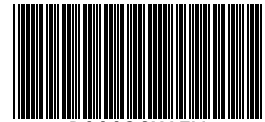




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Written Submissions

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	Erin Nicole Briggs,Appellant 1
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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-Briggs Submissions in Reply.pdf)

[attach.]

ERIN NICOLE BRIGGS -v- TERENCE HILLIER
APPELLANT'S WRITTEN SUBMISSIONS IN REPLY

1. The overarching theme of the defendant's submissions is to seek to support the primary judge's factual findings in rejecting the plaintiff's case and attack the consistency and reliability of the plaintiff's evidence given at first instance in respect to three core issues:
 - 1.1. the advice given by the defendant to the plaintiff and her mother (and father) on 3 March 1999 (**ground 3**);
 - 1.2. the advice as to the plaintiff's return to hockey post-operatively (**ground 4**); and
 - 1.3. factual causation (**ground 6**).
2. The fundamental problem with the defendant's approach is that it does not grapple with the fact that the plaintiff was not found by the primary judge to be a dishonest witness (and neither were Ms Leah, the plaintiff's mother, or Mr Nathan Briggs, the plaintiff's husband). Instead, although the defendant's case at times evidently involved an assertion that the plaintiff gave deliberately untruthful evidence (in the course of being cross examined for ten days), that case was properly abandoned in submissions and the primary judge accepted that the plaintiff, her mother and husband were all honest witnesses. The evidence was rejected on the basis of them having honest but mistaken recollections including about key events. But the problem with the rejection of their evidence on that basis is that a number of the critical features of the evidence of those three witnesses, if it was to be rejected, could have only been rejected on the basis that it was false. That is so because the central aspects of the evidence on those issues were core memories about which the witnesses could not have had an honest but mistaken recollection. As set out further below, a clear example is the incident of acute back pain suffered by the plaintiff at the plaintiff's engagement party in 2008.

Grounds 2 and 3 – section 5O and breach of duty - The advice given by the defendant to the plaintiff and her mother (and father) on 3 March 1999

3. In addition to the positive finding by the primary judge that the plaintiff, her mother and her husband were not dishonest witnesses, the plaintiff's mother Ms Leah (who also demonstrated in the course of the hearing at first instance that she was a meticulous record keeper) had an actual recollection of events (Red 84F-X), which was supported by the plaintiff: Red 57W- 60C. Whilst Ms Leah was giving evidence of an event which occurred many years before she gave evidence and there is obviously the risk or likelihood that she may be mistaken about some details, the consultation with the defendant is an event which was obviously very significant to Ms Leah. The topic was significant back surgery on her young daughter. On Ms Leah's actual recollection of events, there was no room for the primary judge to reject the central features of Ms Leah's account as being a product of honest but mistaken recollection.
4. In addition to Ms Leah's actual recollection, there was also the estimate of fees for anaesthesia issued on the same day, 3 March 1999 (Blue 1 198), and the fact that the surgery was booked and took place just 8 days later. These matters are consistent with Ms Leah's actual recollection of what occurred at the consultation on 3 March 1999. The defendant conceded that he had an incomplete recollection of his consultations with the plaintiff: Red 145H. The defendant's own note (Red 46G-K) does not support the defendant's account.
5. On the evidence of the plaintiff and importantly Ms Leah, the primary judge should not have concluded that there was expert support for the defendant's advice on 3 March 1999. The defendant himself conceded that it was necessary to discuss other options than surgery (Black 3 1032L-O) and on the account of Ms Leah and the plaintiff, the defendant deviated from that plan.

Ground 4 - the advice as to the plaintiff's return to hockey post-operatively

6. On 12 May 1999 the defendant in a contemporaneous letter to the plaintiff's GP, permitted the plaintiff to return to **competitive hockey** (Red 47Q).

7. As recorded in the defendant's clinical record for 7 July 1999, as of 7 July 1999 the plaintiff was "*fully*" back playing hockey and after her return to hockey **was** complaining of lower back pain, with the PSIS (posterior superior iliac spine) sitting at the back end of the hip ridge (iliac crest) in the lower back. This was in circumstances where there had been a clear failure by the defendant to recognise that the fusion in the plaintiff's spine had not been achieved – indeed, he erroneously stated to the GP that the fusion was filling in well: Red 47G. The advice the defendant had given to the plaintiff's parents on 12 May 1999 as to the plaintiff's permitted return to competitive hockey was on the incorrect premise that the fusion was at least sound on the right side (Red 47 G).

8. Further, the defendant's submissions do not address the assumption upon which Professor Dan's evidence was based. Professor Dan assumed that the advice permitted the plaintiff to return to hockey on a "training basis" initially, that is to start with training and stay under clinical management with a view to upgrading to matches: Black 3 1345V – 1346D. On that assumption, Professor Dan regarded that advice as "*borderline*" good practice **and** that **he** would have been more conservative: Black 3 1334W; 1346B. The assumption Professor Dan (who had managed a teenage patient post fusion surgery) was working under when he gave his opinion as it being "*borderline*" good practice **and** that **he** would have been more conservative (with at least three months before he would allow a return to sports (Black 3 1331 F- L)) is inconsistent with what actually occurred per the defendant's letter to the plaintiff's GP on 12 May 1999 that the plaintiff was permitted return to competitive hockey.

Grounds 5, 6 and 7 - Factual causation

9. The defendant contends in his submissions that the plaintiff has misstated the primary judge's finding as to the plaintiff's back pain (DS [4] and [57]), with reference to Red 151H and Red 148I and 149H.

10. The primary Judge characterised his findings as to the plaintiff's back pain in a variety of ways within the primary judgment:

Red 151H	From September 1999 to about 2017/2018 the plaintiff had no significant back pain.
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- Red 169K The plaintiff made no significant complaint about lower back pain from the time of surgery to about 2018.
- Red 170 The plaintiff did not have intervening episodes of low back pain between the original surgery in 1999 and 26 April 2018.
- Red 185F-K The lack of report of any symptoms in the several years following surgery demonstrates on the balance of probabilities that there was no damage to the left facet joint. Indeed, the plaintiff was able to resume hockey and lead an active life until the onset of lower back symptoms in about 2018.

11. Ultimately, the differing characterisation by the primary judge matters not. What matters is that the primary judge erred in rejecting the plaintiff's account of the pain she started to experience following the failed surgery (Black 3 1292B, 1329P-T, 1348F, 1357U and 1365R) as recorded by the primary judge at Red 67W- 72I, which was corroborated by her mother's evidence (Blue 1 272Q, 272V – 273D) and her husband's evidence (Blue 1 255P; Red 82V – 83D). These are not matters about which those witnesses could have had an honest but mistaken recollection – either they were telling the truth or they were not. And, as noted, the primary judge did not reject any of them on the basis that they were untruthful or dishonest witnesses.
12. Further, the plaintiff's evidence was that she predominantly managed the pain herself: Red 69I. This was consistent with the purchase of the Firm Spine Flex aid on 2 July 2001 (Blue 3 934). The self-management aspect of the plaintiff's evidence was corroborated by her husband's evidence at Blue 1 255P; Red 82V – 83D and Black 809W- 811L. Again, this evidence was not something that either the plaintiff or her husband could be mistaken about. The plaintiff's husband's evidence was simply that the plaintiff had suffered with back pain the whole time he had known her, he had observed that *“her back has always been stuffed since I have known her”* [since High School] (Blue 1 255K and P-Q).
13. Further, in circumstances where the defendant's experts did not engage with the failed fusion case (save for Dr Kam accepting that the aim of the surgery was for a solid fusion to occur and he set out the consequences where solid fusion was not achieved (Black 3 1365V and 1359B)) the primary judge should have accepted the evidence of the

plaintiff's experts Dr Drnda and Dr Hopcroft (for example at Black 3 1353L-S, 1354W, 1358N and 1369N) that the failure by the defendant to identify the failed fusion, and give the plaintiff proper post-operative advice materially contributed to the plaintiff's low back pain.

DATED: 2 October 2026



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