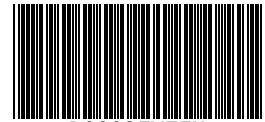




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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00373479

TITLE OF PROCEEDINGS

First Appellant	Erin Nicole Briggs
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First Respondent	Terence Hillier
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FILING DETAILS

Filed for	Terence Hillier, Respondent 1
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Legal representative	Brit Marit Mainhoff
Legal representative reference	
Contact name and telephone	Alicia Hull 0426875145
Your reference	BMM:AUH:1031749

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (resp submissions - briggs - 1Sept26 - HWLE and counsel edits.pdf)

[attach.]

RESPONDENT'S WRITTEN SUBMISSIONS

COURT DETAILS

Court	Supreme Court of NSW, Court of Appeal
List	Court of Appeal
Registry	Supreme Court, Sydney
Case number	2025/00373479

TITLE OF PROCEEDINGS

Appellant	ERIN NICOLE BRIGGS
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Respondent	TERENCE HILLIER
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PROCEEDINGS IN THE COURT BELOW

Title below	Erin Nicole Briggs v Terence Hillier
Court below	Supreme Court of New South Wales
Case number below	2020/00356341

FILING DETAILS

Filed for	Terence Hillier , Respondent
Legal representative	Brit Marit Mainhoff HWLE Lawyers
Legal representative reference	PCN: 26469 NSW Ref: BMM:1031749 Court User No: 1290
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RESPONDENT'S WRITTEN SUBMISSIONS

Introduction

1. The respondent was the defendant in professional negligence proceedings commenced by the appellant, his former patient, Erin Briggs. While practising as a spinal orthopaedic surgeon in 1999, the respondent provided treatment to the appellant which included the performance of an uninstrumented posterolateral fusion on 11 March 1999 (**the surgery**). The appellant was 14 years and 11 months at the time. Although the surgery did not achieve solid bony union, the lay and expert evidence indicated that the appellant achieved excellent symptomatic relief and functional outcome, being able to resume competitive hockey, complete secondary and tertiary studies, build a career and have a family, delivering 4 children between 2009 and 2021.
2. By judgment dated 8 September 2025, the primary judge delivered his reasons and entered a verdict and judgment for the respondent.
3. In her submissions filed on 17 June 2026 (**AS**), the appellant identifies three primary bases for why the appellant's case was rejected at first instance. The first basis was the rejection of the appellant's and her mother, Ms Leah's evidence, as to what was said at the consultation on 3 March 1999 in respect of possible surgery. The second basis was the primary judge's rejection of the appellant's account of her lower back pain from 2004 and continuing. The rationale for these two findings by the primary judge was his conclusion as to the unreliability of the evidence of Ms Leah and the appellant. The respondent maintains that the findings the primary judge made as to the first two bases for rejecting the appellant's case, and the problems with the evidence of Ms Leah and the appellant, were well-supported on the evidence before him. Extensive oral and documentary evidence at trial warranted the primary judge concluding that their evidence should not be preferred.
4. Importantly, AS [13](b) misstates the primary judge's finding as to the appellant's back pain. He did not find that the appellant had not suffered any lower back pain until 2017. What the primary judge in fact found is that from September 1999 to about 2017/2018, the appellant had no significant back pain (Red 151H) and further, by reference to the few references to lumbar pain in the contemporaneous treating records, that such pain did not appear to be a significant or dominant complaint: Red 148I – 149H. In the context of the identified problems with the appellant's evidence, this finding was plainly available.

Approach to Evidence

5. The respondent rejects the appellant's contention at AS [18], that the principles requiring appellate restraint in overturning factual findings have limited operation in this case. While it is accepted that roughly 14 months elapsed between the giving of evidence and the delivery of judgment, this alone does not negate the advantage which the primary judge

received from observing the witnesses at trial, nor can it, without more, justify the upholding of an appeal: *Monie v Commonwealth of Australia* [2005] NSWCA 25 at [44].¹ While substantial delay may call for closer appellate scrutiny of a primary judge's findings, what matters is the quality of the decision-making assessed with regard to the issues, the evidence and the judge's reasons: *Krivoshev & Anor v Royal Society for the Prevention of Cruelty to Animals Inc & Ors* [2005] NSWCA 76 at [124].²

6. In respect of the adequacy of reasons raised at AS [17], a judge is not expected to expound all of the considerations that influence their decision: *CSR Ltd v Della Maddalena* (2006) 224 ALR 1; [2006] HCA 1 at [46].³ Reasons need not be elaborate, nor do they need to make explicit findings on each disputed piece of evidence, especially where it is clear that the evidence has been considered: *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430.⁴ Rather, the reasons should refer to relevant evidence, set out material findings of fact and conclusions reached, and provide reasons for making those findings of fact and conclusions.
7. In the judgment the subject of this appeal, the primary judge gave proper and adequate reasons for why he did not find the appellant's evidence reliable, setting out the answers given by her under cross-examination, identifying when and how that evidence differed from her evidentiary statements or evidence in chief, how her oral evidence evolved throughout the trial and areas where it was inconsistent with contemporaneous records: Red 133P – 144K and 148I – 149N.
8. It follows that there is no basis for the principles of appellate restraint not to apply to the present appeal, noting that challenges to factual findings made by the primary judge are central to it.⁵

Ground 1 – finding as to the advice given by the respondent on 3 March 1999

9. The respondent contends that the findings the primary judge made as to the advice given on 3 March 1999 were open to him and indeed, properly made when one compared the evidence of the appellant and her mother on the one hand and the respondent on the other hand. In brief, the respondent's evidence was supported by the clinical records for the appellant that he had available, albeit that they were incomplete and brief, and the usual practice he described as to his management of patients where he was contemplating an uninstrumented fusion procedure. As against that evidence, neither the appellant nor her

¹ Hunt AJA, Bryson and Giles JJA agreeing.

² Giles JA, Young CJ and Hodgson JA agreeing; see also [120] to [123], citing *Expectation Pty Ltd v PRD Realty Pty Ltd* [2004] FCAFC 189 at [69] to [72].

³ Kirby J.

⁴ At 443-444 (Meagher JA).

⁵ See: *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28 at [55] (the Court); see also *Mt Pleasant Stud Farm Pty Ltd v McCormick* [2022] NSWCA 191 [56] to [59] (Kirk KA, White and Brereton JJA agreeing).

mother had made any record of the pre-operative attendances through February and March 1999, or indeed, any attendances. As the primary judge observed, there were a number of difficulties with their evidence which led to him concluding that he would accept the evidence of the respondent wherever it conflicted with that of the appellant or her mother and that he was unable to rely on Ms Leah's evidence without the support of contemporaneous records: Red 145 K and 149S.

10. Before turning to the findings the primary judge made as to what occurred at each pre-operative consultation the appellant attended, it is helpful to note the particular matters identified by the primary judge as warranting limited weight being placed on the accounts of the appellant and her mother.
11. In respect of the appellant, the primary judge found that her evidence was entirely unreliable due to an inability to recall events which occurred many years ago: Red 148J. In support of that finding, the primary judge noted the submission made on behalf of the respondent to the effect that the appellant first reduced her recollection (of relevant events) to writing at the time of her first Evidentiary Statement in February 2024: Red 132V. In addition, the appellant accepted in her oral evidence that it was only after she saw the Facebook advertisement placed by Commins Hendricks of 15 August 2019 (Blue 1 199) and attended Commins Hendricks on 3 September 2019 that she had cause to think back to the detail of what was said and what occurred at the pre-operative consultations through February and March 1999: Black 1 162I - L. The bare fact of the 20-year gap was significant.
12. Second and more specifically, as the primary judge found, there were shifts between the appellant's various accounts in her evidentiary statements and oral evidence as to what was actually said at the various pre-operative consultations. The appellant maintained in her oral evidence that the only form of treatment discussed at the 12 February 1999 consultation was steroid injections into the back: Red 54Q – Red 55B. Soon after, the appellant conceded that after she read Dr Hillier's Evidentiary Statement, it triggered a recollection in her that the respondent had in fact also indicated on 12 February 1999 that if the spinal injections did not work, she could undergo surgery, with the appellant accepting that he may have specifically mentioned fusion surgery at that time: Red 55G – Red 56W and see also Blue 1 241N and Blue 4 1356F.
13. Further to the above point, and in answer to the appellant's proposition that the primary judge did not properly engage with the evidence of the appellant as to the advice given on 3 March 1999, there were limitations in what she ultimately claimed to recall being said. Whereas she asserted in her initial Evidentiary Statement and Second Further Evidentiary Statement that she could positively recall not being told of any risks during the 3 March 1999 consultations (Blue 1 206W and Blue 1 242O), she conceded while under cross-

examination that she did not in fact have such a positive recollection and instead, could not recall such a discussion or of risks or “significant risks” being raised with her: Black 1 175U – 176P.

14. Third, and as the primary judge found, there was an issue as to the manner in which the appellant’s statement was prepared which supported the contention that her recollection of key events was extremely limited: Red 144I. That is, when the appellant’s first Evidentiary Statement was prepared and described her condition at various presentations on her GP, her physiotherapist and the respondent, the structure of the statement and its contents supported a finding that her independent recollection of the detail of those attendances was extremely limited.
15. In that regard, and as the primary judge noted, when the appellant described her post-operative attendances on Dr Hillier through 1999 in her initial Evidentiary Statement, she was entirely silent as to how she felt at each attendance other than a 7 June 1999 attendance (in fact 7 July 1999): Red 133I – M and Blue 1 207T – 208K. The respondent’s notes for 7 July 1999 record the only complaint of any symptoms during the post-operative period in 1999. However, they do not describe back pain, as the appellant alleges, but some muscle tenderness at the PSIS (posterior superior iliac spine, a bony landmark at the back of the pelvis): Blue 4, 1381L.
16. In other respects, and as regards the appellant’s attendances on her general practitioner and treating physiotherapist, the evidence indicated that the appellant could not recall what occurred at various attendances and had not herself seen the treating records, so that she relied on what she was told by her lawyers as to the contents of various entries and her complaints/presentations at those times. The appellant also said that she relied on the number and pattern of attendances for physiotherapy to found her belief that they must have involved attendances in respect of her lower back: Red 63V – 64R.
17. When one has regard to the actual contents of the treating notes for a number of the attendances, they actually demonstrate that the appellant was simply wrong in terms of why she was attending: see for example the physiotherapy entry for 21 July 2008 at Blue 2 878J and Blue 1 214J and see also Black 1 461N – Y.
18. The difficulty with the appellant’s evidence about her physiotherapy attendances in 2000, as the primary judge observed, was that it was substantially based on assumptions made or inferences drawn by her based on her hockey and work commitments and how she recalled feeling in a general sense (Red 65L), in circumstances where until 21 January 2002, there were no actual records of the physiotherapy attendances, just invoices. As the cross-examination of the appellant set out by the primary judge demonstrates (Red 63L – 65B), there was an inconsistency between the appellant simultaneously saying that she believed

her back condition was okay in the post-operative period through to about 2001 but also suggesting that the number and pattern of attendances through 2000 indicated that the attendances must have been to do with her lower back.

19. Fourth, and as the primary judge observed, there were multiple internal inconsistencies and contradictions in the accounts the appellant gave in the course of her instructions to her solicitors, her Evidentiary Statements and her oral evidence over different days as to the existence, nature and severity of her lower back pain and referred pain into her buttocks and legs, at various points after the surgery. Those matters were ultimately influential in the primary judge finding that the appellant's evidence was entirely unreliable, that she tended to exaggerate her symptoms, and the extent of her injuries and disabilities and that her evidence was inaccurate in some important respects (Red 148H – M and Red 149J – N). The respondent maintains that those findings were entirely open on the evidence and that in circumstances where the primary judge made them, they served to impugn the appellant's credit not just as to what she said about her post-operative back pain, but more generally. The primary judge was entitled to rely on those findings when it came to considering the evidence of the appellant as to what was said and done at the 3 March 1999 appointment with the respondent.
20. The appellant's evidence as to her post-operative back condition will be addressed further below in respect of Grounds 5, 6 and 7 (Factual Causation). For present purposes, the respondent repeats the submissions made at first instance, which the primary judge accepted, as to the multiple problems with the appellant's evidence as to her post-operative condition (Red 132N – 144N and Red 148F).
21. As the primary judge found, that involved significant inconsistencies in the appellant's own evidence in respect of matters such as when the appellant wore a back brace post operatively, when low back pain reoccurred post-operatively, when it worsened, when it became severe, how it changed during her pregnancies and when it involved referred pain into the buttocks and legs (either 2004 or 2017) and further, inconsistencies between the appellant's accounts and the contemporaneous treating records: see Red 133E – G, Blue 4 1363P, Black 1 229F – V, Red 133U – 134C, Black 1 234W – 235V, Red 134K – P, Black 1 319Y – 320Y and Black 1 321J, Red 133P and Black 1 68M – 68T.
22. Relevantly, on days 4, 5 and 6, the appellant gave what were at times wildly varying accounts as to whether the pain in 2004 was confined to her lower back or involved referred pain into her buttocks and one or both of her legs. On day 4 itself, and within minutes of each other, she stated that the pain was confined to the lower back and that it extended into the buttocks and the thighs and was so bad at times that she would vomit: Red 134K – 136T and Black 1 321E – J and 326S – T328D.

23. The primary judge noted that notwithstanding the appellant identifying 2004 as a turning point for her condition in her evidence, there was a single physiotherapy attendance that year (for 20 September 2004) which was unrelated to the lower back and that while there were general practitioner attendances, they were for other problems unrelated to the lower back issue: Red 137I – O, Blue 9 3664E – N and Blue 9 3936Q. The primary judge found that this was one aspect of the appellant's evidence which was inherently unbelievable, being that notwithstanding the severity of the symptoms she claimed she experienced in 2004 and indeed, in the years following, which led her to vomit from pain and need to lie on the floor for relief with increasing frequency, there was not a single clinical record of such a complaint being made in any of the contemporaneous records: Red 148S – Red 149H and see the appellant's evidence at T328.37 – T329.7 and T330.24 – T331.29.
24. The appellant's evidence was that her back pain worsened during each of her pregnancies, then settled after the first and second pregnancies, but permanently worsened after the third pregnancy: Blue 1 214Q and Blue 1 215E, Q and U. The primary judge noted that while the clinical records of the pregnancies contained complaints of other symptoms, they did not record complaints of back pain: Red 138S - U, Red 139K and Red 140H – P. Again, the comparison between what the appellant alleged and what her treating records demonstrate supported the primary judge's findings as to her being entirely unreliable and exaggerating aspects of her evidence.
25. Turning now to the evidence of Ms Leah, the appellant's mother, the respondent again maintains that there were entirely adequate reasons given by the primary judge for not accepting her evidence absent corroboration by contemporaneous records: Red 149S.
26. First, Ms Leah was giving evidence about events occurring well over 20 years ago, such that the passage of time itself was likely to diminish the quality of her recollection: Red 149R.
27. Second, and allied to the above point, Ms Leah gave evidence as to the manner in which her first Evidentiary Statement was drafted (in respect of which see Red 144Q – 144S) which appropriately concerned the primary judge as to its accuracy. In short, it was prepared to reflect a combination of Ms Leah's purported actual recollection, the contents of the book she maintained and the supporting invoices she kept, which contained no clinical information, just dates and billing details: see Blue 1 starting at 1 and Blue 3, 885 – 944 and 1030 – 1117. Ms Leah confirmed in oral evidence that multiple entries in her statement which described medical or physiotherapy attendances and what occurred at them, were added in by the solicitors for the appellant without Ms Leah providing any information herself or ever seeing or being provided with the underlying records. That applied to paragraphs 15(e), (f), (i), (j), (k), (l), (m) and (p), as well as paragraph 29 of her first

Evidentiary Statement: Black 2 825E, 839I, 839T – 842Q, 846Q – 848V, 850R - T, 879J – W, 884I – 884R, 907R – 908T and 912D – 914P.

28. Third, notwithstanding Ms Leah's broad claim that she remembered fairly clearly what was happening at the appointments around the time of surgery (Black 2 836L), she otherwise made concessions as to the limitations of her recollection, both as to what occurred at the 3 March 1999 appointment with the respondent (Black 2 938J - 939H), as well as the frequency of the appellant's complaints of back pain in the year before February 1999, the level of the appellant's function in the period between her fall in 1995 and February 1999, whether the appellant was getting better or worse over the same period and the details of any pre-operative physiotherapy consultations: Black 2 877T – 879W, 884I – S and Red 144U.
29. Fourth, and as noted by the primary judge, Ms Leah made an assumption in preparing her first Evidentiary Statement that the appellant was only ever attending physiotherapy for her low back condition and she highlighted the relevant entries in the book she maintained and provided it to the appellant accordingly: Red 144U, Black 2 833D – T and 835M – V. The physiotherapy records, which exist from 21 January 2002 onwards, demonstrate that on many occasions, the appellant in fact attended for non-low back related problems.
30. Fifth, and notwithstanding that Ms Leah claimed that the respondent did not identify any risks of the surgery during discussions on 3 March 1999, she otherwise did not respond to the detailed information the respondent set out in his Evidentiary Statement as to what he told the appellant and her parents about the nature of the surgery and how it would be performed on 3 March 1999: compare Blue 1 279F – I with Blue 4 1358O – 1360W.
31. For all the above reasons, it was open on the evidence for the primary judge to have the reservations he expressed as to the reliability of Ms Leah's evidence and to not rely on it unless it was supported by contemporaneous records.
32. The appellant (AS [29] – [36]) ultimately sets out six bases upon which she alleges that the primary judge erred in rejecting the evidence of the appellant and her mother about the substance of the advice given by the respondent at the consultation on 3 March 1999. The first basis (AS [30]), with respect, confuses and conflates honesty with reliability.
33. In respect of the second basis (AS [31]), there is simply no equivalence between being a meticulous recordkeeper of medical invoices for tax purposes (Black 2 824P) and being a reliable witness when it comes to what was said at a particular consultation. Contrary to what is said by the appellant, there was in fact a good reason to reject her account. Beyond the respondent's records and his account of his usual practice, he also specifically disputed key aspects of Ms Leah's account of what occurred on 3 March 1999, explaining

that the words she attributed to him did not reflect his views at the time or his understanding of anatomy: Red 100H-T and Blue 4 1361F-1362N.

34. In respect of the third basis (AS [32]), the primary judge's finding as to the appellant's honesty is not the same as a finding of reliability. In addition, the primary judge's acceptance of there being significant problems with multiple aspects of the appellant's evidence was sufficient to conclude that the account should not be regarded as corroborating Ms Leah in terms of what occurred and was said on 3 March 1999.
35. In respect of the fourth basis (AS [33]), the existence of the anaesthetic estimate issued on 3 March 1999 does not support Ms Leah's account (and thus support a finding that the only option discussed on 3 March 1999 was surgery). The quote contains an incorrect date for surgery and Medicare codes for different procedures to what the respondent ultimately performed on 11 March 1999: compare Blue 1 198 to Blue 3 1065. While Ms Leah maintained that the estimate of anaesthetic fees was provided to her by the respondent's rooms and that the respondent himself would have given it to her (Black 3 1114V and 1115V), the respondent maintained that he would not have obtained the quote and that it may have been obtained by his rooms if a patient sought information, such as to the costs involved with proposed surgery: Black 3 1126K. Ultimately, the existence of the estimate of anaesthetic fees was an entirely neutral fact.
36. In respect of the fifth basis (AS [34]), there was no warrant for the primary judge to doubt the accuracy of the evidence the respondent gave as to providing pamphlets to the appellant and her parents, in circumstances where his clinical note included the specific words "*booklet given*". As to the evidence by the respondent that he would have written to the appellant and her parents (as well as her referring GP) about the possibility of surgery, given the time that has passed, the fact that those letters could not be located should be regarded as a neutral fact.
37. In respect of the sixth basis (AS[35]), the respondent's note of the 3 March 1999 consultation is brief, but is not corroborative of Ms Leah's account. As the primary judge commented, an inference may be drawn from the note that a discussion occurred about the proposed operation, including as to the risks involved in it: Black 4 1505S and 1548C. It is also emphasised that the respondent did not have the benefit of the letters he says he would have written the appellant and her parents and her GP, which may have provided further corroboration of his account.

Grounds 2 and 3– finding as to section 50 Civil Liability Act 2002 (NSW) and breach of duty

38. As per the submissions on Appeal Ground 1 above, there was no error in the primary judge's findings as to the advice the respondent gave at the 3 March 1999 consultation about the proposed surgery, including as to risks inherent in it. His Honour's finding

included accepting that the respondent gave advice as to the risk of damaged nerves, infection and bursitis (Red 98Q) and also, the possibility of bone union being delayed or not having occurred, such that the appellant might need further surgery: Red 98T. The primary judge also found that the respondent informed the appellant and her parents that continued conservative management was an option, and that if the appellant could wait for a couple of years and live with her back pain and continue to attend physiotherapy when she needed it, she might find that the pain would reduce: Red 98L and Red 145K.

39. On the factual findings, the primary judge (correctly) made as to what occurred at the 3 March 1999 consultation, there was expert support for the respondent's advice (contrary to what is stated at AS [43]). In that regard, the appellant does not challenge the findings as to Professor Dan's experience with an expertise in the performance of spinal surgery on paediatric patients: Red 174W – Red 175J. Likewise, no challenge is made to the finding that Dr Hopcroft had no relevant expertise in the performance of back surgery, including paediatric back surgery and that Dr Drnda had only distant and limited overseas experience in performing paediatric spinal surgery and no specific experience in performing fusion surgery in paediatric patients.
40. That led the primary judge to conclude, again not the subject of challenge, that Professor Dan's views on the performance of the subject surgery were to be preferred in circumstances where his relevant expertise far exceeded that of Dr Hopcroft and Dr Drnda: Red 175M-P. With respect, His Honour was correct to approach the evidence of the experts in that manner. Indeed, in response to what is stated at AS [39], Professor Dan did not simply state that he would have recommended more conservative management instead of surgery. He specifically stated that in the appellant's clinical circumstances, conservative management and fusion surgery were available treatment options and that the respondent acted in a manner which was widely accepted in Australia by peer professional opinion as competent professional practice in offering an uninstrumented posterolateral fusion on 3 March 1999: Blue 10 4238Q-T and Blue 10 4243R.
41. Professor Dan further explained that while conservative management would be the first measure he would undertake in his practice, the degree of symptomology was critical in deciding whether or not intervention (surgery) should occur (Blue 10 4240J) and that where a patient was still experiencing significant symptoms despite conservative management, the question of surgery would be discussed (Black 3 1294B). Professor Dan stated that the desire of the patient, or in a patient of the appellant's age, her parents, about the necessity to get on with whatever activities they want her to get on with was also a relative indication for surgery: Black 1293P.
42. Noting the factual findings the primary judge made at Red 150F-151J, the primary judge was entitled to conclude that there was expert support for the respondent's advice through

Professor Dan's evidence. The primary judge made unchallenged findings that the appellant's low back pain had persisted and worsened between 1995 and 1999 as a result of her hockey commitments, with the symptoms increasing in severity, that she had already attended 14 physiotherapy consultations for her low back between July 1998 and 12 February 1999, that both the appellant and her parents wanted the appellant to return to competitive hockey as at 12 February 1999 and were anxious for her back pain to be resolved as soon as possible. Based on those findings, there was expert support (from Professor Dan) for the respondent's advice as to treatment options, including surgery. In other words, the appellant's back pain was persistent and worsening despite a fairly lengthy period of physiotherapy and she and her parents were anxious for the back pain to be resolved as soon as possible, particularly so she could return to hockey. In that clinical setting, Professor Dan concluded that offering fusion surgery was acting in a manner which was widely accepted in Australia by peer professional opinion as competent professional practice.

43. Ultimately, the primary judge's finding under s.50 on this aspect of the case (at Red 180V-181F) reflects the above evidence. In short, it was appropriate to offer and perform fusion surgery where there had already been a period of expectant management, including physiotherapy, without improvement, prior to the appellant presenting to the respondent.

Ground 4 – finding as to breach of duty in respect of advice as to the appellant's return to hockey

44. The primary judge identified that one of the allegations the appellant made was that the respondent was negligent in telling her that she could return to hockey at the 12 May 1999 consultation: Red 40I, 174O and 177B-I. The primary judge included the allegation of negligence regarding permission to return to hockey into the broader category of failing to maximise the prospects of fusion taking place following the surgery: Red 178R. Thus, it was not only at Red 182O-R that the primary judge rejected the claim based on the alleged negligence in permitting a return to hockey on 12 May 1999.
45. In the course of considering the respondent's submissions on that allegation, the primary judge provided reasons for accepting those submissions and ultimately concluded that the respondent's actions on 12 May 1999 were reasonable: Red 177B-J. For the reasons that follow, there was no error in that approach.
46. First, and consistent with other findings the primary judge made about the relative areas of experience and expertise of the experts, it is correct that Professor Dan was the only expert with actual clinical experience in the scenario of managing a teenage patient post fusion surgery. The primary judge was thus entitled to place considerable weight on his views.

47. Second, while Professor Dan described permitting the appellant to return to hockey, on a “training basis” initially, on 12 May 1999, as “*borderline*”, the primary judge correctly found that counsel for the appellant did not take up issue of what “*borderline*” meant any further: Red 167F. The primary judge also found that in the circumstances of all of Professor Dan’s evidence, he understood him to intend to convey that he thought the practice could be described as good, though it was on the edge of that description: Red 167G. That finding is not the subject of challenge and indeed, is consistent with what Professor Dan said about permitting the appellant, in circumstances where she reported no low back pain and demonstrated a full range of movement on 12 May 1999, to start with training and stay under clinical management, with a view to later upgrading to matches: Black 3 1345V - 1346D.
48. Third and further to the second point, the appellant and her mother both accepted, notwithstanding that they could not recall much detail of what was discussed on 12 May 1999, coming away with the understanding that the respondent was advising a graduated return to hockey, with training initially and matches later, subject to the appellant monitoring how she was going and returning to see the respondent if there were problems: Black 1 386M -387O and Black 3 979Q-981R.
49. In circumstances where the appellant’s expert witnesses, who had no experience in managing a post-surgical patient like the appellant, refused to even countenance any form of return to hockey in circumstances where the appellant had achieved a complete remission of pain and very good movement by 12 May 1999, there was good reason for the primary judge to prefer the evidence of Professor Dan. While Professor Dan was appropriately cautious about a return to activity after fusion surgery, he acknowledged that there was nuance in the clinical situation, so that advice as to a careful, graduated return to activity, including sporting activity, may be appropriate.
50. Ultimately, the appropriateness of the respondent’s advice about return to hockey on 12 May 1999 was borne out by the fact that she did well while she remained under the respondent’s care through to 20 September 1999. She reported no lower back symptoms while she remained under the respondent’s care. On 7 July 1999, contrary to what the appellant asserts (at AS [49]), she did not describe lower back pain. Rather, she described some tenderness about the PSIS. When the appellant returned on 20 September 1999, at which time she was back playing competitive hockey, she reported being very comfortable and was not troubled by pain: Red 146V, 151G and Blue 4 1366N. She did not return to see the respondent after that appointment until 2019.
51. Even if the Court is against the appellant in respect of Appeal Ground 4, the evidence does not demonstrate that the return to hockey caused any persisting injury. Even Dr Drnda accepted that because he had not examined the appellant, he was left to speculate as to

what long term effect the return to hockey had. He added that in his view, playing hockey did not play a major role in the long-term outcome, that any short-term consequences had not continued and that current symptoms are “*probably more related to surgery*”: Black 3 1369D - R. This issue is addressed further under Grounds 5, 6 and 7 below.

Grounds 5, 6 and 7 – factual causation

Ground 5 - Whether, if given appropriate advice the appellant would have proceeded to surgery?

52. Based on the evidence of Ms Leah given under cross-examination and the chronology which can be discerned from the clinical records, it is apparent that Ms Leah was motivated to find a treatment for her daughter which “would resolve the problem”: Black 2 935E-H. Specifically, Ms Leah gave evidence that the appellant had been in pain for a long time despite having undergone physiotherapy and that the pain was not getting any better: Black 2 900H-P. It was her understanding that the appellant had a fracture in her back and she was worried that the vertebrae might slip off her tailbone, causing her to shrink: Black 2 904O - 905D and 937C – G.
53. In addition to her concern for the appellant’s well-being, Ms Leah was also conscious of her love for hockey and her strong desire to return to playing. The appellant had made the Country Victorian team but was unable to play due to the pain in her back: Black 2 902S-903J. Ms Leah had experience arranging surgery for her other children. This included her son David, who underwent two successful knee reconstructions following ACL ruptures while at university. These surgeries enabled him to return to representative level sport: Black 3:967N-968H.
54. It was open to the primary judge to find that, irrespective of the options presented on or before 3 March 1999, Ms Leah would have elected for the appellant to undergo surgery. This finding is particularly open in circumstances where:
 - (a) The respondent had not initially planned to see the appellant for a further six months if the facet injection settled her down: Blue 5:1916.
 - (b) The respondent later referred the appellant for a course of physiotherapy and Ms Leah returned after only two sessions: Blue 4:1357F-P;
 - (c) The respondent recorded in his notes that a booklet was provided for Ms Leah to “consider” surgery: Blue 4:1357W and 1360V;
 - (d) The respondent denied that he would have provided an anaesthetic quote for the surgery on 3 March 1999, though his rooms would have provided this if it was requested by Ms Leah: Blue 1:198; Black 3:1126 B-M.
55. Notwithstanding the measures undertaken by the respondent above and outlined in his Evidentiary Statement (Blue 4:1358K-1361C), the Court would not be satisfied that Ms

Leah would not have permitted the appellant to undergo surgery had any other advice been provided. That is particularly so in circumstances where the appellant herself gave evidence that she lived and breathed hockey, thought as at 3 March 1999 that surgery would resolve the problem she had with her back (debilitating back pain) and would permit her to continue playing hockey, in respect of which she had ambitions of playing professionally: Blue 1:206U and Black 1:351H.

Ground 6 – Whether the appellant’s account of experiencing low back pain on a regular basis from 2004 with increasing frequency ought to have been rejected?

56. The appellant erroneously contends that the primary judge erred in rejecting her account of suffering lower back pain from 2004 and in accepting the respondent’s contention that she did not suffer (any) lower back pain until 2017: AS [12] and [13](b). The appellant refers to a statement made by the primary judge at Red 148W that there was “not a single record of such a complaint”, as a finding that there was an absence of any contemporaneous records of complaints of lower back pain: AS [71]. This is both an incorrect characterisation of the respondent’s contention and an incorrect characterisation of what the primary judge found.
57. First, the respondent did not contend for a finding that the appellant did not suffer from any back pain until 2017. Rather, both in oral and written submissions, the respondent submitted that the appellant did not suffer any, or any significant lumbar symptoms until 2018 to 2019: Black 4:1745T.
58. Second, the absence of a single record of *such* a complaint referred to by the primary judge at Red148W, is a reference to the appellant’s evidence given under cross-examination, that from around 2004 onwards, she would frequently be lying on the floor and vomiting due to her lower back pain: Black 1:327O-329E; 330G-331H; 411T. Her evidence was that these episodes would occur about 3 times each year from around 2004 but increased in frequency to monthly episodes. The appellant said she would have told her physiotherapist about this: Black 1:330H; 467G-N. The primary judge appropriately found that while there were some limited references to lumbar pain in the records from 2004 onwards, it did not appear to be a significant or dominant complaint: Red 149B-N. This finding was available on the evidence.
59. Third, the primary judge’s findings were based not only on his observation that there was a lack of contemporaneous records to support the appellant’s assertions as to her lower back pain (Red 147N), but also based on concerns with the consistency and reliability of her evidence: Red 144J and Red 148I-X; Red 133N – 144J. This finding was plainly available for reasons which include:
 - (a) There was no financial impediment to her obtaining treatment. The appellant contended that she “was not doing physiotherapy” because she could not afford it

between 2004 and 2006 as she was a university student at that time: Blue 1:212G, 212N and 212T. This was notwithstanding that her parents supported her financially, she was still covered by their private health insurance and the relevant gap payment for physiotherapy was \$9: Black 1:412T-413N; Black 2:858R-X; Blue 3:944. The single physiotherapy attendance by the appellant in 2004 when her lower back pain was said to have become more severe, was for the treatment of a right frontal headache: Blue 2:876Q and Blue 2:883-884. The reason for this attendance is not equivocal, as contended by the appellant at AS [73].

- (b) The appellant went several years where not a single lumbar spine symptom was reported to any medical or allied health practitioner including in 2004, 2005, 2006, 2008, 2009, 2010, 2013, 2014, 2016, 2017. For those attendances where lumbar back pain was reported, it did not always identify that pain as the primary complaint: Blue 2:876D; 877E. There were also attendances where the appellant reported “nil” complaints of lower back pain: Blue 2:880G. While the respondent accepts that the appellant may have been adept at managing her symptoms and may not have always attended for treatment, based on the nature and extent of the pain described in her evidence, it is not credible that such a level of pain would not have featured in any of her clinical records when she did attend for treatment. This is particularly so, during her first three pregnancies⁶ when she gave evidence that her pain was significantly exacerbated. When referred to her obstetrician on 18 March 2009, her General Practitioner referred to the appellant as having been “well” since her spinal surgery and other than treatment for carpal tunnel during her pregnancy, they were uneventful: Black 4:1746L-T; Blue 8:3195; 3203R; 3197; 3292L.
- (c) The appellant’s recollection of her back pain was largely based on reconstruction which itself supported a finding of unreliability. As identified between [14] and [19] above, the process by which her evidentiary statement was prepared gave rise to real concerns about its accuracy. This may have, in part, explained the evolving nature of her evidence. It is uncontroversial that a Court can accept that a witness is honest, while nevertheless finding that the witness’s understanding or recollection is unreliable.
- (d) The evidence of Ms Leah was even more concerning and did not provide any greater satisfaction as to the nature and extent of the appellant’s asserted lower back pain from 2004. Ms Leah’s recollection of any details regarding the appellant’s post-operative pain was poor and she ultimately accepted that she could not “really remember” when she first noticed the appellant experiencing back pain following her

⁶ The appellant’s children were born on 27 September 2009 (Blue 215E), 18 April 2013 (Blue 215Q), 7 March 2017 (Blue 215U) and 8 March 2021 (Blue 220R).

surgery, nor could she recall whether her back pain deteriorated following the birth of her third child in 2017: Black 3:1002E to 1003B.

- (e) As for Nathan Briggs, his evidence was general in nature, at times it was inconsistent with the appellant's own evidence and could not meaningfully assist the court in determining the veracity of the appellant's account: Black 4:1742D-L; Black 2:798K-V; 799F; 799U; 801X-802X. The primary judge was correct to observe that his evidence was of limited value.
- (f) On the *Jones v Dunkel* inference drawn from the absence of evidence from the appellant's longstanding physiotherapist Shane Robertson, it was appropriate for the primary judge to find that his evidence would not have assisted the appellant's case. Throughout her evidence, the appellant spoke of the 20-year treating relationship which she had with Mr Robertson: Black 2:618M, 625M, 637J-M. Other than a handful of attendances with other physiotherapists, Mr Robertson was the appellant's primary treater from as early as 1997 with the physiotherapy records indicating that she was last treated by him on 20 May 2022: Blue 7:2602. When asked why she saw another physiotherapist, Patrick Stowe, on 20 March 2023, the appellant said, that "it's harder to get into Shane": Black 2:648U. There was overwhelming evidence to suggest not only that the treatment relationship was ongoing, but also that it would be expected or natural for the appellant to have called Mr Robertson: *Ling v Pang* [2023] NSWCA 112 at [23]; [26] to [27].⁷ The evidence of Mr Robertson would not have been cumulative. It offered the potential for the appellant to provide corroborative testimony from a longstanding treater, for what she insisted was persistent and significant lower back symptoms which was contradicted by the clinical records.⁸ The Court is entitled to consider the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so: *Ho v Powell* (2001) 51 NSWLR at 576.⁹ In the circumstances, the primary judge did not err in finding that the evidence of Mr Robertson would not have assisted the appellant's case.

Ground 7 – Whether the respondent's negligence was a necessary condition of the harm suffered by the appellant?

60. It is trite to note that, if the Court finds that the appellant achieved a good functional outcome following the surgery, any act or omission of the respondent could not have been

⁷ Kirk AJA.

⁸ See for example Black 501F-J.

⁹ Beazley and Hodgson JJA; see also *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 at [58] and *SSABR Pty Ltd v AMA Group Limited* [2024] NSWCA 175 at [162]-[164].

a necessary condition of the harm suffered by her. The respondent contends that this was the only available finding, noting the difficulty with the appellant's account of her pain addressed above.¹⁰

61. Although it is the appellant's contention that she suffered low back pain from 2004 and that the non-acceptance of this by the respondent's causation expert Dr Kam was based on the respondent's factual attack on the absence of complaints until 2017 or 2018 (AS [76]-[77]),¹¹ this is not the counter-factual that was put to the experts during their joint evidence. Rather, the assumption put to the experts was that the appellant experienced a reoccurrence of pain from 2001, which then was constant and progressively deteriorated: Black 3: 1357I; 1358J; 1359Q; 1378C. This was not consistent with the appellant's main narrative about when her pain became significant.
62. Importantly, the experts accepted that if the appellant was able to return to hockey in mid-1999 as she did and did not experience a significant increase in low back pain, it was demonstrative of a good functional outcome from the surgery: Black 3:1364Q-1366F. Notably, the appellant continued playing hockey until the end of the 2007 season.
63. In respect of the appellant's return to hockey in the months following her surgery, the weight of the expert evidence supported that this was not a significant factor in her ultimate outcome. Dr Alan Hopcroft, liability expert for the appellant opined that while a return to hockey may have played some role in preventing bony union, he accepted that a lack of bony union may have been due to the simple movements you would expect from a teenager: Black 3:1339T-1341X. Importantly, other than Dr Hopcroft who did not comment on the matter, the causation experts agreed that the appellant's return to hockey in the months following her surgery had no bearing on the appellant's current presentation: Black 3:1369F-1370O.
64. Irrespective of when the appellant began to experience pain, the evidence does not support a finding that the appellant would have achieved a better outcome, had she not undergone surgery. Despite the absence of bony union from the surgery, the slip at that L5/S1 had remained stable over time: Black 3:1348P. While Drs Drnda and Hopcroft, expressed the opinion that altering the mechanics of the appellant's spine would be a contributing factor to her current symptoms (Black 3:1371L-W), when asked by Senior Counsel for the appellant to ascribe what portion of the appellant's pain, was due to the surgery and lack of fusion, Dr Drnda said it was "impossible to say", attributing 10% or 20%: Black 3 1375X-1376G. Drs Dan, Kam and Dalton all considered that the appellant's outcome would have been no different had she not undergone surgery: Black 3:1371O; 1372U- 1373B; 1373P-T; 1377F-Y.

¹⁰ See [13] to [24] and [58] to [59]c.

¹¹ This is an incorrect characterisation of the respondent's submission at hearing – see [x] above.

65. It must necessarily follow that any act or omission of the respondent was not a necessary condition of the appellant's harm.

Ground 8 – Limitation

66. The appellant has misconstrued the primary judge's approach to the appellant's application to extend the limitation period applicable to her claim. It is not in dispute that the applicable limitation period expired on 23 May 2005: Red 157O. While the primary judge found that the appellant satisfied the provisions of s 60I(1) of the *Limitation Act* (NSW) 1969 (**LA**) such that s 60G was enlivened, his Honour's determination *not to* exercise the discretion afforded in s 60G(2) was not, on the facts of the case, unreasonable or plainly unjust such that it constituted a *House v King*¹² error.
67. It is erroneous to contend that the primary judge ought to have undertaken a weighing exercise to determine whether any presumptive prejudice suffered was significant enough to outweigh the significant prejudice to the appellant in not being permitted to litigate her claim: AS [84]. The High Court in *Brisbane South Regional Authority v Taylor* (1996) CLR 541 (**Brisbane South**) rejected the proposition that when determining the degree of prejudice engendered by the extension of a limitation period, the prejudice to an applicant must be weighed against prejudice to the respondent.¹³ The Court observed that such an approach was problematic, as the prejudice to an applicant would be absolute in that they would never be able to litigate their claim. The real question is whether the delay has made the chances of a fair trial unlikely.¹⁴
68. It is the applicant on an extension application who carries the ultimate onus to satisfy the Court both that the justice of the case requires an extension and that the grant of an extension would not result in significant prejudice for the respondent.¹⁵ It is insufficient for the appellant to point to the volume of the documentary material available or the capacity of the respondent to 'marshal' expert evidence to mount a defence as evidence of an absence of prejudice: AS [84]. Even if this were correct, it does not follow that in the absence of prejudice and unlikelihood of a fair trial, it will necessarily be just and reasonable to grant an extension of time.¹⁶ The High Court in *Brisbane South* emphasised that prejudice may not only exist where the deterioration in the quality of evidence is palpable, but more often than is realised, the deterioration in quality is not recognisable, even to the parties.¹⁷

¹² *House v King* (1936) 55 CLR 499 at 505 (Dixon, Evatt, McTiernan JJ)

¹³ *Brisbane South Regional Authority v Taylor* (1996) 186 CLR 541 at 549-550 (Toohey & Gummow JJ).

¹⁴ *Ibid* and at 555 (McHugh J); see also *South Western Sydney Area Health Services v Gabriel & Anor* [2001] NSWCA 477 at [34] (Hodgson JA).

¹⁵ *Brisbane South* at 544 (Dawson J) and 554 (McHugh J).

¹⁶ *McLean v Sydney Water Corporation* [2001] NSWCA 122 at [22] (Giles JA).

¹⁷ *Ibid* at 551 (McHugh J).

69. It is not in contention that the respondent had an actual recollection of aspects of his treatment of the appellant, but this was not a complete recollection: Blue 4:1353C-G; 1355S; 1357M; 1363V; 1364V. The respondent relied extensively on his standard practice, combined with his recollection and his clinical notes which were incomplete: Blue 4 1351F-H; 1357K; 1360X; 1362Q. Contrary to what is submitted at AS [84], the primary judge did engage with the respondent's capacity to recall events and his available notes, however this was but one aspect of the primary judge's determination: Red 160C-161M.
70. The primary judge appropriately considered the nature and extent of the missing materials, assessing their impact on the respondent's ability to fairly mount a defence. Those records included, *inter alia*:
- (a) Physiotherapy clinical notes for the two years leading up to the surgery, including the respondent's referral of the appellant for specific interferential treatment, relevant to allegations of clinical indication for the surgery and the sufficiency of conservative management received: Blue 3:885-911¹⁸ and Red 10L & R.
 - (b) Physiotherapy clinical notes for almost 2.5 years following the surgery, relevant to the appellant's contention that she was never without pain following surgery: Blue 3:912-936¹⁹ and Black 1:284V-285S.
 - (c) The respondent's reporting letters to the appellant's parents and treating GP, as well as his letter to the appellant's physiotherapist, relevant to the respondent's account of what advice he provided at the critical consultations between 6 February and 3 March 1999.
71. The import of these missing materials was addressed in the defendant's oral and written submissions: Black 4:1556K -1560S.
72. The respondent may never know the true extent of how the absence of this material, or the faded recollections both his own and those of the appellant's witnesses, impacted upon the robustness of his defence, or the course of these proceedings, commenced over 20 years after he operated on the appellant. The primary judge's determination that both actual and presumptive prejudice was suffered by the respondent was available on the evidence and in consequence, there was no error in the trial judge's exercise of discretion under s 60G of the LA not to extend time. The finding should not be disturbed.

¹⁸ The appellant attended 26 physiotherapy consultations between 12 February 1997 and 26 February 1999.

¹⁹ Excluding the 5 sessions which occurred while the appellant was an inpatient at Albury Wodonga Private Hospital, there were 22 physiotherapy attendances between 29 March 1999 and 26 July 2001.



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