETH MCKENNA
Respondent

RESPONDENT'S SUBMISSIONS

Part I:

I certify that this submission is in a form suitable for publication on the internet.

Part II:

1. The respondent identifies the following issues:

   (a) Whether the majority in the New South Wales Court of Appeal was correct in holding that the appellant owed to the late Mr Rose a duty of care at common law operating alongside the *Mental Health Act 1990* (NSW) (now repealed) ("the MHA").

   (b) Whether, on the facts of this case, the provisions of Section 35 of the MHA were engaged.

   (c) Whether the Court of Appeal was correct in finding that the relevant risk of harm for the purposes of Section 5B of the *Civil Liability Act 2002* (NSW) ("the CLA") was a risk of any physical harm to Mr Rose and was not confined to a risk of homicide.

   (d) Whether the appellant made out a defence pursuant to Section 5O of the CLA.

   (e) Whether the provisions of Section 43 of the CLA have any application to the facts of this case.

   (f) Whether Section 43A of the CLA has any relevance to the facts of this case.

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Part III:

2. It is certified that the respondent does not believe that any notice should be given in compliance with Section 78B of the *Judiciary Act* 1903.

Part IV:

3. The respondent contests the following material facts asserted by the appellant. The references are to the appellant's paragraph numbers.

Paragraph 10:

10 The use of the word "discharge" is apt to cause confusion. The basis of Pettigrove's ("P") release is obscure: refer JAB 746 L 57.

Paragraph 11:

The reference to Part III of the CLA is irrelevant: refer JAB 679 L 35.

Paragraph 12:

- P's diagnosis had been chronic paranoid schizophrenia: JAB 687 L 11.
- P had been compulsorily detained in Victoria on at least two occasions in 2001, for one week and three weeks respectively: refer JAB 254 to 259.
- 20 • Dr Coombes ("C") noted a history of hospital admissions since at least 1995: refer JAB 694 L 30.
- P had been maintained on long acting depot injections from 2001 under prompting from a social worker and had no relapse until he ceased to have them: refer JAB 256 L 20; JAB 689 L 58 et seq; JAB 263 L 39.

Paragraph 13:

- Two doctors at Manning Base Hospital ("MBH") certified P as a "risk to self/others": refer JAB 246 L11; JAB 249 L 36.
- C was unable to explain why he had not considered resuming the depot
30 injections.
- The reference to "CA [40]" is to JAB 694 L 38.
- P had a history of paranoid delusions: refer JAB 255 L 40.
- P had a history of hallucinations, possibly command: refer JAB 104 L 27.

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- C agreed that P could become irrational and in some way harm Mr Rose ("R"): JAB 103 L 48.
- Depot injections would have vastly reduced such a chance: refer JAB 104 L 25-33.

Paragraph 17:

- P was in fact asleep when C purported to examine him initially: refer JAB 608 L 18.
- P said very little whilst in MBH: refer JAB 248 L 32; JAB 249 L 50; JAB 607 L 28.
- P's silence may have been due to the fact that his hearing aids were not working because of flat batteries which were not replaced: refer JAB 607 L 30.
- P had been profoundly deaf since birth: refer JAB 255 L 12, L 26 and L 46.
- Generally, as to the weight to be given to the evidence of C refer to JAB 711 L 23 to 38; JAB 731 L 27.

Paragraph 20:

- It is doubtful P took any part in the 4pm meeting: refer JAB 689 L 43; JAB 609 L 37-61.
- When P left the hospital he had not recovered from his acute psychotic episode: refer JAB 696 L 49.

Paragraph 21:

- If R had not been available P would not have been discharged: refer JAB 618 L 21-39.
- A formal transfer system was available: refer JAB 694 L 57; also JAB 610-611 [28].

Paragraph 22:

- There was no evidence as to what care was available in Victoria or whether it would have been less restrictive: refer JAB 620 L 18.
- The "discharge summary" (JAB 207) states in part "to return to mother's home in Cohuna" and "link up to services at Cohuna". The notes faxed to MBH were from the Echuca Community Mental Health Service in Victoria. The township of Cohuna is some 65 kms north west of Echuca. There was

no evidence as to what mental health services were available in Cohuna itself. Refer JAB 252-270.

Paragraph 23:

- The origin of the asserted "intention" or "expectation" remains obscure.
- There was no plan for the 1,176kms drive from Taree to Kohuna: refer JAB 141 L 41.

Paragraph 24:

- As to the conversations refer JAB 731 L 28.
- C had changed his mind about providing medication: refer JAB 614 L 19.
- P had been unsettled during the night of 20/21 July: JAB 693 [35].

Part V:

4. The respondent agrees that the relevant statutes are the *Civil Liability Act* 2002 (NSW) and the *Mental Health Act* 1990 (NSW) (now repealed). The relevant provisions are set out at JAB 681 to 686.

Part VI:

Duty of Care

5. The duty found by the Court of Appeal was one peculiar to Mr Rose alone: JAB 677 L 24. A summary of the factors leading to this particular duty are set out in the judgment of Macfarlan JA: JAB 723 [104]; JAB 724 [107] and [108].

6. The respondent points out that the passages from *Graham Barclay Oysters Limited Pty Ltd v Ryan* (2002) 211 CLR 540 set out by the appellant in paragraph 37 are those which were relied upon by Macfarlan JA in the majority judgment (see JAB 718 and 719). His Honour referred in the same passage to the "non exhaustive list of salient features" relevant to the identification of duties of care given by Allsop P in *Caltex Refineries (of Queensland) Pty Ltd v Stavar* [2009] 75 NSWLR 649 at [103].

7. The respondent says that the application of the principles stated in those two authorities forms a sound basis for the decision of the Court of Appeal in this case that there was a common law duty of care owed to Mr Rose.

8. The appellant's reliance on the statements of Sheller JA in *Hunter Area Health Service Ltd v Presland* (2005) 63 NSWLR 22 [296] is, it is submitted with respect, not justified. Paragraph [296] begins with the statement:

> *"In the first place the Mental Health Act is directed to enabling detention only as a last resort."*

9. The respondent submits that that is not a proper characterization of the Act. MHA sections 4, 8, 9 and 10 had the combined affect that involuntary detention under the Act was available for a mentally ill person where there were reasonable grounds for believing that care, treatment or control was necessary to protect the person or other people from serious harm (owing to that illness). The "reasonable grounds" would presumably be based on clinical opinion.

Inconsistency

10. The appellant's submissions are based on the false premise that Section 35 MHA was engaged, and operated to effect a release of P.

11. Both the trial judge and the majority in the Court of Appeal found that the factual basis for the engagement of Section 35 MHA did not exist. In short:

    (a) There was no evidence of any relevant decision by the medical superintendent.

    (b) P was still a mentally ill person (still acutely psychotic), so certified by C.

    (c) There was no evidence what care was available in Victoria so as to meet the alternative ground requiring P to be released. Refer JAB 618 L 12-39; JAB 620 L 10-20; JAB 745 [175].

Control and Indeterminacy

12. The theoretical factual scenarios referred to by the appellant are irrelevant to the duty defined by the Court of Appeal. The duty was solely to Mr Rose for the purpose of conveying P to Victoria, a specific and confined duty.

13. As to control, the reasons of Macfarlan JA are sound and correct it is submitted. The appellant again relies upon the supposed operation of Section 35 of the MHA. As Macfarlan JA (and the trial judge) found there was no exercise, or purported exercise of this power as the factual substrata necessary to engage Section 35 did not exist. Inter alia the appellant controlled the medication regime for P up to, and at the point, of

departure. Further, the appellant placed P into R's care knowing that R's conditional offer should not have been availed of as P was still "not well enough": refer JAB 219 L 48.

The Beneficiary of the Power

14. On its proper construction the MHA, particularly Sections 4, 8, 9 and 10 contemplated the detention of a mentally ill person for

"the protection…of <u>others</u> from serious harm"

and so, it is submitted, set up a framework for public protection: refer JAB 719 [92].

Vulnerability

15. The reasons given by Macfarlan JA, it is submitted, are clearly correct. R had called an ambulance for P when he appeared acutely unwell. R's offer was only to drive P to Victoria *"when he is well enough"*. The appellant knew what R did not know – P continued to suffer from an acute psychotic illness: refer RAB 112 L 40.

Breach of Duty: Section 5B of the CLA

16. Section 5B CLA has a definition of "harm". There is no warrant to put a gloss upon that definition particularly since Section 5A of the CLA applies the definition to:

"Any claim for damages whether [it] is brought in tort, contract, and <u>under statute or otherwise.</u>"

17. In addition as Macfarlan JA said at JAB 725 [111], his approach accords with the common law.

18. Even if the only risk was of that of homicide, a risk of 1:3,000 (JAB 194 L 17) must be a risk of such seriousness as to fall within Section 5B of the CLA. Compare the risk of blindness of 1:14,000 in *Rogers v Whittaker* (1992) 175 CLR 479.

Section 5O of the CLA

19. It is agreed that Section 5O constitutes a defence and accordingly the appellant bore the onus of proving that defence. That onus was not

discharged for the reasons set out at JAB 739 to 742. It is important to have reference to the trial judge's actual finding set out at JAB 741 L 50. That finding does not support the existence of a relevant practice.

20. But there is a further problem. None of the expert opinion given was based on the facts that ultimately emerged at the end of the evidence in this case. That was that P was still a mentally ill person and there was no evidence that care of a less restrictive kind was elsewhere available. If a defence is to be made out it is necessary that the practice said to have been followed accorded with the actual facts of the particular case.

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Section 43 of the CLA

21. The appellant argues that it can call in aid Section 43 of the CLA. For the reasons set out by the Court of Appeal at JAB 742 [167] that contention must fail. The case was never put on the basis of a breach of statutory duty.

Section 43A of the CLA

22. The appellant seeks to rely upon Section 43A of the CLA. That attempt fails for the reasons previously discussed. There was no exercise or purported
20 exercise of a special statutory power by the medical superintendent or any other medical practitioner. C's reasons for acting as he did had nothing to do with Section 35 of MHA: refer JAB 618 L 21 to 39.

Part VII:

The respondent agrees that the relevant legislation is the *Mental Health Act* 1990 (NSW) (now repealed) and the *Civil Liability Act* 2002 (NSW).

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Part VIII:

1. Appeal dismissed.

2. Orders of the Court of Appeal confirmed.

3. The appellant to pay the respondent's costs of and incidental to the leave application and the appeal.

Part IX:

The respondent estimates that the oral argument for the three respondents will occupy about 2 hours.

Dated: 20 August 2014

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