

**SUPREME COURT OF NEW SOUTH WALES**

**Mark Fahey v Anglican Community Services trading as Anglicare Sydney and  
Nepean Blue Mountains Local Health District**

**No. 2023/00124390**

**IMPORTANT PUBLIC NOTICE**

**Newmarch House Aged Care Facility Class Action**

On 18 April 2023, Mark Fahey (“**the Plaintiff**”) commenced a representative proceeding in the Supreme Court of New South Wales. The proceeding is brought against Anglican Community Services trading as Anglicare Sydney (**the First Defendant**) and Nepean Blue Mountains Local Health District (**the Second Defendant**) (collectively, “**the Defendants**”). The proceeding arises out of the alleged injury and loss suffered by close family members (“**Family**”) of residents (“**Residents**”) of Newmarch House Aged Care Facility, who it is claimed, died as a result of contracting coronavirus (**COVID-19**) following an outbreak between 18 April 2020 and 19 May 2020 (“**Newmarch House Aged Care Facility Class Action**”).

The Supreme Court of NSW has ordered that this Notice be sent to certain individuals who might be considered a group member who may be affected by the proceeding.

**If you think that you may be a group member you should read this Notice carefully as it may affect your rights. Any questions you have concerning the matters contained in this Notice should not be directed to the Court.** If there is anything in it that you do not understand, you should seek legal advice.

**1. What is a representative proceeding?**

A representative proceeding is commonly known as a “class action”. It is a proceeding that is brought by the Plaintiff on his own behalf, and on behalf of a group of people (“**the Group Members**”) against the Defendant(s) where the Plaintiff and the Group Members have similar claims against the Defendant(s).

Group Members are bound by any judgment or settlement entered in the representative proceeding unless they choose to not participate by “opting out” of the proceeding. This means that:

- (a) if the representative proceeding is successful, Group Members may be eligible for a share of any settlement monies or Court-awarded damages;
- (b) if the representative proceeding is unsuccessful, Group Members are bound by that result and will receive no monies or damages by way of compensation; and

- (c) regardless of the outcome of the representative proceeding, Group Members will not be able to pursue any claims privately against the Defendants in separate legal proceedings, unless they have opted out.

## 2. What is the Newmarch House Aged Care Facility Class Action?

The Newmarch House Aged Care Facility Class Action is brought by the Plaintiff on his behalf and on behalf of all persons who are Family of Residents alleged to have died as a result of COVID-19 between 18 April 2020 and 19 May 2020. The Plaintiff alleges that the Defendants owed a duty of care to persons who are Family.

The Plaintiff says that on 11 April 2020, the First Defendant was notified that a staff member of Newmarch House had tested positive to COVID-19, and that on or around 12 April 2020, the First Defendant engaged the services of the Second Defendant to provide clinical advice in respect of infection prevention and control (“**IPAC**”) procedures and, subsequently, appropriate medical treatment for the Residents.

The Plaintiff also alleges that between 11 April 2020 and 7 May 2020, 34 staff members of Newmarch House and 37 Residents tested positive to COVID-19 (“**COVID-19 Outbreak**”), and that between 18 April 2020 and 19 May 2020, 19 Residents died of COVID-19.

The Plaintiff alleges that the First and Second Defendants are liable to the Plaintiff by reason of negligence because the Defendants breached their respective duties of care to Family and Residents by:

- (a) Failing to be prepared for the COVID-19 Outbreak.
- (b) Their decision to keep Residents at Newmarch House.
- (c) Having severe staffing shortages.
- (d) Providing an inadequate and deficient standard of Residential Care Services.
- (e) Failing to adequately communicate with Family of the Residents.
- (f) Failing to appoint or engage a specialist infection control expert in a timely manner.
- (g) Failing to properly test Residents at Newmarch House for COVID-19.
- (h) Failing to provide clear leadership and adequate management.
- (i) ‘Virtually’ admitting Residents who tested positive to COVID-19 to a service known as ‘Hospital in the Home’ (“**HITH**”), as opposed to physically admitting them into the care of a hospital.
- (j) Failing to prevent the spread of COVID-19 amongst residents at Newmarch House.

The First and Second Defendants are defending the proceeding.

The Plaintiff claims that by reason of the alleged failures of the Defendants described above, his mother Ann Fahey, and 18 other Residents, died as a result of COVID-19.

The Plaintiff claims that he and Group Members suffered a recognised psychiatric illness and loss as a result of the allegedly negligent manner in which the Residents were cared for and the medical services they received, during Covid-19.

The First and Second Defendants do not accept liability for the loss and harm claimed by the Plaintiff.

The First Defendant does not accept the claims made by the Plaintiff and (amongst other things) says that:

- (a) Preparations undertaken for an event like the COVID-19 Outbreak were consistent with regulatory guidance provided to the First Defendant at the time;
- (b) The decision to keep Residents at Newmarch House was not a decision made by the First Defendant;
- (c) Residential care services provided during the COVID-19 Outbreak were not inadequate;
- (d) Staff of the First Defendant were unable to attend to communications from Family of Residents by reason that available staff were limited and the care of Residents was prioritised;
- (e) Infection prevention and control expertise was, at all material times, present during the COVID-19 Outbreak;
- (f) Testing Residents for COVID-19 was not the responsibility of the First Defendant during the COVID-19 Outbreak;
- (g) The decision to admit Residents to HITH, (as opposed to physically transferring and admitting the Residents into the care of a Hospital) was not a decision made by the First Defendant; and
- (h) Steps were taken in accordance with advice and directives from regulatory agencies to prevent the spread of COVID-19 during the COVID-19 Outbreak.

The Second Defendant does not accept the claims made by the Plaintiff and (amongst other things) says that:

- (a) The decision to keep Residents at Newmarch House was not a decision made solely by the Second Defendant;
- (b) Medical care provided by the Second Defendant to Residents during the COVID-19 Outbreak was reasonable, and any negligence alleged in respect of the provision of medical care is denied;
- (c) At the time of the COVID-19 Outbreak there was no active treatment available, other than supportive care, and no vaccinations;

- (d) PCR testing, processing and communication was not solely the responsibility of the Second Defendant;
- (e) Public Health Orders were in place at the time across NSW and those Orders limited visitors to residential aged care facilities and hospitals;
- (f) During the COVID-19 Outbreak, the Second Defendant was not 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, which it did;
- (g) Infection prevention and control expertise was, at all material times, present during the COVID-19 Outbreak; and
- (h) The Second Defendant's ability to exercise its functions is limited by the financial allocation of resources, and that allocation is not open to challenge by the Plaintiff.

### **3. Are you a Group Member?**

You are a Group Member if you are Family (as defined below) of a Resident of Newmarch House Aged Care Facility who is claimed to have died as a result of contracting COVID-19 at Newmarch House during the period 18 April 2020 and 19 May 2020 and you have:

- (a) suffered an injury by way of a recognised psychiatric illness as a result of the death of the Resident;
- (b) that recognised psychiatric illness was caused by the breach of a duty alleged to be owed by the Defendants to you and the Resident;

You are Family if you are:

- (a) the spouse or partner of a Resident, or
- (b) a child or stepchild of a Resident, or
- (c) any other person for whom a Resident had parental responsibility, or
- (d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of a Resident.

Residents for the purposes of the proceeding are persons who were residing at Newmarch House Aged Care Facility pursuant to an agreement with the First Defendant during the period from March 2020 to May 2020 and it is claimed died between 18 April 2020 and 19 May 2020 as a result of contracting COVID-19. If you are unsure whether or not you are a Group Member, you can still register for the class action. There will be no cost to you even if it turns out that you are not a Group Member or if the Court determines you are not a Group Member. If you would like to discuss this further please contact Mr Christopher Slan at Shine Lawyers on 13 11 99.

#### 4. What is Opt Out?

The Plaintiff in a representative proceeding does not need to seek the consent of Group Members to commence a representative proceeding on their behalf, or to identify a specific Group Member. However, Group Members can cease to be a Group Member by opting out of the representative proceeding. If you are a Group Member in the Newmarch House Aged Care Facility Class Action, but you do not want to continue to be a Group Member, you can opt out by completing an "opt out notice", as described below.

#### 5. What should Group Members do?

If you fit the definition of a "Group Member" in the representative proceeding, the following options are available to you:

**Option 1:** If you wish to remain a Group Member and wish to make a claim for any recognised psychiatric illness and loss which you have suffered and which was caused by the death of your relative during the period 18 April 2020 and 19 May 2020 claimed to be as a result of contracting COVID-19 at the Newmarch House Aged Care Facility, there is nothing you need to do at the present time. The plaintiff will continue to bring the proceeding on your behalf up to the point where the Court determines those questions that are common to the claims of the plaintiff and Group Members. However, you are invited to contact Shine Lawyers to register your claim with them, which will enable future notices in relation to this proceeding to be sent directly to you. The contact details are as follows:

Post:	Mr Christopher Slan Shine Lawyers PO BOX 589 Darlinghurst NSW 1300	Shine Lawyers Level 6 299 Elizabeth Street Sydney NSW 2000
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Website: [www.shine.com.au](http://www.shine.com.au)

Telephone: 13 11 99

Following the determination of the Plaintiff's case, you will have to satisfy certain conditions and establish elements of your claim that are relevant specifically to you, before any entitlement to damages may arise.

If the representative proceeding is unsuccessful, or is not as successful as you might have wished, you will not be able to sue on the same claim in any other proceeding.

## **Option 2 Do Nothing**

**If you do nothing**, you will remain a group member and remain bound by any order, judgment or settlement in the representative proceeding. The Plaintiff will continue to bring the proceeding on your behalf up to the point where the Court determines the questions that are common to the claims of the Plaintiff and group members.

However, unless you identify yourself as a “group member” no one may be aware that you are a group member, and you may not be able to share in any possible benefit flowing from the proceeding. Again, you may also have to satisfy certain conditions before any entitlement to a share in any possible benefit arises.

## **Option 3: Opt Out**

**If you do not wish to be a Group Member** you should opt out of the proceeding by completing an “Opt Out Notice”. If you opt out, you will cease to be a Group Member and will not be affected by any orders made in the representative proceeding.

If you wish to bring your own claim against the Defendant(s), you should seek your own legal advice about your claim and the applicable limitation period or time limit before opting out.

**You must decide what to do BEFORE 4:00PM ON 3 MAY 2024.** If you want to opt out you must send your “Opt Out Notice” to the Supreme Court so that it arrives **before** that deadline.

## **6. Will you be liable for legal costs?**

Group Members will not become automatically liable for any legal costs simply by remaining or registering as a group member.

This proceeding is being funded on a '*no-win no-fee basis*' by Shine Lawyers. Shine Lawyers will charge a 25% uplift on its fees in the event the Plaintiff obtains a '*successful outcome*' in the proceeding. A '*successful outcome*' includes any of the following outcomes occurring at any stage of the proceeding:

- where a judgment of a Court is made in favour of the Plaintiff and Group Members;
- a settlement agreement whereby compensation or damages or costs, or a sum of money, an interest in an asset or some other benefit, are payable to (or to the benefit of) the plaintiff or Group Member;
- a reasonable offer of settlement is made which either Counsel for the Plaintiff, or Shine Lawyers, acting reasonably, recommend be accept; and

- if compensation or a benefit from a statutory or other compensation scheme of by way of an ex gratia payment, is obtained.

Representative proceedings are often settled out of Court. If this occurs in this proceeding, you may be able to claim from any settlement amount without retaining a lawyer.

The Court will be asked to share the legal costs among all Group Members who have benefitted from the class action. The effect of any such order, if made, would be that all Group Members who benefit equally share the costs. That means even those who do not sign up to a costs agreement may have to contribute to these costs.

## **7. Further Information**

Please consider the above matters carefully. If there is anything of which you are unsure, you should contact the Plaintiff's lawyer, Shine Lawyers at [www.shine.com.au](http://www.shine.com.au) or by calling **13 11 99**, or seek your own legal advice.

Copies of the Amended Statement of Claim and other relevant documents (including the Defence to the Amended Statement of Claim, the orders of the Court regarding this notice and directions for the ongoing conduct of the proceedings) may be obtained by:

- (a) downloading them from <http://www.shine.com.au>; or
- (b) inspecting them, by appointment, between 9.00am and 5.00pm at an office of Shine Lawyers, details for which are available by calling **13 11 99**; or
- (c) inspecting them by visiting the Registry of the Supreme Court in Sydney at Level 5, Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW, or on the Supreme Court website:

[http://www.supremecourt.justice.nsw.gov.au/Pages/sco2\\_classaction/sco2\\_class\\_action.aspx](http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_classaction/sco2_class_action.aspx)

**DO NOT DELAY TAKING LEGAL ADVICE OR MAKING A DECISION BECAUSE THE DEADLINE FOR OPTING OUT IS 4:00PM ON 3 MAY 2024.**

This Notice is published pursuant to orders of the Supreme Court made on 9 February 2024.