

ROYAL COMMISSION INTO AGED CARE QUALITY AND SAFETY

SYDNEY HEARING

GARDEN VIEW CASE STUDY

SUBMISSIONS ON BEHALF OF DR MILES BURKITT AND DR KENNETH WONG

1. These submissions are made on behalf of Dr Miles Burkitt and Dr Kenneth Wong. Both provided general practitioner services at the nursing home operated by Garden View Aged Care Pty Ltd (**Garden View nursing home**), including to Mr Terance Reeves. Both Drs Burkitt and Wong gave written and oral evidence to the Royal Commission as part of the Garden View Case Study heard at Sydney on 6 and 7 May 2019.
2. In his written submissions of 31 May 2019 Senior Counsel Assisting (**Counsel Assisting**) submits that the Royal Commission should find that consent for the “prescription and administration” of Risperidone to Mr Reeves was not obtained by Drs Burkitt and Wong from Mr Reeves’ “guardian”.¹ Counsel Assisting also seeks a finding that Mr Reeves was ‘deconditioned’ during his admission at Garden View nursing home caused by physical restraint.² The finding of deconditioning is primarily aimed at Garden View nursing home where Mr Reeves had been admitted and particularly at Ms Kee Ling Lau, the Director of Nursing. However, there is an implication in such a finding that the deconditioning occurred while Drs Burkitt and Wong were providing general practitioner (**GP**) medical services to Mr Reeves.
3. In the submissions which follow, Drs Burkitt and Wong submit that no such findings should or can be made because the evidence relied on does not substantiate such findings and because there were serious inadequacies in the investigation by those assisting the Royal Commission, causing prejudice to Drs Burkitt and Wong.

¹ Submissions of Counsel Assisting, 31 May 2019 at [49] (Dr Burkitt), [75] (Dr Wong).

² Submissions of Counsel Assisting, 31 May 2019 at [101].

4. Five points may be made about the lack of investigation. First, the alleged legal relationship of guardianship was never established by evidence. Second, there was no medical evidence tendered to the Royal Commission from those treating Mr Reeves prior to admission to Garden View, despite Mr Reeves having previously seen a geriatrician who (apparently) prescribed Risperidone. Third, there were no medical notes from Mr Reeves' geriatrician or GP setting out his medical and medication history including his medical condition prior to admission. Fourth, there was no expert evidence tendered reviewing the prescription of Risperidone including its appropriate use and amounts. Fifth, the finding of 'deconditioning' is based on lay opinion evidence from Mr Reeves' family which should properly have been given by an appropriately qualified medical expert. No expert medical evidence was tendered on what caused the 'deconditioning'.
5. As is set out below, both Drs Burkitt and Wong in fact both had implied consent from Mrs Reeves, communicated through her daughter Ms McCulla, for the prescription of Risperidone. Mrs Reeves had administered Risperidone in the past and such administration was ongoing at the time of admission to Garden View nursing home. Ms McCulla informed nursing staff at Garden View nursing home of this fact and this was communicated to the doctors. Dr Burkitt may also have reasonably assumed from the record in the Doctor's communication book that, in fact, he had express consent. Further, on the evidence tendered the Royal Commission could not be satisfied that Mr Reeves was 'deconditioned' by the time he left Garden View or the reasons for such deconditioning.

Inadequate investigation

Alleged relationship of guardianship

6. Ms Michelle Lauren McCulla is the daughter of Mr and Mrs Reeves and gave evidence on 7 May 2019. In responding to the leading question, "Is your mother the guardian of your father?" she answered "Yes". This is said to be the foundation for

the proposition by Counsel Assisting that “Mrs Reeves was Mr Reeves’ legal representative (guardian)”.³

7. No document was tendered to the Royal Commission to establish whether Mrs Reeves was either the legal representative or the guardian of Mr Reeves. At law “legal representative” and “guardian” connote different relationships. No order from the Guardianship Tribunal⁴ or power of attorney or other similar instrument was tendered and the records at the nursing home operated by Garden View Aged Care Pty Ltd (**Garden View**) did not contain one.⁵ The Garden View admission form with respect to Mr Reeves makes provision for the admitting nurse to sight a power of attorney but the space was left blank.⁶
8. Mrs McCulla is a bookkeeper⁷ not a lawyer and the relationship of guardian is a statement of a legal relationship. At best her understanding that her mother was the guardian of her father is no more than a statement that her mother was the primary carer and spouse of her father. (Of course, no criticism is intended of Ms McCulla.) According to the ACAT Assessment of 21 Feb 2018 Mrs Reeves was asserted to be his primary carer⁸ which is a statement of fact, not a legal relationship.
9. Counsel Assisting has not established that Mrs Reeves was either the guardian or the legal representative⁹ of Mr Reeves.

Pre-admission evidence of Mr Reeves’ medical condition

10. There was no evidence tendered in the Royal Commission from a medical practitioner who had seen and treated Mr Reeves prior to admission to Garden View.
11. In the ACAT Assessment Mr Reeves was said to have advanced Alzheimer’s disease, depression and hypercholesteremia.¹⁰ Apparently that information was obtained

³ Submissions of Counsel Assisting, 31 May 2019

⁴ Section 14 of the *Guardianship Act 1987* gives the Guardianship Tribunal the power to make an order appointing a guardian.

⁵ See GVN.0001.0001.0146

⁶ *Ibid.*

⁷ WIT.0097.0001.0001 at [4]

⁸ CTH.4001.0004.6800

⁹ The term “legal representative” is not used in the *Guardianship Act 1987*.

from a geriatrician although the name has been redacted in the exhibit.¹¹ No statement was obtained from the geriatrician and his or her clinical notes were also not in evidence. If, as is likely, Mr Reeves had been referred to the geriatrician by a general practitioner (GP) then there should be a report by the geriatrician to the GP containing any relevant diagnosis and suggestions for treatment including medication.

12. Presumably, also, Mr Reeves had a GP who treated him from time to time. No statement was obtained from any such GP and his or her medical notes were not in evidence. As a result there are no primary records available to the Royal Commission of the progression of his serious conditions, his medication history including notation of the relevant medications administered, the amounts of such medication and their efficacy for the period up to admission to Garden View.
13. In many ways it is extraordinary that such foundational material was not in evidence. The Royal Commission is in the deeply unsatisfactory position of having to glean that material from secondary sources, such as the ACAT assessment, and from non-medical witnesses such as Mrs Reeves and Ms McCulla. The simple fact is that the extensive powers available to the Royal Commission to summons such evidence¹² have not been used to obtain highly relevant material.
14. The omission is important for a number of reasons. First, an accurate assessment of Mr Reeves' medical condition by a medical practitioner prior to admission to Garden View was not available to the Royal Commission. Mr Reeves' symptoms and behaviour at Garden View may well (as appears likely) have been a continuation of a long history of day/night reversal, disorientation, aggression, inappropriate behaviour, unco-operative behaviour, sleeping during the day, wandering at night, incontinence and so forth. As will be submitted below, it is simply impossible to accurately find there was a deterioration in Mr Reeves' medical condition at the end of his admission to Garden View nursing home without a 'baseline' understanding of his condition prior to admission to compare it with.

¹⁰ CTH.4001.0004.6799

¹¹ Ibid

¹² Section 2 of the *Royal Commissions Act 1902*

15. Second, an absence of evidence of Mr Reeves' pre-admission medication history makes it very difficult for the Royal Commission to make findings about the use of Risperidone (or Galantamine) and other dementia related medication by Mr Reeves. The evidence from Mrs Lillian Reeves was that she had administered Risperidone to him from time to time.¹³
16. Risperidone, for example, may have been administered by Mr Reeves over a long period of time, given that he had suffered from dementia for 8 years prior to admission¹⁴ to Garden View nursing home. For the period leading up to admission, the Royal Commission is unable to determine:
- The period of time over which he was administered Risperidone;
 - The amount or amounts of Risperidone administered from time to time;
 - Whether those amounts differed over the period of 8 years during which he had suffered from dementia;
 - The frequency of administration;
 - Whether Risperidone was prescribed and/or administered on a 'PRN' or regular basis, or both;
 - Whether Risperidone was efficacious in the opinion of a medical practitioner.
17. Third, the absence of such evidence means that Drs Burkitt and Wong are unable to rely on evidence that, potentially, might indicate that Mr Reeves had been prescribed and administered Risperidone for many years with good effect. Further, such evidence may have established that Mrs Reeves had administered Risperidone to him over a number of years.

Background evidence to Mr Reeves' admission

Mr Reeves' symptoms prior to admission to Garden View nursing home

¹³ Mrs Reeves' Statement WIT.0097.0001.0001 at [8]. As to which see further below.

¹⁴ CTH.4001.0004.6800-6801

18. In the absence of expert evidence the Royal Commission must rely on secondary material in order to establish Mr Reeves' medical condition prior to admission to Garden View.
19. An ACAT Assessment was conducted on 21 February 2018. It reveals that Mr Reeves was suffering from the following symptoms from his dementia:
- Unable to complete a sentence, hold a conversation or provide information;
 - Some aggressive incidents;
 - Several occasions where he has gone walking outside and become lost;
 - Day night reversal and tends to get up during the night thinking he needs to get dressed and go to work;
 - Reduced and interrupted sleep;
 - Lost weight and appetite reduced;
 - Gradual decline in cognitive function since diagnosis of Alzheimer's 8 years ago "with a noticeable deterioration over the last 6-12 months".¹⁵
20. He was said to be "independent in mobility, transfers and toileting but otherwise is dependent on [his wife] Lillian [Reeves] for all activities of daily living".¹⁶
21. The ACAT assessment concluded that if residential care is considered then "Terry would need the skills and contained environment of a specialized dementia unit".¹⁷

Use of Risperidone pre-admission

22. Mrs Reeves gave evidence that prior to admission Mr Reeves had been prescribed Risperidone by a geriatrician.¹⁸ The amount was not indicated in her statement or in oral evidence. She said she had two boxes of Risperidone when Mr Reeves was admitted, which implies that the geriatrician had provided at least one repeat

¹⁵ CTH.4001.0004.6800-6801

¹⁶ CTH.4001.0004.6800

¹⁷ CTH.4001.0004.6801

¹⁸ Mrs Reeves' Statement WIT.0097.0001.0001

prescription.¹⁹ Mrs Reeves said in her statement that “I only ever gave Risperidone when he was upset about something ... or if we were going out somewhere”.²⁰

23. Counsel Assisting has assumed in his submissions that Mrs Reeves had obtained (for her husband) a script from a medical practitioner of “Risperidone ½ tab PRN TDS (to be taken as needed or required three times a day)”.²¹ There is no evidence of this in either Mrs Reeves’ statement or in the transcript.
24. A simple internet search reveals that Risperidone tablets are readily available in amounts of 0.5mg, 1 mg, 2mg, 3mg and 4mg tablets.²² The 0.5mg tablets come in ‘blister packs’ of 20 tablets and each of the others in blister packs of 60 tablets.²³ Counsel Assisting has speculated that the amount prescribed to Mr Reeves prior to admission to Garden View was 0.25mg PRN TDS (as needed, up to three times a day).²⁴ One might equally speculate that ‘½ tablet’ means as much as 2mg, if the tablets were 4mg each. Similarly, the fact that Mrs Reeves says she gave a ‘½ tablet’ from time to time does not exclude that the geriatrician may have, in fact, prescribed regular Risperidone of an amount higher than 0.25mg. So when Mrs Reeves says she gave Mr Reeves a ‘whole tablet’ and he became drowsy, the amount may be considerably more than 0.25mg.
25. When Mr Reeves was administered Risperidone 0.25mg on 8, 9 , 10 and 15 May 2018 at Garden View nursing home it had “no effect” on two occasions and a “small effect” on another occasion.²⁵ This may indicate that Risperidone at 0.25mg was insufficient to have a therapeutic effect.

¹⁹ Ibid

²⁰ Mrs Reeves’ Statement WIT.0097.0001.0001 at [8]

²¹ Submissions at [8]

²² <https://www.nps.org.au/assets/medicines/b6eb77fd-cd49-4e3d-a94d-a53300ff3a6e-reduced.pdf>

²³ Ibid

²⁴ Submissions at [8].

²⁵ GVN.0001.0001.0281-283

Relevant admission records

26. Garden View used a specific form for the admission of persons to the facility which was in evidence. Mr Reeves' admission form was signed on the day of his admission, 1 May 2018, by Lorraine Guinty under the heading "Chief Nurse on Admission".²⁶ Ms Guinty was not called to give evidence. The form was later annotated to include the date of separation.
27. The form does not state who the referring medical officer is (or if there was such a referral) and then specifies Dr Miles Burkitt as the "attending medical officer".²⁷
28. The form states that "the RN is responsible in ensuring that this admission form is completed".²⁸ The form specifies that a tick is to be made, when attended to, against a long list of matters relevant to the admission, or 'NA' where the item is 'not applicable'. On Mr Reeves' form the following matters, *inter alia*, have a tick next to them:
- a) "Contact the resident's or family member's preferred LMO":
 - b) "Resident consent form to be given to family member to complete"; and
 - c) "Medication Identification Chart filled in".
29. It is not clear what precise 'resident consent form' was given and to whom. It is unlikely to have been the form later used to achieve consent for restraint²⁹ because that form has a specific title, 'Restraint Authorisation Form', which differs from the description of the form used on the admission form. No relevant witness was called to assist with resolution of this issue. It may be the case that such a form sought some general consent for the administration of medication.

²⁶ GVN.0001.0001.0150

²⁷ GVN.0001.0001.0150

²⁸ GVN.0001.0001.0151

²⁹ GVN.0001.0001.1270

Communications about Risperidone on the day of admission

The entries concerning Risperidone on 1 May 2018

30. Mr Reeves was admitted to Garden View nursing home on 1 May 2019. In the records for that day there are two contemporaneous notes of a communication between Registered Nurse (**RN**) Kanaan of Garden View and Mr Reeves' family concerning Risperidone. The first is in the Doctors' Communication Book (apparently written before the nurse's clinical note) and the second is in the nurses' clinical progress notes.³⁰
31. Communication with doctors at Garden View nursing home occurred through notation in the Doctor's Communication book and through oral briefings of the doctors by nursing staff. The doctors also kept clinical notes³¹ in a separate document from the nurses' clinical progress notes.³²
32. The Doctor's Communication Book entry on the day of admission reads:
- 1.5.18 Terance Reeves – unsettled, wandering++, wife said she gave him Risperidone 5 mg, ~~½ tab tds (PRN) wife given consent to chart (Reg)~~ Risperidone ½ tab (nocte) + ½ tab tds (PRN) P/s Sign ~~NIM NIM~~³³
33. In addition to the horizontal lines, there is a 45-degree diagonal line going through the whole entry. There was no evidence as to when the lines were added. The author of the entry, RN Kanaan, could not recall why the text was struck though.³⁴ Dr Burkitt said that “there's a tradition in the nursing home that we cross out stuff as we – as we acknowledge it”.³⁵ However, there was no evidence as to whether the lines appeared on the entry when Dr Burkitt saw it on 7 May 2018 when he attended

³⁰ See the reference to “written in LMO's book to review” in GVN.001.002.0278

³¹ See GVN.0001.0001.0648 et seq

³² See GVN.001.002.0278 et seq

³³ GVN.001.002.0286

³⁴ T1266.45-1267.01

³⁵ T1287.02-03

Garden View.³⁶ He said he could not remember whether it was crossed out at the time or not.³⁷

34. Second, there is an entry written at 2200 on 1 May 2018 in the nursing staff clinical progress notes in RN Kanaan's handwriting:

Resident remains awake and wandering. Received phone call from wife & daughter. Wife informed the above. Wife said at home when he is really restless she gives Risperidone 5 mg ½ tab tds. Written in LMO's book to r/v. Staff brought him to the nurse's station as resident doesn't like to stay in the room.³⁸

35. In oral evidence there was a dispute as to who the conversation was with. Mrs Reeves said she did not have a telephone call that night with a nurse³⁹ but Ms McCulla said she did.⁴⁰ However, RN Kanaan said she spoke with Mr Reeves' wife.⁴¹

Conflict between the evidence of Mrs Reeves and Ms McCulla

36. Ms McCulla's evidence was at odds with Mrs Reeves' evidence in two important respects:

- a) The amount of Risperidone which on one occasion caused drowsiness; and
- b) Whether Risperidone was given after that occasion.

37. The examination of Ms McCulla on the issue was as follows:

MR GRAY: All right. What about the reference to the giving of half a tablet of – it's actually .5 milligram, it looks like 5 but it's .5 milligram half tab risperidone. Are you able to comment on that?

MS McCULLA: Well, if they're saying that we informed them that that's something that we would do at home, it's 100 per cent incorrect. Dad never – after the occasion that I was aware that he had had the half tablet to make a trip to a holiday house that we had, he was very dosed out. It didn't sit well

³⁶ GVN.0001.0001.0649

³⁷ T1287.22-23

³⁸ GVN.001.002.0278

³⁹ T1212.42

⁴⁰ T1229.17

⁴¹ T1263.29-45

with him, and as a family we had discussed that we didn't ever want to do that again. So to recommend that as a treatment in a home, absolutely would never have happened.⁴²

(Emphasis added)

38. That is, Ms McCulla said that Mr Reeves had a half a tablet and he was very 'dosed out' and thereafter administration of Risperidone ceased. There was no indication of when the 'dosed out' episode occurred.
39. However, in Mrs Reeves' statement, at paragraph [8], she said as follows:

... I only ever gave Risperidone to Terry when he was very upset about something. For example, if we were going out somewhere and he didn't know what was going on. I would give him half a tablet to settle him down. I didn't do this often and I usually only gave him half a tablet at a time. I gave him a full tablet only once and it made him very drowsy. ...

(Emphasis added)

40. That is, Mrs Reeves indicated that there was one occasion where she had given Mr Reeves a whole tablet and he had been very drowsy. She said she gave him half a tablet to settle him down "if we were going out somewhere" or he was "very upset". She did not say she ceased giving Risperidone at all, even after the experience with a whole tablet.
41. It should be observed that neither witness accepted Counsel Assisting's assertion that the family member who had spoken to RN Kanaan accepted that Mr Reeves was being given 0.5mg of Risperidone PRN by Mrs Reeves. This lack of evidence is compounded by the absence of medication records from Mr Reeves' geriatrician and GP.
42. Accordingly, the Royal Commission is unable to find that Mrs Reeves did not administer Risperidone after the occasion where Mr Reeves experienced drowsiness from an increased dose of Risperidone. This is relevant because it is likely that the

⁴² T1230.1-12

administration of Risperidone was ongoing, and had not ceased at the time of Mr Reeves' admission to Garden View nursing home.

Mrs Reeves and Ms McCulla's account of the conversation with RN Kanaan

43. Both Mrs Reeves and Ms McCulla gave evidence about contact with employees of Garden View nursing home on 1 May 2018.

44. Mrs Reeves was asked by Counsel Assisting,

Have you ever said to staff of Garden View that you sometimes gave your husband half a tablet of risperidone if he was very upset?

And she replied,

I didn't no.⁴³

45. Ms McCulla said about her conversation with RN Kanaan on 1 May 2018:

... I spoke to a nurse when I called the home, and she said that dad was a bit unsettled and was currently with her at the time, following her around. She asked me if there was anything that my father had been previously given to settle his nerves. I repeated that I was aware that she [Mrs Reeves] had given him half a tablet of risperidone previously, but it did not sit well with dad. ...⁴⁴

46. Counsel Assisting suggests that it was Ms McCulla who spoke with RN Kanaan and not Mrs Reeves. This is indeed likely if the Royal Commission rejects RN Kanaan's recollection that it was with Mr Reeves' wife. If that is the case then the active involvement of Mrs Reeves set out in the Doctor's communication book and the nurses' clinical progress notes must have been conveyed by Mrs McCulla to RN Kanaan. Drs Burkitt and Wong accept this occurred.

47. There was some difficulty with Ms McCulla's evidence about the administration of Risperidone at home. At T1229 Ms McCulla said that

I was aware that she had given him half a tablet of risperidone previously

However, at T1230 she said

⁴³ T1212.44-47

⁴⁴ Ms McCulla at T1228.16-21

That if they're saying that we informed them that that's something that we would do at home [administer Risperidone], it's 100 per cent incorrect.

48. As the former statement is corroborated by Mrs Reeves it should be accepted over the second statement which is not corroborated.
49. Accordingly, it is open to the Royal Commission to find that Mrs McCulla informed Ms Kanaan that her mother, Mrs Reeves, gave Mr Reeves half a tablet of Risperidone previously. This accords with RN Kanaan's contemporaneous note in the clinical progress notes and this part of the note in the Doctor's Communication Book: "wife said she gave him Risperidone 5 mg, ~~½ tab tds (PRN)~~".

Counsel Assisting's submission on the contemporaneous notes

50. Counsel Assisting makes three highly contestable submissions about the notations of 1 May 2018 at [33], [34] and [35] of his submissions:
- a) None of the text struck through was consistent with the entry in the progress notes: [33];
 - b) That RN Kanaan crossed out the passage because "she realised she made a mistake" and the note "did not reflect the content of the phone call": [34];
 - c) It is "clear" that the entry did not record consent being given by Mrs Reeves: [35].
51. A simple comparison between the two notes reveals that [33] is incorrect:
- Doctor's communication book: "wife said she gave him Risperidone 5 mg, ~~½ tab tds (PRN)~~".
- Clinical note: Wife said at home when he is really restless she gives Risperidone 5 mg ½ tab tds.
52. The remainder of the Doctor's communication book note reads: "~~wife given consent to chart (Reg) Risperidone ½ tab (nocte) + ½ tab tds (PRN) P/s Sign NIM NIM.~~"

53. RN Kanaan did not recall if she was mistaken about what she wrote.⁴⁵ There was no evidence as to whether she or someone else crossed those words out.
54. Counsel Assisting speculates that the notation was a mistake, presumably because Mrs Reeves now says she did not give such permission. However, there are other interpretations available for the entry in the Doctor's communication book. First, the note may have been RN Kanaan's *interpretation* of what she was told by Ms McCulla. Her interpretation, now unable to be recalled, was that because Mr Reeves had had Risperidone PRN in the past Mrs Reeves was impliedly consenting to both regular Risperidone ½ tab (nocte) and ½ tab PRN. There are further possible explanations such as a superior nurse rejected the notation as accurate or a medical practitioner disagreed that both regular Risperidone ½ tab (nocte) and ½ tab PRN was appropriate for Mr Reeves. (Indeed Dr Burkitt said that such a dose was not one he would have given.)⁴⁶ All of those explanations are speculative including that of Counsel Assisting.
55. This issue simply cannot be resolved on the state of the evidence and no factual finding should be made as suggested by Counsel Assisting at [34].
56. Contrary to what Counsel Assisting says at [35] it is far from "clear" that the note in the Doctor's communication book did not record consent. It clearly *did record* express consent by Mr Reeves' wife, but was crossed out at some unknown point in time. For the reasons stated above it should not be speculated that the passage had been ruled out by the time it was seen by either Dr Burkitt or Dr Wong.
57. Further, both the note in the Doctor's communication book and the clinical progress note recorded that "[Mrs Reeves'] gives Risperidone 5 mg ½ tab tds". The verb used is in the present tense not the past tense and conveys the meaning that such administration of Risperidone was ongoing at the time of admission. It is reasonable to assume that the reader of the Doctor's communication book note would conclude that consent had been given by Mrs Reeves to administration of Risperidone at Garden View because she 'was giving' Risperidone to Mr Reeves at home. It is also

⁴⁵ T1267.01

⁴⁶ T1287.46

reasonable to assume that as administration of medication was now being performed at Garden View that the continuation of the same medication was also consented to. That is, consent was implied and there was no indication that such consent had been withdrawn following admission to Garden View.

58. Accordingly, it is open to the Royal Commission to find that even if the express consent passage had been struck out, Mrs Reeves, through her daughter Ms McCulla, gave implied consent to the continued administration of Risperidone.

Administration of Risperidone at Garden View Nursing Home

59. Neither Dr Burkitt nor Dr Wong were involved in the administration of Risperidone. This was a role performed by the nursing staff at Garden View nursing home.
60. Notwithstanding that the Doctor's communication book recorded express and implied consent to the administration of Risperidone on 1 May 2018 it was, in fact, not prescribed or administered until 7 May 2018. According to the medication charts Risperidone 0.25 mg was given by nursing staff on a PRN basis on 7, 8, 9, 10 (twice) and 15 May 2018.⁴⁷ Nursing notes record that the medication was often ineffective.⁴⁸
61. Due to increased agitation and confusion in the evenings Dr Wong prescribed "regular Risperidone 0.5mg (nocte)" [at night] on 16 May 2018. Mr Reeves was then administered Risperidone 0.5mg at night on 16 May and then on 18, 19, 20 and 21 May 2018 by nursing staff.⁴⁹ Mr Reeves fell on 21 May 2018 and nursing staff ceased Risperidone.⁵⁰ On 28 May 2018 Dr Burkitt formally ordered all Risperidone be ceased in light of the fall.⁵¹
62. No further Risperidone was administered to Mr Reeves in the 46 days before Mr Reeves left Garden View nursing home on 7 July 2018.

⁴⁷ GVN.0001.0001.0837

⁴⁸ GVN.0001.0001.0281-283

⁴⁹ GVN.0001.0001.0835

⁵⁰ GVN.0001.0001.0285

⁵¹ GVN.0001.0001.0649

Was consent obtained by Doctors Burkitt and Wong to prescribe Risperidone?

Dr Burkitt

63. During Mr Reeves' admission in 2018 Dr Burkitt was the Local Medical Officer attending patients allocated to him by the management of Garden View. He attended and served the needs of such patients comprising about 25% of the residents at Garden View.⁵² Dr Wong was his locum. Dr Burkitt did not admit Mr Reeves and first saw him on 7 May 2018 when he prescribed "Risperidone 0.5mg ½ TDS PRN, Charted NIM".⁵³ He later saw Mr Reeves on 28 May, and then 3, 19, 21 and 26 June. Dr Burkitt's evidence revealed that the main form of communication between nursing staff and Dr Burkitt was the Doctor's communication book and discussions with relevant nurses.⁵⁴
64. Counsel Assisting asserts at [47] that "Dr Burkitt did not seek consent from Mr Reeves' authorised representative before making this prescription [Risperidone ½ tab TDS (PRN)]" and at [49] that the Royal Commission should find that "Risperidone 0.5 mg (1/2 tablet PRN) was prescribed and administered without the consent of Mr Reeves and without the consent of his guardian ...".
65. As is set out below Dr Burkitt did not need to specifically seek out such consent because he reasonably believed he had already obtained it. The basis for that belief was that it was communicated in the Doctor's communication book on 1 May 2018 and he had a conversation with a nurse about consent. As is discussed at length above, the Doctor's communication book provided both express and implied consent for the prescription and administration of Risperidone.
66. In his statement to the Royal Commission Dr Burkitt said:

[11] I was advised at the time [7 May 2018] by the duty RN that the resident had already been prescribed this by the resident's doctor prior to arriving at the Garden View Nursing Home. However, I was aware that this particular medication did not accompany him when he arrived at the facility. The

⁵² WIT.0146.0001.0001 at [4]

⁵³ GVN.0001.0001.0649

⁵⁴ See WIT.0146.0001.0001 at [11], [13], [17]

circumstances surrounding the prescribing of this medication was that the duty RN advised me that the resident was extremely agitated, confused and wandering extensively. As I was advised that he was on Risperidone on a PRN basis at home I determined that medication was relevant to the prevailing situation and so I charted it.

(Emphasis added)

67. In oral evidence Dr Burkitt said in relation to the Doctor's communication book:

Well, going on the – the doctor's message book, I interpreted the – what I saw there as a consent.⁵⁵

...

And in relation to the text about express consent crossed out he said:

DR BURKITT: Well, that's probably a – reflects on rather a bad process, perhaps, that is there's a tradition in the nursing home that we cross out stuff as we – as we acknowledge it, and I – you know, I have in my memory that we had a conversation with the nurse and that I had consent to chart it.

68. And then later,

MR GRAY: Now, I just ask you to just give your view again, I'm not sure whether I gave you a chance to answer it: did you regard this entry in the form you saw it as being consent by the authorised representative for you to chart risperidone?

DR BURKITT: Well, I probably did. You've got to remember this patient came into the nursing home with no medical history provided, virtually came in, to the best of my knowledge, with a bag of medication, and very little supporting information, and we have to get on with the job and try and look after him.⁵⁶

69. Accordingly, Dr Burkitt did turn his mind to the issue of consent. He saw the message in the Doctor's communication book as consent. The Royal Commission can be satisfied that Dr Burkitt considered that consent had been obtained because it (appeared that it) was either expressly given or was implied from past administration

⁵⁵ T1286.18-19

⁵⁶ T1288.34-41

by Mrs Reeves. It is not open to the Royal Commission to find that the notation of express consent in the Doctor's communication book had been struck through prior to Dr Burkitt seeing it.

70. Counsel Assisting's submission at [49] that Risperidone "was prescribed and administered without the consent of Mr Reeves and without the consent of his guardian" should not be accepted for the following reasons. First, the statement conflates prescription by the medical practitioner with administration by the nurses employed by Garden View. The two need to be considered separately because there is no evidence that Dr Burkitt (or Dr Wong) ever administered Risperidone to Mr Reeves.
71. Second, *based on the note in the Doctor's communication book*, Dr Burkitt justifiably believed he had express consent and, in fact, had implied consent to prescribe Risperidone to Mr Reeves. He was entitled to and did rely on the Doctor's communication book for consent. If RN Kanaan made a mistake with recording express consent or misinterpreted what she was told then there is no evidence that any such mistake or misinterpretation was communicated to Dr Burkitt. If, contrary to these submissions, the Royal Commission finds that express consent had been crossed out by RN Kanaan then Dr Burkitt still had implied consent based on past administration of Risperidone by Mrs Reeves.
72. Third, Mr Reeves did not have a guardian.

Consent under the Guardianship Act 1987

73. Section 36(1) of the *Guardianship Act 1987* permits "the person responsible for the patient" to give consent for "minor or major treatment". Mrs Reeves appears to have been the person responsible for Mr Reeves as she falls within the definition of that term in s. 33A(4)(b) (a close and continuing spouse) and there is no evidence of guardianship.
74. Consent is not further defined in the *Guardianship Act 1987* and, accordingly, carries its ordinary English meaning. It is well established that consent may be both express

or implied. There is ample foundation for the Royal Commission to find that Dr Burkitt had he had express consent on the basis of the notation of 1 May 2018 in the Doctor's communication book (crossed out after it was written). Implied consent must necessarily arise from the relevant facts and circumstances surrounding the relevant act of treatment, including prescription. A person who holds out an arm to a doctor holding a needle for a vaccination but says nothing is providing implied consent to an injection. In this case the relevant facts and circumstances have been discussed at length above. The Royal Commission has a reasonable basis to find that Dr Burkitt also had implied consent to prescribe Risperidone.

75. Accordingly, the Royal Commission should find that Dr Burkitt had consent to prescribe Risperidone to Mr Reeves on 7 May 2018.

Dr Wong

76. Dr Wong first saw Mr Reeves and examined him on his admission to Garden View nursing home on 1 May 2018.⁵⁷ He next saw him 2 weeks later on 15 May 2018 and for the last time on 21 May 2018.⁵⁸
77. On 15 May 2018 he was told by nursing staff at Garden View that Mr Reeves "was not settling into his new environment, he was wandering around the nursing home and getting agitated with staff. He appeared to be in distress at these times."⁵⁹ He was further told that the "low dose Risperidone" of 0.25 mg "was not effectively managing Mr Reeves distress, his wandering or his behaviour and the wandering was creating a risk of falling."⁶⁰ He said,

I discussed Mr Reeves' condition at that point with the nursing staff and determined that it was in Mr Reeves' best interests and for the sake of safety that his Risperidone was increased to 0.5mg nocte ...⁶¹

⁵⁷ GVN.0001.0001.0648

⁵⁸ GVN.0001.0001.0649

⁵⁹ WIT.0145.0001.0002

⁶⁰ Ibid

⁶¹ Ibid

78. Dr Wong's consideration on 15 May 2018 of the further administration of Risperidone and physical restraint was shaped by the clinical signs presented to him by Mr Reeves which he summarised in oral evidence to the Royal Commission:

MR GRAY: In addition you've said for belt restraint. What were the clinical indications in your mind for belt restraint?

DR WONG: Back to the wandering, the increased risk of fall, okay, when I saw him, he was walking normally, just normal, loss of balance, he was walking well and that's one of the problem, him walking up and down the hallway. And one – the normal matter of trying and controlling him was one is first non-pharmaceutical, we will try behaviour modification, try to talk to him, calm him down. According to the nursing staff, that's not working. Two, pharmacological restraint risperidone, order tablet three times a day. According to nursing staff, it's not working. So we're left down to physical restraint and I've order physical restraint lap band on the chair as the most lowest of them.⁶²

79. Counsel Assisting says at [70] that Dr Wong "did not discuss any limitation on the period of time for which a belt restraint could be required" but omits Dr Wong's answer that he relied on the restraint protocol at Garden View nursing home:

I didn't actually state that [length of restraint] but I was assume that this is the normal protocol, not to – only to invoke when there's no other alternative, when there's danger to him. Number two, I also got assumption that lap restraint is done when, in a safe situation, he would be supervised, not left alone. And also I was left to understand lap restraint possibly means he will be entertained, not just sit there in a corner, he will be entertained – not entertained, sorry, stimulated with people walking around, trying to get him to do things.

80. It should be recalled that Dr Wong was not a resident doctor, but instead visited Garden View nursing home intermittently to see a limited number of patients. He was not in a position to monitor, let alone direct or police, restraint by nursing staff.
81. Counsel Assisting asserts at [71] of *Submissions* that Dr Wong "prescribed the increased regular dose of Risperidone without seeking or obtaining any consent from an authorised representative or family member". Then further at [75] he suggests that the Royal Commission should find that "regular Risperidone nocte was

⁶² T1298.50-1299.04

prescribed and administered to Mr Reeves without his consent, and without the consent of his guardian Mrs Reeves (or any other person responsible) ...”.

82. Dr Wong’s reply to questions about the issue of consent was omitted from the submissions. This is unfair because it ignored the way in which consent was obtained. Counsel Assisting’s submission rests on an assumption that unless consent was provided expressly, and for every adjustment of Risperidone, then consent had not been obtained. That approach ignores the reality that medical practitioners attend large numbers of patients in nursing homes at times when it is highly unlikely that the patient will have the ‘person responsible’ on hand to obtain consent from. It also ignores the fact that consent may be given impliedly.

83. Dr Wong had an answer which provided a basis for assuming consent to his change to the amount of Risperidone. When asked whether he had consent Dr Wong replied, quite properly,

... I made a couple of assumptions. One, it was previously prescribed already by Dr Burkitt and, second, the nursing – nursing staff inform me that the patient was already on it before he came to nursing home.

84. That is, Dr Wong provided two reasons for not seeking (express) consent to prescribe Risperidone 0.5mg: that Dr Burkitt had already obtained consent and that Mr Reeves had been prescribed and administered to it by those responsible for him, prior to admission to Garden View. Dr Wong also relied on implied consent for the prescription of Risperidone. It was reasonable for him to do so because Dr Burkitt had prescribed Risperidone on 7 May 2018 and this was indicated in the medical notes.⁶³ He said he was also aware that Mr Reeves had been administered Risperidone prior to admission. While not explored by Counsel Assisting with Dr Wong, one source of that fact was the notation in the Doctor’s communication book of 1 May 2018 (discussed above).

85. The implied submission that express consent to an increase of Risperidone 0.25mg PRN TDS to 0.5mg (nocte) nightly should have been obtained should also be rejected.

⁶³ GVN.0001.0001.0649

Dr Wong had concluded that Risperidone 0.25 mg “was not effectively managing Mr Reeves distress” which is a conclusion based on his medical expertise. He increased the medication to the next level available and asked for it to be administered regularly. That is an adjustment to the medication within the bounds of the consent obtained by Dr Burkitt. There is no requirement under the *Guardianship Act 1987* that consent needs to be obtained for every incremental adjustment of medication for which consent has already been obtained.

86. The same submissions are made with respect to implied consent with respect to Dr Wong as were made with respect to Dr Burkitt. The Royal Commission should find that Dr Wong did have implied consent to prescribe Risperidone 0.5mg (nocte) on 15 May 2018 and that administration ceased altogether on 21 May 2018.

Deconditioning

87. Counsel Assisting makes submissions at [93] – [101] that Mr Reeves became deconditioned during his time at Garden View. He relies on the observations of Mrs McCulla and Mrs Reeves, rejects any opinion by Ms Lau because she did not have direct contact with Mr Reeves, but accepts Ms McCulla’s assertion that he has had a “partial recovery” post-Garden View because he has regained mobility but remains unable to speak and is incontinent.
88. As mentioned, no medical evidence was provided to the Royal Commission of Mr Reeves’ medical condition prior to admission. Further, there was no medical evidence provided as to his medical condition after he left Garden View. This is despite the fact that he must have been seen by his GP, may have been seen by his geriatrician and is likely to have been seen by a different medical practitioner at the new facility he has apparently gone to.
89. While it was clearly open to those assisting the Royal Commission to do so, no report was sought from a geriatrician as to whether he was ‘deconditioned’ and why, based on the medical notes and records of Garden View or an examination of Mr Reeves.

90. The ACAT Assessment conducted on 21 February 2018, set out above, indicates that before admission and because of his dementia he was already suffering reduced appetite and weight loss and was “unable to complete a sentence, hold a conversation or provide information”. The Assessment also recorded a decline in cognitive function over 8 years with “a noticeable deterioration over the last 6-12 months” prior to the assessment.
91. To submit that weight loss (*Submissions* [100]), inability to speak and incontinence ([101]) were caused by restraint and not the natural progression of a serious condition such as dementia is a highly contentious submission to make where there is no medical evidence to back it up.
92. In the absence of expert medical opinion the Royal Commission should not make a finding of deconditioning nor draw a causal connection between the restraint applied and any assumed deconditioning.

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