



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S155/2025  
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#### Important Information

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**Form 27A—Appellant’s submissions**

Note: See rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA  
 SYDNEY REGISTRY

BETWEEN: **ESTATE OF THE LATE GEOFFREY CROFT**  
 Appellant

and

**MTH**  
 First Respondent

**STATE OF NEW SOUTH WALES**  
 Second Respondent

**SANDRA CROFT**  
 Third Respondent

**APPELLANT’S SUBMISSIONS****Part I: Certification**

1. These submissions are in a form suitable for publication on the internet.

**Part II: Concise Statement of the Issues**

2. The first respondent brought proceedings as against the appellant for damages alleging sexual abuse by the late Geoffrey Croft who was convicted by jury of three offences under s 78 of the *Crimes Act 1900* (NSW) and two counts under s 63 of that Act.
3. The primary judge gave judgment for the appellant finding, having applied the test in *Briginshaw v Briginshaw*<sup>1</sup> and s 140 of the *Evidence Act 1995* (NSW) (**the EA**),<sup>2</sup>

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<sup>1</sup> (1938) 60 CLR 336.

<sup>2</sup> Core Appeal Book (CAB) 47 [202].

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that he could not accept the first respondent's evidence on most matters of context noting she was either not telling the truth or her memory was fundamentally flawed.<sup>3</sup>

4. The first respondent appealed to the Court of Appeal who allowed the appeal as against the appellant, finding that the primary judge owed an obligation to the first respondent to ensure that she did not due to lack of legal skill fail to claim rights or put forward legal arguments<sup>4</sup> and then reassessed the damages<sup>5</sup> contingently assessed by the primary judge.<sup>6</sup>
5. The first respondent had been legally represented up until shortly prior to the trial, and had the assistance of a barrister for advice during the hearing but appeared unrepresented.<sup>7</sup>
6. The first respondent did not at any stage serve or seek to rely upon a certificate of conviction pursuant to s 178 of the EA.<sup>8</sup>
7. The first issue in the appeal is whether a court's obligation to an unrepresented litigant in civil proceedings extends to that articulated by the Court of Appeal, and whether the failure of the primary judge to advise the first respondent of the effect of tendering a certificate pursuant to s 178 of the EA resulted in procedural unfairness to the first respondent.
8. The second issue in the appeal is whether, pursuant to s 92(2) of the EA, a certificate of conviction pursuant to s 178 of the EA was admissible; and, further, in the absence of such certificate, was the Court of Appeal entitled to assume that if such a certificate existed, and was in evidence, it would have established the elements of the offence to a *prima facie* level and amount to corroboration of any evidence which the first respondent might have given as to the factual basis of her claim.<sup>9</sup> Further, even if such certificate did exist and was in evidence, had its effect been rebutted by the trial judge's credit findings, including that the first respondent had given contradictory evidence in these proceedings and the criminal proceedings.<sup>10</sup>

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<sup>3</sup> CAB 68 [278].

<sup>4</sup> CAB 170 [66].

<sup>5</sup> CAB 217 [241]-[254].

<sup>6</sup> CAB 97 [409]-[410].

<sup>7</sup> CAB 9 [6]-[9]; CAB 157-158 [32]-[34].

<sup>8</sup> CAB 159 [36].

<sup>9</sup> CAB 172 [71].

<sup>10</sup> CAB 48 [206], 52 [229]-[234], 55 [242], [244], [250].

9. The third issue is whether, if such procedural unfairness did occur, the Court of Appeal was entitled to reassess damages pursuant to s 75A of the *Supreme Court Act 1970* (NSW), notwithstanding the primary judge's findings, after considering all of the evidence, that he could not accept the first respondent's evidence on most matters of context, and that she was either not telling the truth or her memory was fundamentally flawed.<sup>11</sup>
10. In a re-hearing pursuant to s 75A, in which the primary judge has found substantial credit issues, such an assessment should only be disturbed, much less reassessed, on appeal if those findings are glaringly improbable or contrary to compelling inferences.<sup>12</sup>

**Part III: Section 78B Notice**

11. The proceedings do not require notice pursuant to s.78B of the Judiciary Act 1903 as they do not involve a matter arising under the Constitution or involving its interpretation.

**PART IV: Reasons For Judgment**

12. The primary judgment is unreported and has the medium neutral citation *MTH v State of New South Wales & Ors* [2024] NSWSC 1517.<sup>13</sup>
13. The decision of the Court of Appeal is also unreported and has the medium neutral citation *MTH v State of New South Wales* [2025] NSWCA 122.<sup>14</sup>

**Part V: Facts**

14. The late Geoffrey Croft was convicted by a jury of offences as a result of alleged sexual abuse of the first respondent. His conviction was the subject of an appeal heard by the NSW Court of Criminal Appeal, which was dismissed.<sup>15</sup>

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<sup>11</sup> CAB 68 [278].

<sup>12</sup> *Fox v Percy* (2003) 214 CLR 118; *Leigh v Leigh* (2019) 266 CLR 129, [55].

<sup>13</sup> CAB 5ff.

<sup>14</sup> CAB 136ff.

<sup>15</sup> *Croft v R* [2021] NSWCCA 146; CAB 146.

15. An application for special leave to appeal to the High Court in relation to the conviction was filed on 16 June 2022, but was dismissed pursuant to r 41.08.1 of the High Court Rules 2004 (Cth) due to Mr Croft's death.<sup>16</sup>
16. The first respondent had, prior to the trial before the primary judge, been represented, but at the time of trial was no longer represented.<sup>17</sup> However, she had the assistance of a barrister during the course of the trial,<sup>18</sup> although representing herself.
17. During the trial, the primary judge raised with the appellant whether it was disputed that Mr Croft had been convicted of criminal offences and was informed that the fact he had been charged and convicted was not in dispute,<sup>19</sup> but the alleged abuse was disputed.
18. It was also not disputed that Mr Croft had always maintained his innocence from the time the matters were first raised until his death.<sup>20</sup>
19. At no time during the preparation of the primary proceedings, during the trial, or in the Court of Appeal, was there any evidence of the existence of a certificate of conviction pursuant to s 178 of the EA; nor was any such certificate served or tendered.<sup>21</sup>
20. The primary judge found that the first respondent had given incorrect, wrong or false evidence, which caused him to have considerable disquiet about her evidence generally.<sup>22</sup> His Honour held that he was unable to accept the first respondent's evidence on most matters of context, noting she was either not telling the truth or her memory of her time at the Croft farm was fundamentally flawed.<sup>23</sup> His Honour found that her evidence at trial was inconsistent with the evidence that she gave in the criminal proceedings.<sup>24</sup> The primary judge went on to find he was not satisfied that the abuse alleged against Mr Croft had occurred, and judgment was accordingly entered for the appellant.<sup>25</sup>

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<sup>16</sup> *Croft v The Queen* [2022] HCASL 120; CAB 146.

<sup>17</sup> CAB 9 [6]-[9]; 157-158 [32]-[34].

<sup>18</sup> CAB 9 [9].

<sup>19</sup> CAB 16 [44].

<sup>20</sup> CAB 16 [45].

<sup>21</sup> CAB 148 [11].

<sup>22</sup> CAB 57 [251].

<sup>23</sup> CAB 68 [278].

<sup>24</sup> CAB 52 [229]-[234].

<sup>25</sup> CAB 97 [412].

21. The primary judge set out carefully and in detail the reasons why he was unable to accept the first respondent's evidence.<sup>26</sup>
22. The first respondent's appeal in relation to the second and third respondents was dismissed, but the appeal as against the appellant was allowed.<sup>27</sup>
23. The grounds of appeal filed in the Court of Appeal did not address any issue in relation to s 178 of the EA, and that issue was first raised by the Court of Appeal on 5 May 2025,<sup>28</sup> shortly before the hearing in that Court.
25. The Court of Appeal found that the primary judge had denied procedural fairness to the first respondent<sup>29</sup> in that his Honour not only had a duty to ensure that the rules are obeyed, but an "obligation to ensure" that the first respondent did not fail to claim rights or put forward legal arguments due to a lack of legal skill.
26. The Court of Appeal allowed the appeal and then proceeded to reassess the damages,<sup>30</sup> which had been contingently assessed by the primary judge,<sup>31</sup> notwithstanding the primary judge's adverse findings in relation to the first respondent's credit. The Court of Appeal did so on the basis that the non-existent certificate under s 178 of the EA permitted it to not only displace the primary judge's strong adverse credit findings, but to substitute a favourable one.<sup>32</sup>
27. The appellant submitted that having regard to the credit issues identified by the primary judge,<sup>33</sup> and the primary judge's finding in relation to credit,<sup>34</sup> the Court of Appeal was not able to reassess the damages without there being a finding that the primary judge's determination of facts grounding his assessment were glaringly improbable or contrary to compelling inferences.<sup>35</sup>

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<sup>26</sup> CAB 51-69 [223]-[282].

<sup>27</sup> CAB 225 [261].

<sup>28</sup> Appellant's Book of Further Materials (**ABFM**), page 62.

<sup>29</sup> CAB 169-172 [64]-[74].

<sup>30</sup> CAB 217-221 [241]-[254].

<sup>31</sup> CAB 93-97 [383]-[410].

<sup>32</sup> CAB 210-211 [220].

<sup>33</sup> CAB 51-56 [224]-[250].

<sup>34</sup> CAB 57 [251], 68 [278].

<sup>35</sup> *Fox v Percy* (2003) 214 CLR 118; *Leigh v Leigh* (2019) 266 CLR 129, [55].

## Part VI: ARGUMENT

### Ground 1: Duty to Unrepresented Litigant

28. A court's responsibility or duty to an unrepresented litigant was addressed in *Nobarani v Mariconte*,<sup>36</sup> where the Court cited with approval the observations of Samuels JA in *Rajski v Scitec Corporation Pty Ltd* unreported:<sup>37</sup>

The absence of legal representation on one side ought not to induce a court to deprive the other side of one jot of its lawful entitlement noting that an unrepresented party is as much the subject to the rules as any other litigant but that a court must be patient in explaining them and may be lenient in the standard of compliance which it exacts and it must see that the rules are obeyed subject to any proper exceptions.

29. In *Chalik v Chalik*,<sup>38</sup> the NSW Court of Appeal noted that the extent if any of assistance which a trial judge or appellate court should afford to an unrepresented litigant in civil proceedings is nuanced and has been the subject of many intermediate appellate judgments since *Rajski*.<sup>39</sup>

30. Unrepresented litigants should be provided with sufficient information about the practice and procedure of the court to ensure a fair trial takes place, but care must be taken not to disturb the balance which the rules of practice and procedure are designed to afford both parties. A lack of representation will often justify making allowances in case management, but will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court.<sup>40</sup>

31. Courts should not go so far in accommodating the positions of unrepresented litigants as to make it an advantageous procedural step to dismiss one's lawyers or to retain none.<sup>41</sup> The reason why the first respondent was unrepresented before the primary judge is not known. However, notwithstanding having been represented until shortly prior to the trial and having the benefit of assistance by a barrister during the course of the trial, at no time was a s 178 certificate served upon the appellant or tendered in the proceedings. The duty of a trial judge to assist an unrepresented litigant does not extend to advising litigants as to how his or her

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<sup>36</sup> (2018) 265 CLR 236, [47].

<sup>37</sup> NSW Court of Appeal 16 June 1986, unreported, 27

<sup>38</sup> [2025] NSWCA 136.

<sup>39</sup> [2025] NSWCA 136, [69].

<sup>40</sup> *Mohareb v Saratoga Marine Pty Ltd* [2020] NSWCA 235, [39].

<sup>41</sup> *Malouf v Malouf* (2006) 65 NSWLR 449, [183].

rights should be exercised, or as to the evidence which should be adduced, it not being the function of the court to give judicial advice to an unrepresented litigant.<sup>42</sup> There is also no duty on a judge to advise parties as to inadequacies of their evidence having regard to the pleaded case, or to adjourn the proceedings in order to permit further time to replead their case. A duty to provide information in relation to procedural disadvantages does not include a duty to conduct the case for the unrepresented litigant, or to advise the unrepresented litigant in relation to the running of the case.<sup>43</sup>

32. In *Rowett v Westpac Banking Corporation*,<sup>44</sup> Handley JA noted the role of a judge in a civil case is not to actively assist one party against the other; to advise one party against the other; or in any way to act as legal advisor or legal representative for that party; even if that party is unrepresented.
33. There was no duty or obligation upon the primary judge to ensure that the first respondent was aware of the possible effect of s 178 of the EA, assuming such a certificate was admissible pursuant to s 92(2) of the EA.
34. The primary judge explained in his reasons for judgment that the first respondent was provided with the opportunity to present such evidence as she wished, and in the manner she wished, at any time within the allocated 10-day period,<sup>45</sup> and identified and clarified what the first respondent's allegations were with the first respondent.<sup>46</sup>
35. All parties to the primary proceedings endeavoured to assist the first respondent in the presentation of her case,<sup>47</sup> she being allowed to call such evidence as she wished to.
36. The court is not required to undertake a partisan analysis of unstructured assertions and misconceptions with a view to ensuring that a self represented litigant has not missed some arguable point.<sup>48</sup>

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<sup>42</sup> *Bauskis v Liew* [2013] NSWCA 297, [69].

<sup>43</sup> *Cicek v Estate of Solomon* [2014] NSWCA 278, [130].

<sup>44</sup> [1993] NSWCA 240.

<sup>45</sup> CAB 10 [14].

<sup>46</sup> CAB 10 [15].

<sup>47</sup> CAB 34 [137].

<sup>48</sup> *Mendonca v Legal Services Commissioner* [2020] NSWCA 84, [21].

Ground 2: Section 178 Evidence Act 1995 (NSW) Certificate

37. The conviction of Geoffrey Croft was not in dispute;<sup>49</sup> nor were the charges<sup>50</sup> of which he was convicted. The primary judge admitted the evidence of the convictions but did so on the basis that it was not evidence of the facts in issue.<sup>51</sup> The primary judge also noted the differences in the evidence in the subject proceedings as opposed to the evidence in the criminal proceedings.<sup>52</sup> The finding of the primary judge was that he could not accept the first respondent's evidence that the assaults had actually occurred, noting that her evidence was fundamentally flawed and he was unable to accept her evidence on most matters of context and that she was either not telling the truth or her memory was incorrect, together with the fact that the evidence adduced in the subject proceedings differed from the evidence in the criminal proceedings.<sup>53</sup>
38. The matters which the s 178 certificate would have been capable of evidencing if tendered are limited by sub-s (2) to a certificate signed by the appropriate judge, magistrate or registrar showing:
- (a) The record, indictment, conviction, acquittal, sentence or order.
  - (b) The time and place of the conviction.
  - (c) The title of the applicable court.
39. A certificate showing a conviction, acquittal, sentence or order is evidence of a conviction if stated in the certificate. Subsections (3), (4) and (5) are only evidence of the matters which are stated in the certificate, but not the evidence upon which such conviction or acquittal was based. A certificate, had one existed and been tendered, could only have shown that there was a conviction; it could not be evidence of the factual basis upon which the conviction occurred. It is not disputed that there was no certificate pursuant to s 178, notwithstanding the first respondent having legal representation from prior to 16 April 2020 when the first statement of claim was filed until the filing of a notice of ceasing to act on 14 May 2024, just a few weeks prior to the trial, and thereafter having some additional advice by a barrister.

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<sup>49</sup> CAB 16, [44].

<sup>50</sup> Ibid.

<sup>51</sup> CAB 16-17, [48].

<sup>52</sup> CAB 18, [53]; 50-57 [220]-[251].

<sup>53</sup> CAB 57-69 [252]-[281].

40. In the Court of Appeal, the first respondent raised no issue in relation to a certificate pursuant to s 178 of the EA. The issue concerning the effect of a s 178 certificate was first raised by the Court of Appeal on 5 May 2025, just prior to the hearing of the appeal.<sup>54</sup>
41. Even assuming that a s 178 certificate existed and was admissible, any fact contained within the certificate was still liable to be rebutted. The primary judge found, notwithstanding that there was a conviction, which was admitted, that the first respondent had not proved the relevant underlying facts of the alleged abuse having regard to *Briginshaw v Briginshaw*<sup>55</sup> and s 140 of the EA.
42. Section 92(2) of the EA permits evidence in civil proceedings that a party has been convicted of an offence, other than in the circumstances addressed in paragraphs (a)-(c) inclusive of the sub-section. Section 92 thus provides a qualification to the prohibition in s 91 of the EA, which provides that evidence of a decision or of a finding of fact in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
43. It is important to recognise the the distinction between evidence of a decision, in this case a conviction, and a finding of fact. Nothing in s 92(2) of the EA permits evidence of a finding of fact. Nothing in s 178(1) of the EA permits a certificate to contain findings of fact, and nor could it have in this case where trial was by jury. Even allowing for the scope of a certificate to potentially evidence the particulars of the indictment,<sup>56</sup> the certificate can only go so far as to prove the terms of the charge and the fact of conviction.
44. The effect of s 92(2) is to impose an evidentiary onus on anyone who disputes the correctness of the conviction but does not alter the legal onus of proof of the facts underlying the conviction.<sup>57</sup>
45. Section 178 sets out a procedure whereby the result of a prior conviction or acquittal or order can be adduced by way of certificate if the conviction, acquittal or order is a fact in issue in the proceedings. In these proceedings, the conviction was not in issue but the underlying facts were. Further, sub-ss (3), (4) and (5) limit the evidence to that which is stated in the certificate.

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<sup>54</sup> ABFM, page 62.

<sup>55</sup> (1938) 60 CLR 336 at 361-362.

<sup>56</sup> Section 178(5) of the EA.

<sup>57</sup> *Gonzales v Claridades* (2003) 58 NSWLR 188 at 206.

46. The certificate does not prove a fact which was in issue in the earlier proceedings.<sup>58</sup>
47. As Adamson JA said, a certificate of conviction may be admitted as evidence of the elements of the offence (the appellant would add, subject to its terms) but accepted that it is not conclusive evidence.<sup>59</sup> Her Honour went on to find that while evidence of a conviction was not conclusive proof that an offence was committed, in the absence of direct evidence to the contrary it was sufficient to prove the fact of the conduct alleged to ground the offence.<sup>60</sup> However, s 178 does not go so far, in that a certificate may go to the facts identified in s 178(1); that is, the conviction not the underlying facts.<sup>61</sup> Importantly, the Court of Appeal did not address the disconnect between the evidence given by the first respondent in the criminal proceedings and the evidence she gave before the primary judge.<sup>62</sup>
48. Adamson JA held that the primary judge ought to have commenced his reasoning with the convictions, on the assumption that a certificate under s 178 of the EA would have amounted to *prima facie* evidence of the elements of each offence, and on the assumption that the evidence of the first respondent would have been corroborated by the certificate;<sup>63</sup> but there was no certificate, and its hypothetical contents were unknown, beyond the admitted bare convictions.
49. The primary judge had carefully analysed the confusing evidence as to the first respondent's recollection, and the lack of medical evidence supporting her evidence of regaining memory, which, as the primary judge found, was raised in the proceedings below, but not raised in the criminal proceedings.<sup>64</sup> Contrary to the approach adopted by the Court of Appeal, the primary judge's analysis accorded with principle.<sup>65</sup> In *Willmot v State of Queensland*,<sup>66</sup> the plurality said:

First, courts recognise that the degree of satisfaction required under the civil standard of proof may vary according to the gravity of the fact to

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<sup>58</sup> *Chevalley v Industrial Court of NSW* (2011) 82 NSWLR 634 at 648 [51], 649-651 [55]-[58] (Bathurst CJ, Allsop P, Beazley and Basten JJA and Sackville AJA agreeing).

<sup>59</sup> CAB 162 [45]; *Osborne v Butler* [2024] VSCA 6; 73 VR 386, [35].

<sup>60</sup> CAB 163 [46].

<sup>61</sup> Australian Law Reform Commission (ALCR) 38 (1987).

<sup>62</sup> *Supra* at footnote 52; CAB 56 [250]-[251].

<sup>63</sup> CAB 168 [61].

<sup>64</sup> CAB 12-14 [24]-[34], 57-67 [252]-[273].

<sup>65</sup> See *Davey v Want* [2026] NSWCA 12, [6]-[16] (Stern JA, Bell CJ and Griffiths AJA agreeing).

<sup>66</sup> [2024] HCA 42; 98 ALJR 1407; 419 ALR 623, [30].

be proved. Second, all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted. Third, a court is not bound to accept uncontradicted evidence and the “facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied”. Fourth, courts are mindful that ordinary human experience exposes that human memory is “fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time”. And fifth, where a claim is based upon an interaction with a deceased person (or involving a deceased estate) the court will scrutinise the evidence very carefully.

[citations omitted]

50. Adamson JA proceeded to find that, there being no direct evidence to the contrary other than the late Mr Croft’s consistent denials, the fact of the convictions was sufficient to discharge the first respondent’s onus of proving that the alleged abuse sued upon had occurred.<sup>67</sup>
51. Adamson JA also assumed that as Mr Croft was tried for offences against MTH and RS together, “the [hypothetical] certificate of conviction set out all the offences of which he was convicted”, and on that basis held that the effect of ss 91, 92 and 178 of the EA was that the elements of these offences could have readily been proven by tender of a certificate of conviction.<sup>68</sup> However, as explained above a s 178 certificate could only be evidence of what is stated within it, going to the facts identified in sub-s (1), and limited to the matters contained within sub-s (2).
52. The admission of the fact of a conviction by the appellant was not an admission of the facts alleged by the first respondent’s pleading. This was raised early in the trial and throughout the trial.<sup>69</sup> The primary judge proceeded on that basis and evidence was adduced by the first respondent in relation to what she alleged. The primary judge noted inconsistencies between the evidence in the criminal proceedings and the evidence in these proceedings.<sup>70</sup> The discrepancy between the evidence in the criminal proceedings and the subject proceedings resulted in the primary judge

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<sup>67</sup> CAB 16 [44].

<sup>68</sup> CAB 169 [63].

<sup>69</sup> CAB 12 [22], 16 [44], [48].

<sup>70</sup> CAB 52-53 [226]-[234], 56-57 [250].

rejecting the first respondent's evidence as to relevant factual matters upon which the conviction was presumably founded. His Honour found he could not accept all of the first respondent's evidence in relation to the alleged abuse. The Court of Appeal used the fact of conviction as evidence corroborating the evidence of the first respondent which the primary judge did not accept, and which his Honour found to be inconsistent with the evidence in the criminal trial. In doing so, the Court of Appeal did not find that the findings of the primary judge were glaringly improbable or were inconsistent with facts incontrovertably established; rather, they simply set at nought the primary judge's careful and thorough analysis of the body of evidence before him. None of that evidence was the subject of analysis by the Court of Appeal.

53. The primary judge was correct to record that the conviction itself was not evidence of the facts alleged in these proceedings. Even assuming that a s 178 certificate had been in evidence, the effect of s 92(2) is to place no more than an evidentiary onus on a party who disputes the correctness of the conviction to produce evidence that it is incorrect. The legal onus of proof of the facts necessary to establish the cause of action sued upon, including those underlying the conviction, always remains upon the plaintiff.<sup>71</sup>
54. The requirement for proof of the certificate, and its contents, is demonstrated by the concluding words of each of sub-ss 178(3) and (4) ("if stated in the certificate") and sub-s (5) ("evidence of the matters stated in the certificate"). In assuming the contents of the hypothetical certificate, the Court of Appeal gave the hypothesis scope and weight that the statute did not confer.
55. In *Prothonotary v Gregory*,<sup>72</sup> the Court of Appeal, in a joint judgment of Bathurst CJ, Beazley P and Sackville AJA, held that a certificate given under s 178 purporting to contain particulars of an indictment or conviction is evidence of the matters stated in the certificate. However, s 91 of the EA provides that evidence of a finding of fact is not admissible to prove the existence of a fact that was in issue in the proceedings, even if the evidence is admissible for another purpose. Section 92(2) creates an exception to the general rule in s 91 by providing that the evidence

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<sup>71</sup> Australian Law Reform Commission interim report on evidence (ALRC No 26, 1985, Volume 1), paragraphs 773-778); Australian Law Reform Commission report (ALCR No 38, 1987); *Gonzales v Claridades* (2003) 58 NSWLR 188 at 205-206 [66]-[67].

<sup>72</sup> [2017] NSWCA 101, [17]-[20].

that a person had been convicted of an offence may be admitted to show the fact of conviction. However, evidence of findings on sentence and remarks of the Court of Criminal Appeal were not admissible in subsequent (civil) disciplinary proceedings as evidence of the facts found or referred to in the judgments.<sup>73</sup> They would be no more admissible if contained in a s 178 certificate, which would take the certificate outside the permissible limits of the section.

56. The primary judge was entitled to indicate as he did to the first respondent that the admitted fact of conviction was not evidence of the facts underlying the conviction. Consistent with that indication, the first respondent relied upon evidence as to the facts, which was rejected by the primary judge, due to the substantial inconsistencies between the evidence in the criminal proceeding, and the body of other evidence before him,<sup>74</sup> and his adverse findings as to the first respondent's credit. There was no warrant for the Court of Appeal to overturn his Honour's factual findings.

Ground 3: Section 75A Supreme Court Act 1970 (NSW) - Reassessment of Damages

57. The trial judge, having addressed the issues as to credit,<sup>75</sup> also relied upon findings that the first respondent's evidence was inconsistent with contemporaneous documents and was inconsistent with and/or not supported by evidence which had been obtained for the purpose of the proceedings.<sup>76</sup> He also preferred the evidence of other witnesses. These findings did not only go to the factual questions attending liability, but also to the assessment of damages.
58. Section 75A of the *Supreme Court Act 1970* (NSW) gives the Court of Appeal the same powers and duties as the court below, including in relation to the assessment of damages and/or the making or findings of fact.
59. Appellant restraint is necessary with respect to findings of fact by a trial judge unless they are glaringly improbable or contrary to compelling inferences.<sup>77</sup> A trial judge retains significant advantages over an appellate court, including the

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<sup>73</sup> *Prothonotary of the Supreme Court of New South Wales v Sukkar* [2007] NSWCA 341, [9]; *Prothonotary of the Supreme Court of New South Wales v Livanis* [2012] NSWCA 325, [9]-[10].

<sup>74</sup> CAB 93 [383]-[410].

<sup>75</sup> CAB 48 [206], 52 [229]-[234], 55 [242], [244], [250].

<sup>76</sup> CAB 12 (SC 23-26), CAB 48 (SC 206)

<sup>77</sup> *Fox v Percy* (2003) 214 CLR 118

assessment of credibility and the feel of a whole of a case based on the entirety of the evidence.<sup>78</sup> The principles to be applied are well-known.<sup>79</sup>

60. Where a trial judge's findings depend to any substantial degree on the credibility of the witness, and here there were a number, the findings should stand unless it can be shown that the judge has failed to use or palpably misused his or her advantage or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable.<sup>80</sup>
61. The trial judge's findings giving rise to his conclusions in relation to the credibility of the first respondent and the basis of those findings were not disturbed by the Court of Appeal. The sole basis of the Court of Appeal's paradigm shift in the factual determination of liability and the assessment of damages was its treatment of the hypothetical certificate of conviction.
62. The primary judge formed an extremely adverse view of the credit of the first respondent in that he was unable to accept the first respondent's evidence on most matters of context noting she was either not telling the truth or the memory of her time was fundamentally flawed,<sup>81</sup> with such a view being consistent with his Honour's findings of discrepancies between the first respondent's evidence in the subject proceedings and the evidence which was given in the criminal proceedings, the contemporaneous records, and the evidence of other witnesses whose evidence he accepted.<sup>82</sup>
63. In conducting the appeal by way of a rehearing, the Court of Appeal was bound to conduct a "real review"<sup>83</sup> of the evidence given at first instance and the primary judge's reasons for judgment. However, a Court of Appeal should not interfere with a primary judge's findings of fact unless they are demonstrated to be wrong by "incontravertable facts or uncontested testimony" or they are glaringly improbable or contrary to compelling inferences.<sup>84</sup>

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<sup>78</sup> *AA v Trustee of the Roman Catholic Church for the Diocese Maitland-Newcastle* [2026] HCA 2, [394].

<sup>79</sup> *Davey v Want* [2026] NSWCA 12, [6]-[16] (Stern JA, Bell CJ and Griffiths AJA agreeing).

<sup>80</sup> *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; *Queensland v Masson* (2020) 94 ALJR 785 at 812 [119].

<sup>81</sup> CAB 68 [278].

<sup>82</sup> CAB 52-57 [228]-[251].

<sup>83</sup> *Fox v Percy*, supra, [126].

<sup>84</sup> *Ibid*, [128]; *Lee v Lee* (2019) 266 CLR 129 at 148-149.

64. The trial judge having found that he could not accept the first respondent's evidence, and the Court of Appeal having not found the primary judge's findings to be glaringly improbable or contrary to compelling inferences, dictates that the primary judge's findings in relation to credit, and his Honour's assessment of damages, would stand.
65. If the Court of Appeal was correct to find error in the determination of liability and in the assessment of damages, the appropriate remedy in light of the significant credit issues was to remit the proceedings for a new trial.

**Part VII: Orders Sought**

66. It is submitted that the following orders should be made:
- (a) Appeal allowed.
  - (b) Set aside the orders 1, 3, 5 made by the Court of Appeal on 6 June 2025.
  - (c) In their place, order that the appeal to the Court of Appeal be dismissed with costs.
  - (d) The appellant is to pay the costs of Amicus Curiae.
  - (e) Such costs are not to be set off against any costs order that has been or may be made in favour of the appellant.

**Part VIII: Estimate for hearing**

67. The appellant estimates that it will require 2 hours for the presentation of oral argument.

Dated: 26 February 2026



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## ANNEXURE TO APPELLANT'S SUBMISSIONS

<b>No</b>	<b>Description</b>	<b>Version</b>	<b>Provision(s)</b>	<b>Reason for providing this version</b>	<b>Applicable date or dates (to what event(s), if any, does this version apply)</b>
<b>1</b>	<i>Evidence Act 1995 (NSW)</i>	<i>Current in force version (25 November 2022 to present)</i>	<i>Section 91</i>	<i>Act in force on the date of judgment in Supreme Court of New South Wales and the Court of Appeal of the Supreme Court of New South Wales</i>	<i>28 November 2024, date of judgment in Supreme Court of New South Wales and 6 June 2025, date of judgment in Court of Appeal of the Supreme Court of New South Wales</i>
<b>2</b>	<i>Evidence Act 1995 (NSW)</i>	<i>Current in force version (25 November 2022 to present)</i>	<i>Section 92(2)</i>	<i>Act in force on the date of judgment in Supreme Court of New South Wales and the Court of Appeal of the Supreme Court of New South Wales</i>	<i>28 November 2024, date of judgment in Supreme Court of New South Wales and 6 June 2025, date of judgment in Court of Appeal of the Supreme Court of New South Wales</i>
<b>3</b>	<i>Evidence Act 1995 (NSW)</i>	<i>Current in force version (25 November 2022 to present)</i>	<i>Section 178</i>	<i>Act in force on the date of judgment in Supreme Court of New South Wales and the Court of Appeal of the Supreme Court of New South Wales</i>	<i>28 November 2024, date of judgment in Supreme Court of New South Wales and 6 June 2025, date of judgment in Court of Appeal of the Supreme Court of New South Wales</i>
<b>4</b>	<i>Supreme Court Act 1970 (NSW)</i>	<i>Current in force version (1 July 2024 to present)</i>	<i>Section 75A</i>	<i>Act in force on the date of judgment in Supreme Court of New South Wales and the Court of Appeal of the Supreme Court of New South Wales</i>	<i>28 November 2024, date of judgment in Supreme Court of New South Wales and 6 June 2025, date of judgment in Court of Appeal of the Supreme Court of New South Wales</i>