HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD AND BEECH-JONES JJ

ESTATE OF THE LATE GEOFFREY CROFT APPELLANT

AND

MTH & ORS RESPONDENTS

Estate of Croft v MTH
[2026] HCA 44
Date of Hearing: 10 June 2026
Date of Judgment: 11 November 2026
S155/2025

ORDER

1. *Appeal allowed in part.*

2. *Set aside orders (3) and (5) made by the Court of Appeal of the Supreme Court of New South Wales on 6 June 2025.*

3. *In lieu of orders (3) and (5), order that:*

   (a) *order (2) and so much of order (4) as concerns the costs of the second defendant made by Cavanagh J on 28 November 2024 and so much of order (1) made on 18 December 2024 as concerns the costs of the second defendant be set aside; and*

   (b) *the proceedings between the plaintiff and the second defendant be retried.*

4. *The appellant pay the costs of the amici curiae in this Court.*

5. *Appeal otherwise dismissed.*

On appeal from the Supreme Court of New South Wales

Representation

D J Hooke SC with K W Andrews and D Kim for the appellant (instructed by Keypoint Law)

The first respondent appeared in person

Submitting appearances for the second and third respondents

J E Davidson SC with A R Sapienza appearing as amici curiae

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Estate of Croft v MTH

Evidence – Convictions – Where deceased convicted of sexual abuse of first respondent – Where first respondent sought damages from deceased's estate – Where first respondent unrepresented – Where estate denied deceased abused first respondent – Where primary judge not satisfied first respondent abused by deceased and dismissed first respondent's claim – Where Court of Appeal held primary judge erroneously disregarded convictions – Where Court of Appeal proceeded "as if" certificate of conviction tendered under s 178 of *Evidence Act 1995* (NSW) – Where Court of Appeal accepted deceased abused first respondent – Whether primary judge had obligation to ensure unrepresented first respondent claimed rights or put forward legal arguments – Whether primary judge erred in disregarding deceased's convictions as evidence of abuse – Whether s 92(2) exception to s 91(1) of *Evidence Act* applied to evidence of deceased's convictions – Whether Court of Appeal erred in resolving appeal "as if" certificate of conviction tendered.

Words and phrases – "admissibility", "certificate of conviction", "convictions", "credibility findings", "damages", "effective choice", "elements of the offence", "evidence", "evidential burden", "evidentiary onus", "evidentiary pathway", "fail to claim rights or put forward legal arguments", "fair hearing", "finally determined", "finding of fact", "high probative value", "indecent assault", "issue estoppel", "lack of legal skill", "legal onus of proof", "loss", "negligence", "new trial", "person through or under whom", "positively misled", "prima facie evidence", "privy in interest", "probative value", "procedural fairness", "proof of a conviction", "proof of a fact that was in issue", "rape", "real review of the trial", "record of the trial", "rehearing", "sexual abuse", "unrepresented litigants".

Evidence Act 1995 (NSW), ss 91, 92, 178.
Supreme Court Act 1970 (NSW), s 75A.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD AND BEECH-JONES JJ. In February 1979 the first respondent, MTH, was placed in temporary foster care with the late Mr Geoffrey Croft and his wife, Sandra Croft. MTH was then 16 years old. She was a ward of the State of New South Wales ("the State").

2 In 2019, Mr Croft was convicted of offences involving the sexual abuse of MTH while under his care. In 2020, MTH commenced proceedings in the Supreme Court of New South Wales against Mr Croft seeking damages for assault (and against Mrs Croft and the State seeking damages for negligence). Prior to the hearing of those proceedings, Mr Croft died. The appellant, Mr Croft's estate ("the Estate"), was then substituted as a defendant for Mr Croft.

3 At the hearing before the primary judge (Cavanagh J), MTH appeared for herself.[1] Although the Estate accepted that Mr Croft had been convicted of offences against MTH, it denied that Mr Croft physically or sexually abused MTH. Throughout the hearing, and in his Honour's judgment, the primary judge assumed that s 91(1) of the *Evidence Act 1995* (NSW) precluded evidence of the convictions being used as evidence of that abuse, which was in issue in that proceeding.[2] The primary judge dismissed MTH's claim against the Estate on the basis that his Honour's assessment of MTH's credit meant that he was not satisfied that she had been abused by Mr Croft.[3] In so concluding, his Honour admitted the evidence of Mr Croft's convictions but not on the basis that it was evidence of the facts in issue.

4 The Court of Appeal allowed MTH's appeal from the primary judge's dismissal of her claim against the Estate and substituted judgment in her favour against the Estate for damages in an amount the Court of Appeal assessed.[4] The Court of Appeal otherwise dismissed MTH's appeal against the dismissal of her claims against Mrs Croft and the State.

5 In allowing MTH's appeal against the dismissal of her proceedings against the Estate, the Court of Appeal found that the primary judge erred by: assuming that MTH was not relying on Mr Croft's convictions to prove the abuse;[5]

---

1 *MTH v New South Wales* [2024] NSWSC 1517 at [6].

2 [2024] NSWSC 1517 at [48].

3 [2024] NSWSC 1517 at [278]-[281].

4 *MTH v New South Wales* [2025] NSWCA 122 at [254].

5 [2025] NSWCA 122 at [10].

misunderstanding the effect of the exception to s 91(1) provided for in s 92(2) of the *Evidence Act*;[6] failing to consider the evidence of the convictions on the assumption that a certificate under s 178 of the *Evidence Act* had been tendered and was "prima facie" evidence of the abuse;[7] and denying MTH procedural fairness by not alerting her to the evidentiary pathway which would enable her to prove the commission of the offences by tendering a certificate under s 178.[8]

6 Contrary to the findings of the primary judge, the Court of Appeal accepted MTH's evidence that the abuse occurred and most of her evidence as to its effect.[9] The Court of Appeal assessed damages accordingly.[10] In so finding, the Court of Appeal proceeded "as if" a certificate under s 178 of the *Evidence Act* recording Mr Croft's convictions had been tendered at first instance[11] and reasoned that, in the absence of direct evidence refuting MTH's abuse by Mr Croft, "the" certificate "established" the facts constituting the offences against MTH of which Mr Croft was convicted.[12] At no stage was any certificate recording Mr Croft's convictions tendered before the primary judge or the Court of Appeal.

7 The Estate was granted special leave to appeal to this Court from that part of the Court of Appeal's judgment that upheld MTH's claim against the Estate.

8 For the reasons that follow, the Court of Appeal was correct in finding that the primary judge erred in assuming that MTH was not relying on evidence of the convictions as evidence of the abuse she said she was subjected to by Mr Croft and in disregarding evidence of Mr Croft's convictions as evidence of that abuse. Such evidence as there was of the convictions before the primary judge satisfied the exception to s 91(1) of the *Evidence Act* provided for in s 92(2) and, accordingly, the convictions were admissible as proof of a fact that was in issue in the proceedings that resulted in the convictions. The primary judge's determination of

---

6 [2025] NSWCA 122 at [10], [48].

7 [2025] NSWCA 122 at [61].

8 [2025] NSWCA 122 at [69]-[74].

9 [2025] NSWCA 122 at [61]-[62], [87], [234]-[236], [240]-[241], [251].

10 [2025] NSWCA 122 at [254].

11 [2025] NSWCA 122 at [75], [86].

12 [2025] NSWCA 122 at [85]-[87].

MTH's case against the Estate, including the assessment of her credibility as a witness, was materially affected by the failure to assess and take into account the evidence of those convictions.

9 However, the Court of Appeal erred in resolving the appeal from the primary judge "as if" a certificate of conviction was tendered when no such certificate was tendered before the primary judge or the Court of Appeal. The Court of Appeal also erred in accepting MTH's evidence as to the alleged abuse and its effect without properly assessing the weight to be attached to the evidence of the convictions and considering all the evidence in light of that assessment. Instead, the nature of the primary judge's error was such that a new trial should have been, and will be, ordered.

Mr Croft's convictions

10 After a trial in the District Court of New South Wales in 2019, Mr Croft was convicted of three offences of indecently assaulting MTH[13] and two offences of raping MTH.[14] The offences were said to have been committed between 1 February 1979 and 30 April 1980.

11 At the same trial, Mr Croft was also convicted of what the primary judge described as offences involving "severe regular beatings" and "severe sexual abuse" of "a 12 year old boy" ("RS") during 1977. According to the primary judge, these offences were said to have been committed while RS and his brother stayed with Mr and Mrs Croft during a school holiday break from their orphanage.

12 On 5 July 2021, the Court of Criminal Appeal of the Supreme Court of New South Wales granted Mr Croft leave to appeal against his convictions but

---

13 *Crimes Act 1900* (NSW), s 76 (repealed); as at 1979, s 76 provided that "[w]hosoever assaults any female and, at the time of, or immediately before or after such assault, commits any act of indecency upon or in the presence of such female, shall be liable to imprisonment for four years, or, if the female be under the age of sixteen years, to penal servitude for six years".

14 *Crimes Act*, s 63 (repealed); as at 1979, s 63 provided that "[w]hosoever commits the crime of rape shall be liable to penal servitude for life. The consent of the woman, if obtained by threats or terror, shall be no defence to a charge under this section."

dismissed his appeal.[15] Mr Croft applied for special leave to appeal to this Court. However, he passed away on 22 April 2022. His application was dismissed by this Court on 16 June 2022 pursuant to r 41.08.1 of the *High Court Rules 2004* (Cth) as it was no longer possible to make the orders sought in his application.[16]

Proceedings before the primary judge

13 In her proceedings, MTH sought damages against the Estate for assault in respect of eleven instances of either sexual or physical assault by Mr Croft.[17] MTH's case against Mrs Croft sought damages in respect of her alleged failure to prevent the abuse of MTH by Mr Croft.[18] MTH's case against the State sought damages in respect of its alleged responsibility for the abuse of MTH by Mr Croft,[19] and in respect of its alleged negligence in managing MTH as a ward of the State.[20]

14 Prior to the hearing, MTH's solicitors ceased acting. As noted, MTH appeared for herself at the hearing.[21] She tendered a lengthy statement and gave oral evidence. While MTH did not seek to tender any certificate recording Mr Croft's convictions,[22] her statement referred to Mr Croft's convictions for offences against her and RS. Annexed to MTH's statement were various statements signed by her and prepared by the police. Those statements describe acts of physical and sexual assault by Mr Croft, some of which probably constituted the offences of which he was convicted and some of which appear to be uncharged acts.

---

15 *Croft v The Queen* [2021] NSWCCA 146.

16 *Croft v The Queen* [2022] HCASL 120; see *Singh v The Queen* (2020) 94 ALJR 714; 381 ALR 189.

17 [2024] NSWSC 1517 at [1]-[2].

18 [2024] NSWSC 1517 at [15].

19 [2024] NSWSC 1517 at [15].

20 [2024] NSWSC 1517 at [16].

21 [2024] NSWSC 1517 at [6]-[7].

22 [2025] NSWCA 122 at [11].

15 Before the primary judge, the State did not dispute that MTH was abused by Mr Croft. The Estate and Mrs Croft did dispute the abuse although they did not dispute "the fact of the charges, the convictions, and the sequence of events leading to the charges".[23] The primary judge appears to have assumed that, because MTH had included details of Mr Croft's abuse in her statement, "she's not relying on evidence of [his] conviction[s] to prove the fact" of the abuse. His Honour rejected the tender of those parts of MTH's statement that referred to Mr Croft's convictions against her and RS on the basis that s 91 of the *Evidence Act* meant that "evidence of the earlier conviction[s] is not evidence of the fact[s]" giving rise to the convictions. His Honour repeated that statement throughout the hearing and in his judgment.[24]

16 Prior to the hearing, MTH's former solicitors served a notice of intention to rely on tendency evidence, being the statements of RS and his brother. During the hearing, MTH attempted to tender statements from RS and his brother without calling them to give evidence. The tender was rejected and thereafter MTH unsuccessfully attempted to secure RS's attendance. In his reasons, the primary judge referred to Mr Croft's convictions against RS for "physical and sexual abuse" but, like the convictions against MTH, did not treat them as any evidence of any facts giving rise to those convictions.

17 The primary judge rejected MTH's claims against the Estate and Mrs Croft as his Honour was not satisfied that the abuse MTH testified to had occurred.[25] His Honour found that MTH's evidence was unreliable and incorrect in many respects.[26] His Honour assessed damages on the counterfactual basis that the abuse alleged by MTH occurred[27] but in doing so rejected aspects of her evidence concerning loss.[28] His Honour also dismissed that part of her case against the State

---

23 [2024] NSWSC 1517 at [22], [44].

24 [2024] NSWSC 1517 at [48]-[49].

25 [2024] NSWSC 1517 at [281], [288].

26 [2024] NSWSC 1517 at [220], [272]-[278], [281].

27 [2024] NSWSC 1517 at [383]-[411].

28 See, eg, [2024] NSWSC 1517 at [389], [405].

that was not dependent on a finding that she was abused by Mr Croft for reasons that it is unnecessary to describe.[29]

The Court of Appeal's judgment

18 MTH appealed. She raised 33 grounds of appeal. The Court of Appeal collated these grounds into seven categories.[30] The Court described the first category as an "alleged failure to allow evidence from the criminal proceedings and tendency evidence to be admitted".[31]

19 The Court of Appeal allowed MTH's appeal against the dismissal of her claim against the Estate, reassessed damages and entered judgment in MTH's favour for $1,346,000. The Court dismissed MTH's appeal against the dismissal of her claims against Mrs Croft and the State. The Court of Appeal's reasons for allowing the appeal in respect of the Estate can be conveniently broken down into six steps.

20 First, Adamson JA (with whom Mitchelmore JA and Price A-JA agreed) found that the primary judge had misapprehended that MTH was not intending to rely upon the convictions to establish the offending.[32] Her Honour also found that the primary judge erred in rejecting the use of the convictions for that purpose without referring to the exceptions in s 92.[33]

21 Second, Adamson JA found that the effect of ss 91, 92 and 178 of the *Evidence Act* was that MTH could rely upon "*the* certificate of conviction to establish, first, that Mr Croft had raped her twice and indecently assaulted her three times during the period specified; and, second, that Mr Croft had sexually assaulted RS four times during the period specified".[34] Her Honour found that a certificate could "be used to prove not only the conviction but also the fact of the

---

29 [2024] NSWSC 1517 at [290]-[339].

30 [2025] NSWCA 122 at [3].

31 [2025] NSWCA 122 at [3].

32 [2025] NSWCA 122 at [10], [44].

33 [2025] NSWCA 122 at [10], [47]-[48].

34 [2025] NSWCA 122 at [19] (emphasis added).

offence, its date (or period) and the identity of the offender and victim"[35] and would "amount to 'evidence of high probative value'".[36] Her Honour concluded that the primary judge "should have started with the convictions which, had a certificate under s 178 of the *Evidence Act* been tendered, would have amounted to *prima facie* evidence of the elements of each offence", would have corroborated so much of MTH's evidence as concerned those elements and, there being no "direct evidence" to the contrary, were sufficient to discharge "MTH's onus" that those elements occurred.[37] Although her Honour repeatedly referred to "the certificate",[38] as noted, no such certificate was tendered before the primary judge and no certificate was provided to the Court of Appeal.

22 Third, her Honour further found that the primary judge had "positively misle[d] [MTH] as to the effect of the law", albeit unintentionally,[39] by "[i]n effect" incorrectly informing MTH "that the *only* way in which she could prove the sexual assaults was to give evidence of them herself and the *only* way she could prove that RS had also been indecently assaulted by Mr Croft was to call RS to give evidence of [the assaults against him]".[40] This was said to be incorrect because the *Evidence Act* permitted MTH to "prove the fact of the offences against her and RS by tendering *the* certificate of conviction".[41] Her Honour also concluded that the primary judge denied MTH procedural fairness by "not alerting her to the evidentiary pathway which the *Evidence Act* allowed to enable her to prove the commission of the offences by tendering a certificate of conviction".[42]

23 While her Honour accepted that the primary judge's role was not to give MTH legal advice, her Honour found that the primary judge "had an obligation to *ensure* that [MTH] did not, because of lack of legal skill, fail to claim rights or put

---

35 [2025] NSWCA 122 at [20].

36 [2025] NSWCA 122 at [36].

37 [2025] NSWCA 122 at [61].

38 See, eg, [2025] NSWCA 122 at [11], [19], [63].

39 [2025] NSWCA 122 at [69], [73]-[74] (emphasis removed).

40 [2025] NSWCA 122 at [73] (emphasis in original).

41 [2025] NSWCA 122 at [73] (emphasis added).

42 [2025] NSWCA 122 at [64], [74].

forward legal arguments".[43] Adamson JA concluded that it was not necessary to identify the limits of that obligation in circumstances where MTH could not be expected to argue against his Honour's incorrect statements during the hearing about the effect of the *Evidence Act* in relation to the use of evidence of convictions.[44]

24 Fourth, having found error, Adamson JA held that the Court of Appeal should approach the matter "*as if* the certificate of conviction" had been tendered at first instance[45] and "[o]n the basis set out above, the certificate of conviction established the two rapes and three indecent assaults"[46] and corroborated MTH's evidence for the purposes of assessing her credibility.[47] The "basis set out above" appears to be a reference to (i) her Honour's holding that "the" certificate of conviction could be relied on to prove the elements of the offences under ss 91, 92 and 178 of the *Evidence Act*;[48] (ii) her Honour's observation that evidence of convictions "amount[s] to 'evidence of high probative value'";[49] and (iii) the absence of direct evidence to contradict the convictions other than evidence that, prior to his death, Mr Croft denied any wrongdoing, including evidence of such a denial when he was first confronted with the allegations.[50]

25 Fifth, her Honour then addressed and rejected the balance of MTH's grounds of appeal including those concerning MTH's case against the State[51] and Mrs Croft.[52] As between MTH and Mrs Croft, there was a factual dispute before

---

43 [2025] NSWCA 122 at [66] (emphasis added).

44 [2025] NSWCA 122 at [69].

45 [2025] NSWCA 122 at [75], [86] (emphasis added).

46 [2025] NSWCA 122 at [87].

47 [2025] NSWCA 122 at [90].

48 [2025] NSWCA 122 at [63].

49 [2025] NSWCA 122 at [36], [80].

50 [2025] NSWCA 122 at [61], [85].

51 [2025] NSWCA 122 at [93]-[195].

52 [2025] NSWCA 122 at [196]-[214].

the primary judge as to whether, as MTH claimed and Mrs Croft denied, after the last sexual assault in 1979 she told Mrs Croft that she had been sexually abused by Mr Croft.[53] The primary judge accepted Mrs Croft's denial.[54] Even though Adamson JA concluded the primary judge's assessment of MTH's credibility was "flawed", her Honour did not purport to resolve that dispute. Instead, her Honour concluded that, even if MTH's evidence on this topic had been accepted, Mrs Croft would not have been liable.[55]

26 Sixth, Adamson JA then reassessed damages on the basis that the primary judge's counterfactual assessment was affected by the primary judge's adverse view of MTH's credibility, which was found to be erroneous.[56] In doing so her Honour did not distinguish between the five instances of abuse the subject of Mr Croft's convictions and all the instances of abuse pleaded in MTH's statement of claim and referred to in her evidentiary statements. Her Honour accepted MTH's evidence concerning the effect of that abuse,[57] although her Honour did not accept the counterfactual basis for her claimed loss of earning capacity and the sufficiency of her evidence connecting the abuse to her claim for past out-of-pocket expenses.[58]

Special leave to appeal

27 The Estate was granted special leave to appeal to this Court from that part of the Court of Appeal's judgment that upheld MTH's claim against it. On 5 February 2026, MTH was refused special leave to cross-appeal from the Court of Appeal's assessment of her damages and dismissal of her appeal in respect of Mrs Croft and the State.[59] In this Court, MTH appeared for herself. The Court was

---

53 [2025] NSWCA 122 at [208]-[210].

54 [2024] NSWSC 1517 at [101], [274], [286].

55 [2025] NSWCA 122 at [211]-[213].

56 [2025] NSWCA 122 at [220]-[254].

57 [2025] NSWCA 122 at [237], [245].

58 [2025] NSWCA 122 at [244], [252].

59 *MTH v Estate of the Late Geoffrey Croft* [2026] HCADisp 24.

also assisted by senior and junior counsel who appeared as amici curiae to put arguments in response to those of the Estate.

Evidence of previous convictions under the *Evidence Act*

28 Before addressing the Estate's grounds of appeal, it is convenient to address the issues raised concerning the application of ss 91, 92 and 178 of the *Evidence Act* to MTH's claim against the Estate.

29 Sections 91 to 93 provide:

> **"91 Exclusion of evidence of judgments and convictions**
>
> (1) Evidence of the 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.
>
> (2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.
>
> **Note—**
>
> Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions.
>
> **92 Exceptions**
>
> (1) Section 91(1) does not prevent the admission or use of evidence of the grant of probate, letters of administration or a similar order of a court to prove—
>
> (a) the death, or date of death, of a person, or
>
> (b) the due execution of a testamentary document.
>
> (2) In a civil proceeding, section 91(1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, not being a conviction—

(a) in respect of which a review or appeal (however described) has been instituted but not finally determined, or

(b) that has been quashed or set aside, or

(c) in respect of which a pardon has been given.

(3) The hearsay rule and the opinion rule do not apply to evidence of a kind referred to in this section.

93 Savings

This Part does not affect the operation of—

(a) a law that relates to the admissibility or effect of evidence of a conviction tendered in a proceeding (including a criminal proceeding) for defamation, or

(b) a judgment in rem, or

(c) the law relating to res judicata or issue estoppel."

30 Section 91(1) of the *Evidence Act* provides that evidence of a decision or a finding of fact made in another judicial proceeding is not admissible to prove the existence of a fact that was in issue in that other proceeding. If evidence of a decision or finding of fact is admissible for some other purpose, such as where the conduct of vexatious proceedings is a precondition to the exercise of a statutory power and the evidence is relevant to characterising the conduct of those proceedings,[60] then that evidence is not excluded by s 91(1). However, if evidence of a decision or finding of fact is admitted for another purpose, s 91(2) ensures that the evidence does not become evidence in the extant proceedings of a fact that was in issue in that other proceeding.[61]

---

60 See *Storry v Parkyn (Vexatious Proceedings Order)* (2024) 304 FCR 318 at 324 [21].

61 cf *Evidence Act*, s 60.

Section 92(2): evidence of a conviction

31 Section 92 provides for two exceptions to s 91(1), of which only the exception in s 92(2) is presently relevant. Except in respects that do not bear on this appeal,[62] ss 91 to 93 are not materially different to equivalent provisions of the draft Bill which accompanied the Australian Law Reform Commission's Interim Report on Evidence[63] ("Interim Report") which eventually yielded the Evidence Acts and to which reference can be made in the interpretation of those Acts.[64] The Interim Report was critical of the rule in *Hollington v F Hewthorn & Co Ltd*[65] to the effect that a conviction is not admissible in other proceedings to prove the facts on which it is based.[66] The Interim Report addressed the rule by proposing what became s 92(2).[67]

32 When engaged, the exception to s 91(1) in s 92(2) means that evidence that a party, or a person through or under whom a party claims, has been convicted of an offence is admissible to prove in the extant proceedings the existence of a fact that was in issue in the proceedings that resulted in the conviction. Section 92(3) precludes such evidence being excluded by either the hearsay rule in s 59(1), as it

---

62 Section 77(1) of the draft Bill, which became s 91(1) of the *Evidence Act*, excluded evidence of the decision in an "administrative proceeding" as well as in legal proceedings, but did not expressly exclude evidence of findings of fact, only "the decision". Section 77(2) of the draft Bill, which became s 91(2) of the *Evidence Act*, provided: "Where evidence of such a decision is relevant otherwise than as mentioned in sub-section (1), that sub-section does *not* prevent its use to prove the existence of a fact that was in issue in the proceeding" (emphasis added). Section 79 of the draft Bill, which became s 93 of the *Evidence Act*, did not include any reference to res judicata and issue estoppel: Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 2 at 42-43, ss 77-79.

63 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 2 at 42-43, ss 77-79.

64 *Evidence Act*, s 3(3).

65 [1943] KB 587.

66 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 209 [385].

67 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 442 [773].

could otherwise be characterised as evidence of a previous representation made by the participants in the trial that led to the conviction, or the opinion rule in s 76(1), as it could otherwise be characterised as evidence of an opinion by the participants in the trial that led to the conviction.[68] Section 167(b) of the *Evidence Act* enables a party to make a reasonable request to another party for the purpose of determining a question that relates to evidence of a conviction of a person for an offence.

33 The scope of the exception to s 91(1) in s 92(2) is limited. It only permits evidence of the *conviction* to be admitted as proof of a fact that was in issue in the criminal proceedings. It does not enable the admission of evidence of other decisions made in criminal proceedings such as sentencing judgments or of evidence of findings of fact not forming part of the conviction. Thus, when s 92(2) is engaged the evidence of the conviction is evidence of only some of the facts in issue in the criminal proceedings, namely the (facts constituting) elements of the offence.[69] As illustrated below, the level of particularity at which those facts can be described depends on the evidence of the conviction that is adduced.

A person through or under whom a party claims

34 Section 92(2) permits the admission and use of evidence that a "party, or a person through or under whom a party claims" has been convicted of an offence. In *Re HIH Insurance Ltd (In liq)*,[70] Brereton J observed that the text of this aspect of s 92(2) corresponds with Barwick CJ's description in *Ramsay v Pigram* of the "basic requirement" of a privy in interest for the purposes of issue estoppel, namely "that the privy must claim under or through the person of whom he is said to be a privy".[71] Section 92(2) has an analogous but weaker operation than issue estoppel in that while both involve a finding made in one proceeding being used in another proceeding, s 92(2), unlike issue estoppel,[72] does not make evidence of a

---

68 See *Gonzales v Claridades* (2003) 58 NSWLR 188 at 205-206 [66] ("*Gonzales*").

69 *Osborne v Butler (a pseudonym)* (2024) 73 VR 386 at 394 [34].

70 [2015] NSWSC 790 ("*HIH Insurance*").

71 *HIH Insurance* [2015] NSWSC 790 at [61], quoting *Ramsay v Pigram* (1968) 118 CLR 271 at 279; see, generally, *HIH Insurance* [2015] NSWSC 790 at [60]-[65].

72 *Blair v Curran* (1939) 62 CLR 464 at 532.

conviction binding on the parties.[73] The correspondence between the phrase "a person through or under whom a party claims" in s 92(2) and *Ramsay v Pigram* is consistent with the reference to "claims" in s 92(2) being a reference not to any claim made by a moving party in the proceeding in which the exception is sought to be engaged but to the legal relationship between the person convicted and a party to that proceeding.

35 It is not necessary to determine whether the concept of a privy in interest exhausts the scope of this aspect of s 92(2) or whether it has wider operation such as encompassing any cause of action, defence or liability that a party derives from the person convicted. Instead it suffices to observe that MTH's action against Mr Croft survived his death and became legally maintainable against his estate.[74] The Estate thus acquired a liability, the proof of which against Mr Croft would have been affected by s 92(2) had he survived. MTH relies on the convictions in her proceedings against the Estate as she would have had Mr Croft survived. Thus, for the purpose of considering s 92(2)'s application to MTH's reliance on Mr Croft's convictions, he is a person through or under whom the Estate "claims".

Review or appeal not finally determined

36 In the Court of Appeal and in this Court, the Estate contended that s 92(2)(a) was not engaged by the evidence of Mr Croft's convictions as a "review or appeal (however described)" in respect of those convictions had been instituted but not finally determined. It contended that the manner of dismissal of his application for special leave to appeal did not constitute a "final" determination in the sense of a determination on its merits. Adamson JA rejected that contention. Her Honour was correct to do so.

37 The phrase "(however described)" in s 92(2)(a) suggests that this aspect of the provision is concerned with whether a legal avenue of challenge to a conviction has been engaged (and is outstanding) as opposed to focusing on the label applied to that avenue of challenge. Even so, an application for special leave to appeal is not an "appeal".[75] It is unnecessary to determine whether an application for special leave to appeal amounts to a "review" for the purposes of s 92(2)(a). Instead, it suffices to state that, even if the application for special leave to appeal constituted

---

73 See below at [39]-[45].

74 *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 2(1).

75 *United Mexican States v Cabal* (2001) 209 CLR 165 at 179 [30]-[31].

an application for review, the dismissal of Mr Croft's application by this Court following his death amounted to a final determination of that application.

38 In foreshadowing what became s 92(2)(a), the Interim Report observed that "[w]here a conviction has been appealed against but the outcome is as yet unknown, the civil court should adjourn the proceedings or not take the conviction into account".[76] This confirms that the focus of s 92(2)(a) is whether there is presently some outstanding legal challenge to the status of the conviction rather than whether or why such a challenge may have been dismissed in the past or whether, following a dismissal, another application could have been made, as is theoretically the case with an application for special leave to appeal.[77] Were the position otherwise, one instance of an invocation of any system of reviewing convictions that enabled repeat applications could permanently defeat the operation of s 92(2).[78]

Weight to be afforded to evidence of the conviction

39 The Court of Appeal placed reliance on a section of the Interim Report that described the rule in *Hollington v F Hewthorn & Co Ltd*[79] as unsatisfactory because "fundamentally a conviction deserves recognition as evidence that was more likely to be right than wrong that the person was guilty" and to "admit this evidence [of a conviction] would not conclude the issue but [instead] would make available evidence of high probative value".[80] That section of the Interim Report also stated that the "probative value of a conviction lies in the high standard of proof that must be satisfied before a finding of guilt can be made".[81] As noted, the

---

76 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 443 [776] (footnote omitted).

77 See *DJL v Central Authority* (2000) 201 CLR 226 at 248 [47].

78 eg, *Crimes (Appeal and Review) Act 2001* (NSW), Pt 7.

79 [1943] KB 587.

80 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 209 [385].

81 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 209 [385].

Court of Appeal appears to have treated the (hypothetical) certificate as necessarily having "high probative value".

40 However, adopting an approach that necessarily ascribes high probative value to evidence of convictions does not reflect the Interim Report's description of the proposed exception to s 91(1) that became s 92(2) ("the proposed exception"). The amici's submissions appeared to accept this in that their submissions refer to the evidence of the convictions as having only a "*potentially* ... high probative value" (emphasis added). The difference is significant.

41 Although the Interim Report referred to a conviction as having "substantial evidentiary weight"[82] and as evidence that "can be highly probative",[83] it also stated that the proposed exception does not specify the weight to be attached to a conviction, nor set up a presumption that the conviction is assumed to be correct and thereby "place a legal onus of disproof upon the person convicted".[84] The Interim Report stated that "[i]t is enough that the convicted person will have an evidentiary onus in the civil proceedings, if he disputes the facts sought to be proved by the conviction".[85] Ultimately, the Interim Report stated that the proposed exception was "designed to assist plaintiffs to fill gaps in evidence but should not encourage them to become complacent about discharging the overall onus of 'he who asserts must prove'", and that the "weight to be accorded to a conviction can vary greatly and should be left to the civil court in each case".[86]

42 In *Gonzales v Claridades*, Campbell J referred to these passages in the Interim Report and described the effect of s 92(2) being engaged as imposing "an evidentiary onus on anyone who disputed the correctness of the conviction to *produce* evidence that it is incorrect" but not altering "the legal onus of proof of

---

82 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 444 [778].

83 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 441 [771].

84 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 443 [777].

85 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 444 [778].

86 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 444 [778].

the facts underlying the conviction".[87] This description of s 92(2) was endorsed on appeal to the Court of Appeal[88] and by the Victorian Court of Appeal in *Osborne v Butler (a pseudonym)*.[89]

43 In *Gonzales*, Campbell J observed that the conviction of a beneficiary under a will for murdering his father would be admissible in civil proceedings in which the beneficiary was a party and where there was an issue about whether he had forfeited any entitlement to his father's estate.[90] Even so, his Honour observed that the party contending that the beneficiary had forfeited his benefit under his father's estate would still bear the legal onus of so proving and it would be open to the convicted beneficiary to call evidence "with a view to showing that any such conviction was erroneous".[91]

44 *Gonzales* reflects a correct understanding of s 92(2) although it should be understood in the context of the Interim Report's refusal to recommend any presumption as to the correctness of a conviction, as well as what was meant by the Interim Report's reference to an "evidentiary onus" being placed on the convicted person. That reference to an "evidentiary onus" appears to be a reference to an "evidential burden".[92] As reflected in Campbell J's reference to the convicted person "produc[ing]" evidence that a conviction is not correct, an evidential burden is a burden to *introduce* evidence[93] sufficient to raise an issue as to the existence or non-existence of a particular fact in issue bearing in mind the applicable

---

87 *Gonzales* (2003) 58 NSWLR 188 at 206 [66] (emphasis added).

88 *Gonzales v Claridades* (2003) 58 NSWLR 211 at 215 [16], 222 [54], [55].

89 (2024) 73 VR 386 at 394 [33].

90 *Gonzales* (2003) 58 NSWLR 188 at 206 [67].

91 *Gonzales* (2003) 58 NSWLR 188 at 206 [67].

92 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 15-16 [35].

93 *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

standard of proof.[94] The "evidential burden" is to be distinguished from the legal onus or burden in respect of the proof of the fact.[95]

45 To speak of an "evidential burden" being placed on the convicted person to disprove the conviction is to do no more than describe a "burden" of *introducing* evidence, whether by adducing "substantive evidence" or evidence through cross-examination of the other party's witnesses,[96] or by "draw[ing] attention to the presence of circumstances"[97] that are capable of disproving or rebutting the facts sought to be proved by the conviction. If that "burden" is not discharged then the convicted person runs the risk of the facts sought to be proved by the evidence of the conviction being accepted. If that "burden" is discharged, then whether or not the party seeking, say, forfeiture, as in *Gonzales*, has ultimately proved such facts or the convicted person has disproved them to the satisfaction of the tribunal of fact will depend on the whole of the evidence concerning those facts,[98] including the weight to be attached to the evidence of the conviction, and which party bears the legal onus of proof of those facts.

Effect of a certificate of conviction

46 The notation to s 91 of the *Evidence Act* refers to s 178, which provides:

"**Convictions, acquittals and other judicial proceedings**

(1) This section applies to the following facts—

(a) the conviction or acquittal before or by an applicable court of a person charged with an offence,

(b) the sentencing of a person to any punishment or pecuniary penalty by an applicable court,

---

94 *Cross on Evidence*, 14th Aust ed (2024) at 351 [7015].

95 *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168.

96 *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

97 *Gould v Vaggelas* (1984) 157 CLR 215 at 238; cf *Cross on Evidence*, 14th Aust ed (2024) at 381-382 [7210] fn 191.

98 *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

(c) an order by an applicable court,

(d) the pendency or existence at any time before an applicable court of a civil or criminal proceeding.

(2) Evidence of a fact to which this section applies may be given by a certificate signed by a judge, a magistrate or registrar or other proper officer of the applicable court—

(a) showing the fact, or purporting to contain particulars, of the record, indictment, conviction, acquittal, sentence, order or proceeding in question, and

(b) stating the time and place of the conviction, acquittal, sentence, order or proceeding, and

(c) stating the title of the applicable court.

(3) A certificate given under this section showing a conviction, acquittal, sentence or order is also evidence of the particular offence or matter in respect of which the conviction, acquittal, sentence or order was had, passed or made, if stated in the certificate.

(4) A certificate given under this section showing the pendency or existence of a proceeding is also evidence of the particular nature and occasion, or ground and cause, of the proceeding, if stated in the certificate.

(5) A certificate given under this section purporting to contain particulars of a record, indictment, conviction, acquittal, sentence, order or proceeding is also evidence of the matters stated in the certificate.

(6) In this section—

acquittal includes the dismissal of the charge in question by an applicable court.

applicable court means an Australian court or a foreign court.

Note—

Section 91 excludes evidence of certain judgments and convictions."

47 A certificate answering the description in s 178(2) is evidence of the relevant fact or facts identified in s 178(1), which can include the fact of a conviction.[99] Depending on its terms, a certificate recording a conviction may also be evidence of the particular offence or matter in respect of which the conviction was entered (s 178(3)), as well as any other matters particularised in the certificate (s 178(5)). However, s 178 is only a means of facilitating proof of a conviction. The provision does not address either the admissibility of evidence of a judicial decision recorded in a certificate, including a conviction or a finding of fact, or the weight to be attached to such evidence.[100] Further, nothing in the *Evidence Act* suggests that s 178 is the exclusive means of adducing evidence of the matters specified in s 178(1), including a conviction. Section 178 is not an essential component of s 92, which governs the admission or use of evidence of a conviction. There was no equivalent to s 178 in the draft Bill that accompanied the Australian Law Reform Commission's Interim Report or Final Report.[101]

The evidence of the convictions in MTH's case

48 The Estate's grounds of appeal from the Court of Appeal's judgment are addressed next. It suffices at this point to state that it was erroneous for the Court of Appeal to ascribe error to the primary judge or determine disputed issues of fact itself on the assumed basis that a certificate had been tendered before the primary judge, when no such certificate was tendered and none appears to have been available. Leaving aside the receipt of further evidence[102] (of which there was none), in conducting an appeal by way of rehearing[103] the Court of Appeal was obliged to undertake a "real review of the trial" and the primary judge's reasons,[104] and to do so on the basis of the "record" of the trial.[105] That "record" encompasses the *actual* evidence that was before the primary judge, not any hypothetical

---

99 *Evidence Act*, s 178(1)(a).

100 See *Chevalley v Industrial Court of New South Wales* (2011) 82 NSWLR 634 at 650-651 [58].

101 Australia, Law Reform Commission, *Evidence*, Report No 38 (1987).

102 *Supreme Court Act 1970* (NSW), s 75A(7).

103 *Supreme Court Act*, s 75A(5), (6) and (10).

104 *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25].

105 *Fox v Percy* (2003) 214 CLR 118 at 125 [22].

evidence (or evidence that "would have been available" had the s 178 procedure been invoked, as submitted by the amici). One example of the difficulties that beset the Court of Appeal's approach is that s 178(3) operates on what is "stated in the certificate", something that cannot be ascertained without an actual certificate.

49 The Court of Appeal's approach appears to have in part resulted from an incorrect assumption that the only means of proving a conviction is by the tender of a certificate under s 178. However, as noted,[106] that is only one means of proving a conviction. In this case, it was agreed before the primary judge that Mr Croft had been convicted of two counts of rape and three counts of indecent assault in the relevant timeframe against MTH. Those facts were "agreed facts" for the purposes of s 191(1) of the *Evidence Act*[107] and evidence was not required to prove their existence[108] (and, in any event, the primary judge noted that evidence of the convictions had been admitted, although not for the purpose of proving the facts underlying the convictions). It follows from what has been stated that s 92(2) was engaged such that the convictions were admissible as proof of a fact that was in issue in the proceedings that resulted in the convictions.

50 In particular, so far as the three convictions for indecent assault are concerned, the agreed facts are prima facie evidence that, during the relevant period, on three occasions Mr Croft assaulted MTH and, at the time of or immediately before or after such assault, committed some act that constituted an act of indecency upon her or in her presence.[109] So far as the two convictions for rape are concerned, the agreed facts are prima facie evidence that Mr Croft committed a physical act of penetration without MTH's consent.[110]

51 It was open to MTH at the hearing to adduce other evidence identifying the precise nature of the acts constituting each offence that were put to the jury at Mr Croft's trial. However, that does not appear to have been done and, in any event, the primary judge rejected MTH's attempts to adduce evidence of the convictions through her statement. It may also have been possible to cross-reference MTH's

---

106 See above at [47].

107 See *Evidence Act*, s 191(3)(b).

108 See *Evidence Act*, s 191(2)(a).

109 *Crimes Act*, s 76 (repealed); see above fn 13.

110 *Crimes Act*, s 63 (repealed); see above fn 14; *Papadimitropoulos v The Queen* (1957) 98 CLR 249 at 261; *PGA v The Queen* (2012) 245 CLR 355 at 375 [34].

police statements to the offences of which Mr Croft was convicted to identify the precise acts of Mr Croft that constituted those offences but that does not appear to have been attempted. It is not necessary to take this analysis further because, even at the generalised level just described, the evidence of the convictions was prima facie evidence of those acts, was supportive of MTH's evidence, and placed an "evidential burden" in the sense that has been described on the Estate to disprove that those acts were committed against MTH. The same analysis may also be possible in relation to Mr Croft's convictions for offences against RS, but as the precise offences that Mr Croft was convicted of against RS were not identified at trial, that cannot be taken any further.

The Estate's appeal to this Court

52 The Estate propounded four grounds of appeal, two of which addressed the basis upon which the Court of Appeal found error on the part of the primary judge and two of which concerned the manner in which the Court of Appeal resolved the appeal. Although the Estate's submissions on the grounds of appeal overlapped, the two categories of grounds of appeal are best addressed separately.

Finding of error by the primary judge: Obligation to afford MTH a fair hearing

53 The Estate's first ground of appeal is that the Court of Appeal erred in holding that the primary judge had an obligation to ensure that MTH did not, because of a lack of legal skill, fail to claim rights or put forward legal arguments.

54 There are various descriptions of the approach that should be adopted by trial judges when dealing with unrepresented litigants in civil proceedings[111] and criminal trials,[112] although they are invariably context dependent. It is unnecessary to add to those descriptions to resolve this appeal beyond reiterating that they are

---

111 See, eg, *Hamod v New South Wales* [2011] NSWCA 375 at [315]-[316]; *Moleirinho v Talbot & Olivier Lawyers Pty Ltd* [2014] WASCA 65 at [51]; *Stone v Braun* (2015) 13 ASTLR 444 at 456-457 [62]-[68]; *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* (2020) 280 FCR 479 at 490-492 [51]-[57]; *Chalik v Chalik* [2025] NSWCA 136 at [69]-[72].

112 See, eg, *MacPherson v The Queen* (1981) 147 CLR 512 at 523, 524, 534, 535, 546-547; *TS v The King* [2022] NSWCCA 222 at [68]-[71]; *Gassy v The King* [2023] SASCA 90 at [34]-[37].

directed to the obligation of a trial judge to afford a fair trial or hearing according to law, that is, fair to both parties.[113]

55 Contrary to the submissions of the amici, the Court of Appeal's description of the primary judge's obligation "to *ensure* that [MTH] did not, because of lack of legal skill, fail to claim rights or put forward legal arguments"[114] purported to be a statement of general principle applicable to unrepresented litigants. As such, the statement was expressed in terms that were far too absolute. As formulated by the Court of Appeal, the principle appears to require trial judges dealing with unrepresented litigants to conceive of all reasonably arguable "rights" and "arguments" available to the litigant and to then take whatever steps are necessary to "ensure" the litigant claims those rights and puts those arguments. None of the authorities support an obligation described in those terms. The discharge by trial judges of such an obligation would carry a strong risk of requiring the judge to compromise their impartiality and unduly favour the unrepresented party over the represented party.[115]

56 The amici sought to support this aspect of the Court of Appeal's reasoning on the arguably more limited basis that the primary judge was required, but failed, to put MTH in the position of being able to make an "effective choice" as to how to prove the abuse she alleged, including by obtaining and tendering a certificate under s 178. In oral argument the amici suggested that, as an aspect of affording MTH an "effective choice", the primary judge was obliged to tell her that if a certificate was obtained then she may choose not to give oral evidence. The amici also submitted that the primary judge was required to inform MTH of the "evidentiary pathway" provided by s 178, which the Court of Appeal concluded would have "enable[d] [MTH] to prove the commission of the offences by tendering a certificate of conviction".

57 At a factual level the contention that the primary judge was obliged but failed to afford MTH an "effective choice" to obtain and tender a certificate, or was obliged to inform MTH of the "evidentiary pathway" provided by s 178, must be rejected. The primary judge was not obliged to advise MTH to obtain evidence

---

113 *MacPherson v The Queen* (1981) 147 CLR 512 at 523; *Barghouthi v Transfield Pty Ltd* (2002) 122 FCR 19 at 23 [10]; *Nagy v Ryan* [2003] SASC 37 at [53]; *Tomasevic v Travaglini* (2007) 17 VR 100 at 121 [95].

114 See above at [23].

115 See also *Nobarani v Mariconte* (2018) 265 CLR 236 at 250 [47].

of a conviction or alert her to a "pathway" when the convictions were not disputed. Further, as there is nothing to suggest such a certificate existed, taking such a course would also probably have required the primary judge to adjourn the proceedings, potentially for a substantial period of time, and that could not have occurred without considering the interests of the three defendants to the proceedings. Similarly, the Court of Appeal's finding that the primary judge "positively misle[d]" MTH, albeit unintentionally,[116] because, contrary to what MTH was said to have been told, the *Evidence Act* permitted MTH to "prove the fact of the offences against her and RS by tendering *the* certificate of conviction"[117] cannot be sustained when no such certificate existed or was needed.

58 The submission in support of the Court of Appeal's reasoning was not that it would have been open to the primary judge to inform MTH about the effect of s 178. Rather, it was that the primary judge was obliged to do so. The ultimate source of any obligation to inform a party of a matter in order for the party to have an "effective choice" could only be the obligation to ensure that the trial is fair. But within the concept of a fair trial there is a very wide range of possible options for a trial judge.

59 One difficulty that arises with respect to the conclusion that the primary judge was obliged to advise MTH of the option of electing not to give evidence and instead rely on evidence of Mr Croft's convictions (such as a certificate pursuant to s 178) is in determining whether the primary judge was obliged to advise MTH of the potential consequences of doing so and how far that obligation extended. If MTH did not give evidence then, following a request under s 167(b) of the *Evidence Act*, she might still have been the subject of an order under s 169(1)(b) requiring her to give evidence or risk the rejection of the evidence under s 169(1)(c). If MTH did not give evidence and just relied on evidence of the convictions in the form of a certificate, she risked losing her case entirely if the Estate's evidential burden was discharged and she did not discharge her legal onus.[118] If MTH elected not to give evidence, she would have had to have abandoned so much of her case against the Estate, Mrs Croft and the State that alleged abuse of her by Mr Croft beyond the five instances of conduct constituting the offences he was convicted of committing against her. If MTH did not give evidence she would also have had to prove her case on damages without any direct

---

116 See [2025] NSWCA 122 at [64], [69], [73]-[74] (emphasis removed).

117 [2025] NSWCA 122 at [73] (emphasis added).

118 See above at [44]-[45].

evidence from her, and risk being subject to the drawing of adverse inferences from her failure to give evidence.[119]

60 Generally caution must be exercised in transposing a discussion of a trial judge's obligation to provide an unrepresented party with an "effective choice" as to the conduct of their case in a particular case or context to another case and context. The origin of the phrase "effective choice" is *MacPherson v The Queen*,[120] where Mason J referred to the duty of a trial judge to advise an unrepresented accused of his "right" to a voir dire hearing regarding the voluntariness of his alleged confession so as to put him "in the position in which he can make an effective choice" as to whether to test the admissibility of that evidence.[121] In doing so, his Honour observed that the trial judge should also advise the accused of the potential to be cross-examined on the voir dire, and that choosing to give evidence on the voir dire "might effectively foreclose his option to give sworn evidence later".[122]

61 This description of the duty of a trial judge in *MacPherson* is unimpeachable, as is the reference to "effective choice" in the context of an unrepresented accused in a criminal trial where the prosecution bears the burden of proof and, at various points as the trial unfolds, the accused must respond to the prosecution case by making decisions and exercising rights such as challenging jurors, objecting to evidence, cross-examining Crown witnesses, giving evidence or remaining silent. However, that is different to a civil proceeding where the unrepresented party is the plaintiff and bears the legal onus or burden of proof. In conducting such a case, forensic decisions are called for throughout such proceedings on matters such as which causes of action to maintain, which witnesses to call, and what documents to tender or questions to ask. While a judge must be patient in explaining the rules and procedures as the case unfolds,[123] the judge's duty to afford a fair hearing in such a proceeding does not entail an

---

119 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at 412-414 [167]-[169].

120 (1981) 147 CLR 512; see *Hamod v New South Wales* [2011] NSWCA 375 at [312].

121 *MacPherson v The Queen* (1981) 147 CLR 512 at 534-535.

122 *MacPherson v The Queen* (1981) 147 CLR 512 at 535.

123 *Nobarani v Mariconte* (2018) 265 CLR 236 at 250 [47].

obligation to provide running advice as to the manner in which the plaintiff conducts their case.

Finding of error by the primary judge: Disregard of the evidence of the convictions

62 It follows that the Estate's first ground of appeal to this Court should be upheld. The Estate's third ground of appeal contends that the Court of Appeal erred in holding that the primary judge had disregarded the probative weight of a conviction to prove the elements of an offence when a certificate pursuant to s 178 of the *Evidence Act* had not been tendered.

63 Leaving aside the Court of Appeal's erroneous focus on the necessity for a certificate of conviction to be relied on as evidence of convictions, at the core of its reasoning in determining error on the part of the primary judge that warranted appellate court intervention were the two related findings described above as the first step in the Court of Appeal's reasoning.[124] The first finding was that the primary judge erred in "inferr[ing] that MTH was not seeking to rely on the convictions against Mr Croft to prove that he had committed the offences for which he was convicted". The second finding was that the primary judge was "under a misapprehension ... that a conviction could not prove that the offence had been committed by the offender".[125] Both of those findings were correct and were interrelated. Given that MTH included material in her statement referring to the convictions there was no basis to conclude that she was not relying on the convictions.

64 Further, throughout the hearing and his judgment it is evident that the primary judge proceeded on an incorrect understanding that s 91 precluded any reliance on Mr Croft's convictions as evidence of any facts in issue in his prosecution. The Estate contended that the admissions made at the hearing as to the fact of the convictions were not evidence of the facts alleged by MTH in her statement of claim. However, as explained,[126] the agreed facts concerning the convictions satisfied s 92(2), and were prima facie evidence of some acts of abuse of MTH. They were supportive of MTH's case and corroborative of her evidence.

---

124 See above at [20].

125 See above at [20].

126 See above at [49]-[50].

The primary judge erred in expressly excluding that evidence from consideration in dismissing MTH's claim against the Estate.

65 These two findings by the Court of Appeal were encompassed by the Court of Appeal's description of MTH's first category of her grounds of appeal to that Court.[127] These two findings of the Court of Appeal were also sufficient to warrant the Court of Appeal's intervention. The Estate disputed that, contending that the Court of Appeal impermissibly set aside credibility findings that were not glaringly improbable or inconsistent with facts incontrovertibly established.[128] However, this submission overlooks the circumstance that the primary judge's credibility findings were reached without considering the evidentiary effect of the evidence of the convictions. Even if the convictions were solely dependent on an acceptance of the evidence given by MTH at Mr Croft's trial, that would not mean the convictions had no evidentiary value above and beyond her evidence given before the primary judge, in light of the higher standard of proof involved in obtaining a criminal conviction.[129]

66 It follows that the Estate's third ground of appeal must be rejected. It further follows that, despite the Estate's first ground of appeal to this Court being upheld, ultimately the Court of Appeal did not err in finding error on the part of the primary judge.

The Court of Appeal's resolution of MTH's appeal from the primary judge

67 The Estate's second ground of appeal contends that the Court of Appeal erred in holding that it was appropriate for that Court to decide the appeal "as if a certificate of conviction had been tendered pursuant to s 178" of the *Evidence Act* when no such certificate had been served or tendered prior to or during the proceedings. For the reasons already stated,[130] this ground must be upheld.

68 The Estate's fourth ground of appeal contends that the Court of Appeal erred in reassessing damages in the absence of a finding that the primary judge's credit findings were glaringly improbable or contrary to compelling inference.

---

127 See above at [18].

128 See *Lee v Lee* (2019) 266 CLR 129 at 148 [55].

129 See above at [39].

130 See above at [48].

69 Given that there was error on the part of the primary judge that warranted intervention by the Court of Appeal, these two grounds of appeal, taken together, challenge the approach of the Court of Appeal in purporting to resolve MTH's appeal by accepting her evidence with respect to the abuse she contended that Mr Croft perpetrated against her and in reassessing damages on that basis.

70 Consistent with its view that a certificate evidencing convictions was necessarily evidence of high probative value, the Court of Appeal erred in not addressing what weight should be attached to that evidence. As noted by the Interim Report, the "weight to be accorded to a conviction can vary greatly and should be left to the civil court in each case",[131] although the civil court's assessment of that weight should account for the high standard of proof applicable at a criminal trial.[132] Against that, in this case, given that there was not said to be anyone else present when the sexual and physical abuse was alleged to have taken place and there was no other direct evidence of the offences, the convictions of Mr Croft for offences against MTH appear to have been based primarily on an acceptance of the credibility of her evidence. It is not known whether MTH's evidence at Mr Croft's trial was supported by other evidence, although the prosecution case might have been supported by tendency evidence given by RS. These matters would bear on an assessment of the weight to be attached to the evidence of Mr Croft's convictions. Of course, other circumstances of Mr Croft's trial, to the extent they are known, may also bear on that assessment.

71 Relatedly, the Court of Appeal appears to have misunderstood the nature of the "evidential burden" or onus placed on the Estate. Thus, as noted, the Court proceeded on the basis that the primary judge was required to start with the convictions as prima facie evidence of the elements of each offence, to regard MTH's evidence as corroborated by the (hypothetical) certificate and (critically), "[t]here being no direct evidence to the contrary" of MTH having been abused, to treat the convictions as sufficient to discharge MTH's "onus" (that is, her legal onus) to prove that the abuse perpetrated by Mr Croft occurred. The Court observed that "it is difficult to conceive of an instance where the [E]state could displace the evidence of the convictions in circumstances where there were no

---

131 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 444 [778].

132 Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 209 [385].

witnesses to the rapes and indecent assaults and Mr Croft was unable to give evidence".

72 The Court of Appeal's approach and that observation not only reflect the erroneous conclusion of the Court of Appeal that all evidence of convictions is necessarily of high probative value with the attendant difficulty of displacing that evidence, but also overstate the effect of the evidential burden imposed on the Estate.[133] As noted,[134] the substance of that burden only comprised a "burden" of *introducing* evidence[135] or drawing attention to the "presence of circumstances"[136] that were capable of disproving or rebutting the facts sought to be proved by the convictions.

73 At the hearing before the primary judge, the Estate's response to MTH's case at a factual level was to rely on evidence of Mr Croft's denials of wrongdoing, inconsistencies in MTH's evidence, and discrepancies between her evidence and that of other witnesses, although the last did not involve or amount to evidence directly contradicting MTH's evidence as to the occurrence of the rapes and assaults. The Court of Appeal did not address whether in so doing the Estate discharged the evidential burden as explained above. In that respect the Court of Appeal also erred. Moreover neither the primary judge nor the Court of Appeal addressed the weight to be attached to the evidence of Mr Croft's convictions or considered whether, in light of that assessment and the balance of the evidence, MTH discharged her legal onus or burden of proving she was abused by Mr Croft.

74 It follows that the Estate has made out its challenge to the Court of Appeal's findings resolving MTH's appeal by accepting her evidence on all topics, including as to damages. The fourth ground of appeal should also be upheld.

Disposition of the appeal

75 To the extent that the Estate submitted that the Court of Appeal erred in finding error on the part of the primary judge that warranted that Court's

---

133 cf *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442 at 472 [59], 473 [61]. See also *Fennell v The Queen* (2019) 93 ALJR 1219 at 1233 [81]; 373 ALR 433 at 451-452.

134 See above at [44].

135 *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

136 *Gould v Vaggelas* (1984) 157 CLR 215 at 238.

intervention, it has been unsuccessful. However, the Estate has demonstrated that the Court of Appeal erred in the manner in which it resolved MTH's appeal. The effect of the errors of the primary judge is that the fact-finding process at first instance, including the assessment of MTH's credit, miscarried due to a misapprehension regarding the effect of the evidence of the convictions. Had the primary judge appreciated that the evidence of Mr Croft's convictions was admissible to prove the facts constituting the elements of the offences of which Mr Croft was convicted and evaluated the weight of that evidence, the outcome at trial may have been different. The factual disputes between MTH and the Estate cannot be resolved by remitting the proceedings to the Court of Appeal as they are dependent on assessments of witness credibility undertaken with the benefit of a proper assessment of the weight to be attached to the evidence of the convictions. It follows that a new trial must be ordered.[137]

76 Consistent with its undertaking to this Court, the Estate will be ordered to pay the costs of the amici curiae. There will otherwise be no order as to costs in this Court. All the previous costs orders as between the Estate and MTH will be vacated and the costs of the hearings before the primary judge and the Court of Appeal as between the Estate and MTH must await the outcome of the new trial. It suffices to state that it is open to the parties to resolve the proceedings without further hearing, delay and cost.

77 The following orders should be made:

1. Appeal allowed in part.

2. Set aside orders (3) and (5) made by the Court of Appeal on 6 June 2025.

3. In lieu of orders (3) and (5), order that:

   (a) order (2) and so much of order (4) as concerns the costs of the second defendant made by Cavanagh J on 28 November 2024 and so much of order (1) made on 18 December 2024 as concerns the costs of the second defendant be set aside; and

   (b) the proceedings between the plaintiff and the second defendant be retried.

---

137 *Balenzuela v De Gail* (1959) 101 CLR 226 at 236.

4. The appellant pay the costs of the amici curiae in this Court.

5. Appeal otherwise dismissed.