

APPLICANT'S REPLY SUBMISSIONS

COURT DETAILS

Court	Supreme Court of New South Wales Court of Appeal
Registry	SYDNEY
Case number	2025/390041

TITLE OF PROCEEDINGS

Applicant	John Hooper
First Respondent	Julia Phipps
Second Respondent	Willoughby City Council

1. These submissions are in reply to the defendants' Response filed 4 November 2025 (**Response**).

Risk of a repeat event

2. Underlying both the Response (see at [22], "a substantial chance of a repeat event") and the Reasons (see at [47]: "a prospect that the plaintiff will become ill again in the course of proceedings"), is a conclusion that a dispensation of the jury was indicated because of the extent of the risk of the plaintiff experiencing a third health episode which would disrupt a new trial.
3. It may of course be accepted that there was *a* risk of such an event. However, to conclude that the risk was substantial, or put in relative terms, sufficiently substantial to outweigh the plaintiff's entitlement to a jury trial, was not appropriate, at least not from either the history of the proceedings, or the state of the evidence as to the plaintiff's health.
4. The fact that an event has occurred on 2 of 3 relevant occasions (that is, at 2 of the 3 trials in this matter) does not provide a principled basis to conclude anything as to the prospect of it occurring on another such occasion, other than that such occurrence is *possible*. There was no evidence that the plaintiff was subject to such medical episodes routinely or frequently, whether in circumstances of high stress or otherwise. It is a

fallacy to reason from such a small number of events that a recurrence would be likely or even substantial.

5. In any event, if one accepts the plaintiff's principal submission (noted at Reasons [38]; WF tab 3, pp.27-28) that it would be highly prejudicial to him to have the trial judge determine the matter in circumstances where the shift to judge alone trial occurred so late in the proceedings (in particular after cross-examination had finished, and most forensic decisions already made, in the prevailing context of a jury trial), then the possibility of an adverse health event has much less relevance to the making of an order of a fresh judge alone trial, given the greater flexibility of such a proceeding to deal with health contingencies.
6. Nor was there any basis to speculate, based on the evidence before the Court, of any particular risk of the plaintiff's *death*, in a way that would inform the exercise of the relevant discretion.

Notice of contention: applicant's conduct

7. At Response [31], the defendants' contention is now made that the plaintiff's conduct at trial was inconsistent with a genuine desire for a trial by jury (no longer relying on a contention that the plaintiff deliberately attempted to abort the trial).
8. Whichever way the point is put, the exact circumstances, underlying the findings at Reasons [1], [9]-[11] (WF 17, 19-20) should be borne in mind. Her Honour's reference at Reasons [10 (a)] (WF p.19) to "a suitable explanation for [the plaintiff's] absence to the jury" points to a controversy at the relevant time, namely the hearing on 29 July 2025 (see transcript at WF tab 7(a)), as follows:

(a) When the matter commenced on that day, plaintiff's counsel indicated that the plaintiff wished to be in Court for his counsel's closing address and the summing up (WF tab 7(a), T136.25-.26), further indicated that there was a contest as to what the jury might be told about the plaintiff's absence, and accordingly plaintiff's counsel was content for the jury to be sent home without "a particular explanation today" (T 136.33-.42, esp at .37).

(b) It is apparent that the issue of what the jury could be told about the reasons for the plaintiff's absence had been the subject of prior discussions between counsel

and that they were at odds as to what might properly be said to the jury on this topic: T 136 136.35-.37.

- (c) After her Honour pointed to the need to tell the jury why the trial was running past its 7 day estimate (T 136.44-137.2), counsel for the defendants resisted (at that point) the jury even being told that Mr Hooper was unwell (T 137.4-.8). He elaborated by saying that his concern was the link to his closing address (T 137.29-.30). That closing address had concluded the day prior, just before the plaintiff had his medical episode (Reasons [1]).
 - (d) Defendants' counsel then indicated that if plaintiff's counsel were to commence his closing address "now" (i.e. that day, without the matter being adjourned) he would not object to Mr Hooper's absence being explained to the jury on the basis that he was "unwell today" (T 138.15-.19-.31). Counsel for the plaintiff then sought and was granted a short adjournment to seek further instructions from his client having regard to the options for continuation of the matter raised by the trial judge (T 139.30-.36).
 - (e) After the short adjournment, plaintiff's counsel indicated that his instructions were not to make his closing submissions (T 142.3; counsel said "to not open", but this was evidently a reference to making his closing submissions).
9. Although plaintiff's counsel's explanation did not return to the issue of what the jury would be told if the matter proceeded in the plaintiff's absence, that remained a live issue and that was the context in which the plaintiff gave his instructions, as relayed by his counsel to her Honour. This relevant context was highlighted in the submissions below: WF tab 6(b) p.129, [21(a)]).
 10. As summarised above, the furthest the defendants had gone was to concede that plaintiff's counsel, if opening submissions proceeded on that day, might say that the plaintiff was absent because he was "unwell". As noted above, plaintiff's counsel had not accepted that such an explanation would be adequate except as an expedient for the day, until further explanation could be given to the jury if the matter were adjourned, as sought by the plaintiff.

11. In circumstances, where the defendants had just made their closing address, one which made very direct attacks on the plaintiff, including on his character and credit (noted in the plaintiff's submissions below: WF tab 6(b), p 129 [21(a)]), the prejudice to the jury being told only that the plaintiff's absence was because he was "unwell" was clear. The jury might speculate that the plaintiff had been chastened by the attack on him by the defendants' closing address, and his absence was not because he was in fact "unwell" but because he was ashamed to show his face following that attack. In the face of the defendants' resistance to the jury being told more, namely that the plaintiff's absence was not just because he was "unwell" but because he was confined to hospital, there was a very real prejudice to the plaintiff in the matter proceeding in his absence.
12. In those circumstances, the plaintiff's stated resistance to the matter proceeding before the jury in his absence is not "inconsistent with a genuine desire for a trial by jury" (far less, a deliberate attempt by him to abort the trial). The attribution of such a state of mind to the plaintiff (not being a matter on which her Honour made any finding) is not something this Court should make, especially in circumstances where the plaintiff was in an objectively stressful position, having to confer with his lawyers within the space of a few minutes from his hospital bed.

Impact on the first defendant and witness for the defendant

13. The evidence of Ms Phipps and Ms Blazey does not indicate any particular basis to conclude that either of them would be unavailable at any further trial. While stress and anxiety for all trial participants (including witnesses and lawyers) is to be regretted, it is not a factor that ought to weigh heavily in any consideration of the discretion in question, as it is the interests of justice (and not of the participants in the process) which are the focus.

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24 November 2025

CERTIFICATION

I **Steven Lewis**, solicitor for the Applicant, certify pursuant to paragraph 27 of Practice Note SC CA 01 - Court of Appeal that the Applicant's Reply Submissions are suitable for publication.

SIGNATURE OF LEGAL REPRESENTATIVE

Signature of legal representative:



Date of signature

27 November 2025