



**IN THE SUPREME COURT OF VICTORIA AT
MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST**

Case: S ECI 2020 03282

Filed on: 14/08/2020 12:12 PM

S CI

BETWEEN

SEBASTIAN AGNELLO

Plaintiff

and

HERITAGE CARE PTY. LTD (ACN 106 873 796)

Defendant

WRIT

Date of Document: 14 August 2020

Solicitor's Code: 112 579

Filed on behalf of: The Plaintiff

Prepared by:
Carbone Lawyers

Telephone: (03) 9102 6200

302 King Street
Melbourne VIC 3000

Facsimile: (03) 9102 6299

Email: tony.carbone@carbonelawyers.com.au

Ref: TC:200443

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, **YOU MUST GIVE NOTICE** of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may **OBTAIN JUDGMENT AGAINST YOU** on the claim without further notice.

***THE PROPER TIME TO FILE AN APPEARANCE** is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

IF the plaintiff claims a debt only and you pay that debt, namely, \$ and \$ for legal costs to the plaintiff or the plaintiff's solicitor within the proper time for appearance, this proceeding will come to an end. Notwithstanding the payment you may have the costs taxed by the Court.

FILED

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

**IN THE SUPREME COURT OF VICTORIA AT
MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST**

S CI

BETWEEN

SEBASTIAN AGNELLO

Plaintiff

and

HERITAGE CARE PTY. LTD (ACN 106 873 796)

Defendant

STATEMENT OF CLAIM

Date of Document:	14 August 2020	Solicitor's Code: 112 579
Filed on behalf of:	The Plaintiff	
Prepared by:	Carbone Lawyers 302 King Street Melbourne VIC 3000	Telephone: (03) 9102 6200 Facsimile: (03) 9102 6299 Email: tony.carbone@carbonelawyers.com.au Ref: TC:200443

PARTIES AND GROUP MEMBERS

1. The plaintiff is the son of the deceased, Carmela Agnello (“**the deceased**”).
2. At all material times the defendant:
 - a. is and was incorporated in the State of Victoria and is capable of being sued in the State of Victoria pursuant to the provisions of the Corporation Law;
 - b. is accredited as an approved provider of aged care services pursuant to the provisions of the *Aged Care Quality and Safety Commission Act 2018* (Cth) (“**ACQSCA**”);
 - c. provided aged care services pursuant to the provisions of the *Aged Care Act 1997* (Cth) (“**ACA**”);
 - d. provided residential accommodation and aged care services at its care facility located at 25 Willandra Drive Epping in the State of Victoria (“**Epping Gardens**”);
3. This proceeding is commenced as a group proceeding pursuant to Part IVA of the *Supreme Court Act 1986* (Vic) by the plaintiff on his own behalf and on behalf of:
 - a. all persons who at any point from February 2020 sustained mental or nervous shock in connection with a person with whom they had a close proximate relationship and

- who was or is a resident at Epping Gardens pursuant to a resident agreement for residential care and who was either killed, injured or put in danger by acts or omissions of the defendant;
- b. The legal personal representatives of the estates of any deceased persons who came within sub-paragraph (a) herein during the period;
 - c. all residents at Epping Gardens pursuant to a resident agreement for residential care residents who at any point from February 2020 sustained injury, mental or nervous shock, loss and damage and/or were put in danger by acts or omissions of the defendant;
 - d. all employees of the defendant who had worked at Epping Gardens who at any point from February 2020 sustained physical injury, mental or nervous shock in connection with their employment at Epping Gardens and/or were put in danger by acts or omissions of the defendant.
4. As at the commencement of this proceeding, there are seven or more persons who have claims against the defendant.

THE DECEASED

5. The deceased was born in Italy on 27 April 1928.
6. On or about 26 September 2018 the deceased, together with the support of the plaintiff and the deceased's immediate family members, entered into an agreement with the defendant entitled Resident Agreement for Residential Care ("the agreement").

PARTICULARS

A copy of the agreement is available for inspection at the plaintiff's solicitor's office during normal business hours on reasonable notice.

7. On entering into the agreement, the deceased took up full time residence at Epping Gardens.
8. Whilst a resident at Epping Gardens the deceased was dependent on the defendant for her care needs and the provision of a safe living environment.
9. In the course of her residence at Epping Gardens, the deceased, inter alia:
 - a. was exposed to COVID-19 positive staff and residents;
 - b. was exposed to an unsafe residential environment contaminated by Epping Gardens COVID-19 positive residents, staff and unauthorised visitors;
 - c. was not properly isolated or cared for in accordance with Commonwealth and State Government Care Facility guidelines and directions; and
 - d. was not provided with any or any adequate personal protective equipment ("PPE").

10. On 28 July 2020 the deceased died from contracting COVID-19.

THE DEFENDANT

11. Pursuant to the terms and conditions of the agreement and its accreditation as a provider of aged care services under the ACQSCA, the defendant agreed to provide to the deceased aged care services and accommodation.

12. In requesting the defendant, and the defendant agreeing, to provide accommodation and aged care services under the terms and conditions of the agreement to the deceased, the defendant then entered a fiduciary relationship with the deceased.

PARTICULARS

- (i) The relationship between defendant and deceased is a fiduciary relationship.
- (ii) By reason of that relationship, the deceased reposed trust and confidence in the defendant in its capacity as the deceased's accommodation and aged care provider.

13. By reason of the relationship referred to in paragraph 12, the defendant was under duties, amongst other duties, to:

- a. act in the deceased's best interests;
- b. actively work to provide a safe and comfortable environment consistent with the Deceased's care needs;
- c. deliver accommodation and aged care services safely, competently, diligently and as well as reasonably practicable;
- d. be responsible to the care needs of the deceased;
- e. be compliant with all relevant legislation, regulations and professional standard guidelines;
- f. disclose in a timely and proper manner all matters relevant the deceased's aged care and accommodation requirements, health, well-being and security to the plaintiff;
- g. at all times provide adequate and properly trained staff to care for the deceased's health and well-being;
- h. at all times ensure there is available all necessary inventory and equipment to provide for and ensure as reasonably practicable the health and well-being of the deceased;
- i. at all times ensure it has in place and when necessary properly implement in a timely way an effective infection control program.

14. Further, or alternatively, the agreement contained a contractual term, requiring the defendant to use its best endeavours to protect the deceased's interests and to exercise reasonable care and skill in carrying out, by all proper means, its obligations and duties to the deceased

under the terms and conditions of the agreement and in compliance with all relevant legislation, regulation and professional standard guidelines (“**the Implied Term**”).

PARTICULARS

- (i) The Implied Term was implied in the agreement.
- (ii) The Implied Term was implied in law.

15. Further, or alternatively, the defendant, as an accredited aged care services and residential accommodation provider, it was under a duty of care to exercise a level of skill, care and diligence sufficient to prevent occurrence of the kind which occurred of matters referred to in paragraphs 9, 10 and 18 herein and which were within the scope of the risk of which the defendant was positively required to avoid and prevent from occurring (“**duty of care**”).

CLAIM AGAINST THE DEFENDANT

16. In all the circumstances, the matters pleaded in paragraph 9 and 10 herein occurred by reason of the defendant’s negligent actions, omissions and conduct.

17. Further, in addition to the matters referred to in paragraph 9 herein, the defendant:

- a. was or ought to have been aware that at all relevant times prior to 20 July 2020 a COVID-19 pandemic has been declared in the State of Victoria;
- b. was or ought to have been aware the State of Victoria considered it reasonably necessary to issue to the defendant Care Facilities Directions pursuant s.200 (1) (b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic) (“**PHWA**”) to protect public health and the health of the deceased;
- c. was or ought to have been aware the State of Victoria considered it reasonably necessary to issue to the defendant on 13 April 2020 Care Facilities Directions (No 2) pursuant s.200 (1) (b) and (d) of the PHWA (“**CFD2**”) to protect public health and the health of the deceased.

BREACHES

18. In breach of its duty of care and and/or in breach of the implied term, the defendant:

- a. allowed or permitted staff and residents to:
 - i. not wear PPE;
 - ii. move freely within Epping Gardens
when there was a risk of spreading contamination and contracting COVID-19 infection.
- b. Permitted “visitors” and “excluded persons” as defined in CFD2 entry to Epping Gardens and thereby exposed the deceased to contracting COVID-19.

PARTICULARS

allowed staff from other aged care facilities entry to Epping Gardens without having self-isolated or an up to date vaccination against influenza;
permitting “excluded persons” entry to Epping Gardens without registration for the purpose of attending a baby shower on 16 July 2020;
permitting “excluded persons” entry to Epping Gardens without registration for the purpose of attending a party on 18 July 2020;
permitting “excluded persons” entry to Epping Gardens without having been tested for COVID-19.

- c. failed to act in the deceased’s best interests;
- d. failed to actively work to provide a safe and comfortable environment consistent with the Deceased’s care needs;
- e. failed to deliver accommodation and aged care services safely, competently, diligently and as best as reasonably practicable;
- f. failed to responsibly and/or adequately care needs of the deceased;
- g. failed to be compliant with all relevant legislation, regulations and professional standard guidelines;
- h. failed to disclose to the deceased and/or the plaintiff in a timely and proper manner all matters relevant the deceased’s aged care and accommodation requirements, health, well-being and security to the plaintiff;
- i. failed to at all material times provide adequate and properly trained staff to care for the deceased’s health and well-being;
- j. failed to at all times ensure there is available all necessary inventory and equipment to provide for and ensure as reasonably practicable the health and well-being of the deceased;
- k. failed to at all times ensure it had in place and implemented an effective infection control program;
- l. exposing the deceased and/or causing her through the defendant’s conduct to contract COVID-19;
- m. causing and/or materially contributing to the deceased’s death;
- n. at all material times exposing or subjecting the deceased to the unnecessary risk of death.
- o. at all material times failing to warn the deceased she should use adequate PPE whilst on Epping Gardens premises;
- p. failing to advise or properly advise persons the deceased and/or the plaintiff that they should wear PPE;

- q. failing to ensure its staff were properly informed of the dangers of COVID-19 and were instructed in safe working practices necessary to protect the deceased from contracting COVID-19;
 - r. failing in all the circumstances to employ adequate staff levels;
 - s. failing to instruct staff adequately or at all in relation to:
 - i. its COVID-19 infection control program; and
 - ii. the dangers of exposure to COVID-19;
 - t. failing to have any or any adequate awareness of the dangers of exposing the deceased to COVID-19 in any form;
 - u. failing to keep abreast of the known literature and information relating to the dangers of COVID-19;
 - v. failing to heed the warnings given by State and Federal Governments as to the dangers of COVID-19.
 - w. failing to educate staff in regard to COVID-19;
 - x. failing to take any reasonable care for the safety and wellbeing of the plaintiff.
 - y. concealing information from the plaintiff regarding the risks which it exposed the deceased to;
 - z. improperly concealing from and/or misrepresenting information to the plaintiff, and all relevant Government authorities concerning the severity of risks and dangers of COVID-19 contamination and spread at Epping Gardens.
19. As a result of the defendant's failures referred to in paragraphs 9 and 18 the deceased died after contracting COVID-19.
20. By reason of the defendant's failures referred to in paragraphs 9 and 18, the defendant breached its fiduciary duties to:
- a. act in the plaintiff's best interests; and
 - b. deliver aged care and accommodation services to a standard competently, diligently and to a standard consistent with the deceased's aged care needs.
21. Further, or alternatively, by reason of the defendant's failures referred to in paragraphs 9 and 18, the defendant:
- a. did not use its best endeavours to protect the deceased from contracting COVID-19 and preventing her death as a consequence thereof; and/or
 - b. did not exercise reasonable care and skill in carrying out, by all proper means, its obligations and duties required of it as an accredited aged care service and accommodation provider which amounted to a breach of the Implied Term referred to in paragraph 14 above.

22. Further, or alternatively, by reason of the defendant's failures referred to in paragraph 9 and 18, the defendant did not in all the circumstances use all reasonable skill, care and diligence in carrying out its obligations and duties to the deceased as an accredited aged care service and accommodation provider, which amounted to:
- a. a breach of the defendant's duty of care referred to in paragraph 15 above; and/or
 - b. a breach of the implied term; and/or
 - c. a breach of its obligations and duties pursuant to the provisions of the ACQSCA and ACA and the regulations and guidelines made thereunder; and/or
 - d. a breach of a direction or requirement under paragraphs 5 and 8 of CFD2 and thereby committed an offence under s.203 of the PHWA.
23. By reason of the matters aforesaid it was reasonably foreseeable to the defendant that the plaintiff, as a person of normal fortitude, would, in all the circumstances suffer a recognizable illness by reason of the defendant's breaches to the deceased referred to above and by reason thereof the plaintiff has suffered injuries, loss and damage.

PARTICULARS

Psychological reaction marked by depression and anxiety.
Nervous shock.

PARTICULARS OF LOSS AND DAMAGE

The plaintiff has incurred medical and like expenses details of which will be provided prior to the trial of this action

PARTICULARS

The plaintiff is aged 59, born in Australia, on 5 February 1961.
The plaintiff is employed as a freight clerk.
The plaintiff's particulars of loss of earnings and loss of earnings capacity will be provided prior to trial.

24. Further and/or in the alternative, at all times material the defendant knew, that by reason of its conduct, it was putting the deceased at risk of death or serious injury and that nevertheless in wanton and contumelious disregard of the deceased and her health the defendant chose to knowingly continue to provide aged care services and accommodation in breach of Federal and State Government legislation, regulations, guidelines and directions. Further, in all the circumstances the defendant either knew or ought to have known that in doing so there was a

reasonable likelihood the deceased would die or suffer serious injury. As a consequence of the above the plaintiff and each of the group members claim punitive damages against the defendant.

COMMON QUESTIONS

25. The questions of law or fact common to the claims of the plaintiff and each of the group members are:
- a. Whether or not a duty of care was owed to the plaintiff and the group members and if so the content of that duty.
 - b. Whether or not the defendant committed the acts and/or engaged in the conduct alleged in the statement of claim.
 - c. Whether or not the defendant committed the wrongs alleged in the statement of claim.
 - d. Whether or not the plaintiff's and the group members' similar conditions were causally related to the defendant's claimed breaches.
 - e. Did the defendant breach its common law duty of care.
 - f. If the defendant breached its common law duty of care, was such breach a cause of the death of the deceased and any of the losses suffered by the plaintiff.
 - g. What are the principles for identifying and measuring losses suffered by the plaintiff and group members as a result of the conduct and actions of the defendant as alleged in the statement of claim.

THE PLAINTIFF CLAIMS:

1. Damages.
2. Punitive damages.
3. Interest pursuant to the *Penalty Interest Rates Act 1983* as amended.
4. Costs.
5. Such further or other relief or order or direction as the Court thinks fit or just and equitable.

J. B. RICHARDS QC

D. C. DEALEHR

Carbone Lawyers

.....
CARBONE LAWYERS
Solicitors for the Plaintiff

1. Place of trial - Melbourne.
2. Mode of trial - Judge alone.
3. This writ was filed for the plaintiff by Carbone Lawyers of 302 King Street, Melbourne VIC 3000.
4. The addresses of the plaintiff is 43 The Avenue, Sunbury, VIC 3429.
5. The address for service of the Plaintiffs is care of Carbone Lawyers, 302 King Street, Melbourne VIC 3000. Email address for service of the plaintiff is tony.carbone@carbonelawyers.com.au.
6. The addresses of the defendant is 1118-1120 High Street, Armadale VIC 3143.