

IN THE CORONERS COURT  
OF VICTORIA  
AT MELBOURNE

Court Reference: 2132 of 2014

**FINDING INTO DEATH WITH INQUEST**

*Form 37 Rule 60(1)*

Deceased: MORGAN PATRICK MCCABE.

Delivered on: 13 November 2018.

Hearing dates: 9-10 May 2016, 11-12 October 2016.

Findings of: CORONER PETER WHITE

Coroners Officer: Leading Senior Constable King Taylor.

Representation: Ms E Ellyard of Counsel appeared for the  
Wesley Mission Victoria, and employees  
Ms Jennifer Horsefield and Ms Mia  
Tseres.

Mr A Lewis of Counsel appeared on behalf  
of Xxx.

Catchwords:

Death by drowning of a disabled person attending a beach resort holiday organised by an authorised care provider and the duty of persons engaged in holiday planning and holiday care, and the search for a missing person.

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## PURPOSE OF A CORONIAL INVESTIGATION

1. The Coroners Court of Victoria is an inquisitorial jurisdiction<sup>1</sup>. The purpose of a coronial investigation is to independently investigate a reportable death to ascertain if possible the identity of the deceased person, the cause of death and with some exceptions, the surrounding circumstances. Surrounding circumstances are limited to events which are sufficiently proximate and casually related to death.
2. The cause of death refers to the medical cause of death, incorporating where possible the mode or mechanism of death.
3. For coronial purposes the circumstances in which death occurred, refers to the context or background and surrounding circumstances to the death, but is confined to those circumstances sufficiently proximate and casually relevant to the death and not merely all circumstances that might form part of a narrative culminating in death.
4. The broader purpose of a coronial investigation is to contribute to a reduction in the number of preventable deaths, the promotion of public health and safety, and the administration of justice. The Coroners role is to seek to establish the facts and surrounding circumstances.
5. Additionally a Coroner may comment on any matter connected with the death, may report to any Minister, public statutory authority or any person connected with the death, including recommendations relating to public health and safety and the administration of justice. This finding draws on the totality of the material produced as part of the coronial investigation into Morgan Patrick MCCabe's death, including the inquest brief, statements, reports and testimony of witnesses who gave evidence at the inquest and any exhibits tendered through them. In writing this finding I do not purport to summarise all of the evidence but refer to it only in such detail as appears warranted by its forensic significance. All coronial findings must be made based on proof of relevant facts on the balance of probabilities. In determining these matters, I am guided by the principles enunciated in *Briginshaw v Briginshaw*.<sup>2</sup> The effect of this and similar authorities is that coroners should not make adverse findings against, or comments about, individuals unless the evidence provides a comfortable level of satisfaction that they caused or contributed to the death.

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<sup>1</sup> Section 89(4) *Coroners Act 2008* (Vic).

<sup>2</sup> (1938) 60 CLR 360.

## REDACTIONS

6. Having considered applications that I withhold the names of various persons connected with this inquest in the public interest, I direct that the names of Xxx and Yyy who were the carer's present at Phillip Island during the events under consideration, be with-held from this finding for reasons to do with their mental health and personal wellbeing. I further order the redaction of the names of the three other Wesley Mission clients, who were also parties to these events, (Aaa, Bbb and Ccc).
7. On balance, I do not consider that a case for any further redaction has been established.<sup>3</sup>

## BACKGROUND

8. On Friday 25 April, 2014 Wesley Mission Disability Support Supervisor Xxx, together with fellow staff member Yyy, accompanied four adult male Wesley Mission clients to attend a holiday at Phillip Island. They were due to return to Melbourne on the following Monday 28 April, 2014. The clients were Bbb and Ccc, normally resident at Moira road, and Aaa and Patrick McCabe (Patrick), from Georges road.<sup>4</sup>
9. According to Xxx, the clients were *pretty high functioning. Bbb and Ccc are able to go on public transport and things like that by themselves. Patrick and Aaa are also high functioning. They still need a level of daily care but can also be quite independent.*<sup>5</sup>
10. The circumstances in which arrangements for this holiday came to be made were a matter of dispute between the Wesley Mission, and Xxx. Relevant evidence concerning this issue was given on behalf of Wesley Mission by Xxx's supervisor Mia Tseres, (Mia),<sup>6</sup> and the Missions Victorian Residential Manager, Jennifer Horsefield, (Jennifer).<sup>7</sup> A statement by Wesley General Manager Services, Kelly Stanton dated 25 May 2016, was also received and has been accepted into evidence as part of exhibit 8.

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<sup>3</sup> Section 8(e) Coroners Act, and Sect 18(2) (b) Open Courts Act considered and applied.

<sup>4</sup> See Xxx's evidence set out from paragraph 19 below. See also her statements at exhibits 3 and 3(a) and transcript book 1, commencing at 47.

<sup>5</sup> Exhibit 7 and 7(a).

<sup>6</sup> See Mia's evidence set out from paragraph 103 below. See also her statement at exhibits 4 and 4(a), and transcript book 1, commencing at 196.

<sup>7</sup> See Jennifer's evidence set out from paragraph 200 below. See also her statement at exhibits 7 and 7(a) and transcript book 2, commencing at 64.

11. According to Xxx's original statement, on the morning of Sunday 27 April 2014 after breakfast Ccc and Patrick while supervised by Xxx, went for a walk to the beach leaving the house before midday and returning at approximately 1.30 pm. At shortly before 2 pm, Patrick went out of the house through the back door. About 10 minutes later Xxx went out through the back door to look for Patrick. He wasn't in the back yard where she had thought she would find him and so she took the path leading from the back garden down to the beach, (the route they had earlier taken), where she continued her search. Thereafter and in something of a panic, she called local Police, whom she asked to, *keep an eye out for him*. Shortly afterwards and while still at the beach, Xxx stated that she saw Patrick and after speaking together, that they returned to the house.
12. At a later time Patrick left the house again, after telling Xxx that he wanted to collect some cuttlefish, he had left outside. He had also asked for and been given a piece of paper with both Xxx and Yyy's name written on it. This may or may not have been concerned with his intent at that time to go to the beach so that he might draw their names in the sand.<sup>8</sup>
13. Later Xxx realised Patrick had not returned and she went outside and then to the beach to conduct a search. After an extensive search, and at around 4.30pm, she claimed that she called Mia informing her that Patrick was missing, following which she was in regular contact with Mia over the issue of her ongoing search, which did not include a direction from Mia that she should notify police.
14. At about 5.46pm we know that Xxx called police informing them that Patrick had gone missing.<sup>9</sup> Xxx testified that thereafter she continued her search and later informed Mia that Patrick was missing, but not that she had already notified Police. Later at approximately 7.50 pm according to her testimony, she messaged Mia informing her that she had earlier called the police.
15. The circumstances in which this contact and the earlier alleged phone conversations took place between Mia and Xxx and the content of those conversations, were a matter of dispute between Xxx and Mia. I further note that there was a level of inconsistency as to the timing of these events in Xxx's early statements, as amended, as compared with her later evidence provided at inquest. Additionally relevant to these matters was the evidence given by Xxx concerning her physical wellbeing at the time a timeline was obtained from her by her

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<sup>8</sup> See paragraph 44 below.

<sup>9</sup> See paragraph 46 below.

employer's State manager, Jennifer McGrath some two days after Patrick's death, and the involvement of Mia, Jennifer and Yyy in those events. I also note Xxx's ongoing issues with her own mental health, following the events under examination.

16. It is not in dispute that Xxx called Mrs MCCabe to inform her that Patrick was missing as requested by Mia and that Mia and Mrs MCCabe also later spoke. They arranged to drive together from Melbourne to Phillip Island, arriving at the house at around 1.30 am.<sup>10</sup>
17. On arrival Xxx and Mrs McCabe took the Wesley bus and resumed the search for Patrick. SES together with local police had also continued to search. These groups searched until 8.35am on Monday 28 April, when Patrick was found deceased in the water at Ventnor beach in the vicinity of Cadogan Avenue. Mrs MCCabe later attended the Cowes police station with Xxx and Mia and identified Patrick who was believed to have drowned.
18. At the Directions Hearing and during the course of the Inquest, three major issues were identified.
  - a) The planning of the holiday including the choice of residence participants, the manner of the choice of venue and the choice of and number of attending staff, and the changes in staffing arrangements that occurred shortly before the holiday commenced.
  - b) The circumstances in which Patrick went missing on 27 April 2014.
  - c) The steps taken to report his absence and to find him.

#### EVIDENCE.

#### **Xxx**<sup>11</sup>

19. Xxx testified that at the relevant time she was employed as a Disability Support Supervisor at a residential home in George's road Ringwood run by the Wesley Mission, Victoria. Her duties included supervising and assisting house staff who together were responsible for providing 24 hour care to the 5 clients normally resident at the home. Her role was to be the team leader responsible for five staff and further administrative duties concerned with the staffing and management of the home. At the time of making her statement to the Coroner's

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<sup>10</sup> Transcript book 1 at 50.

<sup>11</sup> On the application of Counsel and without objection, Xxx was permitted to give her evidence via telephone conferencing from a room within the Court, which was remote from the courtroom.

investigator, Xxx had worked in disability support for about 10 years, 9 of which were with Wesley Mission, employed at the Georges road home. The requirements needed to become a disability support worker are certificate 4 in disability, which Xxx completed approximately 4 years ago whilst at TAFE.<sup>12</sup>

20. In further testimony Xxx stated that she was not working at the present time and had not been able to work since soon after Patrick's passing, but was about to undertake a return to work programme.
21. As above, on Friday 25 April 2014, Xxx together with colleague, Yyy, brought 4 Wesley Mission clients to stay in a rental property on Phillip Island for the weekend. These included Patrick whose risk profile is further described in the evidence of Xxx from paragraph 39 below.

**b) Pre-Holiday Planning.**

- Undated supplementary email statement exhibit 3(a), re planning.

22. An email sent by Xxx to the Court and copied to the parties, was tendered in evidence and became exhibit 3(a). In that Xxx stated that:

*Prior to the holiday, Patricia McCabe had spoken to the co-ordinator and herself. (She) was eager for her son to attend a holiday and was given all the information up front, and where it was situated in Silver leaves, Phillip Island. Patrick did want to go away to Sydney but his mum said she would prefer if he just went away for a weekend in Victoria, due to cost and actually requested the Phillip Island area. She said it was nice down there and a beautiful area and that she and her husband at one stage had owned property nearby.*

23. *Patricia was given copies of the holiday proposal and details of staff and cost. Patricia was happy that Yyy was attending as she felt Patrick had good rapport with her. Patricia paid Patrick's share of the cost of the holiday in cash.*

*Patricia was also happy for the other two residents from Moira road to attend as Patrick was good friends with them and they were independent residents. Patricia signed off on the*

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<sup>12</sup> Transcript 89-90.



*proposal giving her permission and there were no other issues leading up to the holiday besides regular feedback from her, that Patrick was excited to be attending.*<sup>13</sup>

- Oral testimony re planning.

In regard to the planning for the Phillip Island trip, Xxx had been involved together with Mia, her colleague Yyy and Jennifer. Mia was her immediate superior and Jennifer was, *further up the ladder. Jenny was the manager. She was the one who would look at the staffing costs and... see if it was, 'doable', with the costs involved.*

24. There were discussions between the four women about the planning for the holiday but Xxx's role was to prepare the Holiday Application Form. Her further evidence was that she had had no experience in organising a holiday or preparing a holiday application form before this time.
25. As above, Xxx had known Patrick for a period of nine years, and had together with another seven staff members taken five clients including Patrick on a trip to Torquay on a previous occasion. She together with the seven staff, looked after the clients, but she had no particular responsibility for Patrick. She also had no role to play in respect of the planning of that trip.<sup>14</sup>
26. In reference to the preparation for the Phillip Island trip, Xxx was questioned about the preparation of the Holiday Application Form, exhibit 3(b).<sup>15</sup> According to Xxx, both her supervisor, Mia and the general manager Jennifer, were extensively involved in the process. Her colleague Yyy assisted by helping her with the sourcing of potential accommodation destinations. Mia was also involved with this part of the preparation. She was, just, *talking us through it and giving us ideas of what we should do and how we should do it.*
27. Sections 3 and 4 of the Form, headed respectively, '*Benefit of the holiday to the client(s)*', and '*Destination*', were filled out by Xxx. Phillip Island and the particular accommodation was chosen because, *there was actually another team leader from a different house that had been there prior to us going there and she said it was set up for people with disabilities. It had like a hoist and stuff like that, so they had been there before and she advised us about it.*

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<sup>13</sup> Exhibit 3(a) dated 1/12/2014. Moira road was another facility for disabled persons, run by the Wesley mission.

<sup>14</sup> (Book 1) Transcript 62-3.

<sup>15</sup> There were two versions of this form one dated 7/3/14, exhibit 3(b), and a second dated 2/10/14, exhibit 3(c).

28. Prior to the holiday no one involved in the planning, including Mia or Jennifer, physically viewed the location before it was signed off on. They instead relied upon descriptions of the property given to them by the other member who advised that the property contained a *bigger bathroom and a bigger toilet and because we had Aaa with a broken leg, and he had a walker... that would have been great for him.*<sup>16</sup>
29. Point 6 of the Application addressed the issue of staffing during the course of the holiday. Xxx testified that, *to begin with we realised that Aaa had a broken leg, we did ask for extra staff, but we still thought it was 'doable' without it. (I did have concerns) to begin with, I did but I still thought that we could cope with that, because I ended up signing it.*
30. Xxx testified that when Aaa broke his leg she queried if additional support would be needed. The proposal was assessed and Xxx was informed her that an additional staff member would not be required.<sup>17</sup> According to Xxx the cost of the trip was a major factor in the decision not to employ an additional staff member as Wesley, *pays for staff to attend and they did not have the budget.*<sup>18</sup>
31. In addition, Xxx testified that staff at Wesley were apprehensive about volunteering to work and attend the holiday as they were concerned about the pay rate. Wesley staff, *only had a certain amount of hours that [they] could use... we had to get them right before the holiday would be approved.*
32. Xxx further explained that she was effectively required to donate hours and the payment for same, to defray the costs of staff payments due in respect of the holiday, meaning that she would not receive payment for her work over the weekend, other than her normal base salary.<sup>19</sup>
33. Staff would only be paid from 11am until 7pm instead of the usual 8am to 10pm, which meant that the overall cost of the holiday would be reduced and could therefore be approved. Staff who originally wished to attend later rejected the offer.<sup>20</sup> Staff who attended the trip

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<sup>16</sup> Transcript 73-4.

<sup>17</sup> Transcript 74.

<sup>18</sup> Transcript 75.

<sup>19</sup> Transcript 75-6.

<sup>20</sup> Transcript 77-8.

were still waking up early and performing work duties due to the expectation they would have to care for clients even though this expectation was never formally discussed.<sup>21</sup>

34. And, *We had enough trouble with getting the hours approved, that was the end, final end of trying to get them approved and Jenny kept sending them back...*<sup>22</sup> There was no other way for the staff to organise their hours to better reduce costs. Staff were expected to sleep at the accommodation, however, only one of them would be paid over that time. Staff would rotate which member would be paid for the *sleepover shift* and the other would volunteer. Xxx *signed off* on this agreement.<sup>23</sup>
35. Further according to Xxx, the agreement set out their roles and responsibilities, including their 24-hour duty of care. Xxx understood that both she and Yyy owed a duty of care to the *clients* but they were never briefed on this matter.<sup>24</sup> Additionally staff were not briefed on how to deal with emergencies.<sup>25</sup>
36. Families did not get a copy of the application made by Wesley for the holiday. Again from Xxx, families would not have been aware of its contents although both Mia and she had conversations with Mrs MCCabe about the arrangements concerning the holiday, *who was eager for her son to attend the holiday. She was given all of the information up front and particulars in regard to the accommodation, and where it was situated in Phillip Island.*<sup>26</sup>
37. In regard to staffing levels, she also had a conversation with Mrs MCCabe telling her that, Yyy and I were going... and that was the only conversation... I can understand how she may have thought that there were more carer's because other holidays... you know, there'd been only two client's and two carer's had gone.

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<sup>21</sup> Transcript 78.

<sup>22</sup> Transcript 79.

<sup>23</sup> Transcript 81. Yyy did not sign the document. See brief page 123 and transcript 82. A second similar document was signed on her behalf by Jennifer after Patrick's death. See exhibit 3(f) dated 24 March and Jennifer's evidence at paragraph 251 to the effect that she could not recall when she signed the document on behalf of Yyy.

<sup>24</sup> Transcript 81-2.

<sup>25</sup> Transcript 83.

<sup>26</sup> Transcript 86.

38. Reference who would lead the staff, *I think that because the holiday... we were organising for a long time, we were... everybody just wanted it to happen, and it was a quickly planned thing... we didn't have any conversation in regard to that.*<sup>27</sup>

- Testimony re Patrick's risk presentation.

39. Xxx further stated that the (George) Street house where she supervised Patrick was kept locked when people were inside, this because there was another client who had previously absconded. Patrick did not have a key to the premises.

During the period of Patrick's stay with Wesley Mission, Xxx had become familiar with his Prader-Willi syndrome. *He had a tendency to seek out food and we had to keep cupboards locked because he would go looking for food.* This was the only symptom of which she was aware. She was also aware that he had, *obsessive tendencies, but it was never something that was talked about... Obsessive Compulsive Disorder... it was never something that was diagnosed.* He sometimes displayed this behaviour in respect of cleaning for example his birdcage... *He had tendencies to clean his birdcage for hours on end... to me it was more a tendency about cleaning, cleanliness.*<sup>28</sup> Xxx was additionally asked about her staff outings with Patrick. She was aware that he had sometimes gone on outings with fellow members of staff but she did not work on weekends and was not familiar with that matter. She was also aware that such outings had included shopping and other recreational activity, including attendance at film showings and ten-pin bowling.<sup>29</sup> Staff had multiple strategies to deal with Patrick's Prader-Willi Syndrome and his obsessive behaviour. They were contained in an 18-point plan<sup>30</sup> available to all staff. <sup>31</sup> For the holiday, staff were given a contingency plan relating to the care of Patrick. This covered potential issues which may arise, such as, *if there were any issues or if a staff member became sick or one of the residents became sick that [they] would try and get someone else to come down... so that if a staff member or resident*

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<sup>27</sup> Transcript 86-7.

<sup>28</sup> Transcript 65.

<sup>29</sup> Transcript 66.

<sup>30</sup> Transcript 90 and the document headed, *Tips for Patrick McCabe* (x18), at Exhibit 3(d).

<sup>31</sup> The 18 point document in summary stated when to remind Patrick to shave and reiterate how he should listen to staff. It also contained instructions on how to wash and fold his clothes, how to administer consequences and rewards **and when to lock doors to keep him inside.** (See footnote 203 below). There were tips regarding Patrick's Special Olympics Training and his dietary requirements. It contained instructions how there is to be no hugging or tickling of staff and that staff are to ensure Patrick removes all items off his floor. It also provides instructions on Patrick's sleeping schedule, his DVD borrowing allowances and what items he is allowed to choose to consume during the day. The emphasis is mine.

*was unwell, they would be relieved.* However, for the holiday, no specific risk assessment was under taken.

40. In regard to Patrick's personal traits Xxx further offered that Patrick was an energetic person, who had swum in the Special Olympics and that he enjoyed walking. As to this trip, Xxx made a statement to Police the day after the events under examination, in which she stated, *He was really happy staying at the house and getting on really well with everybody. He liked to go for walks and at times he did walk, off on his own'. (later amended in Court through her Counsel to), 'ahead with the group'. Not on purpose but just because he enjoyed it. Patrick was able to communicate with people, and knew about watching out for traffic and crossing the road and that sort of thing.*<sup>32</sup>

**c) Patrick's movements on Sunday 27 April, 2014, dated 28 April 2014.**

- Statement by Xxx.

41. Xxx and Yyy shared the driving of their four clients to Phillip Island, arriving at 4 pm on the Friday afternoon. On Saturday 26 April they all went to the Chocolate Factory and later saw the penguins and had a barbeque dinner. After an uneventful first day on the Saturday the four men slept in on the Sunday and had a late breakfast followed by a TV movie. Thereafter *Ccc, Patrick and I went for a walk to the beach, which was about 200 meters from the house. While there Patrick was looking for cuttlefish. After collecting some cuttlefish... we all came home. We arrived back at the house at 1.30 pm.*
42. At around 2 pm Xxx saw Patrick leave the house via the back door to put his cuttlefish into a bag. About 10 minutes later she walked out to the back of the house to look for him and immediately realised that he wasn't there and looked down the path leading to the beach. Xxx walked down to the beach with Ccc but couldn't see Patrick. She, *looked in both directions along the beach, but he wasn't there.*<sup>33</sup>
43. *Xxx was panicking* and called the police and explained the situation, which call we know was in fact taken at 2.01pm. She asked them to, *keep an eye out for him.* But within 5 minutes she states that she found him walking on the beach. They all returned to the house where Xxx spoke to Patrick about his disappearance.<sup>34</sup>

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<sup>32</sup> Exhibit 3 paragraph 20, statement by Xxx taken 28 April 2014 at Cowes Police Station.

<sup>33</sup> Exhibit 3 page 2. See also photographs showing outside grounds surrounding house at exhibit 3(e).

<sup>34</sup> Exhibit 3 page 2.

44. Later Patrick requested to have Xxx and Yyy's names written on a piece of paper. Xxx was not sure why, but during their earlier walk that day she had written his name in the sand.<sup>35</sup> Patrick told Xxx he was going outside to the back of the house again to put some cuttlefish in a shopping bag. Xxx said to him, '*... don't be long because we are going out for a late lunch*'. *It would have been mid-afternoon by this time.*<sup>36</sup>

According to her amended statement, at around 4:30pm Xxx realised Patrick was not in the back yard.<sup>37</sup> Patrick wasn't there. Xxx and Ccc then drove around the main street of Cowes while continuing to search and then back to the pier. Later, very concerned for Patrick, Xxx called Police to notify that he was missing, *as it was getting cold and starting to get dark. When I spoke to Police they came to the pier. I gave them a description of Patrick. I thought he was wearing blue jeans and a blue jumper, and blue and black runners. After talking to the police Ccc and I drove back to the house. I then informed my co-ordinator, Mia that Patrick was missing earlier than this, at about 4 to 4.30 pm, and that I had spoken to Police about this.*<sup>38</sup> The emphasis relates to the amendment sought on behalf of Xxx.

45. Wonthaggi Police subsequently received a call at 5.46 pm from Xxx reporting that Patrick had gone missing. In response Police came to the house and checked in the vicinity but without result. Xxx went to the beach to continue her search and then commenced to drive around Cowes, returning to the house every half hour or so, while on her version, maintaining contact with Mia and without discussion between them of whether the Police should be notified. Instead according to Xxx, Mia simply continued to emphasize to her the importance of finding Patrick.

- Testimony from Xxx.

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<sup>35</sup> Exhibit 3 page 3.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid. I note that Xxx later gave contradictory evidence about the time at which she first informed Mia that Patrick had earlier gone missing, telling the court that she noticed he was missing for a second time, from the backyard after only a few minutes following his departure to attend to his cuttlefish, and that she was coincidentally engaged in a telephone conversation (about another client) with Mia while she looked for Patrick at that time. Her further evidence was that it was during this early conversation that she told Mia that Patrick had gone missing earlier in the day. See paragraphs 54-58 below, where her evidence explaining the reasons for her belief as to this matter, and her then view as to the correct sequence of events, are set out. I also note that the reference to that time being 4-4.30 pm, had been added to her statement at the request of counsel, Transcript 54 and exhibit 3 page 3, and her later evidence suggesting that she had in fact informed Mia of this matter, at an earlier point.

Xxx's inconsistency on these issues together with the inferences to be drawn from the telephone records of the timing of calls between Xxx and Mia, is discussed below in the findings section commencing at paragraph 268.



46. Xxx further testified that later at 7.55pm she contacted Mia by text, having resolved to also inform her that the police had been earlier called in regard to his further disappearance.<sup>39</sup> At Mia's direction Xxx then called Patrick's mother, Mrs MCCabe, informing her that Patrick was missing, and that the Police had been contacted. Mrs MCCabe determined that she would come down immediately. Mrs MCCabe later arrived with Mia, and Xxx and Ms MCCabe then immediately took the Wesley bus to continue the search. At around 4.00 am they returned to the house and Xxx slept for approximately one hour. They resumed searching later in the morning and xxx learnt that SES personnel were also now involved. Later at about 10 am the group heard that a male body had been found on the beach. They then attended Cowes police station, and the body that had been found on the beach, was identified as being Patrick.<sup>40</sup>

47. In further examination Xxx was examined about the timeline, which had been prepared at a meeting with Wesley senior staff on 30 April, i.e. some two days after Patrick's body was found.<sup>41</sup> Xxx commented, *that this was straight after I'd been released from the Doctor, with high blood pressure so I can't really... the time line means nothing to me now when I look at it... I was called in for a meeting that I really didn't want to attend and wasn't medically fit to attend but never the less attended. In addition Xxx offered that she was unable to remember much of the meeting... questions were put to me about the times and I think at the time I can't remember whether or not Yyy had been there first and I was just happy to go with what she said because I didn't like, I had no idea. I just wasn't in a very good frame of mind that day.* **In testimony Xxx was unable to verify whether the statement she made at that time was accurate or not accurate.**<sup>42</sup> The emphasis is mine.

48. I also note that there was some further confusion regarding the facts of the phone call which we know from telephone and Police records took place at 13.57 pm on Sunday, April 27. At this time a report was made by Xxx about an incident of Patrick going missing. Police notes regarding that phone call state Xxx, *Client gone for a walk. Taken longer than normal. Patrick MCCabe. Mild intellectual disability. In Cowes. Meant to return ½ hour ago?* Xxx confirmed

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<sup>39</sup> See details of calls and messaging between the two women in the findings section at paragraph 301 below.

<sup>40</sup> Exhibit 3.

<sup>41</sup> See brief, Exhibit 5, 153.

<sup>42</sup> Transcript 94-5. Wesley advised that Mia was not at the meeting and would testify that she believed that the conferencing with both women did take place on that day, but did not know which order the interviews were conducted in. See also brief pages 152-156, which includes the time frames prepared by Wesley state manager Jennifer Craig with Jennifer (Horsefield), purportedly after meetings with Mia as well as Xxx and Yyy. The suggestion that Mia was present on this occasion is also alluded to in a text message exchange between Xxx and Yyy on that date. The order in which the three women were interviewed is not established by this evidence.

that she had made the phone call but cannot recall stating Patrick should have returned half an hour ago. This did not make sense to her as she would never willingly permit Patrick to go for a walk on his own for half an hour.<sup>43</sup> Patrick was only allowed outside to move the cuttlefish he had collected closer to the house. Before Xxx realised Patrick was missing, he was only outside for approximately 5 minutes.<sup>44</sup>

49. In further testimony Xxx stated that the property they were staying at for the holiday was approximately 25 metres from the water.<sup>45</sup> When Patrick went missing she was immediately concerned for his welfare and once he she realised he was missing she began to search for him.<sup>46</sup>

50. Within 5 minutes, Xxx located Patrick. He was following his footprints in the sand to return back to the house.<sup>47</sup> Xxx and Patrick walked back to the house where they all prepared to go out for lunch. Whilst they were preparing, Patrick asked if he could go back outside to put his cuttlefish into a bag. Xxx allowed it and Patrick walked outside on his own.

51. When Xxx was questioned as to why she did not go with him she stated:<sup>48</sup>

*I didn't think that I needed to because he had been outside at the residence where we lived... you know he would go outside and do different things. Like he he'd go out and wash the bus and we'd just lock the front door and he would ring the doorbell to come back in and because he said he was only going to do that I didn't see a problem with it.*

53. Xxx continued, *I didn't see it as a risk. Had I seen it as a risk it wouldn't have happened, I wouldn't have let him do it.* When Xxx realised Patrick was missing she returned to the beach again to look for him. Xxx provided conflicting statements as to when she called the police. At inquest she stated she called the police whilst on the beach. In later evidence she stated that she called the police upon returning to the house.<sup>49</sup>

54. Once back at the house, Xxx (testified) that she called Mia and told her Patrick was missing. She also told Mia that Patrick had also gone missing earlier that day. She did not mention that she had called the police in regard to his second disappearance as she was concerned about

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<sup>43</sup> Transcript 97.

<sup>44</sup> Transcript 98.

<sup>45</sup> Exhibit 3(e).

<sup>46</sup> Transcript 101.

<sup>47</sup> Transcript 102.

<sup>48</sup> Transcript 103.

<sup>49</sup> Transcript 104-5.



Mia's reaction. It was a *Wesley process that we had to get permission to call police, and as stressed as I was, it just wasn't something I wanted to go into, to say why I had called police without ringing and getting approval... I didn't know we had to ring Wesley to get permission to call the police, but it had been talked of previously.*<sup>50</sup>

55. When Xxx told Mia that Patrick was missing Mia told Xxx that they needed to find him. Mia did not ask Xxx to call the police. *Like she was really worried, as I was... and all I can remember her saying was that, 'we need to find him'.*<sup>51</sup>

56. It was approximately an hour and a half after Patrick went missing that Xxx called the police. This was again in conflict with where she previously stated she called the police once at the beach, or on returning from the beach. Xxx's justification for waiting so long to call the police the second time was that she thought Patrick would return like he had when he went missing earlier that day. Xxx later stated she had another conversation with Mia where she said, *Later, during the hour and a half, I did have a further conversation... while I was driving the bus around she was really, really worried and so was I. And all I can remember is her just saying, 'we need to get him, we need to get him back,' and that was up until I rang the police officer from the pier.* The emphasis is mine.

57. While Xxx was looking for Patrick, Yyy was back at the house caring for the other clients.<sup>52</sup>

58. As above, according to Xxx's phone records the second time she called the police was at 5:53 pm, informing them that Patrick was missing. She had been calling and texting Mia, keeping her informed throughout the afternoon. At 7:50pm Xxx texted Mia telling her that she had called the police and that Patrick hadn't been found. Mia then called her back and asked her to call Mrs MCCabe and inform her that Patrick was missing, which she did.<sup>53</sup>

59. Since the day of the accident, Xxx stated that she has been on WorkCover and had not been in contact with the organisation and was not a part of the quality of service review.

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<sup>50</sup> Transcript 107-8

<sup>51</sup> Transcript 109.

<sup>52</sup> Transcript 112.

<sup>53</sup> Transcript 113-14.

60. The house used for the holiday was fitted with a security code and to access the front door the code had to be entered. Xxx could not recall if the backdoor could be locked from the inside. Patrick did not need to be let out to exit the back of the home and he could open it himself.<sup>54</sup>

Ms Ellyard for Wesley Mission.

Under questioning from Counsel for Wesley Mission, Xxx stated that the arrangement to visit Phillip Island, had been made about 6 weeks before the event. The document Mrs McCabe subsequently signed to authorise Patrick's participation was faxed to her by Xxx on 17<sup>th</sup> March, 2014.

*Discussions were had about it... well we decided we were going to go away at the end of April.*<sup>55</sup>

61. In reference to exhibit 3(f) the Wesley Mission Application Form signed as approved by Jennifer on 31 March, Xxx agreed that indicated that approval had been granted some three weeks before departure. She also agreed that Jennifer's approval included some fairly detailed discussion about how the staff costing aspects of the trip would be funded.
62. She further testified that part of the issue was the costing for the staff who were going away on the holiday, as well as the need for appropriate arrangements to be made in respect of the staff who remained to attend to the clients from the two houses, who were not attending the holiday. The reasoning for the back and forth of the documents was to find an economic way to host the holiday. The final version of the document calculated the additional cost would be approximately 35 hours, plus the sleepovers.
63. Xxx was then asked about the additional cost of sleepovers and how the staff member who was being paid for that night would be the one who had the obligation to wake up and help the client.
64. The appropriateness of this arrangement was questioned by the Court. After identifying the issue as I then saw it, I concluded by further commenting that, *it seems to me and I make this*

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<sup>54</sup> Transcript 116.

<sup>55</sup> Transcript 119.

*point so that you may address it, that any other arrangement makes a rather unfair demand upon the services of Wesley staff, who are being called upon to participate in this way.*<sup>56</sup>

65. Xxx was further questioned about staffing arrangements and how originally a staff member called Renee, was to attend the holiday weekend but how she subsequently made herself *unavailable*. And how in these circumstances Yyy had stepped up and agreed to replace her.

66. Further that the client who had broken his ankle, Aaa was taken to his GP by Xxx and it was determined that he would be able to attend the holiday, *as long as he wasn't required to do much walking*. Aaa was further required to bring his walker, which he was required to use and had used prior to breaking his leg.<sup>57</sup>

67. In respect of being briefed by Mia concerning her responsibilities, it was suggested she would testify that she had briefed Xxx on the day of her signature to the application 24/3 relating to Xxx's duty of care. Additionally, on subsequent days Xxx and Mia discussed the details of what Xxx's duty of care would be required whilst on holiday. Xxx responded, *'Well I agree she is probably going to give evidence but I disagree that we had conversations over the course of the weeks about the holidays, not a brief as such...'*

68. In a later testimony Xxx stated that she informed Mia about her not wanting to attend the holiday. Right up to the very last day I wasn't comfortable with attending. *I said that I wasn't comfortable with attending... I had never been away from my family and my partner... and I've got two sons... my partner passed away 4 months after Patrick.*<sup>58</sup>

69. *Ultimately Xxx agreed to attend the holiday. According to Xxx, Mia was understanding of her concerns about attending the holiday.*<sup>59</sup>

70. Xxx was then asked about her earlier evidence that no risk assessment had been undertaken. She stated she could not remember if there was an analysis of the risks associated with the holiday.

71. Concerning the meeting that led to the chronology being prepared, Xxx agreed that it was important for Wesley to try and work out what had happened. As earlier, she disagreed with Counsels suggestion that Mia had not been at that meeting.<sup>60</sup>

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<sup>56</sup> Transcript 125-7.

<sup>57</sup> Transcript 128.

<sup>58</sup> Transcript 131.

<sup>59</sup> Transcript 131.

72. Xxx returned to complete her testimony on the following morning May 10. On resumption, Counsel offered in evidence a medical report dated May 5 2016, which stated,

*Xxx has post-traumatic stress disorder with anxiety and depression, also aggravation of Hypertension triggered by death of client, April 2014. This has increased in severity as the inquest for his death approaches. She may not be able to remain for the whole of the inquest.*<sup>61</sup>

73. Further questioning by Wesley then focused on the planning of the holiday. Counsel questioned Xxx stating that Mia will say that in her recollection, *there was never any discussion about needing more than two people to care for the four people on this holiday?*
74. Xxx responded: *There was a discussion around you know if having two people would be sufficient. We obviously thought we could do it with two people, to care for the four clients on this holiday. We thought we could do it with two but we did have a discussion about having more, and especially when... I think it came up more when one of the residents had a broken leg or broken ankle.*
75. Wesley further questioned... *Her recollection will also be that when discussions were held at the team meeting about the need to fill the second spot that was left by Renee, in that conversation it was always clear that it was a total of two staff who were going to go on this holiday?* Xxx responded affirmatively and confirmed that in that specific meeting, there was not a discussion regarding the requirement of more staff.
76. Xxx further agreed that when she and Yyy were away with the four clients that they could ring Mia for assistance or advice, at any time. She also agreed that there was discussion over the relevant time with Mia to do with the issue of Ccc's medication, which had mistakenly been left in Melbourne.
77. Statements made by Mia and Xxx were seen to contradict each other. Wesley further questioned Xxx in relation to this matter. The first issue was if Xxx told Mia she could see Patrick on the pier when he went missing the second time. Statements from Mia indicate Xxx told her she could see Patrick, however, Xxx at inquest disagreed and stated that she needed to get off the phone with Mia, *as she thought she could see Patrick on the pier and would need to drive over to check.*

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<sup>60</sup> See transcript 133.

<sup>61</sup> See Exhibit 3 (g), signed by a Dr Sanders.

78. Xxx disagreed with the time in which Mia was informed Patrick was missing. Xxx testified that Mia was aware Patrick was missing well before 7:50 pm when she texted Mia.

*Q. Your memory is in error and the conversation that you and Mia had shortly after your text at 7.50, was the first time she had any information from you that Patrick was missing?'*

Ans. No.

79. Xxx also disagreed with the timing of conversations she had with Mia regarding numerous other phone calls. Xxx testified that these conversations occurred before 8:00 pm, however, according to Mia, these occurred later in the night.

Mr Lewis for Xxx.

80. Xxx testified that she has commenced a process of returning to work at a different Wesley home than where she had previously worked with Patrick.<sup>62</sup> She then spoke of the impact his loss had had on her and her difficulties in returning to full time employment.

81. Xxx gave further evidence of Patrick's obsessive tendencies. She stated that there was no formal diagnosis of OCD. Prior to the holiday. She also had no previous experience of Patrick absconding.

82. Xxx further stated that prior to the holiday she was not told that she must keep Patrick in eyesight at all times. She further commented even if she had, there would be no way that this could be achieved. *He was independent. He showered on his own, he went to the toilet on his own.*

83. Xxx testified that she was never told that Patrick was not allowed to be in either the front or back yard at home without supervision. She knew he was a very strong swimmer in pools, however, she did not know about his swimming capabilities in the sea.

84. Xxx was also questioned regarding the first time Patrick went missing. She confirmed he was missing for approximately 5-10 minutes. She did not file a formal police report but instead called the police and asked if they could keep an eye out for him. She also confirmed that she soon found Patrick as he walked back over the crest of a hill.

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<sup>62</sup> Xxx's work and medical history following Patrick's death is discussed at transcript 158-9. The effect of her post event disorder on her continuing ability is discussed by the witness at transcript 159. She opined, *not really had an effect on my (ability) to remember detail, but it has made it harder for me to talk about it and you know to be constantly talking about it.*

85. Xxx was asked... *the phone call to police you were asked about yesterday?* And the reference to, *client gone for a walk... meant to return half an hour ago.* Q. *Was Patrick allowed to go for a walk by himself?* Xxx disagreed that Patrick was allowed to go for a walk by himself. Xxx was unable to explain why the police would have that written down in their notes and was firm in stating that she would never tell Patrick to go for a walk by himself.<sup>63</sup>
86. When Xxx found Patrick the first time he went missing they had a discussion that he had *worried her* and how, *he should not do it again.* Xxx further commented that she did not think he would do it again. She explained to him the dangers of walking off and that she did not want him to get lost. Xxx stated she thought he understood her at the time.<sup>64</sup>
87. Xxx was questioned as to why at 2:00 pm she did not tell Mia about Patrick being missing and why she was concerned how Ms Tseres would take the news. Xxx stated, *I just thought she would be quite upset and angry... we'd had conversations prior that we always needed to get permission to call the police and that... even afterwards she said to me that I should have called her first before I called the police, so I was just worried what she would think.*<sup>65</sup>
88. Xxx further mentioned that relating to the Wesley protocol, *we had a conversation prior that if anything ever happened we always needed to get um 'pager's authority', to call police... like an emergency pager... That's at the house... like after hours.*<sup>66</sup>
89. When Xxx later called the police at 5:40pm or 5:53pm she did not tell Mia because, *the same reason like when we had first spoken about Patrick missing. It was about like they were worried that the media could get hold of it or something and that was really worrying me. I didn't want, you know, anything to happen so I was worried to let her know then but then I realised I had to obviously tell her.* It was after this at 7.50 pm Xxx stated she sent Mia a text informing her about calling the police.
90. Her further testimony was that between her call to Police at 5.50pm and her text to Mia informing her of the call to police, that she had, *ongoing calls (to Mia) talking about how we are trying to find him and you know we're looking everywhere and we have been looking at the beach... Yeah it was awkward (not telling Mia that the police had already been called),*

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<sup>63</sup> Transcript 165.

<sup>64</sup> Transcript 165-7.

<sup>65</sup> Transcript 168-9.

<sup>66</sup> Transcript 168-69.



*but like I felt comfort that the police were helping look at the same time. That we had help rather than just Yyy and I.* <sup>67</sup>

91. Xxx stated that after she told Mia, Mia said that she would have to speak to Jennifer. Mia stated that, *now she was going to have to ring... to inform Jen because I called the police, which was something that she hoped to avoid.* Xxx also stated that Ms Tseres told her the following day, *she... said that we had done everything correctly apart from calling the police, we should have got permission before we did that.* <sup>68</sup>

92. Xxx was questioned about Yyy's statement. She thought Yyy had only gone out once looking for Patrick during what was the second search, *as someone always had to be at the house with Aaa who had a broken leg.*

93. Xxx confirmed that after he had gone into the backyard at the start of the first incident that she had noticed him missing after a period of approximately five to ten minutes, and that she had immediately become worried.

*It was a really stressful day. Later, my blood pressure was up probably 200 over 84, not that I'd checked it but I could tell.* <sup>69</sup>

94. Xxx was then questioned in regards to her health after the incident. She said that within an hour of finding out they had found Patrick she was not feeling well. When questioned about her health on 30 April 2014 when was asked to and made the timeline of events to Wesley, she stated, *I'd just left my Doctors surgery, who didn't want me to leave... Um only if my mum came and picked me up and drove me. And I was there for an hour while they kept checking my blood pressure, which wasn't going down.* She also testified that she is still under the care of a psychologist who she sees once a week. <sup>70</sup> The emphasis is mine.

95. In regard to the holiday planning she was further questioned about the suggestion that she and Yyy were to be paid for the hours of *11 to 7, day shift.* That arrangement applied to both with one to be paid for a sleepover on the first night and the other to receive similar pay for the second night only.

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<sup>67</sup> Transcript 170-71.

<sup>68</sup> Transcript 171.

<sup>69</sup> Transcript 176.

<sup>70</sup> Transcript 177-8.

96. The third nights pay was to go to Yyy, *I think that I just said that Yyy should have it.* Xxx further stated that despite this arrangement that she and Yyy had arranged that they would share duties equally and assist each other at all times as circumstances required. And that they acted in this manner during the stay and following Patrick's disappearance.

97. Xxx further confirmed a request for additional staff after Aaa had broken his leg. Xxx stated *we asked, we thought it would be helpful if we had someone else that could come along, but ultimately we still thought that it was able to be done.* Xxx testified that she was told they did not require additional staff, as there were issues with costing.<sup>71</sup>

Coroners Assistant, in re-examination.

98. Xxx stated again that she had a discussion with Mia requesting to have more staff attend the holiday. Xxx stated the major reason she believes this request was rejected was due to the costs associated with hiring another staff member.

99. When questioned by her Counsel, regarding not informing Ms Tseres about notifying the police, Xxx was concerned Mia would be angry and upset.

Q. *What made you think that?*

Ans. *I just did.*

Q *Had you had experience in giving information or a message to Mia that you didn't think she would like in the past?*

Ans. *Probably in the past, yeah.*

Q. *Can you remember any particular or in general the response you received?*

Ans. *Nothing that I can recall or feel like that I want to go into at the moment. It's just Yeah, I don't know.*

Q. *I truly did not understand that. What do you mean by 'I don't know'?*

Ans. *It's - um it's confusing. I just yeah I don't know. I can't answer that.*<sup>72</sup>

100. Xxx's further testimony was that she didn't work weekends and hadn't taken Patrick on weekend outings. She had taken him to his medical appointments, but didn't have a lot of experience in dealing with him outside the house.

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<sup>71</sup> Transcript 178.

<sup>72</sup> Transcript 186-7.



101. When Xxx queried other staff on how Patrick had behaved on previous holidays she was told he had been good and that they had no concerns.

Coroner

102. Xxx was questioned about her personality. She described herself as, *a caring and trustworthy person. I am also very quiet and helpful.*<sup>73</sup>

**Efthhimia Tseres (Mia).**<sup>74</sup>

**a) Witness statements.**

Statement 1, dated 26 June 2014.

- Patrick's risk presentation

103. At the time of the making her first statement to police on 26 June 2014 (approximately two months after the events under examination), Mia had worked for the Wesley Mission in a variety of positions over a seventeen year period.

104. Over this period she had worked with Patrick and, *came to know him very well.*

105. She described Patrick as, *caring, giving and friendly to everybody. He was a witty, humorous and a happy guy. He enjoyed practical jokes and experiencing new things and adventure. Patrick was a good mate to his friends.*

106. She further described Patrick's Prader-Willi syndrome related behaviour and the steps taken within the home in connection with this matter.<sup>75</sup>

107. Mia also spoke of Patrick's love of sport and particularly of swimming. I observed Patrick's swim in the pool and he could complete many laps before having a rest. **I haven't observed Patrick swim at the beach before.** Patrick enjoyed all types of activities and going out. He would never say no to anything. If he could be involved he would be.<sup>76</sup> The emphasis is mine.

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<sup>73</sup> Transcript 192.

<sup>74</sup> Efthhimia Tseres (Mia), was employed at the relevant time and now as a residential coordinator by the Wesley Mission. Her responsibilities included managing 5 residential houses and approximately 30 staff, and the Missions 20 clients who resided in shared supported accommodation. The clients received 24 hour care, and all attended day services, or supported employment. See Mia's first statement dated 26/6/2014 at exhibit 4.

<sup>75</sup> Exhibit 4 page 1.

<sup>76</sup> Exhibit 4 page 2.

108. Mia further described that Patrick had Obsessive Compulsive Disorder (OCD):

*He would become fixated on a particular task and would not be diverted from this... and that Patrick's OCD appeared to be becoming more prominent. The OCD would tend to make him late for various activities and would affect his life in this way. He would spend a lot of time on a particular task to make sure it was just right.*<sup>77</sup>

- Holiday planning.

109. Mia then described the holiday planning, asserting that:

*Prior to the weekend away with three other clients and two staff members, Xxx did a proposal detailing the weekend away. I required a contingency plan and emergency management profiles on the clients attending. The weekend away was approved for the clients and staff. They were staying in a house located at 5 Silver Leaves Avenue, Silver Leaves.*<sup>78</sup>

*I spoke to Xxx and Yyy before they left to go away. When they got to Silver Leaves I contacted them again. Everything was going well. I had various contacts with Xxx over the weekend to see how they were going.*

- Sunday April 27, 2014.

Mia stated that on Sunday 27 April she received a call from Xxx, about Ccc's medications. She spoke to Xxx again at 12.30 pm about this:

*Between 4 and 5pm I spoke to Xxx again. Xxx told me... and that Patrick was on the sand getting cuttlefish. At 7.50pm I received a text from Xxx that she had to call police as they couldn't find Patrick. I called Xxx and spoke to her when I received this text message. I told Xxx to call Mrs McCabe, and that I would call Jen Horsefield, Manager of Residential Services, and inform her.*

110. *Between 8.30pm and 10.30pm I had several calls receiving and giving updates. At 10.30pm I decided to go to Phillip Island. I met Patricia at 11.30pm at Patrick's house and I drove her to Phillip Island... arriving at 1.30am. Mia also stated that while at the house she saw there was a pile of cuttlefish to the left of the back door. **Xxx had told me that Patrick had collected the cuttlefish for his birds. Patrick had budgies at his house and he is obsessed with his***

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

*birds. He used to have up to 100 birds at home. He has two budgies at the Ringwood, Wesley Mission house. I can understand Patrick becoming obsessed with collecting the cuttlefish off the beach. This would be consistent with who Patrick is. I was devastated at the death of Patrick. He was a much loved person by his family, friends and all staff at Wesley Mission.*<sup>79</sup>

The emphasis is mine.

111. Mia participated in the giving of her so called Time line statement taken by Wesley State Manager Jennifer Craig with her supervisor Jennifer (Horsefield), on 30 April 2014.

*7.50pm Text from Xxx - have had to call Police-Patrick not back at house.*

*7.55pm Mia called Xxx - Patrick missing for three hours. Mia asked Xxx did she call Police, Xxx said she had at 5.45pm. Mia told Xxx to call the family and advise them of what had happened... See exhibit 5 (Brief volume 2) at page 121.*

Statement 2, dated 26 September 2014.

- Patrick's risk presentations

112. Patrick had a condition known as Prader-Willi syndrome... *which is a difficult condition to manage because food is everywhere in the community. As a result of the Prader-Willi, Patrick would attempt to access food if possible and at times, would hide food from staff or try to manipulate access to food. He was not allowed to go into the community by himself because he would attempt to access food. As a result of the Prader-Willi syndrome, Patrick had very specific guidelines which were communicated to all staff caring for him... Patrick was never allowed to go into the community by himself because of his Prader-Willi.*

113. Patrick had a lot of tendencies suggestive of OCD. However I am not aware of him having been formally diagnosed with this condition.

*If Patrick was treated like a child his OCD tendencies would become more apparent... If you did not take the time to listen to him he would stutter and scream, because he felt he was not being heard... if Patrick was not supported this would occur.*

114. As Patrick aged his OCD became more apparent. It had been less apparent when Patrick first moved into Wesley supported accommodation.

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<sup>79</sup> Ibid page 3-4.

115. *For as long as she knew Patrick he would not swim in the ocean. He did not like swimming at the beach and would refuse to do so.<sup>80</sup> Although Patrick did not like the ocean he loved the sand and cuttlefish.*
116. *The house was a locked house, but not because of Patrick. It was because one of the other residents, Alex would abscond if the doors were left unlocked or open... The outside area of the house was fenced and locked but only for Alex so Patrick could have left the property if he had wanted. His parents were aware of this... Patrick volunteered to give his key to the house back and he would ask when he needed to use the key and staff would give it when he needed and would ensure he locked it after himself.*
117. There were never any issues with Patrick leaving the property. Patrick would wash the house bus every Saturday at his leisure in the front area, which has a fence but was not locked.
118. *One of the strategies in Patricks Behaviour Support Plan, devised to assist with Prader-Willi, and depression was based on allowing him to walk off when angry but to make sure he was followed. When Patrick was angry or upset his awareness of his own well-being could be affected as a result of him being so fixated on a particular thing.*
119. *When we were out in the community, Patrick liked to walk ahead of the rest of the group. Patrick was faster than the others and would say, I'm not like them [the other residence], I don't need assistance. He liked to be independent. When we were out with a group, we'd say to him, 'Pat mate, you can't go too far ahead'. We'd be constantly telling Pat to slow down.* Strategies to deal with this issue in the BSP were to talk to Patrick about it, not restrain him. We would have to discuss this with him and he would agree to slow down. The emphasis is mine.
120. Patrick had been on three or four previous holidays whilst under the care of Wesley, *which I had also gone on as a carer... The trips that Patrick had gone on were planned in the same manner as the Phillip Island trip. In Torquay Patrick and the others, stayed in a house which was not gated and not locked down.* Patrick's mother was always actively involved in the planning of the trips Patrick went on.

- Holiday planning.

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<sup>80</sup> I note that when she was challenged on her opinion concerning swimming in the sea, (based upon the instructions of Mrs McCabe) that Mia took a less certain position. See paragraphs 134-5 below. See paragraph 107 above as to an earlier, again contrary viewpoint expressed in her first statement.

121. In regard to holiday planning in June 2013, Mrs MCCabe raised the idea of Patrick wanting to go on holiday. There was then discussion about this proposal and the possibility of including Patrick's friends from his and other units. Together with Patrick, Aaa from Patricks house, and Bbb and Ccc ... *were identified as clients who would attend. Bbb and Ccc were higher functioning than Aaa and Patricks housemates at George's Road.*
122. Mia instructed Xxx to plan the holiday. According to Mia, Xxx was required to a) discuss the possibility of a weekend away with clients and the team leaders in the houses in which they reside; b) carry out regular communication with the families of the attending clients; c) carry out continuous communication with me regarding the progress of holiday plans; d) determine a destination and source an appropriate property; e) consult with other team leaders to determine an appropriate property, who then provided advice regarding the chosen property; f) contact the property to determine availability and cost; and g) prepare the holiday plans including dates , costs etc.
123. Silver Leaves at Phillip Island was identified as an appropriate accommodation given it had been recommended by one of the other team leaders and was set up for people with disabilities, including hoists, fire safety, emergency evacuation etc.
124. After completing this material Xxx submitted the plan. Further information was then sought and Xxx submitted a final holiday plan. *In approving the final holiday plan, (Mia) considered: a) client safety and medical needs; b) staff relationships (who knew who well to attend); c) staff to client ratio; d) any potential behavioural risk; e) experience of the staff attending; f) the clients attending... and their compatibility; g) involvement from clients as to what they would like to attend:*<sup>81</sup>
125. **Mia submitted the pre-approved holiday plan to Jennifer, who requested additional information regarding staffing and particular costing.** After further discussion took place regarding the holiday plan including client needs and safety, Jennifer approved the holiday plan... *I then provided Xxx with approval to make the necessary arrangements to take the trip... All information provided to the client's families was verbal. Xxx informed me that she discussed matters including the staffing and client levels with Patrick's parents... Two carers had been identified as an appropriate care-client ratio for the four clients attempting on the trip. The mix of clients going on the trip were considered to be lower needs than the five*

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<sup>81</sup> Exhibit 4(a) paragraph 54.

*residents from the Georges road house, which has two carers allocated during the day... Usually for a client group of the needs mix that were going to Phillip Island, we would have two carers for four to six clients depending on initial needs...*

126. **The number of carers was approved by Jennifer.** Consent letters were provided to the families with emergency profiles attached.
127. **Mia submitted the plan to Jennifer for review. After further discussion regarding staffing and costing, which included the client's needs and safety, Jennifer approved the holiday plan. Once Jenny approved... I provided Xxx with approval to make the necessary arrangements for the trip.** The emphasis is mine.

*Xxx informed me that she had discussed matters including the staffing and client levels with Patrick's parents including there would be two carer's for four clients... In the lead up to the trip we had continual discussions in team and supervision meetings regarding the holiday preparations. Two carers had been identified as an appropriate carer-client ratio for four clients attending on the trip... Usually for a client group of the needs-mix that were going to Phillip Island we would have two carers for four to six clients... The number of carers was discussed with and agreed by Jenny.*

128. Xxx had been working with Patrick for about 8 to 10 years and knew what to do to support him. *I do not think that Yyy had gone on a holiday with clients before. Xxx had gone on a weekend to Torquay with client's years before... It is also the practise to discuss client's expectations around getting lost or moving away from the group, whilst they are away on holiday. Clients are informed they are not to leave the sight of the carers given the unfamiliar surroundings.*<sup>82</sup>

- Sunday April 27, 2014.

129. Mia further asserted that she was in contact throughout the day with Xxx to discuss Ccc's medications. She further stated that although she could not remember the series of events but that she believed, as a result of what she was told by a neighbour, that she called Xxx straight after she texted Wesley carer Adam, at around 4.45 pm. *My neighbour remembers me saying whilst on the phone to Xxx at this time that, 'you had better go get him because you are going out bowling and to dinner'. I called Xxx on my work phone and asked her what they were*

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<sup>82</sup> Exhibit 4(a), paragraphs 54-62.



*doing. Xxx said, 'I am in the backyard with Ccc. I can see Patrick at the beach. We are going out for dinner and bowling'. I could hear Ccc in the background saying, 'That's Patrick'.*

130. Xxx mentioned during this phone conversation that Patrick had walked ahead out of sight when they had been walking on the beach earlier that day and they had found him just around the corner on the beach. *She did not inform me at that time she had called police. Had Xxx informed me of this I would have made a mandatory call to my manager. If I had been aware Xxx had called the Police, I would have instructed Xxx and Yyy to instruct Patrick that he was to stay close to them at all times.*<sup>83</sup>

*... no indication from any of the calls I had with Xxx or Yyy that day or any previous day that that they were concerned about any of their clients or in particular about Patrick's behaviour.*

131. *At 7.50pm I received a text from Xxx with the words, 'We would have had to call police. Couldn't find Patrick. He must have been running, please don't stress we already are. Will call you. We are looking for him. Think he may have walked to Main Street'. Xxx and Yyy should have informed me that Patrick was missing earlier and that they had called the Police again regarding this.*<sup>84</sup>

Mia's oral testimony .

- Patrick's risk presentation

132. In her testimony as to these matters Mia adopted her two earlier statements referred to above.<sup>85</sup> She further confirmed that she was now the Residential Co-ordinator for five Wesley Mission run homes including Georges road and prior to this appointment some two years previously, she had been the team leader in the Georges road house a position taken over by Xxx. Patrick had lived in this house for nearly 16 years.

133. Patrick had an intellectual disability... diagnosed with Prader-Willi and part of Prader-Willi can be obsessive compulsive.<sup>86</sup> In regard to his OCD traits, anything that was important to Patrick, so he was very proud of how he looked, how he dressed, and being clean, he was very obsessed around that. Cleaning... as Xxx mentioned was one of them... *his birds were*

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<sup>83</sup> Exhibit 4(a) paragraphs 64-9.

<sup>84</sup> Exhibit 4(a) paragraph 70-1.

<sup>85</sup> Transcript 198-200.

<sup>86</sup> Transcript 200.

*another, so anything that was important to Patrick he would just become fixated on.* The emphasis is mine.

134. In regard to his swimming, he would train, he was part of the Special Olympics, so he would train every Wednesday and compete twice a year in the games. Mia stated that she had seen him swim before in a pool, however, in relation to the ocean she further stated, *well we gave Patrick those opportunities to do that when he went to Queensland and Tasmania, and when we took him to Frankston Beach, and he didn't want - not that he was frightened of the ocean. He chose not to swim in it.*

135. Q... *his family say that he quite enjoyed the beach, quite enjoyed swimming in the ocean, he lived in Sale with the family, they'd been in Qld, places like that and he would swim in the sea... would you dispute that?* Mia responded that she did not, but in her experience with him, *he did not go into the ocean.*

136. Mia was asked about Patrick's behaviour and his reaction if treated like a child. She said:

*He would get angry, and if he was in the home he would storm to his room, and knew the strategy was to walk away and calm down until he was ready to talk about that. If staff picked battles with him, then he would get more and more frustrated, which we explained that you should never do. If he was out in the community, there is a risk that he would tell you I'm leaving, which did happen on one occasion... It didn't work out well... they were at the Shell Service Station, at Hungary Jacks, and the agency worker grabbed him and ... fell to the ground... he was quite bruised... that's when strategies came around where Patrick wrote a memo to staff about, 'not touching me'.<sup>87</sup>*

137. In regard to the planning process, Mia further testified that with Xxx being the leader, a discussion was held among George's road staff, because staff were reluctant to go away, and *Xxx put her hand up... a lot of staff are reluctant to go away because there are funding issues in regard to holiday planning.* The emphasis is again mine.

138. Mia believed Xxx was up to the task of organising the holiday. Her reasoning was:

*Xxx had worked there for nine years and had built a great rapport with Patrick and known his strategies and who he was as a person quite well and also shown some very strong leadership skill, which is why she was appointed as team leader of George's road when I left.*

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<sup>87</sup> Transcript 204.



139. When questioned about the planning process she confirmed that in order to get the plan approved she had to demonstrate there would not be a large blowout cost. She said there were other factors which played a role in acceptance of a plan but cost would be one.<sup>88</sup>

140. A requirement of staff is training. Mia stated:

*We have management training that Wesley offers, which is first aid and fire... then we do other specific as we did (words unclear PW), association that Patrick was involved in, would come out and train staff around what was for him or other clients with their specific needs.<sup>89</sup> Mrs McCabe played a part in obtaining this specific training for carers in regard to Prada-Willi syndrome.*

141. Other training staff received was behaviour support training, managing positive behaviour support... *how to engage the client actively and proactively, there was epilepsy training, there was autism training and various [other] training sessions.*<sup>90</sup>

142. Yyy volunteered to attend the holiday when another staff member pulled out. Mia stated:

*She had worked in the houses for more than one year. She was capable. Her mother works for our organisation and, Yyy showed the particular qualities and had quite a high standard that we saw... She worked in other houses, which Bbb and Ccc came from before she took on a permanent line at George's road... she was offered positions in the other two houses as well as George's.*

143. When asked about Yyy's qualifications, she replied:

*She didn't come with any qualifications, that's why she was hired as a casual initially so we could see how she worked and the quality of her work... Back then it wasn't mandatory to have cert 4 it is now but it wasn't then... She came to us with no qualifications. She worked as a casual with us for... roughly 12 months... She was a casual but she was there significantly... she probably did 60 hours a fortnight.*<sup>91</sup>

**At the time the holiday took place Wesley did not have any policies regarding carer to client ratios. Wesley has amended their practice, however, the carer to client ratio is still**

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<sup>88</sup> Ibid.

<sup>89</sup> Transcript 208-9.

<sup>90</sup> Transcript 210.

<sup>91</sup> Transcript 211-12.

**dependent on the specific clientele attending. Decisions depend on, the client's needs, they're physical needs, the daily living skills that they need to be supported with.** <sup>92</sup>

144. Whilst on the holiday, Yyy and Xxx were required to have *sleep overs* as opposed to active nights. Mia explained the difference between these:

*On an active night you need to be awake the whole night. On a sleep over you are paid it is an overnight shift so you are paid from up until 10 pm and then you are legally required to sleep from 10 pm to 6 am and then you need to be back on the floor... you don't get paid by the hour they get paid an allowance for sleeping... it is currently \$73 I believe... back then it was possibly 60 something... it is roughly around that.* <sup>93</sup>

145. Mia confirmed that predominantly 90% of houses are sleep over houses and it is rare that a house would be an active night house. She continued:

*If a client needs assistance through the night they would wake staff and staff would attend to them, and part of the award is that the first hour of staff being awake on a sleep over is free of charge (to Wesley), ... if a client is awake through the night they would ring the medical emergency number to inform us. So whether that's a medical issue or a client can't sleep, it's a reportable incident.*

146. Although Xxx and Yyy were sleeping at the residence, they alternated who had the *sleep over* shift. Yyy had two nights (being paid *sleepover duty*). Xxx had one that Mia was aware of.

147. **Mia also confirmed that before the holiday took place, no one visited the house.** When assessing the suitability of the house, they relied upon the recommendation made by another team leader who had been there before. They also knew the house was set up for people with disabilities to support them.

148. **Mia acknowledged that the house used did not have fencing, however, reiterated that the clients which attended the holiday were not required to be locked in.** <sup>94</sup>

Coroners Assistant.

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<sup>92</sup> Transcript 212-13.

<sup>93</sup> Transcript 213.

<sup>94</sup> Transcript 217.

149. The witness was then asked a question about her earlier statement, statement two, in which she stated that at the relevant time *Wesley did not have, our own procedures for the planning of a holiday, we had covered and considered all areas that should have been covered. When there is no procedure in place we referred to the DHS Residential Services Manual, or the RSPM.*<sup>95</sup>
150. Mia was asked if they discovered that they did not have a contingency plan. Mia stated they had one, *however, it was not included in the holiday planning.*<sup>96</sup> When the plan was sent back to Xxx she was asked to include the contingency plan which can be found in their manual. It was unclear if this manual included anything about client to carer ratios.
151. **Wesley did not have a policy for carer to client ratios when leaving the house.** The ratio was determined on the needs of the individual. For the holiday which Patrick attended, Mia s and Jennifer reviewed the needs of the four clients that were going to attend. After this review they determined only two carers where required. **This was not based on the fact only two staff initially volunteered to attend.**
152. When asked if Xxx ever brought up the issue that one client was fitted with a moon boot at the time of the holiday, Mia stated, *no she did not.*
153. When assessing client safety and medical needs, Mia assessed any incident reports or evidence that indicated a risk for the client to be left alone, not supported, or if they can go out into the community on their own. Mia managed the houses, which had clients attending the holiday and was able to access this information.
154. The same process is followed when assessing behavioural risks. It is based on the individual client and they have any behavioural issues the staff are briefed on that. Behavioural risks associated with Patrick were, the strategies used for when he gets upset or angry, and his *tendency to get side tracked if he is fixated on something.*
155. These behavioural issues were discussed with Xxx and Yyy over a couple of months when it was discussed at a staff meetings about the change of staff who were going, who wanted to go about what to look out for.<sup>97</sup>

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<sup>95</sup> See exhibit 4(a).

<sup>96</sup> Transcript 218.

<sup>97</sup> Transcript 221.

156. In relation to duty of care, the same rules apply for when the clients are in the house:

*They need to be aware of the clients, where they are at all times to the best of the staffs ability... and my direction was when you are in the community, they need to be in sight at all times.*

*It was part of the briefing that they needed to contact me when they arrived and throughout the weekend so some were text messages with photos about what they did etc, and some were phone calls.<sup>98</sup>*

157. In regard to issues that continued to arise in the planning phase of a holiday Mia spoke of costing. Jennifer received the first plan and had issues with the staffing and costing.

*Under the award that we were under... there is no funding for holidays. Full stop. So there ultimately should be no cost to the organisation but that is obviously unrealistic, so you need to come up with some way of being able to allow these men to take the trip they want, and to ensure that we are looking after the residents that are left behind.<sup>99</sup>*

158. In regard to Mia's timeline, *HR were involved in an investigation as to what occurred, ensuring our clients and staff were OK... and to get some sort of chronology of what occurred a couple of days after the event.*

159. Once they left for the holiday, there was an issue regarding one client's medication that had been left in Melbourne. Due to this problem, on 27 April 2017, Mia and Xxx had regular contact.<sup>100</sup>

160. When Patrick went missing the first time, Mia affirmed that she was not aware he was gone or that a phone call had been made to the police. She said, *so had I not known about the first time Patrick went missing and Xxx for the first time had told me that at 4pm, 4.45 phone call that Patrick was missing and she'd called the police, I would have been in my vehicle on the phone to her doing what I needed to do as a co-ordinator while I was driving to Phillip Island.*

161. When Mia was informed Patrick had gone missing the second time via text message at 7:50pm, she called Xxx back at 7:55 pm. According to Mia:

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<sup>98</sup> Transcript 224.

<sup>99</sup> Transcript 223.

<sup>100</sup> Brief 154 and transcript 225.

*I called her I asked her what had happened and she said that she's called police that Patrick was missing so I'd asked her and if she, Yyy and the clients were OK. And she said that she was quite panicked and worried and called the police, and I said... 'how long has he been missing?' and she said, 'from about 5.30pm' and that's when I said, 'that's over three hours.'*

*I was just as panicked as Xxx was... I needed to inform Jenny because I had just got off the phone to her letting her know everything was going really well and there was no issues and the holiday was quite successful, and I needed to call Patricia and I couldn't do both...*

162. After the incident, there was a quality of service review. Mia was partially included in some of this review. At the time Bernadette was the general manager of Wesley. Mia further testified as to the procedures put in place following the death of Patrick, paginated from page 2.52(a) of the brief.<sup>101</sup> The documents written for the organisation of the holiday were not as substantial as the new policy documents drafted since Patrick's death.

163. Mia stated that since Patrick's death Wesley has taken clients on holiday. Mia further stated holiday approval is not more difficult, instead the process is easier and clearer with the correct documentation in place. **This documentation includes risk assessments conducted by management, attending staff, team leaders and the host venue.**

164. Clients are not able to contract external providers to attend a holiday and Wesley does not provide staff. Wesley still contributes to the planning process so they have detailed information to support the residents.<sup>102</sup>

165. In further evidence, Mia stated that under the new protocol there is a reference to an Occupational Health and Safety check list, which relates to pathways stairs, entrances, veranda services, lighting *and additional requirements based on client support needs: locked gates, locked doors and distance from the main road etc.*

166. The person organising the holiday would rely on information provided by the accommodation provider to make their assessment. Wesley usually used accommodation providers they had used prior which usually specialise in hosting people with disabilities.

167. Mia stated that upon arrival, if the accommodation does not meet the requirements, staff would notify management.<sup>103</sup> When questioned if Wesley had a policy in place for when and

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<sup>101</sup> Transcript 234.

<sup>102</sup> Transcript 235-6.

if a client went missing. She stated they did not have a policy in place,<sup>104</sup> however, this has changed and they now have a comprehensive list of what needs to be done and how to deal with a missing client.

168. **A concern raised by Mrs McCabe was the premises was not fenced. Mia did not remember this conversation occurring, or that it may have been a factor in the holiday not being approved.**<sup>105</sup>

169. In response to further questioning first in respect of the Torquay holiday Mia testified that it was five rather than seven carers who attended... *The clientele that went there were very different to the clientele that went to Phillip Island...*<sup>106</sup>

For the holiday in Queensland two carers and two clients attended.<sup>107</sup> It appeared that the carer to client ratio for the Philip Island holiday was determined by financial considerations primarily? In response Mia disagreed.

170. The holiday was a request of the four men who wanted to go.<sup>108</sup> The fact Renee originally pulled out of the trip did not affect the likelihood of it occurring.

171. Mia admitted there was **no written risk evaluation undertaken in respect of the proximity of the house to the water for the four clients.** When questioned why Xxx and Yyy would accept a weekend of more work and less pay, Mia explained they were paid on top of their usual rostered hours. This provided the incentive to attend the holiday.

172. **Mia stated that Xxx never raised concerns about not wishing to attend the trip, soon before their departure. Mia stated that there was no history of Xxx not sharing with her information about danger prior to this incident.**

173. Mia stated that she had a close relationship with Xxx and was able to tell if she was stressed. She was aware that Xxx had a history of hypertension. **She stated that she, had worked with Xxx over a long period of time and that she knew when she was feeling uncomfortable or**

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<sup>103</sup> Transcript 237-8, and following discussion.

<sup>104</sup> Transcript 241.

<sup>105</sup> Ibid.

<sup>106</sup> Transcript 241-2.

<sup>107</sup> Transcript 242.

<sup>108</sup> Transcript 242.

*anxious or stressed out about any situation. She was quite a quiet human being.*<sup>109</sup>

The emphasis is mine.

174. In relation to Patrick's previous behaviour, Mia acknowledged that Patrick was allowed in the yard of the home to perform duties, such as, wash the car. If Patrick wished to, and was not supervised outside he would be able to walk off the premises if he desired.<sup>110</sup>
175. Mia rejected the proposition that similar rules would apply on the Phillip Island trip, that Patrick would be allowed outside unsupervised. Mia stated, *he is allowed to go outside, but as they were briefed, when they are out in the community outside the house they need to be sighted at all times.* This was for all clients including Patrick. Mia stated that this requirement was communicated verbally to Xxx.
176. Mia stated that when Patrick was away from his normal home, staff needed to be *super vigilant* and that they should have been watching Patrick when he was outside.<sup>111</sup> Mia offered the opinion **that there was no need for a third staff member.** She stated she did not agree having a third staff member would have assisted keeping the four clients in sight when they were out of the house.
177. In regard to the planning, Mia rejected that Xxx requested be paid instead of 11am to 7pm to 9am to 10pm. In regard to Xxx discussing extra staff, *Xxx didn't have that discussion with me. I had that discussion with my manager, not about extra staffing, around Aaa's care... I wanted to make sure that he was (1) Fit to go on the holiday, or whether we needed to withdraw him or (2) whether he needed any extra support to him because of his fractured ankle.*
178. At the police station the day after the incident, Mia stated to Xxx, *I reassured Xxx that they followed the correct protocols, except for not calling me before the police, notifying me after she'd done that.* Mia later appeared to correct herself stating that Xxx should have called her at the time she had called the police, *so that I can report it up.*<sup>112</sup> The emphasis is mine.
179. Mia stated that Wesley now has new processes in place for organising a holiday for clients. She stated that even if the new policies were in place at the time of the Phillip Island holiday,

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<sup>109</sup> Transcript 242-5.

<sup>110</sup> Transcript 246-7.

<sup>111</sup> Transcript 248-51, which includes further relevant testimony.

<sup>112</sup> Transcript 265.



it still would have gone ahead. She stated, *I believe it still would have gone ahead because we did all those assessments, although they weren't recorded.*

180. Mia stated *on 30 April, I think they looked at my phone. I spoke with Jenny McGrath and Jenny Horsfield after they had chatted to the two girls.* From the point at which Patrick went missing and Mia finding out, Mia had no contact with Yyy.

181. Following the conclusion of Mia's testimony the Court adjourned to a date to be fixed to allow the investigator to seek further information from telephone records concerning the timing of phone calls between Xxx and Mia and the timing of calls and messages and the content of those messages, between Xxx and Yyy, (sent on the day of Patrick's disappearance). Those documents were later received by the Court and circulated to interested parties and on the application of Wesley Mission a subpoena was issued to Xxx requiring her to reappear to answer questions arising from the content of those documents.

#### WESLEY MISSION & MCCABE FAMILY APPLICATIONS

182. The Court also adjourned on the application of Wesley Mission to allow it to consider calling Jennifer Horsefield. Subsequently an application to reconvene to hear that evidence was granted.<sup>113</sup>

183. The inquest reconvened on 11 October 2016. The Court heard an application from Mr Lewis for Xxx that the subpoena to recall Xxx be dismissed on the grounds that a psychologists report **suggested that Xxx now suffered from a deteriorating mental state as a result of her earlier testimony and further from the receipt of the subpoena, and that it would be a breach of process to force her to testify in these circumstances.**

184. It was further submitted that the report of her GP, Dr Sanders, tendered during that earlier testimony was also relevant. That report informed that her medical condition at that time included hypertension, depression, and post-traumatic stress disorder,<sup>114</sup> and that she was then currently taking prescribed medication, Valium and Serapax.<sup>115</sup>

185. Mr Lewis further submitted the fact that as part of the material, namely the telephone messaging between the two parties, had been in the possession of the investigator from the commencement of the investigation, that it would be oppressive to recall his client to answer

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<sup>113</sup> Transcript book 2, 60-1.

<sup>114</sup> Ibid 11 to 17. See also exhibit 3(g), the report of Xxx's GP, Dr Sanders.

<sup>115</sup> Ibid 42.



questions about those messages at this point in time, having regard to that earlier opportunity. Her position should also be referenced to the position of colleague Yyy, who had earlier been excused having regard to health related issues.

186. Against this Wesley Mission in a submission later joined by Mrs MCCabe, submitted that this was not a case of a possible abuse of process because the question for me was simply whether Xxx was well enough to testify, and while there was a suggestion that her mental state may deteriorate if she was required to answer further questions, there was no evidence that she was presently unfit to be recalled.<sup>116</sup>
187. Wesley Mission further referred to a three month gap between the series of consultations under taken after her last appearance, until these consultations recommenced after her receipt of the subpoena, the subject of this application. The submission was then made that it might therefore be inferred from these events that it was not a significant medical setback that had caused her to seek only the three earlier consultations, and that it was a concern about being re-examined, which was now causing her anxiety and stress.
188. Wesley also submitted that a case raised in support by Mr Lewis, *Hamilton v Cade*, was not relevant as it dealt with an attempt to allow the production of evidence of a previously existing condition in an appeal proceeding, as part of an attempt to impugn evidence earlier given at trial.
189. In her further submission, Counsel offered that the material to be put to Xxx was relevant to when Patrick went missing, which was directly relevant to my finding in regard to the circumstances of death. Specifically the text messages from Xxx suggest, *that rather than from 2pm as her testimony suggested, Patrick had gone missing from about 10am. They also suggest that she and Yyy were looking for Patrick between 2pm and 3pm.* And that the texts raised the further possibility that rather than errors in planning, that it was the execution of the plans which was *wrong in a way that Jennifer and those planning the holiday could not have foreseen.*<sup>117</sup>

#### FURTHER APPLICATIONS AND RULINGS

190. After a consideration of these submissions, and of the evidence provided during the course of the inquest to that time I ruled in favour of the application. In so ruling I found that the

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<sup>116</sup> Ibid 18-29

<sup>117</sup> Ibid 29.

Applicant had established to the necessary degree that a recall would put her at a risk of further serious injury. I also acknowledged that grounds existed for her recall but determined that to insist upon her recall in such circumstances was likely to significantly endanger her wellbeing and therefore constitute an abuse of due process. Xxx was accordingly excused from giving further testimony.<sup>118</sup>

191. An application was then bought by Wesley to call Yyy, who had been earlier excused during the directions hearing, (without objection), on the basis that she was then medically incapacitated and unable to return to Victoria, and that she was then resident and continues to reside in an alcohol and drug treatment facility in Western Australia.
192. That application was refused on the basis that the information offered in support was insufficient, with the parties given leave to renew such an application should further relevant evidence be obtained.<sup>119</sup>

#### **Jennifer Horsefield.**

- Risk management.<sup>120</sup>

193. At the time of this trip, Wesley Mission did not have a risk analysis policy specifically related to holiday planning.<sup>121</sup> The holiday planning document used at the time of this incident was that found at exhibit 3(b)<sup>122</sup>
194. After Patrick's death a review of Wesley procedures resulted in the development of new procedures, which specifically addressed the planning procedure and involved the development of relevant approvals with accommodation safety checks, holiday risk assessments, family consent forms, response to a missing client incident forms and a staff responsibility check list.<sup>123</sup>
195. Following a review of the DHHS Practice Manual on Missing Persons also occurred, which is now reviewed with staff every six months in staff team meetings. *Wesley has also a new*

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<sup>118</sup> Ibid (book 2) transcript 43.

<sup>119</sup> Ibid transcript 44-59. An application to further investigate the capacity of Yyy to testify was subsequently made in writing and was refused. Paragraphs 265-67 refers. In so deciding I also advised that all parties would be given an opportunity at the conclusion of the inquest to make submissions on how any new telephone and messaging evidence should be viewed, and how it should impact upon my consideration of the credibility of the witnesses previously called to testify.

<sup>120</sup> See exhibit 3(b).

<sup>121</sup> Exhibit 7 page 1.

<sup>122</sup> See exhibit 3(b) signed on 7 March 2014 and exhibit 3(f) signed on 24 March 2014.

<sup>123</sup> See JH 2 which became part of exhibit 5.

policy around this, namely the Missing Persons Procedure. As part of this risk assessment staff must identify any client risk in relation to wondering or absconding, and how to minimise this risk, in addition to reviewing the missing Person Procedure before the outing. This has been instigated since Mr McCabe's death. As the residential manager I have instructed all co-ordinators in approximately 20 houses to add this into monthly staff meetings for review subsequent to Mr McCabe's death.<sup>124</sup> Additionally Wesley now provides staff training which recognises Obsessive Compulsive Disorder (OCD), and the associated issues for people who suffer from this. While there are, no other clients currently with OCD, staff would now know how to address OCD when a new client enters.

196. Wesley has instigated Mental Health First training, which all staff will attend in June and July this year and OCD is captured in this training.

197. For the purposes of providing legal advice, Wesley's then lawyers obtained a report from an independent consultant. Wesley claims legal professional privilege in relation to both the production and content of the document.<sup>125</sup>

- Holiday Planning.

198. In her second statement, Jennifer spoke of the factors that contribute to holiday. *The support needs of clients are given the highest priority...after hours support is also equally important to ensure that suitable supports are available should any adverse situations occur where a client or staff member may require assistance. **Client and staff safety has and will always remain the most important consideration for Wesley.***

199. Other considerations include the funding of the holiday, location of amenities in the area and transportation. Further consideration, is also given to appropriateness of accommodation, which while a priority is not as significant where the staffing ratios are firstly assessed as adequate. *I rely on the support of the team leaders and co-ordinator's and their input to assess the appropriateness of any holiday as they work more directly with the clients and understand their support needs more intimately. In relation to the Phillip Island holiday I felt extremely confident in Mia and Xxx contributing their opinions to me given their extensive experience and knowledge of both the clients and their subsequent support needs... I fully assessed each individual client according to their support needs... and I*

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<sup>124</sup> Ibid page 2.

<sup>125</sup> Ibid page 2-3.

*gauged the family support of the four client's family members and any concerns they may have raised, of which none were brought to my attention... I also looked at their support needs including staff ratios in their current residence and when they access the community.*<sup>126</sup>

200. Jennifer went on to explain the costing for staff.<sup>127</sup>

*The house was recommended by another team leader and was equipped to provide accommodation to people with disabilities, and therefore from a physical sense I deemed it appropriate... I expected that the clients including Patrick would be appropriately supervised at all times, would not be put at risk of entering the water, or of being out of sight whilst outside the house, from Xxx or Yyy, for a period of time long enough for them to go missing.*

*This was not my or Wesley's expectation of how the carer's would have acted during the holiday to Phillip island.*<sup>128</sup>

*Reference funding and to address the coroners concerns, Wesley is not funded by DHHS to provide support for our staff to support clients to go on holidays. In the absence of such funding no holidays would ordinarily occur.*

*To do this we rely on staff volunteering some of their required hours some of the required hours of support during the holiday and we base costs on paying part of their wages each day and associated allowances. We cannot direct our staff to take clients on holidays. They have to be willing to do this of their own volition... I would never compromise client safety over the availability of funding.*<sup>129</sup> *Wesley could not direct staff to take people on holidays and staff are aware that they would have to provide some hours of support without receiving monetary compensation. The hours paid to staff are determined prior to them going away, so that they are aware of what they are agreeing to.*<sup>130</sup> The emphasis is mine.

201. In her testimony Jennifer further stated that as residential manager she was responsible for 20 houses across Melbourne with 94 clients living within these homes. She was the manager of four co-ordinators of whom Mia was one. Each co-ordinator was responsible for five houses, which were administered by separate team leaders of whom Xxx was one.

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<sup>126</sup> Exhibit 7(a) page 1-2.

<sup>127</sup> Ibid page 2.

<sup>128</sup> Ibid 3.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid 4.

202. According to Jennifer, Xxx was responsible for the first stage of the planning process. She was required to complete the holiday proposal form. This was then reviewed by Mia, *and then escalated up to me... to review and assess the suitability of the holiday and the clients attending.*

Ms Ellyard

203. According to Jennifer, the means of planning and seeking approval for a holiday was to fill out a holiday proposal form that had sections within that identified the location of the holiday home, the clients who would be attending, and the proposed activities.<sup>131</sup> Jennifer had no role in populating this form but only had to review it.

204. When reviewing the form Jennifer would consider:

*Each of the clients that were proposed to go on holiday and their current support needs and requirements, both at home and in the community as well as looking at the staff members that were proposed to go and their experience and knowledge of the clients who were going... the proximity to Melbourne, accessibility if we need to get down their quickly.*<sup>132</sup>

205. The holiday proposal form did not contain all the information detailing the needs of individual clients. To fulfil this knowledge gap, Jennifer used the materials collected concerning each client. This included the clients lifestyle plan which details *their support needs... if they have a physical disability... whether they require manual handling, hoisting in and out of bed. It is looking at their day to day needs, so personal care needs, and [If] they require physical assistance with that or just verbal prompting to shower or shave. It also included their emergency profiles, if a client had behaviours of concern, there is a behaviour support plan that sits behind that. Additionally Jennifer would look at any incident reports, patterns of behaviour, trigger issues and intervention methods. She could access these files by computer and also through a hard copy, which was kept in her office.* The emphasis is mine.

206. To determine the staffing requirements for the holiday, Jennifer stated:

*Going through each of the four men that were identified. So Bbb and Ccc had similar needs. They were both what we call high functioning, people with intellectual disability. Meaning*

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<sup>131</sup> Transcript book 2, page 70.

<sup>132</sup> Ibid 74.

*they were quite independent, with all their personal care needs... They required some staff supervision, they were both able to access the community without staff support... They could catch public transport on their own without supervision.*

*Bbb and Ccc ... there was a high degree of independence. So for Aaa I was aware that he had some... He required some support with day to day activities. **He did have some behaviours although he did not have what we call a behaviour support plan. We had strategies built around Aaa, who had the 'broken foot', to support him if he became angry or started (word unclear PW), so the staff were all aware of that document. ...in the community we had hired a wheel chair to get him round. He was probably the one out of the four men... that required more assistance with personal care. In terms of support with meals they were all able to feed themselves.***

*As for Patrick, there were some measures around accessing food and he did have a formal behaviour support plan. For Patrick I was aware of... he'd had incidents over the years that I'd commenced the roll in 2011 and I guessed there were some incidents, um with behaviours and some sort of verbal and physical aggression, so I was aware of that. But at the same time there hadn't been... a daily occurrence... or weekly occurrence leading up to the holiday the people we support there is a stabilisation... they're being well supported and managed and behaviours tend to dissipate. The emphasis is mine.*

*I guess I refer back to the individual clients that we sent away and their support needs as well as being able to follow reasonable direction. So if they are out in the community that they are able to understand and respond to certain direction from the staff so that they are adequately supported having assessed these and their needs that all four men... that Bbb and Ccc in a normal... I don't like talking about it in this way but assessing people with disability and their needs, if I had another two like Bbb and Ccc I would probably think a one to four was a suitable ratio.*

*If I had Patrick and Aaa times two, I would think one to two for those two and another one to two for another Patrick and Aaa was reasonable.<sup>133</sup> All the men bar Aaa were deemed independent in those personal care skills.*

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<sup>133</sup> Ibid 95.



207. The rest of the brief exhibit 5, included from page 157-202 the full client profile in regard to Patrick. Jennifer stated that she looked at this client profile together with similar files in respect of the other three men, when making her assessment that this holiday could go ahead.

208. When questioned if she based the appropriateness of staff numbers on her own personal knowledge and experience or from some protocol or guide she stated:

*This is one of the challenges with working with humans and assessing the needs. There is no tool you know that can mechanically spit out the number. It is very much relied upon obviously my own experience, the experience of Mia as the co-ordinator and of Xxx as the team leader that was making these recommendations...*<sup>134</sup>

*I think experience is certainly a factor in the sense that I'd actually taken clients away on holidays, Mia had taken clients away on holidays, Xxx had taken clients away on holidays so all three of us had an understanding of what it means to take a person with a disability away on holidays, and what that looks and feels like.*<sup>135</sup>

209. In respect of the second holiday application form dated 24 March and signed by Jennifer (exhibit 3f), Jennifer's testimony was that she specifically had access to Patrick's profile at brief pages 244-45, with Aaa's emergency profile commencing at page 246, and Ccc's emergency profile commencing at 248.

210. When asked who made the recommendations for the two staff to attend the holiday, Jennifer assumed it would have been Xxx as she had drafted the proposal and identified herself and Yyy to attend.

211. When Jennifer was questioned about the staff payment she was aware the staff would be away for more than 48 hours and they would only be paid for a fraction of that time. She stated:

*It's a common practise. We are not funded to take clients on holidays, so we do rely on – we have staff that will offer to volunteer some of their time and I guess it is the nature of the work we do that we do attract people that really are very passionate about the work that they do,*

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<sup>134</sup> Ibid 98.

<sup>135</sup> Ibid 99.

*and care greatly about the people they support and will often volunteer their time to take them away on holidays.*<sup>136</sup>

212. Staff are identified to go on the holiday by volunteering. The holiday was proposed by Patrick who, in consultation with his family, decided on Phillip Island. Patrick identified that he wished to go with his friends Aaa, Bbb and Ccc. The four families contributed to the cost of renting the property.

213. Jennifer was involved in the approval of the house selected. When assessing the house, Jennifer first considered the disabilities of each of the clients and if the house met their needs.<sup>137</sup> **She stated that she was unaware the property did not have a fence.** She stated:

*In this instance I didn't deem that it was necessary to have a ... locked compound where clients could not exit because I felt with the people I was sending their support needs and histories of behaviours and also the histories of behaviours and also the ratio of staff that it was not required.*

*I guess we are used to working under this umbrella of freedom basically and human rights and freedom of movement and things like that **and any time that we have to restrict that we have to go through processes to allow that to happen.***<sup>138</sup>

214. The family of Patrick raised concerns regarding the capabilities of Xxx and has questioned if she was capable of being in charge of the holiday. Jennifer disagreed with this. :

***She was managing a house which had challenges... I'd almost say that she had tendencies... but at the same time I'd always deemed her a very thoughtful leader... you know you can have all the processes and practises in place, but it's about how they interact with people and how they treat their fellow human beings... she was proud of her graduating with a Diploma of Management... it was through a traineeship we had engaged with an***

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<sup>136</sup> Ibid 91.

<sup>137</sup> Ibid102.

<sup>138</sup> Ibid 105. Counsel indicated her understanding that the George's road house (not the external perimeters of the property), where Patrick lived was kept locked because one of the residents *was prone to leaving the premises... Patrick was permitted to come and go as he wished, but the door was locked and so sometimes he would have to ask for it to be opened because it had been locked because of someone else.* And further evidence that he would be released either to the back garden where he would attend to the cleaning of his birdcage and from where he couldn't leave, or to the front garden where he would wash the van, and from where he could potentially depart. Transcript 108.

*external provider... it was 12 to 18 months (in 2013) with the training tailored around disability work and leadership and what comes with that.*<sup>139</sup>

*Xxx managed a house where there were incident reports logged on a fairly regular basis and she was always pro-active in management of those incidents, so I certainly felt that she was aware of the types of risks and behaviours that would be evident and how to manage those situations.*<sup>140</sup>

215. Jennifer also commented that Xxx was trained in managing difficult situations in 2012. She had completed her mandatory training requirements around disability support work, such as, First Aid Level 2, CPR training and fire safety training.

216. Jennifer was asked by the Court if Xxx was aware of the standard procedure in place for reporting incidents up the line of command at Wesley. Jennifer summarised these practices,

*There are multiple scenarios of what that would look like because of the nature of the work that we do... all staff are trained that when... but when they deem it as significant... any time that clients or staff are at risk... all staff are aware of the process of incident reporting, and also that triggers when an email is logged it triggers an email trail out to co-ordinators myself and its dependant for some we call a Category 1 or 2 incident report where there is a risk of death or significant harm or injury to either staff member or a client, we have an after-hours system... that they are able to contact someone who is not directly involved, but perhaps is going to be able to think about things that perhaps they (the reporting party) is not able to think about because they are in a state of adrenalin and flux about responding to something...*<sup>141</sup> The emphasis is mine.

*I was aware there was a time gap yes... it caused me to be quite distressed... she knows that she should have escalated the situation...*<sup>142</sup>

**Jennifer stated that Xxx did breach protocol by calling the police first, however, she reiterated that the client's safety is paramount. If she had called either her or Mia admitting to calling the police, she could not imagine either her or Mia getting mad.**

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<sup>139</sup> Ibid 111.

<sup>140</sup> Ibid 112.

<sup>141</sup> Ibid 114-5.

<sup>142</sup> Ibid 116-7.

I note here that Jennifer was agreeing with Xxx that the Wesley protocol required a duty manager or above, to be notified of any incident before the Police were informed.<sup>143</sup>

217. In further evidence Jennifer again observed that Aaa and Patrick lived together at George's road. She'd worked with them for over 10 years.<sup>144</sup> Xxx did know Bbb and Ccc through outings but Yyy had a more intimate working knowledge of the two men.<sup>145</sup>

218. Jennifer stated her expectations when a client is lost were that the matter would be reported to Wesley within 10 minutes of acknowledging the client is lost. **She further acknowledged there was no formal documentation given to Xxx** however stated,

*Given that Patrick was never unsupervised in the community... that would warrant a response that was quite shocking, that he was not in sight, they could not find him within a period of time, and that would warrant a phone call up the escalation process.*<sup>146</sup>

219. When Jennifer was questioned about the review of policies since Patrick's death she stated she, *still would have made the same decision to send the ratio of clients to staff.*<sup>147</sup>

220. **She admitted that she was not familiar with the surrounding area of the holiday house, was not aware the property if the property was fenced, or that it had a back garden which immediately led to the beach.** She stated she was aware the property was *designed for people with disability and that we'd had previous people attend the holiday house without incident.*

221. When asked if it would be inappropriate to undertake a risk analysis without first viewing the property, Jennifer stated:

*I guess the practicality of doing that, to actually go to Phillip Island an hour and a half from Melbourne... is not always practical... Within the new guidelines it would be a conversation with the owner of that premises to assess that but yeah, not always practical to actually physically look at the property.*<sup>148</sup> The emphasis is mine.

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<sup>143</sup> Ibid 119.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid 120-134

<sup>146</sup> Ibid 135.

<sup>147</sup> Ibid 137.

<sup>148</sup> Ibid 140.

222. Jennifer agreed that she had previous dealings with Xxx who by the time of her arrival had worked for Wesley for about 10 years and had become a team leader. She had formed a favourable impression of her capabilities and was seen to have behaved in a caring way towards her clients.
223. During the holiday, there was one 8 hour sleepover wage to be paid to one of the two staff for each of the three nights, with two such payments to be paid to Yyy and one to Xxx.
224. There was also a donation by Xxx of the administrative fee for the 10 hours of labour at her usual salary level over the period of a fortnight that she would otherwise have been entitled to. That is to say she would be expected to complete a full quota of shift work with no reduction of her ongoing administrative workload over that period.<sup>149</sup>
225. In regard to the second holiday work plan exhibit 3(f), Jennifer further testified that the reference to the ongoing workload at George's road and the work to be undertaken by Renee was in respect of an arrangement whereby Renee would accept a shift swap and therefore not have to be paid overtime, for her additional work at Georges road, while Xxx and Yyy were away at Phillip Island. These negotiations took place with the goal of ensuring no staff were to be paid overtime. The reasoning behind this was to ensure staff were not earning more than their fortnightly rate so as, *to avoid us going into overtime*.<sup>150</sup>
226. Jennifer stated that she never believed the holiday required 3 staff instead of two. When questioned if this was because the Wesley budget would not support three staff members, she stated this was never her consideration as she would not compromise a client's health and welfare over the budget. The documents signed to approve the holiday were signed by staff after Aaa had broken his leg. At this time Jennifer re-assessed whether the staff to client ratio was appropriate given Aaa's condition. His injury was reviewed by a GP and a wheelchair was hired for when he was out in the community. When Jennifer was questioned about Aaa's further physical impairment which may require additional levels of care from staff, she stated, *Aaa already required support with those elements of his care, so yes it would have added a degree of extra support, but I wouldn't say it was excessive beyond what was normally the case*. Jennifer also stated that Xxx did not raise with her that Aaa being in a wheelchair would pose an issue in care, which may require an additional staff member. (I note that her evidence is consistent with Xxx's evidence on that matter).

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<sup>149</sup> Ibid 146-9.

<sup>150</sup> Ibid 152-3.

227. Jennifer additionally testified that had it been thought necessary to add an additional staff because of Aaa's increased mobility difficulties, or as I understood her for any other reason, that could have *jeopardised* the trip.

*In terms of the monetary cost associated with that, we would have reviewed that. I wouldn't say that it would have stopped the holiday going ahead... It could have.*<sup>151</sup>

228. Jennifer was then asked about how his mobility issue would impact upon the carer's ability to respond to an emergency. She did not think it would have, but it would depend upon what the situation was.<sup>152</sup>

229. Jennifer understood that Patrick suffered from Prader-Willi syndrome and also displayed obsessive compulsive traits.<sup>153</sup>

230. Jennifer took these traits into consideration when assessing the holiday plan.

231. In regard to his obsessive tendencies and the additional risk this might cause, Jennifer stated that the staff, principally Xxx had worked with Patrick for 10 years and understood his particular traits.<sup>154</sup> She felt that this experience would *allow her to make calls* during the holiday as required.<sup>155</sup> She further stated that she took into account how Patrick's obsessive traits might manifest themselves over the holiday and that this might make it more difficult for the staff to manage him and also the other three clients. She believed this might cause staff to contact the on-call and seek advice as to how to manage the particular difficulty.

232. In response to the Coroners assistant **Jennifer confirmed that there were no Wesley protocols in respect of missing persons or medical emergencies at the time under examination.** The second part of the application form was taken from the DHHS residential manual.<sup>156</sup> Documents supplied to staff do not directly indicate what is to be done in an

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<sup>151</sup> Ibid 159.

<sup>152</sup> Ibid 161. See further discussion about the potential impact of an emergency situation upon the efficiency of the number of staff to client ratio at 161-3.

<sup>153</sup> Ibid 164.

<sup>154</sup> Ibid 167.

<sup>155</sup> Ibid 166-7.

<sup>156</sup> See exhibit 3(f) at brief page 236.



emergency situation. In its basic form, it states that during after hours, the after house pager was to be called in an emergency.<sup>157</sup>

Coroners Assistant.

233. Jennifer additionally testified that the after-hours contact was one of the co-ordinators who would do this work on a rotating basis. It was coincidental that Mia was the on call over this weekend.

234. She was also aware of Patrick's love for nature, and birds and animals, and that when out in the community he could become *fixated on a particular thing*. This was taken into account, *inclusive of behaviours*, when assessing the suitability of all four clients for this trip.

235. In regard to taking three carers, Jennifer stated that she was not aware whether carer's from the other house, where Bbb and Ccc lived, were invited to attend. The discussions came from the fact that the idea for the holiday stemmed from Patrick in George's road and that, *there were two carer's from that house who volunteered to do that*.<sup>158</sup>

236. Jennifer was aware that Xxx had never planned a holiday before and had not previously gone on a holiday, other than as a care provider. She stated it was a part of staff development to allow them to make plans for holidays. Jennifer said that Xxx also had the support of Mia to complete the forms. She continued that since Xxx was employed in the capacity of a supervisor, it was within her duties to plan holidays for clients.<sup>159</sup>

237. Mia was the team leader on the holiday to Torquay, which occurred before Jennifer's appointment. Xxx was a care provider on this holiday.

238. Xxx who had never been a team leader on a holiday before and Renee, who had just finished her probation, would be the only carers for the four men on the planned holiday. When Yyy volunteered to attend the holiday to replace Renee who withdrew, she was deemed a suitable carer by Jennifer.<sup>160</sup>

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<sup>157</sup> Ibid 170.

<sup>158</sup> Ibid 174.

<sup>159</sup> Ibid 177.

<sup>160</sup> Ibid 179.

239. Jennifer was then asked about the impact of having a third carer from a different house attend. She stated that it would impact the additional house, but they could possibly alter the work time and volunteer their time, to make it fit the budget.<sup>161</sup>
240. Jennifer stated that it was difficult to comment on how she might have viewed that proposal had it been presented to her... *if there was a third person on that document and the cost was there, I would assess it as that document.*
241. It was suggested that Patrick's mother assumed this holiday would be like the ones he had attended before, that the carer to client ratio would be even. In response Jennifer offered, *I did not assess the men or the women that went on those other trips so how those conclusions were made about how many staff went I can't talk to that.*
242. When Jennifer was asked if extra staff allowed for better security she disagreed to a certain extent. She stated Wesley relies on staff doing the right thing and performing their duties.<sup>162</sup> In response to further questioning she re-affirmed that there was no particular tool to record her analysis of risk, *it is very much based on looking at each individual's needs...*
243. There was no document or note of her review of the plan. *It would be a discussion with Mia, or whoever it was that they needed further scrutiny or review on this or that... client's needs.*
244. She further agreed that under the holiday plan exhibit 3(f), at page 238 of the brief that it was *an option* that families could pay for staff members to attend the holiday, if they wanted extra staff to go. That hadn't occurred during her time in the job and she did not consider it on this occasion.<sup>163</sup>
245. She was also referred to the fact that Patrick's house in George's road, though not the property as a whole, was locked because of another client. She felt however that hiring a house for a holiday for a group which included Patrick, could not have a fence with a lockable gate, because that would first require a permission to be obtained from *the senior practitioner, as you are restricting the area's that a person can enter or exit.*<sup>164</sup>

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<sup>161</sup> Transcript Book 2 at 180. I believe the question was *between 11pm and 7am*, and I am satisfied that the answer given was to that same question.

<sup>162</sup> Ibid 181.

<sup>163</sup> Ibid 182-3.

<sup>164</sup> Ibid 183-4.

246. She further considered that it was the carer's *duty of care to those four clients*, to prevent clients leaving the premises. The issue of duty of care was not part of the application form but was part of the Code of Conduct. **The issue of risk analysis was at that time also not part of a formal document or protocol. This is all now part of the new application form.**

247. She was not certain whether Xxx's training in leadership and her Diploma of Management had included training in how to deal with emergency situations. *I can't comment on that. I'd have to go back and have a look. It was quite a few years ago.*<sup>165</sup>

248. She was then referred to exhibit 7(b), which referred to incident report writing and training, but not risk analysis or emergency management.

249. She further confirmed that she was not aware if Yyy had accompanied clients away on a holiday prior to this time.

250. In regard to Yyy, she wasn't sent away for training, *she was sent away to do her job*. In regard to Xxx and despite her evidence to the contrary, Jennifer expected that she would have been shown, *documents in relation to dealing with an emergency situation*. She was also aware through her on the job training at George's road how to deal with matters that required, *escalation and about how that situation is managed... on many occasions you know she would utilise the after-hours service to get support*.

*But in terms of documentation there may be, themes through our policies and procedures around emergency situations, but I couldn't point you to a particular document that talks purely about emergency situations. I think our documentation around significant incident reporting would have a theme in there.*

*... The risk man system was in place in 2014... an incident is lodged on the computer which generates an email to the key managers that oversee the house...*

*... For example if Xxx logged an email... during the week it would trigger an email out to myself and to Mia yes. And if there is an OH&S risk that would go to our OH&S officer. Risk man would not be available when people are off site, but it wouldn't stop them from doing*

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<sup>165</sup> Ibid 185-6.

*what they would normally do in an emergency situation, which was trying to ring the back-up.*<sup>166</sup>

251. Reference her signing exhibit 3(f) on behalf of Yyy, Jennifer was unable to recall when she signed it.

252. She also confirmed that under the new protocol it was appropriate to allow the planning of the holiday to proceed **before a viewing of the premises and then to review its suitability once the clients and carer's actually reach the premises.** And further, that if there was a concern about the suitability of the premises which arose on arrival that that matter can then be referred to client's family members to make a final decision as to whether the holiday should proceed, or the party should return home. This approach applied equally to holiday trips in and outside of Victoria.<sup>167</sup>

253. In regard to the new policies now 47 (c) in the brief, Catholic Schools in Australia can use a Camps and Excursions guide which has a checklist of matters to be considered in advance and it is comprised of these certain questions.

*It talks about risk area, example risk and control... and one of the points raised, is rental properties and he has recommended... that so far as is practical, Wesley only rent fenced properties when taking clients away on holidays?*

254. Jennifer observed that the needs of the client and requirements of the residence for the duration of the holiday is, *assessed on an individual basis, whether we need to have them locked in a premises.*

255. She also testified that she received regular incident reports concerning the George's road property, which sometimes involved, *a verbal or physical stout.* She further identified that these issues stemmed from a new client moving in, which presented new challenges.

256. Jennifer agreed that there were two people present within the house, Patrick and Aaa, who exhibited anger issues during the period before the holiday. In regard to moving one or other

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<sup>166</sup> Ibid 190-1

<sup>167</sup> Ibid 196-7.

or both on, she informed about the DHHS Disability Support Register that exists and the process that is gone through, before a movement can take place.<sup>168</sup>

257. She also agreed that she was not aware of the physical environment of the holiday house but was aware of its proximity to the beach.

258. Jennifer was aware that Renee was originally meant to be attending the holiday, but based her risk assessment on Xxx and Yyy who eventually attended. She felt that she could not comment on the reasoning that caused Renee to decide to pull out of attending the holiday.

259. Jennifer also admitted there were multiple drafts of the holiday proposal form. She stated it took a lot of negotiation and revision due to having to ensure enough staff at George's road, and on the holiday. She was then questioned about the 24 hour duty of care Xxx referred to but stated she had not been briefed on that matter. She referred to the holiday proposal form, which she signed and which she considered, clearly laid out Xxx's duties.<sup>169</sup>

260. In regard to Patrick's key to the Georges road house she confirmed that Patrick had been asked to give up his front door key, which he did.<sup>170</sup>

Ms Ellyard.

261. **Jennifer further testified that if a member of staff had been required to check the premises for suitability prior to the making of a decision to rent, that would require an allocation of funds for the staff members attendance, from the current budget, that didn't exist basically, to do that would be putting us in deficit.**

262. She also informed that the Georges road residents have not been on holiday since this incident.

263. Regarding work hours, Jennifer believed Xxx was contracted to work 70 hours per fortnight and Yyy was part-time. This meant that she would be paid for the extra hours at whatever her base rate was, or at the penalty loading rate associated with that particular shift. **The changes in shift were to ensure that neither staff members would be paid overtime.**<sup>171</sup>

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<sup>168</sup> Ibid 204-5.

<sup>169</sup> Ibid 211.

<sup>170</sup> Ibid 217.

<sup>171</sup> Ibid 222.

264. Counsel then referred her client to Xxx's history as a team leader and any differences that might exist between team leadership on a holiday and team leadership in a residential house. Jennifer felt there were no difference between the two situations.<sup>172</sup>
265. Following Jennifer's evidence Counsel then renewed her application that I should seek to call Yyy, which application I refused again this having regard to the reasons given above.
266. In addition, I reasoned that the evidence so far provided by available witnesses most specifically, the supervising carer Xxx, established a level of contradiction in regard to the passage of events around Patrick's original disappearance, which matter was unlikely to be resolved through the hearing of further evidence from Yyy, whose own role in the attempted recovery was seen as more limited.
267. In the exercise of my discretion I therefore determined that over and above the consideration of the additional materials provided, now admitted as exhibit 5(a), that I should not further investigate how it might become possible to call further evidence from Yyy, the subject of the application.

## FINDING

268. I note Patrick's medical background, which included Prader-Willi syndrome and his history of obsessive compulsive behaviour. It is also relevant that he had lived at his current address at George's road Ringwood, over a period of 14 years. During this period he had been cared for by the Wesley Mission staff, which at different times included Mia and Xxx, the latter having been directly involved in his care over the previous 9 years. I further note that Patrick's behaviour was sometimes belligerent and that he could become difficult to manage especially when he had been focussing on a particular activity from which he did not wish to be distracted.<sup>173</sup>

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<sup>172</sup> Ibid 225.

<sup>173</sup> See Mia's evidence as to Patrick's behaviour presentation at paragraphs 105, 107, 108 and 110 (Statement 1), 115-21, (Statement 2) and 133 and 136 (Inquest testimony); Jennifer's at paragraph 206 and Xxx's at paragraphs 39-40, the latter including reference to the house staff's strategy plan maintained in respect of Patrick, that plan being further discussed at paragraph 297. See also exhibit 6 which includes the Department of Health and Human Services incident reports made by Wesley staff in respect of Patrick between 2012 and April 2014, which disclose 18 reportable incidents of what were mostly described as *disruptive behaviour*, the most recent of which involved a retaliatory incident of a violent nature involving both Patrick and another resident, (Incident report 8877).



269. Patrick who was 42 years of age, was an accomplished swimmer and had competed in the Special Olympics. He had very much looked forward to his holiday at Phillip Island, which had been proposed by his mother and was pleased that certain of his friends were to attend, together with Disability Support Supervisor Xxx and co-carer Yyy, who had been persuaded to accompany the group in the role of carer's.

270. In further assessing the evidence, I note that there has been conflict between the evidence of Xxx and the statement of Yyy, although both have alleged that Mia had been told well before 7.50pm on the Sunday night that Patrick was missing, but not that the Police had been called in to join the search for Patrick.<sup>174</sup> There is also conflict between the evidence of Xxx and the evidence of Jennifer with Jennifer and Mia largely aligned in regard to all matters. As between Xxx and Mia, there is difference most particularly over the matter of when the fact of Patrick's disappearance was notified to Mia. I note here that this is significant because of the duty of Wesley to set in motion an efficient recovery attempt for any missing client at the first available opportunity.

271. In reviewing these conflicts I have been assisted by reference to the phone and text records.<sup>175</sup> It is relevant that these particular records became available and were presented through the statement of DSC Adrian Condon.<sup>176</sup> Given the unavailability of Xxx through illness at that time and the on-going unavailability of Yyy, I note that their evidence has not been tested by reference to these additional materials.<sup>177</sup>

272. I also note the Wesley submission that in considering the evidence of Xxx, I should not extrapolate simply from my perception of Xxx's presentation in Court, which on the evidence was affected by her multiple psychological injuries diagnosed in the aftermath of Patrick's death, (a matter not put in dispute), and use that perception as a basis to determine how she

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<sup>174</sup> See Yyy's *time frame* at Exhibit 5 page 155, 30 April 2014, which refers to Xxx contacting Police at around 4pm and calling Mia at 5 pm. It appears that Wesley did not obtain Yyy's advice as to the purpose or outcome of Xxx's call to Mia.

In this context see also Yyy's statement to Police made 7 May 2014 at exhibit 5 page 26, where she states that at 5-5.30pm Xxx contacted Mia and informed her that Patrick was missing. She goes on to state that, *Police had already been contacted by this time*. (I direct myself that in the absence of cross examination on this statement that it should be accepted as evidence that these words were said by Yyy in her statement to Police, but not accepted as to the truth of its content).

<sup>175</sup> These records became part of the brief headed Coronial Brief version 2. Save for the earlier statement of Jennifer dated 23 May, 2016, exhibit 7(a), these remaining documents and the statements of Kelly Stanton and DSC Condon will be admitted as exhibit 5(a).

<sup>176</sup> See exhibit 5(a) from page 86.

<sup>177</sup> See paragraph 287.

might have responded to Mia in the period following Patrick's disappearance. I accept this submission.

273. In evaluating Xxx's response to Patrick's disappearance then I direct myself to rely on the evidence provided by Xxx herself, together with that of Jennifer and Mia as to her particular skillset at the time of the holiday planning and during the holiday itself. Also relevant are the content of text messages exchanged with Yyy over the period the search continued, the inferences to be drawn from the fact of the house supervising role that she was then employed to undertake and my assessment of the credibility of the witnesses to these matters.

274. The danger of hindsight and the unconscious tendency to regard a known event as more probably or likely than it was, has also been considered and is accepted.

275. I additionally direct myself as to the dangers implicit in accepting the evidence of a particular witness on certain matters while remaining unsatisfied as to the quality of the evidence given by that witness in regard to other matters.<sup>178</sup> I have also considered the lack of documentation of the holiday's planning exercise as well as the approaches employed by Wesley to risk analysis, missing persons and holiday emergency management.<sup>179</sup>

#### **A) Planning**

276. Having considered all of the evidence and Counsels submissions, and having directed myself in regard to the applicable law, I find that at the relevant time Xxx was a competent and hard-working employee.<sup>180</sup> She was also introverted, and sometimes self-deprecating.<sup>181</sup> I additionally note the long period Xxx spent working under the supervision of Mia and my view as to Mia's forceful personality, which was on display during her own lengthy testimony.<sup>182</sup>

277. I have considered Wesley's contrary submission but further find that the planning of the holiday to Phillip Island was driven by the efforts and decision making of Jennifer and Mia,

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<sup>178</sup> See *R v Bromley, R v Karpany*, 1986 CLR, High Court of Australia.

<sup>179</sup> See Xxx's evidence at paragraphs 24-38, 70, Mia's at 173, and Jennifer's at 220-21, 231-32, 242-44, 247-49, 257, 259, 261 and 263.

<sup>180</sup> See evidence of Mia at paragraph 138 and Jennifer's at paragraphs 214-15 and Xxx's at 102.

<sup>181</sup> See evidence of Xxx at paragraph 102, Mia at 173 and the text messages transcript between Xxx and Yyy, on Sunday 27 April, at exhibit 5(a) pages 112-3. instances

<sup>182</sup> In addition to my observations as to Mia's general demeanour see the testimony generally as it details the subordinate nature of the relationship, which existed historically between herself and Xxx.

and not by those of their subordinate Xxx, who consistently remained a follower in these matters.<sup>183</sup>

278. Funds to undertake such a holiday had not been budgeted for and I find that plans went ahead with Jennifer and Mia's substantial focus on holiday costs, and without proper regard to the appropriateness of the holiday home and the risks involved in taking this group of four young men to reside in such a location, which by its nature invited normally curious young men of limited experience and for whom such visits were a rarity, to want to get outside and explore.<sup>184</sup> I comment on this matter further below from paragraph 312.

279. I also find that the existence of this particular risk was personified in the personality of Patrick, who had a documented history that included an obsession with his own birds, who was to visit an area that is known for its abundant bird life.<sup>185</sup> He was also energetic and enjoyed walking and more generally was given to obsessive and impulsive behaviour.<sup>186</sup> He had also grown used to being confined at the invariably closed accommodation in George's road, which offered little scope for adventure and for which he had not been permitted to retain a house key.<sup>187</sup> The sum of the evidence establishes then that Patrick found the circumstances at the Phillip Island property much more stimulating and much less restrictive than those to which he had become used to at his home in Ringwood, and that such an outcome was predictable.

280. I additionally find that the planning for and the risk analysis carried out in respect of Patrick and his companions for this visit was inadequate.<sup>188</sup> Also relevant is the arbitrary manner in

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<sup>183</sup> See Xxx's evidence at paragraphs 23-4, 26-30 and 34-5 and Mia's at paragraphs 150-51 and 155-56.

<sup>184</sup> On management and costing see Jennifer's evidence at paragraphs 210-12, 223-25 and Mia's at 123-25 and 126-27, and Xxx's at 23, 28, 32 and 34. As to the location of the holiday home and its risks see photographs at exhibit 3(e), brief 108-111 and Jenny's evidence at paragraphs 209, 216, 218, 220, 229, 231-32 and 236-39.

<sup>185</sup> See paragraph 110. It is also relevant that he was said by Mia to love both sand and cuttlefish. See paragraph 115.

<sup>186</sup> As to Patrick's behaviour see paragraphs 39, 40, (Xxx) 110, 115, 117, 118-19, 133, 135-36 and 139 (Mia).

<sup>187</sup> See Xxx's evidence as set out at paragraphs 39, 50, and 60 above and Mia's as set out at paragraphs 108, 110, 113, 115 and 117-18. See also the House strategy prepared in respect of Patrick, which emphasizes the regimented environment including at points 6 and 14 direction provided in regard to the keeping of doors locked around Patrick's access to and from the house, (as set out at footnote 203).

<sup>188</sup> See paragraphs 24, 26, 28, 29, 30 and 35. (Xxx), 211, 218, 220-21, 225, 227, 230 and 240-47. (Jennifer). See also footnote 203 the house strategy for managing Patrick, and paragraph 318 concerning earlier incidents at the George's Street house, involving Patrick, and reported undisciplined behaviour. I also note that neither Mia nor Jennifer had visited the premises before approval for the trip was signed off on, and that Jennifer who was responsible for the ultimate approval was aware that the property was by the beach but not that it was unfenced.

which the number of staff to attend the holiday was established, without reference to earlier similar events or to the particular needs of those nominated to attend and how Xxx and Yyy were approved to perform this task, with little or no information about how many staff that were to attend, passed on to Mr and Mrs McCabe, or to the other interested families.<sup>189</sup>

281. The lack of experience of Xxx in hosting such a holiday and an absence of any meaningful training in respect of emergency management in any setting is also relevant.<sup>190</sup>

282. I additionally find that Xxx's later reluctance to attend the holiday, because of her commitments to her young family (as I find she voiced to Mia), was ultimately overborn. This occurred in a setting where she understood that her withdrawal would likely mean that the event would not take place, this leading to extreme disappointment for Patrick and for the other clients similarly involved.<sup>191</sup>

283. The fact that both Xxx and Yyy proceeded in this matter notwithstanding what I find were the concerns communicated to Mia by Xxx at that time, and the prejudicial arrangements which were offered in regard to their salaries and the resulting negative advice from certain colleagues, is a measure of the commitment of each to their work, which I find reflects well on the character of both women.

#### **B) Sunday 27 April, 2014 -Breakfast to mid-afternoon.**

284. Having addressed myself to the contradictions within the different versions of these events offered by Xxx and having considered the pivotal role Xxx played in the Wesley response, I find that I cannot be satisfied as to exactly what occurred in respect to Patrick's movements before mid-afternoon on that day. I find indeed that there is inconsistency and uncertainty contained in this evidence and that I am not satisfied as to the event sequence relevant to Patrick's movements during this period.

285. In so finding, I note that the giving of such evidence in this manner often tends to establish that such a witness was untruthful in testimony. However in this instance and after a review of the evidence I find that Xxx was in fact in genuine difficulty with the recall of issues concerning Patrick's sequential behaviour and the timing of her own responses to that

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<sup>189</sup> See paragraph 36-7.

<sup>190</sup> See paragraph 35.

<sup>191</sup> See the evidence of Jennifer at paragraphs 227 and 239 above, and the preponderance of the rest of the evidence, which establishes that there was a general reluctance by the carer's at George's Street to accept the financial terms, that were on offer.

behaviour. Also relevant was her evidence that she could not now say whether the time-line she provided to her employer some two days after Patrick's disappearance was accurate, the implication being that at the time of her testimony she retained little confidence in regard to the history of these events as set out in that time-line, (and by inference therefore in her own statements also).<sup>192</sup>

286. Given the evidence as to her mental state provided by her health provider, and in the absence of evidence to the contrary, I am also satisfied that the emotional trauma suffered by Xxx as a result of Patrick's death, is consistent with Xxx now becoming an unreliable witness to the historical facts and times relevant to that consideration. This matter was further complicated by the efforts of Wesley managers to have her contribute to the making of a time-line, some two days after Patrick's death, at a time when the unchallenged evidence tends to establish that she was suffering from hypertension and was not well enough to participate in that exercise.<sup>193</sup> The fact that a potential conflict of interest arose at that time for those managers is also relevant.

287. As set out above it is also the case that I ruled that Xxx was unfit to be recalled following the receipt of the records referred to above, and that she was not additionally examined about them. I am also mindful that the absence of Yyy from this proceeding has meant that the Court has been denied what may have become an opportunity to further assess those events.<sup>194</sup> Having regard then to these issues and the test established in *Briginshaw v Briginshaw*, (1938 CLR), I return an open finding as to the events that occurred prior to Patrick's ultimate disappearance, in all probability after leaving by the back door to attend to his cuttlefish and having then been attracted to a possible further exploration of the beach. This is likely to have occurred relatively quickly and without malevolent intent, by his moving from the back garden along the pathway that stretched from the rear boundary of the unfenced back garden, towards the beach some twenty-five to thirty meters away.

### **C) Mid-afternoon April 27 and the Wesley response to Patrick's disappearance.**

288. Referring again to the same evidence discussed above together with all of the rest of the evidence, I find that I am satisfied that by mid-afternoon Patrick was in fact a missing person and that Xxx, who had conducted an extensive search of the area, was becoming increasingly

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<sup>192</sup> See her evidence set out at paragraph 48 and the time line at exhibit 5(a) page 120.

<sup>193</sup> See paragraph 48.

<sup>194</sup> See reference to my ruling on an application made by Wesley Mission concerning the recall of xxx at paragraph 206, and the calling of Yyy, at paragraphs 208-9 above.



stressed by her inability to find him. As set out above I find myself unable to determine when that disappearance commenced.

289. In considering now the conflicting evidence as to when Mia was informed of this matter I am satisfied that Xxx herself felt torn as to what she should do in response to Patrick's disappearance. This uncertainty arose because of the lack of authority she had to initiate a search involving Police, without first discussing such a course with an in charge Duty manager.<sup>195</sup> (I note Wesley's contrary submission but find that the preponderance of the evidence establishes that notification to Police of such matters under the then existing arrangement was only to occur after a Wesley Duty manager was consulted).<sup>196</sup> It also arose in the context of Xxx's lack of confidence concerning her relationship with Mia, (also the relevant duty manager on 27 April), who had supervised her over the 10 years she had been with Wesley, and as above, who had been closely involved in the pre-holiday approval process. Further relevant was the latter's forceful personality referred to above.

290. It is also the case that rightly or wrongly, Xxx felt that Wesley's position was impacted by the concern of Wesley manager's to protect the organisation from media scrutiny and that this might be impacted by Police involvement in a formal search.<sup>197</sup> Of lesser significance, I note that Xxx's state of mind is also likely to have been effected by what I am satisfied was her stated wish for a third carer to attend following Aaa's leg injury, this to help with the holiday, and that Mia had been dismissive of this request. I further note that Jennifer and Mia had both been caused to look at various difficulties that had arisen at the George's road home in the past.<sup>198</sup> While there was no evidence to suggest that Xxx was directly prejudiced by these inquiries, I do not exclude the possibility that she also felt vulnerable as a result of that scrutiny.<sup>199</sup>

291. I remain satisfied then that Xxx's over-riding objective over the course of the afternoon was to see Patrick returned to a safe environment and that it is reasonable that she initially saw sharing the knowledge of his disappearance with Mia as an appropriate means of getting the help she then needed. As above such an approach was within her understanding of what I find

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<sup>195</sup> See the evidence of Xxx on this issue at paragraph 88, and Jennifer at 226, and the contradictory evidence of Mia at paragraph 178.

<sup>196</sup> See footnote 195 above.

<sup>197</sup> See paragraph 89.

<sup>198</sup> See paragraphs 278-9 above and the incident reports made to DHHS, found in exhibit 6 referred to again in paragraph 318.

<sup>199</sup> The George's street house had been managed by Xxx after she succeeded Mia into that position.



was the then Wesley requirement that she should not notify Police of an emergency situation, before first seeking input from a duty manager.<sup>200</sup>

292. However as nightfall began to set in, Xxx determined that Patrick's continued disappearance demanded that the Police be called and we know that this occurred at 5.37pm, with Mia later admonishing her for her failure to speak to a superior before making that report.<sup>201</sup> Xxx's ongoing concern about her call to Police and her perception of a possible response by Mia might explain why that notification was not immediately communicated to her.

293. It is common ground that at 7.50pm, some two hours and 40 minutes after her call to Police on the issue, that Mia was finally informed by Xxx by telephone message of her earlier notification to Police. The message was as follows.

*'We would have had to call police. Couldn't find Patrick. He must have been running, please don't stress we already are. Will call you. We are looking for him. Think he may have walked to Main Street'.*

294. I note the use of a telephone message rather than a direct call to convey that message, and further that in the language used in that message Xxx appears to justify her decision to call Police into the search because, they *couldn't find Patrick*. While this wording does not establish that Mia already knew of Patrick's disappearance, I find that it is consistent with the fact that Mia had already been told that Patrick was missing, but was not aware that an earlier notification to police had taken place.

295. It is also the case that by the time of her notification to Mia, Xxx knew as a fact that the authorities were doing all that they could to locate Patrick. I further consider that Xxx's change of focus is consistent with the possibility that she was comfortable with her earlier decision to engage Police but that it was the matter of having contacted Police without seeking Mia's permission that had become the major stressor to her by that time.<sup>202</sup>

296. I have further considered Mia's testimony and find that she was not an impressive witness and that I did not believe her on issues concerning Patrick's dislike of swimming in the sea (paragraph 115) and the planning of the event, (paragraph 124).

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<sup>200</sup> See paragraph 289.

<sup>201</sup> See Xxx's evidence at paragraph 91 and Mia's at paragraph 178.

<sup>202</sup> See paragraph 90 above.

297. In addition to what is set out above on these matters, I further note the contents of the strategy plan in place for Patrick referred to at paragraph 39 above.<sup>203</sup> I do not consider that these directives, together with the controls that surrounded Patrick's access to the front door, were inappropriate but rather that Wesley management, (Jennifer and Mia), failed to properly take his home environment into account when assessing the suitability of this particular holiday house, its proximity to the beach, and the proposed staff client ratio. Also relevant are Mia's contradictions within her own evidence concerning both the matter of Patrick's swimming history and the Wesley arrangements to do with consultation with a manager or duty manager, before a house supervisor was permitted to contact Police.<sup>204</sup>

298. I find then that all of these matters are persuasive and are consistent with the possibility that Mia was told in the afternoon about Patrick's status, as alleged by Xxx (and Yyy). It is appropriate to now further review the conflict between Xxx and Mia (on when Mia was first made aware of the disappearance), having regard to the known telephone contact between Xxx and Mia, and the telephone messages between Xxx and Yyy.

299. Having reviewed the latter, I find the text messages are not particularly helpful to the matter in issue. On the other hand the phone records of contacts between Xxx and Mia are important.

300. I note the following calls were made on 27 April 2014, between Xxx and Mia using Wesley phones and personal phones, and that the records concerning the fact of these calls came from the telephone companies that provided these services.

- a) Xxx to Police at San Remo Police station at 1.57pm and 2.01pm. The duration of the first call was 7 seconds and the second was 4 minutes and 13 seconds. I am satisfied that these calls were made in connection with a disappearance and were made from Xxx's personal phone.

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<sup>203</sup> As to the planning of the event and the risk analysis undertaken see Mia's evidence at paragraphs 124-25 151, 53 and 318, as well as Jennifer's evidence generally. The suggestion that this sort of an in depth analysis occurred without records made, defies common sense and I simply do not believe it.

As to the strategy to care for Patrick at George's Street see exhibit 5 page 194. (Point 6. *During the week Patrick checks his birds in the afternoon and on weekends during the day, not in mornings during the week, staff to ensure they lock the back door once Patrick is inside unless ..... is still outside.* Point 14. *Staff to ensure that when Patrick arrives home the door is locked until he has completed all of his chores before dinner, before he sees his birds.*) The emphasis is mine.

<sup>204</sup> See paragraphs 107 and 115, 134-35 re Mia's inconsistent evidence as to Patrick's history of swimming in the sea, and her evidence and the evidence of Xxx and Jennifer as to the protocol on speaking with a supervisor, before notifying Police of a potential emergency. (Paragraphs 178 (Mia), 88 (Xxx) and 216 Jennifer).

- b) A phone call from Mia at 2.31pm, which was followed by a text message from Mia at 3.52pm made from Mia's work phone.
- c) A phone call from Xxx at 4.00pm which lasted two seconds followed by a phone call from Xxx at 4.01pm, with the 4.01pm call lasting 11 minutes and 2 seconds, and simultaneous text message from Xxx at 4.01pm also made from Xxx's personal phone.
- d) A phone call from Xxx at 4.16pm lasting 1 minute and 2 seconds followed by a text exchange between the two women at 16.19. The call was made from Xxx's personal phone.
- e) A phone call from Mia at 5.07pm lasting 2 minutes and 12 seconds, from Mia's work phone.
- f) A phone call from Xxx at to Police at San Remo Police station at 5.37pm lasting 1 minute and 41 seconds, from Xxx's personal phone.
- g) A phone call from Xxx to 03595xxxxxx at 5.39pm, which was immediately disconnected. I note here that 03595 is south west area number, which includes the Mornington, Pakenham, Rosebud, Warburton and the Yarra Range areas and that the call was made from Xxx's personal phone.
- h) Two phone calls from Xxx to Cowes police station at 5.40pm lasting 13 seconds, and at 5.42pm lasting 5 seconds, followed by a 7.07pm call which lasted 5 minutes and 51 seconds. I am satisfied that these calls 5.37pm, 5.40pm, 5.42pm and the later 7.07pm call were all made in connection with Patrick's disappearance and that by this time Xxx in consultation with Yyy, had spent a considerable time looking for Patrick and was extremely stressed by her inability to find him.
- i) Following the first two calls to the Cowes Police station (the 5.40pm calls) in which Xxx notified Police of Patrick's status as a missing and intellectually disabled person, I note that there were no further phone communications, between Xxx and Mia, until Xxx sent Mia a text at 7.50pm and 7.51pm, which is set out at paragraph 293 above. We know that in this message Xxx informed Mia that the Police were involved in the search.
- j) Also relevant are the messages sent between Yyy and Xxx on this date and photographed from Yyy's own phone, which was the only text material in evidence. These photographs and the transcript of the messages are found at new exhibit 5(a) pages 112-4.

301. From these contacts I observe that in her first contact with Police at 1.57pm and in her first call to Mia at 4.00pm, Xxx made what was an initial contact lasting only a few seconds. These were followed by calls of a much longer duration. (Notably the second such contact with Mia at 4.01pm, lasted 11 minutes and 2 seconds.) It is also the case that a similar event occurred at 5.39pm, as set out above. The fact that this sequence of events occurred in such a manner on three occasions tends to establish a level of uncertainty or anxiety in Xxx, about her reason(s) for the making of those calls.
302. I also note that more importantly these records are inconsistent with Xxx's evidence that she spoke to Mia at around 4.30pm telling her that Patrick was missing at that time and had further conversations with her from then until her 7.50pm text, in which they talked of her ongoing search with Mia telling her to continue her search, (but not directing her to inform Police).<sup>205</sup>
303. Rather absent other evidence on the matter, it is the case that the phone records tend to establish that there was no contact between the two women during the period between 5.07pm and 7.50pm, a gap of two hours and forty three minutes.
304. Assuming for the moment that such a call was made, I find myself satisfied that an absence of clarity as to exactly when it took place is not particularly significant. What does arise however is the gap in time between these events and the telephone record evidence suggesting that there was in fact no contact between the two witnesses over the lengthy period between when Police were informed of the disappearance at 5.37 pm, and when Xxx messaged Mia at 7.50pm. My particular concern is that I would expect there to be plenty of communication between the two in these circumstances, and particularly so if Mia had been informed that Patrick was missing, but the seeking of a Police involvement in his recovery had not yet been discussed.
305. I have reviewed again all of the evidence and the two judgements referred to above, *Briginshaw v Briginshaw*, and *Bromley v R*, *Karpany v R*. I direct myself as before. Having so directed myself, I find that in the absence of a satisfactory explanation for this matter that I cannot with any reasonable degree of certainty be satisfied as to what occurred in respect of Patrick's absence during the mid-afternoon. And when it was that Mia was informed of this matter, and should reasonably have been expected to comprehend the need to seek or to authorise the seeking of immediate assistance, from the authorities.

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<sup>205</sup> See paragraph 46 above.

306. Specifically then and for the reasons set out above I find myself unable to accept the evidence of either Xxx or Mia as to when Wesley management was informed of Patrick's disappearance and I make no finding as to this matter.

**D) Governmental Agencies response.**

309. Moving now to the Police response to the 5.53pm notification I find that the efforts made by Government authorities to locate Patrick were reasonable and appropriate with Cowes police searching the beach area and attending the Silver Leaves address at 6.07pm. Later Bass Coast Police Sergeant Kennedy was also appraised of the situation and he contacted the State Rescue Co-Ordination Centre and completed a Missing Person's Risk Assessment. At 8.45pm the Police Air wing was contacted to search the Cowes fore shore in the area both East and West of the holiday house. Cowes Police van members searched in the area heading west towards Cowes CBD, while San Remo Police joined in the search, looking in the area to the east. Cowes taxi services were also contacted and requested to keep a look out for Patrick.
310. The Police Air Wing completed their search at around 9.20pm with no sightings made of Patrick. A Police Dog Squad member and dog also attended and searched without success between 11.00pm and 3.00am. Wesley staff, including Xxx and Mrs McCabe, also searched until the following morning when Police and SES assembled at the Silver Leaves Store. At about 8.35am Police were informed that a male body had been found floating in the water at Ventnor beach in the vicinity of Cadogan Avenue, Ventnor. Later Patrick was identified at Cowes Police station by his mother and his remains were brought to Melbourne for further investigation. Further Police led investigation revealed that Patrick was last seen alive on the beach at the rear of his holiday home at about 4.00pm, on 27 April. He was not wearing a shirt at this time. The distance from where he was last seen to where his body was located is approximately 11 kilometres walk along the beach from the holiday house in a westerly direction. Patrick's shoe and a pile of cuttlefish located near the Cowes Yacht Club ramp suggest that Patrick was at this location prior to entering the water. This is approximately 1.5 to 2 kilometres west from the house, which is a distance he might easily have walked. In these circumstances the investigating officer surmised that Patrick walked from the holiday house in a westerly direction past the Cowes pier late on the afternoon of 27 April 2014, during which time he may have been seen by passers-by on the beach. It is unknown where or how Patrick came to be in the water, or why he drowned.

### E) Autopsy Examination

311. From the autopsy conducted by senior pathologist Dr M Lynch, we know that the cause of Patrick's death was found to be, *consistent with drowning*. I further note his comments at comment 6 as to the finding of the drug fluoxetine at levels in excess of normal therapeutic use and his comment that, *the drug is generally well tolerated even in cases of acute overdose*. It is noted that there has been no evidence as to how this excessive amount of medication came to be ingested and no suggestion that it caused or contributed to death.<sup>206</sup>

#### COMMENT.

312. I am satisfied as above, that in addition to the immediate concerns for Patrick that over the course of the afternoon Xxx was also concerned about how to best respond to such an emergency. The absence of instruction on this issue, which was specific to the particular circumstances at a holiday destination and its location, constituted a further set of issues with which Xxx was not familiar.

313. For the avoidance of doubt, I find that prior to her departure from Melbourne, Xxx should have been instructed by the Wesley hierarchy to use her own judgement and to call for the assistance of Police and Emergency Services, if and when she determined that any person within her care was missing, or though within sight may have become endangered.

314. As above I additionally find that there were restraints placed on Wesley managers in respect of client outings and holidays and that there was no funding that had been budgeted to be made available for this event. Notwithstanding planning for this holiday went ahead on the basis that the participating families would be asked to meet the cost of the accommodation and that two staff only would be requested to agree to juggle their own salary arrangements so as to mean that they would receive no more in salary, despite what I find were the additional hours to be worked, and the greater responsibilities to be shared over this 4 day 3 night event. It is also the case that Jennifer was aware that the existing protocol allowed for families to be approached to meet additional necessities including staffing costs but that this possibility was not considered in this instance.

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<sup>206</sup> From the toxicology report I note that the overdose symptoms of Fluoxetine are generally well tolerated and even in cases of acute overdose, are relatively benign and that one of the possible effects of an overdose of fluoxetine can be lethargy. When used in conjunction with other drugs the toxic effects of fluoxetine are intensified. I also note that there was no indication of the use of any other pharmaceutical or other illicit drugs, found at autopsy. See exhibit 5, pages 54-65.



315. The preparation of holiday plans for a group of four disabled persons inevitably presents particular challenges. The fact that such preparation requires care is self-evident and the suggestion that a visit to check out the suitability of this particular accommodation would cost time and money implies that Wesley did not consider that it should undertake such a visit for that reason.<sup>207</sup> I reject this position and find that the only imperative here was to do the planning in a proper way having regard to the reasonable interests of the four clients, as well as both Xxx and Yyy. I additionally find that the planning of this holiday was poor and that if indeed any consideration of risk did take place that the un-written consideration of same was inadequate and unprofessional resulting in insufficient safeguards being adopted. In short this holiday should never have been planned for or undertaken unless or until appropriate levels of funding could be secured.
316. It is of course appropriate that holidays should be arranged for and on behalf of disabled persons. However in this case the commitment of Wesley managers to the idea that such a holiday should take place despite the shortage of funds and the inevitable preoccupation with cost issues that then ensued, led to error as financial considerations ultimately came to outweigh issues of safety.
317. I also find that error occurred in the assumption that the management of Patrick and his friends could be effectively undertaken at Silver Leaves with a 2 to 4 staff client ratio, despite the fact that neither carer was familiar with that environment. Also relevant was the less restrictive manner in which Patrick came to be confined over this period, which matter was also not contemplated before arrival, and the further assumption that this issue was unlikely to provide additional difficulty.<sup>208</sup> I further find that it should always have been clear to Jennifer and Mia that two staffers to look after Patrick, Aaa, Bbb and Ccc over this 4 day period, was never likely to be sufficient. While they may have been lucky and avoided such a catastrophe that is not the way that risk should be managed.

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<sup>207</sup> See paragraphs 221 and 261 above.

<sup>208</sup> See above concerning the features of Patrick's George's Street home where he was confined to a fully enclosed back garden, where he focused on his much loved bird-aviary. His access to the front garden was also effectively limited in that although that garden was not fully enclosed Patrick didn't have a key and could only obtain access to that garden with staff approval. Patrick therefore could only leave the house in consultation with a staff member. His entry to the front garden also involved either leaving the house in the company of staff or family, or his heavy focus on his cleaning duties in respect of the house bus, which would be parked in the front garden where his presence could be monitored. In that setting Patrick's preoccupation with the cleaning of the bus and an absence of distraction had allowed him to carry out this work without incident.

318. I further note from the some 18 incident reports about Patrick made to DHHS between July 2012 and April 17 2014, (found within exhibit 6), that there is a pattern of what is often described by Wesley staff as Patrick's disruptive behaviour, this arising in circumstances where he had reacted aggressively to what were unpredictable though not unusual events. Over the relevant period it can be seen his behaviours were often acts of retaliation and it further may be seen that in such instances he needed to be monitored closely, with intervention needing to occur before any such over- reaction progressed. His favourable response to interventions either made directly by Mia, or in which her name was used to help defuse a potentially difficult confrontation, is also noted.<sup>209</sup>
319. I find then that a series of management errors in pre-planning and risk management contributed to Patrick's death and that this outcome was preventable.
320. I turn now to the various changes which have occurred to the planning procedures and risk analysis now to be undertaken by Wesley when planning for future events such as the one under examination. I also note the evidence given by Mia and Jennifer concerning whether Wesley is still offering holidays to disabled residents in Wesley run homes in Victoria, and note the reduced opportunity to use these systems in circumstances where it seems fewer holidays are now being undertaken within the organisation.
321. Given the resulting absence of information concerning the success or other of these initiatives, I have nothing to add other than that I understand how important holidays are in the context of supporting disabled persons. That said I maintain my earlier reservations about the planning of such events without proper funding in place, and without a prior examination of the proposed holiday home and its near environs by a properly qualified Wesley Mission representative.<sup>210</sup>
322. I also note the helpful recommendations suggested by Patrick's family and thank all parties for their contribution in this area. I note Wesley's undertaking that these matters will receive their further consideration.
323. Finally I wish to express my condolences to Patrick's family and his friends for their loss. I note that exhibit 6 includes a message book, which was used between 2000 and 2014 at George's road to record contacts between Wesley staff and Patrick's parents, Mr and Mrs

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<sup>209</sup> See also footnote 173 above.

<sup>210</sup> Such a person should be qualified and experienced in risk analysis involving residents who are intellectually disabled.

MCCabe. This book details the love for, and the great care taken of Patrick over this period by both parties. Like so many others working in similar positions within this industry, Wesley staffers too tried to support this much loved young man and I am sorry for their loss also.

DISTRIBUTION.

324. I direct that a copy of this finding be provided to the following persons.

The family of Patrick McCabe.

Xxx.

Yyy.

Mia Tseres.

Jennifer Horsefield.

Jennifer Craig.

The Chief Executive of Wesley Mission, in the State of Victoria.

The Chief Executive of WorkCare, Victoria.

The Senior Practitioner, in the State of Victoria.

The Chief Executive Safer Care Victoria.

Secretary of the Department of Health and Human Services, in the State of Victoria.

  
PETER WHITE  
CORONER



Signed this 13<sup>th</sup> day of November 2018.

