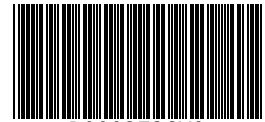




Filed: 17 June 2026 4:39 PM



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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
First Respondent	Terence Hillier

FILING DETAILS

Filed for	Erin Nicole Briggs,Appellant 1
Legal representative	Geoffrey Potter
Legal representative reference	
Telephone	02 6933 6900

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 (2676-Written Submissions 16.06.26 Briggs v Hillier (1).pdf)

[attach.]

ERIN NICOLE BRIGGS V TERENCE HILLIER

APPELLANT'S WRITTEN SUBMISSIONS

1. In February 1999, the appellant (plaintiff below) was 14 years of age. She was a talented and successful junior country hockey player. But four years earlier she had hurt her lower back when a prank at school went wrong and she fell on her tail bone: Red 53M. She had experienced lower back pain from that time.
2. The plaintiff had had physiotherapy and by early 1999 was referred to the respondent (the defendant below), an orthopaedic surgeon. The defendant had in the previous month commenced public and private practice in Albury, New South Wales and obtained admitting rights to Albury Base Hospital, Wodonga District Hospital and Albury Wodonga Private Hospital: Red 44H.
3. On 12 February 1999, the plaintiff first attended on the defendant. She was accompanied by her mother, Ms Suzanne Leah and her father.¹ As set out below, the plaintiff's mother was a very careful historian when it came to the plaintiff's medical appointments. She maintained that she had a good recollection of the consultations with the defendant about the treatment of her daughter.
4. At the 12 February consultation, the plaintiff and her mother told the defendant that the plaintiff was a healthy young woman who played high level sport, but that she had significant lumbar pain, and options were discussed to deal with that pain: Red 44M–45I. The defendant arranged for the plaintiff to have her L5 pars defects infiltrated with a local anaesthetic and a steroid and was advised that she should come back if she was still troubled: Red 45R. The plaintiff had the injections on 18 February 1999: Red 45T.
5. On 23 February 1999, the plaintiff came back to see the defendant, again with her mother. The defendant noted that the injections were done four days ago and had not been helpful; that the plaintiff would see Shane Robertson, physiotherapist and after that she would be reassessed: Red 46E.

¹ The plaintiff's father was deceased by the time of the trial

6. The critical consultation occurred on 3 March 1999, less than three weeks after the initial consultation with the defendant. There was a significant dispute before the primary judge about what occurred at this consultation. The central parts of Ms Leah's account were that the defendant: stated that her daughter's L5 vertebrae was "slipping off" her tailbone and that it would fall off completely causing her daughter to lose height; said that that problem could be fixed if he performed spinal fusion surgery; made no mention of any option to treat the plaintiff's pain other than surgery; and made no mention of the risk that the fusion surgery might fail. The defendant's account was materially different. He said that he gave very detailed advice about some 27 different matters (see Red 96C-98U) including that there were conservative treatment options available which might reduce the pain other than surgery; that he made no recommendation in favour of surgery; and that he did not say that the plaintiff's L5 vertebrae was slipping off her tailbone and would cause the plaintiff to lose height.
7. Eight days after that consultation, the plaintiff was operated on by the defendant for an uninstrumented posterolateral fusion at the Albury Wodonga Private Hospital. The defendant also removed what he called a "rattler" (a midline exposure of loose bone) in the plaintiff's back.
8. It was common ground between experts retained for medico-legal purposes that the surgery failed: see for example Black 3 1329 J - Y, 1348F, 1357U, and 1365R. There is no doubt that the plaintiff obtained some improvement after the surgery, but not because the fusion operation had been successful: see for example Black 3 1357O. The defendant eventually accepted in his evidence that the fusion had failed to take: Black 1092F-V.
9. The plaintiff returned to see the defendant on 12 May 1999. On that day she said she wanted to return to playing hockey and the defendant allowed her to return to competitive hockey: Red 47Q.
10. The plaintiff turned 18 on 23 March 2002. She thereafter went to university and later married Nathan Briggs. She had four children.
11. In April and May 2019 the plaintiff attended on the defendant: Red 51G-51P. She was referred to Dr Anil Nair who noted that she remained troubled by her lower back: Red 52S. The plaintiff consulted solicitors who advised that she may have a cause of action against the defendant arising

from the failed surgery. She commenced proceedings on 16 December 2020: Red 52V. Accordingly, she needed an extension of time under the *Limitation Act* 1969 (NSW) to maintain the proceedings, which she sought by notice of motion which was heard together with the main proceedings.

12. The trial commenced on 24 June 2024. There were two main factual issues before the primary judge: first, whether the defendant's 3 March 1999 advice was as stated by the plaintiff's mother or as stated by the defendant, and second whether the plaintiff had suffered low back pain from 2004 onwards as she, her husband and her mother said, or whether she did not suffer low back pain until 2017 as contended for by the defendant. The plaintiff was cross examined over 10 days in June and July 2024. Mr Briggs and Ms Leah were cross examined in July 2024 (Ms Leah over two days). The primary judge reserved his decision on 17 December 2024 and delivered reasons for judgment on 8 September 2025, around 14 months after he had observed the plaintiff, her husband and mother give their oral evidence.
13. The primary judge rejected the plaintiff's case in essence for the following reasons:
 - (a) His Honour rejected Ms Leah's and the plaintiff's account of the 3 March consultation, and accepted the defendant's account. Based on the defendant's account, the primary judge upheld the defendant's defence that his treatment of the plaintiff was widely accepted in Australia by peer professional opinion as competent professional practice pursuant to s.50 *Civil Liability Act* 2002 (NSW);
 - (b) His Honour rejected the plaintiff's evidence (supported by her husband and mother) that she suffered low back pain from 2004 and found that she had not suffered any lower back pain until 2017. On the basis of this finding, the primary judge found that the plaintiff had not established that any failure by the defendant was a necessary condition of her lower back condition;
 - (c) His Honour found that the plaintiff had not established an entitlement to an extension of time. While his Honour found that the plaintiff had satisfied the matters in s.60I *LA*, he found that it was not just and reasonable to extend time because the defendant had suffered actual and presumptive prejudice: Red 161N.

14. The plaintiff's position on appeal is that the plaintiff's appeal falls to be resolved by reference to the correctness of the primary judge's two key factual findings, namely the advice given by the defendant on 3 March 1999 and whether the plaintiff in fact had experienced lower back pain prior to 2017. The resolution of the first of those factual issues will determine the correctness of the s.50 defence and the resolution of the second of those factual issues will largely determine the question of causation. If the plaintiff's factual case is accepted, the expert medical evidence on breach and causation is clear. As to the extension of time, the exercise of the primary judge's discretion miscarried and disclosed *House v R* error. The primary judge failed to have proper regard to a number of material considerations, principally that the defendant had available to him his notes and purported to have an actual recollection of the advice that he gave to the plaintiff, such that there was no proper basis for the finding of actual prejudice, and any presumptive prejudice was significantly outweighed by the prejudice to the plaintiff in not extending time.

Approach to challenging factual findings on appeal

15. Before addressing the appeal grounds, it is necessary to say something about the approach to challenging factual findings in an appeal by way of rehearing. The plaintiff acknowledges the settled principles that where factual findings are made by a trial judge based upon the reliability of witnesses determined by the trial judge as a result of seeing and hearing them give their evidence, those findings will not be disturbed unless they are "*glaringly improbable*" or "*contrary to compelling inferences*": *Fox v Percy* (2003) 214 CLR 118 at 128 [29]. Further, the plaintiff accepts that the principle of appellate restraint is not limited to findings expressly stated to be based wholly or partly on demeanour in the narrow sense: see for example *Mt Pleasant Stud Farm Pty Ltd v McCormick* [2022] NSWCA 191 at [56]-[58].
16. As noted, the primary judge observed the plaintiff giving evidence over 10 days of cross-examination. In the ordinary course, that would be a good basis for appellate restraint in disturbing his Honour's findings made about the reliability of lay witnesses. However, as stated by this Court in *Monie v Commonwealth of Australia* [2005] NSWCA 25 at [43], a trial judge's advantage "*does weaken with time*". Where there is a significant delay between hearing and seeing witnesses and the

delivery of judgment, the trial judge generally is obliged to give specific reasons for accepting or rejecting the evidence of those witnesses. Matters that may be relevant include whether the judgment records that contemporaneous notes have been made and impressions formed at the time that the witnesses were giving their evidence, and whether specific and satisfactory reasons are given for accepting or rejecting evidence: *Monie* at [43].

17. There was a substantial delay between the primary judge hearing and seeing the plaintiff, her mother and her husband along with the defendant give evidence – around 14 months (a little longer for the plaintiff). In *CSR Ltd v Della Maddalena* [2006] HCA 1; (2006) 224 ALR 1, the High Court of Australia (at [47]) observed that a delay of eight months between the judge reserving judgment and delivery of reasons was substantial. Further, the judgment does not record the existence of contemporaneous notes of impressions formed at the time of the oral evidence. And, for the reasons below the reasons for rejecting the essential elements of the evidence of the plaintiff, her mother and husband were with respect not satisfactory.
18. In the circumstances, the principles requiring appellate restraint in overturning factual findings rejecting the evidence of the plaintiff, her husband and her mother have limited operation.
19. The plaintiff acknowledges that the approach to fact-finding about events which occurred well before a trial must have regard to the eroding effect of the passage of time on memory. The unreliability of human memory as a feature of the fact-finding process has been addressed by this Court: see for example Davies J in *The Nominal Defendant v Corden* [2017] NSWCA 6 at [165]. Courts usually prefer to rely upon contemporaneous documents in the fact-finding process: see *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200 per Jagot J at [1247]; *Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd t/as Uncle Ben's of Australia* (Federal Court of Australia, Tamberlin J, 29 June 1995, Unrep) at [122]-[123] (cited with approval by the High Court in *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* [1999] HCA 15; (1999) 161 ALR 599 at [15].

Appeal ground 1: The advice given by the defendant on 3 March 1999

The primary judge's findings

20. **12 February 1999:** The first consultation between the plaintiff, her mother and the defendant was on 12 February 1999. The defendant made a note which is set out by the primary judge at Red 44M–45I. The plaintiff gave an account of what she could remember, recorded by the primary judge at Red 54J–O. The plaintiff's mother gave an account of what she could remember, recorded by the primary judge at Red 85T–84D. The defendant gave an account of what he could remember about this consultation, recorded at Red 92B–F.
21. **23 February 1999:** The primary judge set out at Red 45C–E the defendant's note, to the effect that the plaintiff had had injections four days ago which had not been helpful and that she was to see Shane Robertson, physiotherapist. The plaintiff's account in her evidentiary statement is set out at Red 57U (Blue 1 206 M). The plaintiff's mother's account is recorded by the primary judge at Red 84D. The defendant's account is set out at Red 94U.
22. **3 March 1999:** The defendant's notes are set out by the primary judge at Red 46F–K. The primary judge recorded the plaintiff's mother's account at Red 84F–X. The plaintiff's account is recorded at Red 57W–60C. The defendant's account is recorded by the primary judge at Red 95D–99F.
23. The plaintiff's mother's account (supported by the plaintiff) and the defendant's account were irreconcilable. The defendant maintained that he made no specific recommendation that the plaintiff should proceed with surgery (Red 99B), and that, critically, he advised that if the plaintiff "*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 98K–L. The plaintiff's mother had an actual recollection of the consultation, and she maintained that the defendant advised that the plaintiff's L5 vertebrae was slipping off her tail bone and it would fall off completely and cause her to lose height; that the defendant did not suggest any treatment for the plaintiff other than surgery and did not recommend a second opinion; and that the defendant did not identify any risks with the surgery he recommended: Red 84J–X. Her version was consistent with the plaintiff's version.

24. Accordingly, the primary judge was required to resolve this significant difference between the evidence of Ms Leah supported by the plaintiff on the one hand, and the evidence of the defendant on the other about the advice given on 3 March 1999.
25. The primary judge set out the evidence given by the plaintiff and her mother in detail. His Honour recorded the plaintiff's submission about that evidence at Red 132K, to the effect that the plaintiff and her mother were truthful, accurate and reliable witnesses. The primary judge recorded the defendant's position at Red 132N-133C, that despite the very lengthy cross examination, the defendant conceded that the plaintiff was *not* a dishonest witness, although her recollection was poor and that she should only be accepted when corroborated by contemporaneous records. At Red 141C-F, the primary judge recorded that the defendant's position was that the plaintiff's evidence was *not* "*deliberately false*", but rather was simply "*not believable*".
26. With respect to the evidence of the plaintiff's mother, the defendant's position was that the Court "*should be circumspect*" (Red 144O) for four reasons stated at Red 144Q-145C.
27. With respect to the defendant's evidence, the defendant contended that the Court should find that he was an honest, open and forthright witness who accepted that he had an incomplete recollection of the consultations with the plaintiff: Red 145H.
28. In dealing with the competing submissions and the contradictory evidence, the primary judge made a finding at Red 145L that he accepted the evidence of the defendant wherever it conflicted with the plaintiff or her mother. The basis for that finding appears to be a conclusion by his Honour that the plaintiff's and Ms Leah's evidence was based on a belated reconstruction of events, in contrast to the defendant's evidence which was based largely on his contemporaneous records and his usual practice: Red 145M: see also Red 146E-I; Red 148F; Red 148I-M; Red 149P-T and Red 150R-S.

The plaintiff's complaints on appeal

29. The plaintiff contends that the primary judge erred in rejecting the evidence of Ms Leah corroborated by the plaintiff and preferring the evidence of the defendant with respect to the consultation on 3 March 1999, for the following reasons.

30. First, none of the reasons identified by the defendant (at Red 144Q-145C) or the sole reason cited by the primary judge at Red 145M supported the rejection of Ms Leah's evidence about the substance of the advice delivered on 3 March. The primary judge specifically found that Ms Leah was an honest witness (Red 149P) and that she gave her evidence in an entirely candid manner. The central problem with the primary judge's rejection of her evidence of the events of 3 March 1999 is that Ms Leah had stated and maintained that she had an actual recollection of the advice given by the defendant on that day in her written statement and her oral evidence: Blue 1 267Q-L; Black 2 935E-940B; Black 3 966P-969N. Although the passage of time was significant (as it was for the defendant), Ms Leah had every reason to remember the key advice that was given at that consultation, having regard to the significance of that advice to her 14 year old daughter, who she plainly cared for with a high degree of skill and attentiveness.
31. Second, Ms Leah was an unusually reliable witness. She was a meticulous record keeper who maintained a book of medical appointments for her daughter. While that book of appointments did not record the detail of what advice was given, it is positive evidence of her carefulness. There is every reason to believe Ms Leah when she said she had an actual recollection of what was said and what was not said at the critical consultation. There was no good reason to reject her account.
32. Third, whilst there were reasons to discount the reliability of some aspects of the plaintiff's account, including that she was a minor at the time, her account was consistent with and corroborated her mother's account on the key features. And, as noted, the primary judge expressly found that the plaintiff was not a dishonest witness.
33. Fourth, the likely sequence of events supports Ms Leah's account. After the 3 March consultation, an estimate of fees for anaesthesia was issued on the same day (Blue 1 198), and surgery was booked promptly, noting that surgery was performed by the defendant on 11 March 1999. That is consistent with the only option discussed on 3 March being surgery.
34. Fifth, whilst the primary judge made no reference to this, there were significant reasons to doubt the accuracy of the defendant's evidence. He gave evidence about two aspects of his usual practice at the time, namely that he provided pamphlets (albeit it they did not relate to the surgery the defendant

was proposing: Black 3 1032L) and would have written to the plaintiff and her parents: Red 99E.

However, Ms Leah had given evidence that she had no record of any such correspondence and if it had been received, she would have kept it. There was reason to doubt that the defendant followed his usual practice in this respect, and it raised a serious issue about whether the defendant followed his usual practice in other respects.

35. Sixth, turning to the one contemporaneous document with respect to the 3 March consultation (the defendant's own note), that note (set out at Red 46G-K) does not support the defendant's account. Rather, it is more consistent with the account given by Ms Leah and the plaintiff, namely that the only option discussed at that consultation was the surgery which the defendant was proposing.
36. Accordingly, the primary judge erred in failing to find that, in accordance with the evidence of Ms Leah, on 3 March 1999 the defendant gave the advice as recorded at Red 84J-X.

Appeal grounds 2 and 3: Section 5O defence and breach of duty

The primary judge's findings

37. The first step for the primary judge in making findings with respect to s.5O defence or with respect to breach of duty was to resolve the factual issue about what advice the defendant gave on 3 March. That issue is addressed in ground 1.
38. The primary judge found that the risk of harm was the risk that a bony union may not be achieved in the spinal fusion and that it might lead to ongoing and/or worsening low back pain and/or slip progression: Red 169E.
39. The primary judge observed that the defendant's expert on breach, Professor Dan, was the most experienced expert in respect of the performance of spinal surgery: Red 175P. Professor Dan's evidence was that he would have recommended more conservative management, instead of surgery. However, the primary judge did not understand Professor Dan to suggest that it was unreasonable for the defendant to have performed the surgery in the circumstances: Red 170W. Professor Dan's position appears to have been that the decision to operate or recommend surgery was dependent upon the physical condition of the plaintiff, taking into account the wishes of the plaintiff and her

parents: Red 171D. At Red 170R -171D, the primary judge recorded that the effect of Professor Dan's evidence was that the range of treatment options available in March 1999 included both conservative management and fusion surgery, and that the choice would be influenced by the plaintiff and her parent's desire for the plaintiff to return to hockey: Red 179U.

40. Dr Hopcroft and Dr Drnda (the medico-legal experts qualified by the plaintiff) expressed the opinion that fusion surgery was not an appropriate treatment option until all conservative management was exhausted and that a second opinion should have been obtained prior to surgery: Red 179X. The primary judge observed that "*none of the experts would have themselves recommended the surgery in the circumstances, but Professor Dan was aware of a number of people who (in about 1999) had the surgery at the plaintiff's age*": Red 179X-180D. Professor Dan's view was that surgery was not contraindicated, but he agreed "*that a period of expectant management was appropriate*". The primary judge said that the defendant had attempted a period of expectant management, but that the plaintiff and her parents were anxious for surgery: Red 180F.
41. The primary judge found that, notwithstanding Professor Dan's equivocal support (at best) for the defendant's approach, and the evidence of the plaintiff's medico-legal experts that surgery should not have been performed, the defendant acted in a manner which was widely accepted in Australia by peer professional opinion as competent professional practice: Red 180X-181D.

The plaintiff's complaints about the primary judge's findings

42. The s.5O question was to be determined based on the proper factual findings about the advice given on 3 March 1999.
43. On the factual findings contended for above with respect to that consultation, there was no support by any expert for the defendant's advice. Indeed, the defendant himself said that it was necessary to discuss other options than surgery: see for example Black 3 1032L-O. The defendant's original plan of treatment for the plaintiff was a conservative one: Black 3 1027T. He deviated from that plan.
44. The primary judge in the alternative made a finding (at Red 182V) that if he was wrong about the s.5O defence, the defendant was not negligent in failing to take precautions pursuant to s.5B CLA.

That finding too is unsustainable on the factual contentions advanced by the plaintiff about the advice given on 3 March 1999.

Appeal ground 4: The advice as to the plaintiff's return to hockey post-operatively

45. The plaintiff's case was that there was a failure by the defendant to recognise that fusion had not been achieved in the plaintiff's spine, and in advising the plaintiff and her parents on that false premise that she could return to playing competitive hockey on 12 May 1999: Red 11S -V.
46. The primary judge rejected the plaintiff's case: Red 182O-R.
47. The plaintiff contends the primary judge erred in rejecting the plaintiff's case for the following reasons:
48. On 12 May 1999, the defendant advised that the plaintiff's fusion was not fully sound on the left side 8 weeks post-surgery, but noted that she was fully active and recorded this in his notes: Red 47J. In his letter to the plaintiff's GP, the defendant said the plaintiff had been quite active since an early stage in her post-operative recovery, and he had allowed her to return to competitive hockey: Red 47Q.
49. By 7 July 1999 the plaintiff had fully returned to hockey: Red 47X-48B, 151E; Black 3 1341S-T. On 7 July 1999 the plaintiff returned to see the defendant complaining of lower back pain: Red 48C.
50. On 20 September 1999 and after the plaintiff was back playing competitive hockey, the defendant recorded in his notes that he considered the spinal x-ray suggested fusion development: Red 48L. Moving forward to 2019, on 13 March 2019 with a bone scan in hand, the defendant considered the fusion was stable: Red 50W, but ultimately at the hearing he accepted that the fusion had failed to take: see Black 3 1092F-V. At no stage when he had seen the plaintiff post-operatively in 1999 did the defendant advise that the fusion had failed or tell the plaintiff about that.
51. As set out above, there was no doubt amongst the experts (plus the defendant) that the fusion had failed: Black 3 1292B, 1329P-T; 1348F;1357U; 1365R. Dr Drnda said that there was a complete lack of bridge bone: Red 1329S. With little movement Professor Dan and Dr Hopcroft agreed that fusion of the bone would take at least three months or maybe longer: Black 3 1330J. Professor Dan's

evidence was that the process to turn the graft into bone involved blood clotting with the maturation of the blood clot taking a period of time (Black 3 1330E -F) and Dr Drnda opined that at least three months were required to expect some beginning of maturation of bone.

52. During the concurrent evidence, Professor Dan accepted that the defendant permitting the plaintiff to return to hockey when he did would be regarded as “borderline” good practice and that he would have been more conservative: Black 1334T–W; 1346B. Indeed, in the concurrent evidence, Professor Dan said that normally sport should be avoided for at least three months (Black 3 1331G) with vigorous activities to be avoided: Black 3 1331K. Dr Drnda said that sport should be avoided for six months: Black 3 1331T.
53. Both Dr Hopcroft and Dr Drnda considered it was not good practice allowing the plaintiff to return to hockey at 8 weeks post-operatively: see for example Black 3 1334S; 1335F.
54. Dr Drnda explained that even if a bridge (bridge bone) was forming at three months, twisting, bending, colliding and falling will cause breakage and likely reabsorption: Black 3 1331R.
55. On this evidence, the plaintiff contends that the advice given by the defendant on 12 May 1999 permitting the plaintiff to return to playing hockey plainly was not in accordance with the standards of his peers and was in breach of his duty of care.

Appeal grounds 5, 6 and 7: Factual causation

56. The primary judge addressed factual causation pursuant to s.5D CLA at Red 1804J–185K. The issue of causation involved the following questions: (1) whether, if given appropriate advice, the plaintiff’s mother would have proceeded with the surgery; (2) if there was no surgery, is it more likely than not that the plaintiff would have achieved a better outcome for her low back pain; and (3) whether the post-operative advice made a material contribution to the outcome for the plaintiff’s low back pain.

Whether, if given appropriate advice, the plaintiff’s mother would have proceeded with the surgery

57. The first issue with respect to factual causation - whether the plaintiff’s mother would have agreed to go ahead with surgery if given proper advice - was required to be resolved consistently with the

factual findings about the advice given by the defendant on 3 March 1999. It is obvious that the plaintiff was very keen for the plaintiff to be able to return to hockey. That is a natural enough human emotion for a 14 year old skilled sports person. However, that did not mean that if the defendant had given proper advice including the advice he himself stated that he ought to have given as recorded at Red 98L, the plaintiff's mother would have proceeded with spinal surgery on her 14 year old daughter. The plaintiff contends that, if given advice of that kind, the plaintiff's mother plainly would not have proceeded to book in and have her daughter undertake serious surgery on her still developing spine.

If there was no surgery, is it more likely than not that the plaintiff would have achieved a better outcome for her low back pain

58. The next aspect of factual causation is whether if the plaintiff did not have surgery, it is more likely than not that the plaintiff would have achieved a better outcome for her low back pain.
59. The starting point is that, as noted, there was no real issue that the surgery failed: see for example. Black 3 1292B, 1329P-T; 1348F; 1357U; 1365R. There is no doubt that the plaintiff obtained some improvement following the surgery, but not because the fusion operation had been successful: see for example Dr Drnda's opinion at Black 3 1357O. The defendant also accepted in his evidence that the fusion had failed to take: see Black 1092F-V.
60. The real causation issue turned on when the plaintiff had started to experience low back pain. The plaintiff gave an account of the lower back pain that she experienced in her evidentiary statements at statements at Blue 1 210M, 212I, 212N, 212T, 213H, 213U, 214D, 215U. The primary judge recorded the plaintiff's account of experiencing low back pain at Red 67W-72I. That account included a number of occasions when the plaintiff said she sought treatment for her pain, but relevantly (at Red 69I) the plaintiff's account was that "*generally I would manage myself*". There was no doubt that the plaintiff experienced other problems other than low back pain, but her account was that particularly from 2004 onwards she had routinely experienced low back pain – not all of the time - but particularly when it was cold or after doing strenuous activity: see for example Red 69T.

61. The plaintiff's husband gave evidence in chief of his observations of the plaintiff from 2004. His account corroborated the plaintiff's account of experiencing low back pain throughout that period: Blue 1 255P; Red 82V–83D. He was cross examined about his account, but to no effect – he maintained that the plaintiff had experienced low back pain throughout that period.
62. The plaintiff's mother Ms Leah gave evidence that supported the plaintiff's account of experiencing lower back pain in the period she identified in her evidentiary statement in chief: Blue 1 272Q, 272V–273D. She too was cross examined but to no effect – she maintained her position in her oral evidence.
63. It is relevant to observe that the evidence of these witnesses that the plaintiff had experienced low back pain since 2004 was *not* a matter of technical detail about which an honest witness may have held an honest but mistaken recollection of that detail. This evidence was direct evidence from the plaintiff and direct observational evidence from her husband and mother.

Primary judge's findings

64. The primary judge resolved the factual controversy of whether the plaintiff had experienced back pain as she contended particularly from 2004 onwards at Red 137J–N and in other places as identified below. As set out below, the primary judge appears to have been heavily influenced by submissions made by the defendant to the effect that there were *no entries* in the medical records which supported the plaintiff's account of suffering low back pain throughout the period of time: see for example Red 137J; Red 147N; Red 148G; Red 148W. His Honour went so far as to find that “*there is, however, not a single record of such a complaint in the contemporaneous records*”: Red 148W.
65. The primary judge evidently accepted a submission made by the defendant that the Court “*would be slow to accept the evidence of Mr Nathan Briggs*”, because his recollection was limited: Red 145F; see also Red 148F and Red 149U–150D. Notwithstanding that, the primary judge found that Mr Briggs was an honest witness: Red 149V.

66. The primary judge discounted Ms Leah's evidence at Red 149P-T. However, he also found that she was an honest witness: Red 149V.

Plaintiff's complaints on appeal about the primary judge's findings

67. The plaintiff contends that the primary judge's finding relevantly at Red 185F that the plaintiff had not experienced lower back pain until 2018 was in error. Instead, the primary judge should have accepted the plaintiff's evidence that she had suffered low back pain from 2004 onwards, for the following reasons.
68. First, whilst there were (understandable) difficulties with the accuracy of the plaintiff's account of some of her attendances at physiotherapy from 2004, those difficulties were not a reason to find that she was being untruthful when she said that she had experienced low back pain particularly from 2004 onwards. As noted, the primary judge did *not* find that she was a dishonest witness. In the absence of a finding of dishonesty, the primary judge should not have rejected her evidence of suffering from low back pain from 2004. She could *not* have been *mistaken* as to that core memory, and it was not a mere matter of detail. The plaintiff's account that she had experienced low back pain throughout that period of time could not have been the product of an honestly held but mistaken belief.
69. Second, there was no reason to reject the evidence of the plaintiff's husband. The reason advanced by the primary judge was that he had not recalled all of the details of the plaintiff's treatment, and that much was true. But again, he was a witness who the primary judge accepted was honest and he gave clear evidence of observing ongoing lower back pain suffered by the plaintiff over the relevant period of time. In particular, he gave evidence (at Black 2 273T) of a particularly acute event at their engagement party in 2008. There was simply no good reason to reject that evidence. That Mr Briggs did not remember some details of the reasons for the plaintiff's attendances at physiotherapy supplied no proper basis for that rejection.
70. Third, the same can be said for the evidence of Ms Leah. As noted, the primary judge found that she was an honest witness. She gave evidence of consistent observations of the plaintiff complaining of

low back pain throughout the relevant period. There is no reason to reject her evidence in light of the finding that she was an honest witness.

71. Fourth, the primary judge was mistaken about the absence of contemporaneous support in the documentary records for the plaintiff's complaints of lower back pain. As noted, his Honour went as far as to find that "*there is, however, not a single record of such a complaint in the contemporaneous records*": Red 148W. That finding was wrong. On 19 August 2002, a physiotherapy note records lumbar pain: Blue 2 875D. On 31 March 2003, a physiotherapy notes records lumbar pain: Blue 2 876D. On 28 July 2003, a physiotherapy note refers to the lumbar spine: Blue 2 876L. On 26 February 2007, a physiotherapy note records lower back ache: Blue 2 877E. On 25 June 2007, a physiotherapy note records lumbar ache: Blue 2 877 J.
72. Further, the physiotherapy notes (see for example the appointment on 29 July 2003 (Blue 2 876 L)) record a review of a home exercise plan (HEP). At other appointments, STM (Soft Tissue Massage) and MET (Muscle Energy Technique) are recorded as being administered. The plaintiff's husband also gave evidence of the plaintiff being massaged by him, stretching at home and using a "whale fin": Black 2 809W-Z and 810B-F. On 2 July 2001 the plaintiff had a physiotherapy consultation and purchased a Firm Spine Flex aid for \$60 from Health Focus Physiotherapy: Blue 3 934.
73. Further, a number of the documentary records themselves are equivocal about whether the plaintiff was complaining of low back pain. An example is the primary judge's evident acceptance of the submission made by the defendant that "*the one entry in the physiotherapy records of that year is a sole attendance unrelated to the back*": Red 137K. The typed version of that note is at Blue 2 876R and refers to MET and STM. (The handwritten version is found at Blue 7 2644N-O). The positive contention was advanced by the defendant that this note supplied a basis to discount the plaintiff's evidence supported by her mother and her husband of suffering lower back pain in 2004. The note does not support such a serious finding. The same point can be made about a number of the entries upon which the defendant relied to mount his case that the evidence of the plaintiff, her husband and her mother on this topic should be rejected.

74. Fifth, the primary judge (at Red 147S-148C) drew an inference that the evidence of the plaintiff's physiotherapist Mr Robertson, who had treated the plaintiff from the time of her surgery until at least 2020, would not have assisted her case. No such inference should have been drawn. There is no reason to think that Mr Robertson was a witness who it would be expected to be called by the plaintiff rather than the defendant on the basis that Mr Robertson was in the plaintiff's camp or at least more available to her: see for example *Payne v Parker* [1976] 1 NSWLR 191. There is a serious question about whether a treating doctor or treating allied health professional would properly be regarded as falling into the camp of the party who has been treated. Further, the primary judge did not make a finding that the treatment relationship had continued to the time of the trial, and in the absence of such a finding there is further reason to doubt that the witness is in the party's camp: see for example *ACCC v Colgate-Palmolive* [2017] FCA 1590 at [579]. Further, the rule in *Jones v Dunkel* does not require a party to call witnesses to give cumulative evidence: *Ronchi v Portland Smelter Services Ltd* [2005] VSCA 83 at [85].
75. There is also a case management issue at play. The parties adduced their evidence from lay witnesses by statement. Mr Robertson relevantly would have been a witness giving evidence about factual matters. No explicit notice was given by the defendant in his Defence that an attack on the truthfulness of the plaintiff's evidence about suffering low back pain particularly from 2004 was in play. In circumstances where the plaintiff herself gave evidence of suffering low back pain in that period of time, and her evidence was supported by both her mother and her husband, there is no reason to suppose that the plaintiff would have considered the need to obtain a statement from Mr Robertson to support her evidence on this particular topic. It was the defendant who mounted a case based upon contemporaneous documents and who positively asserted that those documents supported a conclusion that the plaintiff was not complaining of low back pain. If the defendant wished to establish that fact, he needed to succeed in his attack on the plaintiff's evidence supported by her husband and mother in order to make good that proposition. Mr Robertson was in neither party's camp and the defendant's case attacking the reliability and credibility of the plaintiff, her husband and mother on this issue fell to be resolved by reference to the limited support, properly

understood, provided to that case by the contemporaneous medical records upon which the defendant relied.

76. The next aspect of causation was the support from the medical evidence for the plaintiff's case on the assumption that the plaintiff had in fact suffered low back pain from 2004. The principal expert witness relied upon by the defendant, Dr Kam, made repeated references to the significance in his opinion to the absence of history of complaint before 2017: Black 3 1356T-W, 1359H-N, 1356R-X. Dr Kam conceded that if that assumption was wrong his position would be likely to be different: Black 3 1359R.
77. The approach of the defendant on this issue relied entirely upon the factual attack on the absence of complaint until 2017 or 2018. As much is clear from the approach taken in the cross examination of the expert witnesses who gave evidence on medical causation, reflected at Black 3 1361C-1365T. That attack was made not upon the expressions of expert opinion, but rather on the assumptions of fact for which the defendant contended. Attacking expert medical opinion by undermining the accuracy of assumptions is of course perfectly permissible. However, what that approach left if the finding of fact was that the plaintiff had in fact suffered low back pain from 2004 was unchallenged expert evidence from the plaintiff's expert witnesses on causation, which was to the effect that the surgery had caused anatomical disruption and spinal weakness: Black 3 1356E; 1358N.

Whether the post-operative advice made a material contribution to the outcome for the plaintiff's low back pain

78. The plaintiff's position is that that failure to give adequate advice post-operatively made a material contribution to the harm suffered by the plaintiff. Dr Drnda identified that sarcopenia in the absence of a fusion can become a problem (Black 3 1353L) and Dr Hopcroft agreed (Black 3 1354W and 1358N). The defendant's causation experts did not engage with the failed fusion case.
79. Dr Kam accepted that the aim of the surgery was for a solid fusion (Black 3 1365V) and if the plaintiff was disadvantaged by the surgery then the pain from the surgery would never go away, would accelerate over time and the plaintiff's two years of pain relief may have been a placebo: Black 3 1359B. Dr Drnda explained why the plaintiff would have had an improvement in her pain

levels postoperatively even though the surgery failed: Black 3 1357L-S. Dr Drnda attributed the plaintiff's 'current symptoms' at the time of the hearing to the surgery: Black 1369N.

80. In determining causation at Red 185F there was no engagement by the primary judge with the failed fusion or the causation evidence of Dr Drnda and Hopcroft relevant to it. That evidence was a sufficient basis to find that the failure to give proper post-operative advice made a material contribution to the plaintiff's low back pain.

Appeal ground 8: Limitation

81. The plaintiff was under a disability until her 18th birthday on 23 March 2002 and the limitation period expired three years after that date: s.52(1)(m) LA: Red 157O. The plaintiff commenced the proceedings on 16 December 2020 and therefore required an extension of time.
82. The primary judge correctly identified that it was first necessary to address the matters in s.60I LA, as the Court's discretion under s.60G is only enlivened if the pre-conditions in s.60I(1) are satisfied.
83. The primary judge considered whether the pre-conditions in s.60I had been satisfied at Red 157W–159U. The primary judge found that the pre-conditions under s.60I(1) were satisfied: Red 159V. The remaining matter for consideration was the exercise of the primary judge's discretion under s.60G(2). The primary judge's conclusion is at Red 161N, namely that both presumptive and actual prejudice had been suffered by the defendant and that the trial "*has been unacceptably unfair in all of the circumstances*": Red 161O.

Plaintiff's complaints on appeal

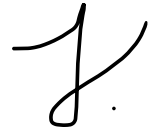
84. The plaintiff contends that the primary judge's exercise of discretion under s.60G miscarried. The primary judge failed to give consideration to a number of key issues in his conclusion, including that the defendant had purported to have an actual recollection of the consultations with the plaintiff; the defendant had maintained his notes; the plaintiff's mother had maintained the book of entries; and perhaps most significantly, the defendant's ability to meet the plaintiff's case is demonstrated by the fact that he was able through senior counsel to cross examine the plaintiff for 10 days along with marshalling significant expert evidence on both liability and damages, as well as calling the

defendant to give oral evidence after he prepared a very detailed statement. It is worth observing the significant detail in the defendant's statement at Blue 4 1349, not only expressed to be by reference to usual practice but also stating an actual recollection. The defendant went into similar significant detail whilst being cross-examined. Whilst a degree of presumptive prejudice may have been suffered, that was not significant enough in the circumstances of this case to outweigh the significant prejudice to the plaintiff of not being permitted to have an extension of time to litigate her case.

17 June 2026



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