

AUSTRALIA / JUDGMENT

# Davey v Want

**[2026] NSWCA 12****COURT**

Court of Appeal

**DECIDED**

18 February 2026

**BEFORE**Bell CJ at [1];  
Stern JA at [2];  
Griffiths AJA at [130]**CASE / FILE NUMBER**

2025/325796

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**Source record****Court of Appeal****Supreme Court****New South Wales****Summary available****Amendment notes****Medium Neutral Citation:** Davey v Want [2026] NSWCA 12**Hearing dates:** 16 December 2025**Date of orders:** 18 February 2026**Decision date:** 18 February 2026**Before:** Bell CJ at [1];  
Stern JA at [2];  
Griffiths AJA at [130]**Decision:** (1) Appeal dismissed.  
(2) Appellant to pay the respondent's costs.**Catchwords:** EVIDENCE — Standard of proof — Civil cases — whether primary judge failed properly to apply standard of proof and reached erroneous conclusion — where primary judge did not so err  
APPEALS — From finding of fact — Credibility and reliability of witnesses — whether primary judge erred in treatment of evidence of appellant and two witnesses — where the weight to be given to the evidence of each witness was a matter for his Honour — where primary judge's findings were based on his Honour's assessment of the evidence as a whole — where primary judge did not so err  
APPEALS — From finding of fact — Credibility of witnesses — whether primary judge erred in finding respondent had not deliberately sought to create a false impression and gave inadequate reasons for so finding — where primary judge did not so err

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| Legislation Cited:       | Evidence Act 1995 (NSW) ss 140(2), 165B                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Cases Cited:             | AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle [2026] HCA 2<br>Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34<br>Dedakis v Deligiannis; The estate of Rebecca Deligiannis (also known as Rebeka Deligiannis) [2024] NSWSC 1018<br>DL v The Queen (2018) 266 CLR 1; [2018] HCA 26<br>Douglass v The Queen [2012] HCA 34; 86 ALJR 1086<br>Fox v Percy (2003) 214 CLR 118; [2003] HCA 22<br>GLJ v Trustees of the Roman Catholic Church (2023) 280 CLR 442; [2023] HCA 32<br>J and E Vella Pty Ltd v Hobson [2023] NSWCA 234<br>Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8<br>Lee v Lee (2019) 266 CLR 129; [2019] HCA 28<br>Lim v Lim [2023] NSWCA 84<br>Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60<br>M v M (1988) 166 CLR 69; [1988] HCA 68<br>Ming v Director of Public Prosecutions (2022) 109 NSWLR 604; [2022] NSWCA 209<br>Moubarak by his tutor Coorey v Holt [2019] NSWCA 102<br>Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA [2025] NSWCA 72<br>Warren v Coombes (1979) 142 CLR 531 at 552; [1979] HCA 9<br>Watson v Foxman (1995) 49 NSWLR 315<br>Willmot v Queensland [2024] HCA 42; 98 ALJR 1407 |
| Category:                | Principal judgment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Parties:                 | Robyn Davey (Appellant)<br>George Want (Respondent)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Representation:          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Counsel:                 | B Dooley SC with A Saleh (Appellant)<br>P Skinner (Respondent)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Solicitors:              | Shine Lawyers (Appellant)<br>Carroll & O’Dea Lawyers (Respondent)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| File Number(s):          | 2025/325796                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Publication restriction: | Nil<br>Decision under appeal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Court or tribunal:       | District Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Jurisdiction:            | Civil                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Date of Decision:        | 06 June 2025                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Before:                  | Newlinds DCJ                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

File Number(s): 2023/422992

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant appealed against the primary judge's dismissal of her claim that the respondent sexually abused her on two occasions in the early 1970s, when she was aged between five and seven and he was 17 or 18. The first incident of alleged abuse was said to involve the respondent placing his hands in the appellant's underwear and fondling her vagina when she was sitting on his lap riding a tractor at a property referred to as Lot 23. The second incident was said to involve broadly the same conduct but whilst the appellant was sitting on the respondent's lap at a family gathering. The respondent denied that he had ever sexually or otherwise assaulted the appellant.

The key issues before the Court were:

- (i) whether the primary judge failed properly to apply the standard of proof and reached an erroneous conclusion;
- (ii) whether the primary judge erred in his treatment of the evidence of the appellant and of two of her cousins, Janet and Pamela Skinner;
- (iii) whether the primary judge made a number of erroneous factual findings and provided inadequate reasons for those findings; and
- (iv) whether the primary judge erred in finding that the respondent had not deliberately sought to create a false impression and gave inadequate reasons for so finding.

The Court (Stern JA, Bell CJ and Griffiths AJA agreeing) held, dismissing the appeal: As to issue (i)

(1) The primary judge did not err in his approach to the onus and burden of proof. His Honour also did not erroneously rely on a "Longman warning". His reference to that case was only to keep firmly in mind that the delay had caused significant forensic disadvantage to the respondent: [1] (Bell CJ); [76]-[82] (Stern JA); [130] (Griffiths AJA).

*Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34, *Wilmot v Queensland* [2024] HCA 42; 98 ALJR 1407, applied; *Longman v The Queen* (1989) 168 CLR 79, referred to; *Lim v Lim* [2023] NSWCA 84, considered.

As to issue (ii)

(2) The primary judge did not fail to take into account aspects of the appellant's post-abuse behaviour. His Honour referred to the appellant's memory of the events in question, to the joint report of the psychiatrists instructed by the parties, and to the clinical records of Ms Bray, the appellant's treating psychologist. In these circumstances his Honour did not err in not separately referring to the appellant's own account of these matters: [1] (Bell CJ); [84]-[90] (Stern JA); [130] (Griffiths AJA).  
(3) The primary judge did not err in failing to consider Janet Skinner's evidence. The weight to be given to that evidence was a matter for his Honour: [1] (Bell CJ); [91]-[94] (Stern JA); [130] (Griffiths AJA).

(4) The primary judge did not err in his treatment of Pamela Skinner's evidence. His Honour found that the appellant said something to Pamela Skinner that reflected badly on the respondent and that this was relevant to the appellant's allegations. The primary judge did not err in his characterisation of this evidence, having regard to

inconsistencies between it and the appellant's evidence. The weight to be given to it was a matter for his Honour: [1] (Bell CJ); [95]-[98] (Stern JA); [130] (Griffiths AJA). *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, applied.

As to issue (iii)

(5) The primary judge did not err in finding that it was unlikely that as a young child the appellant would be concerned that reporting abuse by the respondent may lead to the loss of her family's accommodation. This was a matter for his Honour, having seen the appellant give evidence and having regard to the evidence as a whole. His Honour was entitled to have regard to inherent probabilities in assessing the reliability of her evidence. The primary judge explained the basis for his finding, with no inadequacy in those reasons: [1] (Bell CJ); [99]-[105] (Stern JA); [130] (Griffiths AJA).

(6) The primary judge did not err in finding that the clinical records of Ms Bray suggested confusion in the appellant's memory. His Honour recognised that the references in Ms Bray's records to abuse by or charges against a family member could either be referable to such confusion, or to Ms Bray erring in her note-taking and recollection. His Honour's approach is what is required of a judge weighing all the evidence in the balance and assessing whether the allegations had been established to the requisite standard: [1] (Bell CJ); [106]-[112] (Stern JA); [130] (Griffiths AJA).

(7) The primary judge did not err in finding that the appellant's memory was inaccurate as to the purpose and location of the family gathering where she alleged that the second incident of abuse by the respondent occurred and that this cast doubt upon the accuracy or reliability of her memory of that alleged incident of abuse. The inaccuracies his Honour identified in the evidence necessarily undermined the reliability of the appellant's recollection. The primary judge's finding was based upon his assessment of the evidence as a whole, and his Honour had clear advantages over this Court in this regard: [1] (Bell CJ); [113]-[116] (Stern JA); [130] (Griffiths AJA).

As to issue (iv)

(8) The primary judge did not err in his treatment of the respondent's evidence and, in particular, in not finding that the respondent had deliberately sought to discredit the appellant and that this displayed a consciousness of guilt. Whilst the primary judge had characterised the respondent's evidence in a way that was unduly unfavourable to the respondent, even on that characterisation, there was no error in finding that the respondent's evidence should not be held against him in the manner contended for by the appellant. The significance to attach to such matters was very much a matter for his Honour: [1] (Bell CJ); [55]-[56], [117]-[127] (Stern JA); [130] (Griffiths AJA).

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## JUDGMENT

BELL CJ: I agree with Stern JA.

STERN JA: On 6 June 2025, after a four day trial at which eight witnesses (including the appellant and respondent) gave oral evidence and were cross-examined, the primary judge dismissed the appellant's claim that George Want, the respondent, sexually abused her on two occasions in or around 1971 and 1972 respectively, when the appellant was aged between five and seven years and he was aged 17 or 18 years. The first incident of alleged abuse was said to involve the respondent placing his hands in the appellant's underwear and fondling her vagina when she was

sitting on his lap riding a tractor. The second incident was said to involve broadly the same conduct but whilst the appellant was sitting on the respondent's lap, with a blanket over the two of them, at a gathering at the respondent's aunt and uncle's house (which I refer to as Aunt Sadie and Uncle Will's house). The appellant claimed that each of these incidents of abuse was an assault and trespass to the person and sought damages, including aggravated and exemplary damages. The respondent denied that he had ever sexually or otherwise assaulted the appellant.

The appellant now appeals against the primary judge's dismissal of her claim (leave to appeal out of time having been granted at the hearing of the appeal to the extent required). The appellant's grounds of appeal essentially contend that the primary judge erred in his fact finding and in his ultimate conclusion that the appellant had not met her onus of proof.

Whilst the primary judge also rejected an application by the respondent for a permanent stay of the proceedings or dismissal for abuse of process, there is no appeal against that order.

For the reasons set out below, the appeal should be dismissed with costs.

### Relevant principles

On an appeal by way of rehearing this Court must conduct a real review of the evidence given at first instance, and of the primary judge's reasons, to determine whether the primary judge's findings are erroneous, making due allowance for such advantages as may have been enjoyed by the primary judge: *Warren v Coombes* (1979) 142 CLR 531 at 552; [1979] HCA 9. As the majority explained in *Warren v Coombes* at 552 (Gibbs ACJ, Jacobs and Murphy JJ):

[I]f the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment.

As is well recognised, however, when evaluating findings of fact made following a trial involving oral evidence and cross-examination of key witnesses, an appellate court must be mindful of the advantages enjoyed by a primary judge who observed the trial and the evidence as it unfolded. The high bar set for a challenge such as that brought by the appellant here reflects the advantages of a primary judge "by reason of having seen the witnesses and having been immersed in the milieu of the trial": *J and E Vella Pty Ltd v Hobson* [2023] NSWCA 234 at [214] (Stern JA, Mitchelmore JA agreeing).

As regards findings involving the assessment of the credibility or reliability of witnesses, including findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts: *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28 at [55], an appellate court's review must also be conducted in conformity with the principles set out in *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [28]-[29]. To succeed, an appellant must establish that "incontrovertible facts or uncontested testimony" demonstrate that the primary judge's conclusions are erroneous, or that the decision is "glaringly improbable or "contrary to

compelling inferences”.

As noted below, the appellant contends before this Court that the primary judge erred in making the findings he did as to the reliability of the appellant’s evidence, and in not finding that the respondent was not a truthful witness who deliberately sought to create a false impression. Such findings fall comfortably within the principles set out above. It follows that the appellant’s contention that this Court is in as good a position as the primary judge to determine these matters should be rejected.

The fact that the appellant’s claims arise out of events which occurred some decades ago adds a further complexity. The proper approach to fact finding in civil cases involving such allegations was discussed by the High Court in *Willmot v Queensland* [2024] HCA 42; 98 ALJR 1407 at [30] (see also *GLJ v Trustees of the Roman Catholic Church* (2023) 280 CLR 442; [2023] HCA 32 at [59]-[62]). The High Court there identified five techniques which may be deployed to guard against unfairness to either party:

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 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)

The *Briginshaw* standard (derived from *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34) is reflected in the first of these techniques (see most recently *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2 at [219] (Gordon J)). As was recently observed by the Chief Justice in *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* [2025] NSWCA 72 at [3]: “[a]s a matter of practicality, *Briginshaw* and s 140(2) of the Evidence Act [1995 (NSW)] present a forensic challenge to those who seek to establish serious allegations, decades after the event”.

The principles derived from *Jones v Dunkel* (1959) 101 CLR 298 at 305; [1959] HCA 8, *Watson v Foxman* (1995) 49 NSWLR 315 at 319 and *Longman v The Queen* (1989) 168 CLR 79 at 107-108; [1989] HCA 60 are cited as authority for, respectively, the third and fourth of these techniques. It is salient in this regard to observe that in *Jones v Dunkel* at 305, Dixon CJ said:

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.

In light of the analysis in *Willmot*, there is no merit in the appellant's contention that the primary judge here erred in taking guidance from the analysis in *Longman* notwithstanding that, unlike the present case, that involved criminal liability. Indeed, some years before *Willmot*, in *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102 at [80], this Court observed that the observations of McHugh J in *Longman* at 107-108 were pertinent to issues arising in civil proceedings (in that case, the fairness of a trial). Relevantly, in *Longman* at 107-108, McHugh J said:

The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to "remember" is well documented. The longer the period between an "event" and its recall, the greater the margin for error. Interference with a person's ability to "remember" may also arise from talking or reading about or experiencing other events of a similar nature or from the person's own thinking or recalling. Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine: Hunter, *Memory*, rev. ed. (1964), pp 269-270.

Nor, contrary to the appellant's contention, did the primary judge err in referring to the observation of the High Court in *M v M* (1988) 166 CLR 69 at 77; [1988] HCA 68, in the context of an allegation that a parent sexually abused a child (made in family law proceedings), that claims of sexual abuse are "often easy to make, but difficult to refute". That observation is apt well beyond family law proceedings.

Here the alleged instances of sexual abuse occurred over 50 years before proceedings were commenced. Given this, questions as to the reliability of human memory loom large. As Leeming JA explained in *Dedakis v Deligiannis; The estate of Rebecca Deligiannis* (also known as *Rebeka Deligiannis*) [2024] NSWSC 1018 at [15]:

Memory is fallible and malleable, especially memory concerning past beliefs. One of Lord Leggatt's first judgments contains an extensive and influential consideration of the frailties of memory, including (relevantly for present purposes) that memories of past beliefs are revised to make them more consistent with present beliefs: *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [18]. It is usually desirable to start with reliable contemporaneous documents and uncontroversial facts. "Usually, the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation": *Camden v McKenzie* [2008] 1 Qd R 39; [2007] QCA 136 at [34] (Keane JA). That is not to deprecate the potential significance of testimonial evidence. In particular, as was said by Bell P in *ET-China.com International Holdings Ltd v Cheung* [2021] NSWCA 24; 388 ALR 128 at [27]-[29], testimonial evidence may provide valuable assistance in explaining the context of, and omissions from, the contemporaneous documents.

As is clear, in cases such as the present a primary judge must scrutinise all available evidence with care to identify whatever forensic pointers are presented, mindful of the difficulties faced by the parties and the seriousness of the allegations made. As set out below, the primary judge's fact finding was consistent with these principles.

### The grounds of appeal

It is convenient to consider the appellant's 11 grounds in the notice of appeal (NOA) under four headings:

The primary judge erred in his approach to the onus and standard of proof. In this regard, the appellant contends:

that the ultimate finding that she had not discharged her onus of proof was erroneous having regard to the Briginshaw standard and the Evidence Act, s 140 (ground 1);

that the primary judge erroneously treated cautionary concepts, such as those relating to unreliable or uncorroborated evidence (Evidence Act, s 165B and Longman) or a supposed forensic disadvantage of a defendant, as if they were affirmative evidentiary requirements and thereby failed to apply the balance of probabilities standard of proof (ground 2); and

the primary judge applied *M v M* and thereby erred in his approach to factual findings (ground 3).

The primary judge erred in failing to consider the entirety of the evidence of the appellant (ground 4) and Janet Skinner (ground 5), and in dismissing the evidence of Pamela Skinner (ground 6).

The primary judge made a number of erroneous factual findings and provided inadequate reasons for those findings, being:

that it was unlikely that as a young child the appellant would be concerned that reporting the abuse may lead to the loss of her family's accommodation (ground 7);

that the clinical records of Ms Bray suggest confusion in the appellant's memory (ground 8); and

that the appellant's memory was inaccurate both as to the location of and reasons for the family gathering at Aunt Sadie and Uncle Will's house and that this cast doubt upon the accuracy or reliability of the appellant's memory as a whole (ground 9).

The primary judge erred in finding that the respondent had not deliberately sought to create a false impression and gave inadequate reasons for so finding (ground 10), and ought to have found that, in part, the respondent's evidence was a deliberate attempt to discredit the appellant and displayed a consciousness of guilt and that the respondent was not a truthful witness (ground 11).

## Relevant background

Given the issues raised, and before turning to the primary judge's findings, it is necessary to set out some aspects of the evidence before the primary judge by way of background. One reason for doing so is to demonstrate the stark inconsistencies across the evidence before the primary judge and the difficulties he faced in assessing the reliability of honest recollections of events long past.

The respondent was born on 27 July 1953. The appellant was born on 16 March 1965.

The respondent's evidence was that from 1967 the appellant rented a house owned by his father, Cecil Want, located on what was known as Lot 23, which was a lot of about 75 acres owned by his father. His father's house, where the respondent lived in 1971, was located about one kilometre from Lot 23. His father grazed beef cattle on Lot 23 until his father's death in 1994.

The appellant said that from around 1968, when she was three years old, she was aware that her family lived in a house that her father rented from Cecil Want.

The appellant said that when she was around four years old she was in bed with her uncle Gordon (with whom she was staying at the time) and he touched her with his hand between her legs above her clothes. This stopped when her aunt called out that breakfast was ready and she got out of bed. The appellant also said that when she was about five or six years old another uncle, Ivan, put his hands into her underwear and started to touch her genitals. This happened on about three occasions. Ivan died in 1982, and Gordon in 1984. Without intending any disrespect, I will refer to these uncles by their first names.

The appellant said that she told her brother about the abuse by Ivan and that he told her mother who shouted at her, asking her what happened, and called her a "dirty little bitch". Her father then came in and stopped her mother yelling. She also said that she believed that her parents believed her and after this they "just watched me like a hawk, never left alone with him [Ivan] sort of thing". She said that her parents talked to her about staying away from Ivan. The appellant said that that gave her comfort. She also said that her grandmother "would not let anything be said or done about what happened and it was not spoken about again".

The appellant described the respondent as thin with short dark hair. The respondent's evidence was that he had long hair in 1971 and 1972 and attached three photos taken in 1971 to one of his affidavits to demonstrate this.

As to the first incident of alleged abuse, the appellant said that, to the best of her recollection, it occurred when she was about six years old in around 1971. The respondent was riding around on the tractor on his parents' property. He pulled up and spoke to the appellant's father, who was in the yard. The appellant asked if she could go for a ride on the tractor and both the respondent and her father agreed. She climbed onto the tractor and sat on the respondent's knee. He had one hand around her waist and one on the steering wheel. He moved his hand from her waist and put it into her shorts and underwear and she felt his hand trying to get her legs apart. She felt a pressure of fingers on her vaginal area. There was no penetration. The tractor was moving all the time and this went on for about three to five minutes or so and stopped when the respondent

needed both hands to steer the tractor. The respondent then drove back to the yard and the appellant got off. She did not want to get into trouble again by telling anyone what happened.

The respondent said there was very little need for tractor work on Lot 23 at that time and that the tractor was housed at the dairy property about one kilometre away. If tractor work was done on Lot 23 it would have been infrequent and would have been done by his father. To get from the dairy property to Lot 23 the tractor would have had to be driven along what was then the Pacific Highway. The respondent did not have a driver's licence in 1971 and did not drive on the highway. He said that he had no recollection of ever driving the tractor with anybody else riding on the tractor with him and said:

I have never regarded it as a safe practice and it was not something I did.

The respondent's cousin, Trevor Want, said that the respondent's father's tractor was very difficult to drive and that two hands were needed to drive it. He said that Cecil Want, was a very law abiding and cautious person who was "always fussy about doing the right thing and looking after people and thing[s] he was responsible for".

As to the second incident of alleged abuse, the appellant said that this occurred during a Want family gathering at Aunt Sadie and Uncle Will's house and that the respondent's aunts and uncles were at the house at the time. She recalled she was wearing hot pants. As to the purpose of the Want family gathering the appellant's evidence was:

When I had gone home and mum had said there was a lot of cars over, I said, yes, because Cecil was there, Mary was there, and Trevor was there. And mum had made reference because what - sort of talking to me and dad, my father, that Sarah had fallen once or twice and Will had to go and help her to just stand up because Mary wasn't strong enough, I guess, to do it on her own. And he also worked at the brickworks five days a week where the others were farmers, full-on farmers. They didn't have other jobs. And if she was fall, while he was at work, someone, one of the other brothers had to step in and help Mary, if need be. So if the mother fell or something, again, Mary couldn't help her up, he needed to make sure that one of the other brothers, Trevor or Cecil, could be available.

She said that the get together was because of Sarah falling or having had a couple of falls.

She said that after playing outside with Aunt Sadie and Uncle Will's daughter Julie, she went inside to watch television with the respondent and three of his cousins including Trevor Want. There was nowhere for her to sit so the respondent let her sit on his lap. He placed a blanket over her lap and his legs. He then undid the buttons on the hotpants she was wearing and put his hand down the front of her shorts and inside her underwear. He separated her labia using his fingers. This went on for only a minute or so and the appellant squirmed and felt uncomfortable. The respondent's mother then called that it was time for the appellant to go home and she left.

An affidavit from the appellant's cousin Janet Skinner was in evidence before the primary judge. She is about six and a half years older than the appellant and five years younger than the respondent. She said that she would visit the appellant approximately every four to six weeks and

that she and her sisters, and the appellant, would go over to play with Julie Want at the property next door (Aunt Sadie and Uncle Will's house) and that the respondent "was often there too". She said that he "seemed to hang around us kids, particularly the girls, often". She said that, more than once, he would touch her on the arm and say words to the effect of "you're looking good" and that this made her feel uncomfortable. She did not say when this happened.

The respondent said that he rarely visited Aunt Sadie and Uncle Will's house and he never saw the appellant there without her mother. He agreed that he would do work for Will Want and would have a cup of tea and then leave with his father and possibly could have played the odd game of cricket there. He denied ever watching television there or having the appellant sit on his knees. He said he wouldn't have allowed her to sit on his knee. He said:

I wouldn't feel comfortable with children sitting - I'm an only child and I've never had children around me and I don't feel comfortable with young children. It's not an accepted thing, especially if she wasn't family, in front of aunty Sadie, who is very particular and religious. I don't think it would be appropriate to have little children sitting on adolescen[t's] laps.

He was totally unaware of any get-together because there was a need for Sarah to be looked after. He said in 1972 Sarah's sister Mary was looking after her. He said Sarah did not have a walking stick (it is not clear if this answer is tethered to 1972) but accepted that she had a walking stick in photographs in 1981 and 1983. He said that in 1971 Sarah was "fit, stable on foot and capable" and was then aged 78 with no need for home care or home assistance. In 1970 she had travelled to Sydney to look after his aunt who had a collapsed lung and pneumonia but he did not know if Sarah had a walking stick then. He said there would have been no need for a family gathering in 1971 or 1972 to discuss her need for care as she had no need for care. She died in 1987 aged 94 and did not become unsteady on her feet until the last 12 months of her life.

Julie Want gave evidence that the respondent would mostly come to her home to do work with or for her father. He sometimes would have a cup of tea with her parents then leave with her father to do farm work. She did not agree that he was often at her house. She did not recall him playing with herself, her brother or Trevor Want but said he might have been involved in the odd cricket game when her father was involved. She had no recollection of ever watching television with him, could not recall him watching television at her house and did not think it would have happened. She could not recall the respondent hanging around the young children at her home or around her. She said that the allegations the appellant had made did not fit with her view of the respondent's character and that preying upon young girls was not something that she thought was, to her knowledge, in his character. She did not recall family members coming to her house to socialise and said that "the Wants didn't socialise". She did not recall the appellant visiting her parents' house.

Trevor Want said there was never a Want family gathering at Aunt Sadie and Uncle Will's house. Gatherings of the family were very rare and when they happened they occurred at Sarah's home. He denied that he was playing with the appellant at Aunt Sadie and Uncle Will's house as the appellant alleged. He said he did not play with the younger girl cousins and did not visit that

house to play in the afternoon. He said the respondent generally associated with the adults when the uncles and aunts got together and said that the respondent did not play with him or, to his observation, with his other younger cousins. He said that the allegations the appellant made against the respondent are entirely out of character.

The respondent's cousin Margaret Caisley said that the respondent had long hair throughout high school. She also said that the allegations against the respondent were "totally out of character" for the person she knew when growing up on neighbouring farms and that he never took any interest in anyone younger than himself. She also said that she had no recollection of a family gathering at Aunt Sadie and Uncle Will's house. She said that her grandmother Sarah did not need care in the 1970s and to her knowledge, there was no family meeting to discuss her care. She said that in the 1970s Sarah did not have mobility issues and was not prone to falls.

Another of the respondent's cousins, Helen Granleese, said that the respondent did not spend any time with her when they were growing up and when the family did get together he would associate with the older people and not with the younger cousins. She also said that she did not recall the event described by the appellant as happening at Aunt Sadie and Uncle Will's house in 1972, nor any family gathering hosted by Sadie at that house. She said she would have found it special for the family to be gathered there with the children. She said she did not recall Sarah having a walking stick but agreed that she had one in photos taken after she went to university in 1975 that she was shown in cross-examination.

The appellant said that she felt that she could not tell anyone about her abuse by the respondent because of her mother's reaction when she was told about what happened with Ivan. She said, "I thought that I was going to get in trouble because I'd done something wrong". She also said that if she told anyone "they wouldn't believe me or it could lead to us being homeless and that would be my fault". She said she was concerned about where her family could live if they could not live in the respondent's father's house. She said that she did not tell her parents at the time because she was worried about what would happen. In her oral evidence she said that she thought of reporting the abuse to her parents but never did:

Because I thought, where would we live? What would happen? What's – you know, we're talking about the landlord's son. You know, where does that leave us? ... Would we get evicted out? You know, would I even be believed? All those questions that - yeah.

The appellant said that after the abuse she felt very alone and fearful about when abuse might happen again. She said that it caused her to become withdrawn at school and that she had the uncomfortable feeling that everyone knew what had happened. She started acting out and being cheeky.

The appellant said that not long after the incidents, when the appellant was seven or eight, she told her cousin Pamela Skinner, who was one year older than her, what had happened. She told Pamela what had happened with Ivan and Pamela had said she hated him. This led to the appellant feeling able to tell Pamela about what happened with the respondent. She said that, on that occasion, she told Pamela about the three events of abuse, including those by her uncles.

Pamela Skinner said in her witness statement that on one occasion, when she thought she was about eight or nine, she was sitting with the appellant on the ground at their grandmother's house and the appellant was upset and crying, Pamela asked what the matter was, and the appellant "told me that the George follows her and that he touches her in her pants". During her oral evidence in chief, Pamela agreed that that was "almost exactly" and then "exactly" what the appellant said, in her memory. She said that she told the appellant "we should tell our mums" but that the appellant did not want to and "begged me not to tell anyone". Pamela said she had been assaulted herself by another uncle and that her sister had been molested by that other uncle and by Ivan. She said that the appellant did not tell her that she had been assaulted by Ivan.

The appellant left home when she was 17, in 1982. She had three children from three different fathers in the 1980s. She returned to the house on Lot 23 in 2008 to look after an uncle, Alan, who had developed pneumonia and a brain tumour. She remained there until 2020. The respondent said that in 2011 the appellant personally approached him and asked if she could rent the house on Lot 23 from him. He agreed to this and from 24 July 2011 the appellant was recorded as the tenant of the house on Lot 23. The respondent attended the appellant's wedding in 2016. The appellant said that this was because her husband Ricky (who did not know of the abuse) invited him and she "figured well you know I didn't have to go near him. I avoided him". According to the respondent, the appellant remained living with her husband at the house on Lot 23 until 10 January 2021. The respondent said that during this time he had periodic contact with the appellant, collecting rent, on occasion attending to minor maintenance matters at the house, and when the appellant's dog strayed and the appellant called him to ask if he had seen it.

The first time the appellant gave any detailed account of the alleged abuse to anyone is when she told her psychologist, Judi Bray, in 2020, that she recalled being abused by three people, being two uncles and one neighbour. She first saw Ms Bray on 19 October 2020 which she said in oral evidence was after she had left the house at Lot 23 for the second time. The appellant's explanation for why she went to Ms Bray was:

I felt it was time that I needed to deal with it. I'd got my first granddaughter by then and I was looking at her and seeing myself and, yeah, I was just worried about what may happen to her in the future, and I thought I needed to deal with it.

She continued:

Yes, just I didn't want what happened to me to happen to her and I guess it's just I had to deal with it. It was time to deal with it.

The appellant then saw Ms Bray on 11 further occasions between 1 February 2021 and 1 September 2022. Ms Bray's clinical records relating to the appellant (comprising 35 pages) were in evidence at trial. These show that when the appellant first saw Ms Bray, on 19 October 2020, she had depression and anxiety with extremely severe symptoms. She is recorded as referring at that attendance to early childhood sexual abuse "at age five by three separate males/both family & neighbours", although in a letter shortly after this attendance Ms Bray referred to sexual abuse "from the age of five years". These clinical records include other generic references to the appellant's childhood sexual abuse.

A curious aspect of these clinical records is that they include references by Ms Bray to the appellant's abuser as a "family member" when it appears likely that the reference is to the abuse that the appellant now says was by the respondent:

On 27 July 2021, Ms Bray noted that the appellant had reported that "the family member who had abused her as a child has been making contact [with the appellant's] mother to find out what [the appellant] is doing" which was triggering. As the primary judge observed, by 2021 both of the uncles that the appellant said had abused her were dead, so it is difficult to see how this could be a reference to either of them. By way of background, the appellant said during her examination in chief that from 2005 onwards the respondent would call into her mother's house for a cup of tea and her mother would tell her that he had been asking where she was and where she was living. That was, however, many years before the appellant moved back into the house on Lot 23 (which was by then owned by the respondent) and, on the respondent's account, the appellant thereafter had ongoing contact with him up until early 2021 when she moved out.

On 17 February 2022, Ms Bray recorded that the appellant had been proactive in attending the police station and giving statements to "charge her uncle with his sexual abuse" against her as a child. The appellant's oral evidence was that she discussed with Ms Bray what steps would be taken with police, and "police was one of the options", but said that that was in relation to the respondent and not one of her uncles and she never contacted the police.

In a letter to the appellant's general practitioner of 2 September 2022, when closing the appellant's file, Ms Bray reported that following 12 counselling sessions the appellant had "the courage to confront her fears of having been sexually assaulted as a child by a family member and pursuing compensation through the court process". There is no evidence that any compensation claim was made other than against the respondent.

The appellant first told her mother about the abuse "close to when she finished with Ms Bray".

Both the appellant and the respondent instructed expert psychiatrists in the proceedings at first instance. There was no dispute between them that the appellant had suffered significant damage to her mental health by reason of sexual abuse which she suffered as a child.

The primary judge's findings

### As to credibility and reliability

The primary judge found that the appellant was a witness of truth and that she had the memories she described of the relevant events and honestly believed that they occurred. Consistent with the authority I have set out above, his Honour directed himself, however, that this did not mean that the appellant's evidence was sufficiently reliable or accurate so as to allow him to be satisfied, taking into account the Briginshaw standard, that the appellant had proved that the abuse occurred. The primary judge also directed himself in accordance with Dedakis at [15], and noted that, "with potentially one exception", there was no evidence that was "uncontroversial or established by contemporaneous documents". His Honour later directed himself by reference to the observations in *Fox v Percy* at [31] as to there being doubt as to the ability of a trial judge to differentiate between truth and falsehood based upon demeanour and the consequent need to base conclusions, as far as possible, upon contemporaneous materials and the apparent logic of events.

His Honour identified at the outset a number of matters that were relevant to the reliability of the appellant's evidence. First, he noted that, as the first occasion on which the appellant gave any detailed account to anyone of her abuse by three different people was in 2020 and his Honour observed that, as these assaults all occurred, in the appellant's memory, within a few years of each other, there was a possibility that the appellant was misremembering or her memories of her interactions with the respondent had been jumbled with her memories of other events.

Second, his Honour found that the appellant's vivid recollection of the Want family gathering was inaccurate as to the purpose of the gathering being the frailty of "Grandma Sarah" and as to whether there was ever any family gathering at that property.

Third, his Honour found that the explanations given by the appellant for not complaining of abuse by the respondent to her parents were "not necessarily particularly plausible". His Honour observed that the appellant's father was supportive of her when she disclosed the abuse by her uncle, with the clear inference being that there was no plausible reason for the appellant not telling him of abuse by the respondent. Further, as to the appellant's explanation that she did not tell anyone about the abuse for fear of her family losing their accommodation, the primary judge said that he "got the very strong impression that this explanation was not in her mind as a child but is something she has thought about since", adding that it "strikes me as a very unlikely thing for such a young child to understand, let alone be concerned about".

Fourth, the primary judge found that, according to Ms Bray's clinical notes, the appellant had given "somewhat inconsistent statements as to what occurred".

As for the defendant, the primary judge found that overall he was doing the best he could to grapple with the detail of the questions that were put to him in cross-examination. His Honour found that he was giving honest evidence and honestly believed that he did not sexually assault the appellant.

As regards one matter, being the respondent's evidence as to the likelihood of him having been at Lot 23 with the tractor, as discussed in more detail below, the primary judge found that there came a point where the respondent deliberately sought to create a misleading impression in his evidence. The primary judge found that the respondent's evidence as to this was "not something I consider ought to be held against him". This was because his Honour found that there was an explanation for the respondent giving this evidence, being that:

[The respondent] is a man in his late 60s seeking to answer very serious allegations about conduct he is said to have engaged in more than 50 years ago and he was doing his best in his evidence to try and explain why what the [appellant] was saying did not make sense to him.

The primary judge also "form[ed] the impression that the [respondent] was seeking to cast aspersions on the [appellant's] credit or reliability in relation to the address [of Lot 23] in circumstances where he knew that the property had very many different addresses". The primary judge found, however, that:

My overall impression of him is that he was an honest witness doing the best he could in very difficult circumstances to try and give evidence about many matters which, if he is to be believed, were mundane events at the time, through the haze of distant memories. Again, I accept my own fallibility in reaching such a conclusion based on his demeanour in the witness box.

The primary judge also noted that "[i]mportantly, on the central questions, that is whether he sexually assaulted the [appellant] on the two occasions alleged, he was steadfast and consistent in his denials".

The primary judge rejected the appellant's contention that the evidence the respondent gave concerning the tractor driving along the highway and the street address of Lot 23 were evidence of consciousness or acceptance by him that he is in fact guilty of what the appellant alleged against him. But his Honour said that those matters did give him "some pause to reflect" on the respondent's credibility as a witness overall:

[B]ut, having done so and when I consider his evidence as a whole, I am satisfied that on the central questions in the case, that is whether the two events occurred, he was giving his best honest recollection.

The primary judge said that there was nothing about Pamela Skinner's demeanour that caused him to doubt her "credibility as [opposed] to reliability" but that he was "somewhat perturbed by her insistence of an accurate recollection of actual words spoken". He said:

I am not persuaded that the actual words were said, but I accept that something negative was said by the [appellant] about the [respondent's] conduct, which Pamela took to mean that the [appellant] felt he had done something to her that was inappropriate.

As for the evidence of Janet Skinner (who was not cross-examined), the primary judge found that she was not being untruthful, but that he was satisfied on the evidence as a whole that:

[A]s a young boy and teenager, the [respondent] did spend more time with adults than other children and did not spend a particular amount of time playing with other children. That is not to say that he never played with other children at all.

The primary judge found Margaret Caisley to be “an impressive witness” and that he did not have any reason not to accept her evidence. He accepted her evidence, in particular, as to her opinion as to the respondent’s character, as to Sarah’s physical state in the early 1970s and as to the length of the respondent’s hair at around that time.

The primary judge said that he had “no hesitation in accepting [Ms Granleese’s] evidence as her best memories of times long past”.

As for Trevor Want, the primary judge said:

[A]s to my observations as to demeanour, I found Trevor Want to be an entirely satisfactory witness and have no reason not to accept his evidence as to his recollections as to what was going on in the early 1970s and also his assessment of the [respondent’s] character.

Finally, as regards Julie Want, the primary judge found that she was a witness who “presented well” and said:

I accept her evidence as to her recollections of events in the early 1970s.

### **The primary judge’s findings as to the facts**

The primary judge noted what was said by the High Court in *M v M*. His Honour also referred to the well-known observations of McLelland CJ in *Watson v Foxman* at 319 and to the observations of both Deane J (at 92) and McHugh J (at 107-108) in *Longman*. Having done so, his Honour directed himself that:

In other words, it is well understood that people can honestly “remember” “events,” but that memory does not necessarily mean that the event actually occurred. This is the difference between fabricated evidence and unreliable evidence. Honest evidence as to a memory goes only so far in proof. The next important question is the reliability or accuracy of that evidence. It is at this point that an understanding of the fallibility of human memory has an important part to play.

The primary judge also directed himself by reference to *Briginshaw* and the Evidence Act, s 140 and *Willmot* and considered the limited circumstances in which so-called Longman warnings are available in criminal trials. Ultimately, his Honour concluded that the reference to “Longman-type reasoning” in *Willmot* at [29]:

[R]einforces that care must be shown before accepting uncorroborated evidence and demonstrates that the courts have developed principles and techniques for dealing with cases of this kind. Albeit the Longman direction was being explained by the High Court as a technique to ensure the ultimate fairness of the trial.

The primary judge was comfortably satisfied that the death of many potential witnesses and the “fading and perhaps changing of memories of important witnesses”, including the appellant, the respondent and Pamela Skinner in particular, meant that there was significant forensic disadvantage to the respondent. His Honour said that he should keep that prejudice in mind when “weighing all the evidence by reference to the ability of the [respondent] to deploy perhaps better evidence if not for the delay”.

His Honour found that both the accounts of the appellant and that of the respondent were plausible.

As to matters that went to the reliability of the competing accounts, the primary judge’s key findings are set out below. As regards each, his Honour observed that the findings were not “of an incontrovertible, objective fact” within the meaning of that term in *Fox v Percy*.

First, the evidence was that the respondent’s father was safety conscious and probably would not have allowed the respondent to take a six or seven year old child for a ride on a tractor. Second, that having regard to the preponderance of evidence, it was more likely than not that there was no family gathering at Aunt Sadie and Uncle Will’s house and that, “if something happened”, which is presumably a reference to an alleged sexual assault of the appellant by the respondent, it was more likely than not that it happened somewhere other than at Aunt Sadie and Uncle Will’s house. Third, all of the evidence was that Sarah was in good health and steady on her feet in 1971 and 1972 and the primary judge noted that this was conceded by the appellant’s senior counsel at trial. Those matters meant that the primary judge was satisfied on the balance of probabilities that the appellant’s memory in relation to the Want family gathering was not accurate in significant ways, being the location and the reason for the gathering and that the appellant’s vivid memory of aspects of the second instance of alleged sexual assault were not accurate, which cast doubt upon the accuracy and reliability of the whole of that memory.

Fourth, the primary judge was not satisfied that the respondent had inappropriately enquired after the appellant over the years, or watched her in a suspicious way, in any way that had relevance to the matter before his Honour.

Fifth, the primary judge was not able to find that the precise words Pamela Skinner ascribed to the appellant were said, having regard both to the fact that Pamela Skinner said that the appellant told her that the respondent “follows me” and that was no part of the appellant’s evidence and to the discrepancies between the appellant and Pamela Skinner’s account of this conversation. However, the primary judge did accept that “at some vague level the [appellant] was upset at primary school and that she said something which made Pamela Skinner think that the [respondent] had done something untoward”. Contrary to the appellant’s submission, the primary judge’s finding, whilst not inconsistent with the appellant having complained of a form of sexual abuse, does not itself support a finding that the appellant did complain of such abuse. The words “something untoward” comprehend a range of conduct, encompassing a multitude of possibilities other than sexual abuse.

As to the clinical records of Ms Bray, the primary judge found that there was “at least a possibility” that these accurately recorded what the appellant had told Ms Bray, which was inconsistent with her memory of the events in question and who the perpetrator was, “which is, as one might expect, somewhat jumbled and confused” and that this cast some doubt as to the accuracy of that memory. He said that, after allowing for the likelihood that medical professionals might make mistakes in their notes, the matters at [46] above gave him pause to think that the appellant’s memory was “a little more jumbled and confused than she suggests”.

The primary judge also found that it was relevant that there were never any rumours within the respondent’s family that he had ever done anything like what was alleged in these proceedings.

Ultimately having weighed these matters, the significant passage of time, the seriousness of the allegations and what his Honour referred to as “the other matters I have mentioned” in the balance, the primary judge did not feel the requisite level of satisfaction that the two events of alleged abuse occurred. As is apparent, contrary to the appellant’s contention, the primary judge took matters into account and weighed them in the balance irrespective of whether they could be characterised as “objective and incontrovertible evidence”.

### **Did the primary judge err in his approach to the onus and standard of proof? (NOA grounds 1-3)**

The central thrust of grounds 1 to 3 is that the primary judge failed properly to apply the standard of proof and reached an erroneous conclusion having regard to the relevant principles. As to this, the appellant relies upon three broad contentions.

First, the appellant contends that the primary judge effectively reversed the onus of proof by his reliance upon *M v M* and *Longman*. Further, the appellant contends that the primary judge set a standard that required the appellant to show that she was not fabricating evidence or had incontrovertible objective evidence to support of her account.

That contention can readily be rejected. The primary judge relied upon *M v M* and *Longman* as demonstrating judicial recognition of the fallibility of human memory, the phenomenon of honest recollection of false events, the difficulty in refuting allegations of sexual assault, and the need to scrutinise uncorroborated evidence with great care where a number of years have passed between the event complained of and the trial. The primary judge was clearly well aware that *M v M* arose in a family law context and that *Longman* was concerned with criminal liability. Moreover, the primary judge properly directed himself as to the standard of proof and reiterated that it was his task to make findings by reference to this standard when reaching his key conclusions. There is nothing in the primary judge’s analysis that suggests that he approached his factual findings on the premise of a false allegation that had to be disproved, and, as my analysis of relevant principle shows, it is consistent with authority for *Longman* to be relied upon in civil cases such as the present.

Further, whilst the primary judge did ask whether the evidence included incontrovertible facts which provided a touchstone by which to assess the reliability of both the appellant and the respondent's accounts, this approach flowed from, and in no sense contravened, the guidance given in *Fox v Percy* at [31]. Consistent with this, the primary judge also assessed the evidence by reference to the apparent logic of events and did not dismiss matters that could not be characterised as objective and incontrovertible. The appellant's contention that the primary judge reversed the onus of proof should be rejected.

Second, the appellant contends that the primary judge overstated the burden the appellant had to discharge. For the reasons set out above, and having regard to the way in which his Honour directed himself, this contention must also be rejected. Moreover, contrary to the appellant's contention, the primary judge's approach was consistent with the analysis of this Court in *Lim v Lim* [2023] NSWCA 84 at [17]-[23].

Third, the appellant contends that the primary judge erroneously relied upon a Longman warning. This contention mischaracterises his Honour's reliance upon Longman which did not go beyond his Honour keeping firmly in mind that delay had caused significant forensic disadvantage to the respondent "when weighing all the evidence by reference to the ability of the [respondent] to deploy perhaps better evidence if not for the delay". Further, to the extent that complaint is made about the primary judge's reference to the Evidence Act, s 165B (which applies to criminal prosecutions), that was only for the purpose of explaining that Parliament had introduced (in that section) a statutory limitation upon the circumstances in which a so-called Longman warning should be given.

It follows that I would reject grounds 1 to 3.

#### **Did the primary judge fail to consider the entirety of the evidence? (NOA grounds 4-6)**

The appellant complains about the primary judge's approach to her own evidence (ground 4) and to that of Janet (ground 5) and Pamela Skinner (ground 6). To the extent that the appellant contends that the primary judge failed to consider her and Janet Skinner's evidence simply because some matters were not referred to in his Honour's judgment, that contention has no proper foundation. The duty upon a court to give reasons does not extend to referring to every argument or piece of evidence: *Ming v Director of Public Prosecutions* (2022) 109 NSWLR 604; [2022] NSWCA 209 at [43]. Rather, the court should "identify the principles of law applied ... and the main factual findings on which the judge relied": *Douglass v The Queen* [2012] HCA 34; 86 ALJR 1086 at [8], cited in *DL v The Queen* (2018) 266 CLR 1; [2018] HCA 26 at [32]. The primary judge did that, explaining in some detail the matters upon which he placed reliance in reaching his ultimate finding. Having regard to the ambit of the duty to give reasons, a failure to refer to a particular piece of evidence does not give rise to an inference that it was not considered.

## The appellant's evidence

As ground 4 was advanced in the appellant's submissions, it involves the contention that the primary judge failed to take into account aspects of the appellant's post-abuse behaviour which she contends were consistent with her having experienced sexual abuse. In particular, she points to evidence that she gave that she was a happy child up to year 1 at primary school but that following the incidents of abuse this changed. She became withdrawn and struggled academically and socially and engaged in substance abuse at age 14 or 15 to suppress intrusive memories, also reporting lack of trust in adults, difficulties with intimacy, intrusive thoughts and vivid memories of the respondent and of both incidents of abuse she alleges occurred. She contends that the primary judge ought to have, but did not, consider these behavioural changes. She also contends that the primary judge should have given "significant weight" to the opinion of Dr Schelle (the psychiatrist instructed by the appellant at trial) as to the appellant's memory of events being "entirely possible". She relies, in support of her contentions, upon her evidence that she did not believe that the abuse by her Uncle Gordon had any significant impact and did not believe that the abuse by Ivan impacted her, in comparison with the later abuse, because Ivan died in 1982.

The appellant's contention that the primary judge failed to consider these matters should be rejected. The primary judge referred to the appellant's "very clear memory of the events in question", which extended to her recollection of what she was wearing at the time of the alleged assaults, and (correctly) observed that Dr Schelle's evidence was that he should not read too much "one way or another" into the fact that the appellant's memories of the abuse were "vivid". The primary judge also referred to the joint report of Dr Schelle and Dr Murphy (the psychiatrist instructed by the respondent at trial) which stated that the appellant suffered significant damage to her mental health and problems of social adjustment as a result of sexual abuse she suffered as a child, from which she had never fully recovered. The primary judge clearly also had regard to the clinical records of Ms Bray, albeit that (as he said) he only referred in his reasons to those aspects of the records that were the subject of submissions, and these made reference to and relied upon the appellant's account of her mental health symptoms over time.

In these circumstances the primary judge did not err in not separately referring in his reasons to the appellant's own account of these matters. It is in any event readily explicable that the primary judge might not refer to the matters the appellant complains of. There is no objective evidence corroborating the appellant's account of the changes in her behaviour and the timing of those changes. The dangers of fallibility and malleability of memory apply to such evidence. Further, whilst Pamela Skinner said that the appellant was a bright kid "but started to struggle in some way at school with her speech" and started to stutter, she did not identify when these things happened. Janet Skinner described the appellant as a "smiley little girl with ruby red hair. She was charming and talkative" and did not suggest this changed during her childhood.

In addition to this, despite the appellant's evidence to the contrary, changes in the appellant's behaviour in the period after the alleged abuse could have been referable to the abuse from either or both of her uncles. As recorded by the primary judge at J[140], in the joint report of Drs Shelle and Murphy the psychiatrists said:

We identified several traumas, any of which would have caused significant damage to a young child. This included the abuse by an uncle, the abuse by a different (paternal) uncle, and the abuse by [the respondent].

As Dr Schelle agreed in oral evidence, her report took into account the appellant's subjective belief and is thus not objective evidence corroborating the appellant's account. Indeed, as senior counsel for the appellant accepted on appeal, the expert evidence was prepared on the predicate that the appellant's account was accepted. Further, as the primary judge recorded at J[144], Dr Schelle accepted that "in the context of a medico-legal appointment concerning a court case against the [respondent], it was only to be expected that the [appellant] would, when explaining her symptoms for that purpose, emphasise (without ... in any way suggesting this would have happened dishonestly or deliberately) the events concerning the [respondent]". Logically, that expectation would apply also to the appellant's evidence that her post-abuse conduct was referable to the abuse she alleged against the respondent as opposed to the abuse by either of her uncles. In these circumstances, changes in the appellant's behaviour in the period after the alleged abuse by the respondent did not provide a reliable basis upon which to find that her account of the abuse should be accepted.

To the extent that the appellant contends that her reasons for consulting Ms Bray and her commencement of these proceedings provided objective support for the allegations of abuse against the respondent, that contention should be rejected. The appellant said that she consulted Ms Bray in 2020 because she was concerned about the vulnerability of her granddaughter. This is also identified as the "catalyst" in Ms Bray's clinical records. Objectively, given the abuse of the appellant by her uncles, that does not support her claim against the respondent. In any event this evidence reflects nothing more than the appellant's own subjective state of mind in 2020. Similarly, to the extent that Ms Bray's clinical records indicate that on 29 March 2021 the appellant expressed a strong feeling of relief at moving out of what had been a family home which was a "trigger of abuse memories", that references the appellant's subjective state of mind in 2021.

It follows that I would reject ground 4.

### **Janet Skinner's evidence**

In ground 5 the appellant contends that the primary judge erred in failing to consider Janet Skinner's evidence as to the respondent's presence at Aunt Sadie and Uncle Will's house and as to the respondent's presence at Lot 23. The impugned finding of the primary judge in this regard is set out at [60] above.

As to the respondent's presence at Aunt Sadie and Uncle Will's house, the appellant contends that, on the basis of Janet Skinner's evidence, the primary judge should have found that the respondent was regularly at Aunt Sadie and Uncle Will's house and played/interacted with other children there on a regular basis. One difficulty with this submission is that Janet Skinner's evidence does not support that finding. Whilst she does say that the respondent was often at that house when she went there, and that he seemed to "hang around us kids", and separately says that while visiting "we" would play board games and watch television, she adds, "Nothing very exciting, just spending time playing with girls". As is clear, she does not suggest that the respondent played or watched television with them and she only gives evidence of the respondent interacting with her (not the appellant). Even that was only "on more than one" occasion, and these occasions are unspecified and undated. In any event, the primary judge clearly considered Janet Skinner's evidence, weighing it against the body of evidence that, as a young boy and teenager, the respondent spent more time with adults than with other children: J[85]. The weight to be attached to Janet Skinner's evidence was a matter for his Honour.

The appellant also contends that, on the basis of Janet Skinner's evidence, the primary judge ought to have found that the respondent was driving the tractor and carrying out maintenance work at Lot 23 on at least two occasions. There was, however, no error in the primary judge making no reference to this evidence. The evidence was not specific to any particular time period and the respondent accepted that on occasion he assisted his father in tractor work at Lot 23.

It follows that I would reject ground 5.

### **Pamela Skinner's evidence**

In ground 6 the appellant contends that the primary judge erred in "dismissing the evidence of Pamela Skinner because it did not amount to incontrovertible or contemporaneous evidence". As already observed, this mischaracterises the primary judge's findings. Moreover, in reliance upon Pamela Skinner's evidence, the primary judge found that the appellant said something to her that reflected badly on the respondent at the time and that this was relevant to whether he did what the appellant alleged.

The appellant also contends that the primary judge should have found that Pamela Skinner's evidence was corroborative of the appellant's allegations of sexual abuse. Again, this contention should be rejected. The primary judge's approach to Pamela Skinner's evidence turned very much upon the discrepancies between the evidence of the appellant and that of Pamela Skinner as to what the appellant told Pamela Skinner and in what circumstances. I have set out their respective accounts at [40]-[41] above. Whilst the appellant says she told Pamela Skinner about the abuse by Ivan, and indeed it was the discussion about Ivan that led to her telling Pamela Skinner about the abuse by the respondent, Pamela Skinner said that the appellant never told her that she had been abused by one of her uncles. Moreover, Pamela Skinner says that the appellant told her that the respondent "follows" her, and that that was exactly what the appellant said, but that is no part of the appellant's account of the respondent's conduct. Having regard to these inconsistencies, the primary judge did not err in not characterising her evidence as providing an objectively

established fact, supporting the credibility of, or corroborating, the appellant's account, as described in *Fox v Percy* at [31].

Further, for the reasons I set out at [72] above, the primary judge's findings based upon Pamela Skinner's evidence (and it would follow also Pamela Skinner's evidence that she and the appellant would refer to the respondent in derogatory terms) do not suggest any error in his Honour's ultimate conclusion that the appellant's claim was not proved. It was a matter for the primary judge to weigh that evidence in the balance and his Honour did not err in the approach he took, or the conclusions he drew, from that evidence.

It follows that I would reject ground 6.

Did the primary judge make erroneous factual findings or give inadequate reasons for his findings? (NOA grounds 7-9)

### **The appellant's reasons for not telling her parents of the abuse**

In ground 7 the appellant contends that the primary judge erred in not accepting her evidence, set out most clearly in her first evidentiary statement (dated 22 August 2024), that:

I did not tell my parents [of the abuse] at the time because I was worried about what would happen. My family was very poor and we were living in the house owned by Cecil [the respondent's father] for very cheap rent.

Earlier in this statement the appellant had said that she did not tell anyone about the first incident of abuse as she "did not want to get in trouble again".

In her oral evidence in chief, the appellant described her parents' reaction to finding out about her abuse by Ivan (at [23] above) and was then asked about the alleged abuse by the respondent and said that she felt that she could not tell anyone about it:

Because of mum's reaction at me when my brother told her about the abuse with Ivan. I thought that I was going to get in trouble because I'd done something wrong.

It was only later in her oral evidence, after her senior counsel asked her a (leading) question about the concerns she had indicated in her statement as to what would happen "in terms of being able to live on the property if you reported the [respondent]", that she referred to her concerns about eviction (described at [38] above).

The primary judge's finding as to these matters is set out at [52] above. The appellant contends that this finding was erroneous as the matters referred to by the primary judge are not "within judicial knowledge nor commonsense". I do not agree. The primary judge's finding was, on its face, predicated in part upon his assessment of the appellant's evidence and also from his evaluation of the inherent probabilities having regard to his understanding of what might have been expected as a matter of logical probability of a child aged seven or eight years. The former is a matter for the primary judge, having heard and observed the appellant giving evidence and having regard to the evidence as a whole. The latter is something that the primary judge was

entitled to have regard to as part of his assessment of the reliability of the appellant's evidence. There is nothing "glaringly improbable" or "contrary to compelling inferences" about his Honour's finding.

The appellant also contends that the primary judge gave inadequate reasons for his conclusion as to the appellant's evidence going to why she did not tell her parents of the abuse. However, the primary judge explained the basis for his finding, in terms which I have found disclosed no error. Having regard to the principles I discuss at [83] above, there is no inadequacy in his Honour's reasons.

It follows that I would reject ground 7.

### **Ms Bray's clinical records**

The gravamen of ground 8 is that the primary judge should have found that the clinical records of Ms Bray were consistent with and supportive of the appellant's account of sexual assault by the respondent and that the inconsistencies between what was recorded in Ms Bray's records and the appellant's account in evidence before the primary judge were likely ascribable to erroneous recording by Ms Bray.

As noted at [46] above, in three separate places, twice in her clinical records and once in her letter to the appellant's general practitioner, Ms Bray makes references to abuse by or charges against a family member, or to the abuser being a family member, whereas in the appellant's evidence those matters are now attributed to, or said of, the respondent. On their face, these references in Ms Bray's clinical records suggest two possibilities. One is that Ms Bray erred in her note-taking and recollection when writing to the appellant's general practitioner or misunderstood what the appellant said. The other is that in 2020 to 2022 when the appellant saw Ms Bray and spoke of her childhood abuse for the first time in many decades there was some confusion and conflation in her mind as between the abuse she now alleges against the respondent and her abuse by a family member.

In his Honour's reasoning, the primary judge recognised both possibilities, and, as set out at [73] above, found that Ms Bray's clinical records gave him "pause" to think that perhaps the appellant's memory was "more jumbled and confused than she suggests". I see no error in this approach. It is precisely what is required of a judge weighing all of the evidence before him in the balance and seeking conscientiously to assess whether serious allegations made by one party against another in respect of events many years earlier have been established to the requisite standard.

Beyond this, it is also of some significance that in Ms Bray's clinical note of 14 July 2022 there is reference to the appellant having met with a barrister whose focus was "pursuing the abuser's estate for financial settlement". That suggests that, at least at that time, the appellant may have said something about bringing a claim against an abuser who had died, albeit that she said in her oral evidence that she did not use the word "estate" in her discussion with Ms Bray and that her uncles "didn't own nothing". Similarly, whilst charges would not be laid by police against a dead

perpetrator, references in Ms Bray's clinical records to the appellant having the option to attend further sessions if she needed support "when the charges are laid against her Uncle & the Court date is set" may well have reflected what the appellant told Ms Bray albeit that the appellant said in her evidence that she did not in fact go to the police and no charges arising out of the appellant's abuse were ever laid. It was for the primary judge to assess this evidence and, having done so, to consider what weight to give to the entries in Ms Bray's clinical records.

I would also reject the appellant's submission that the references in Ms Bray's records to her former home triggering memories of abuse suggest that her focus with Ms Bray was on abuse by the respondent. There is nothing in Ms Bray's records that connect that "trigger" specifically with the respondent. Moreover, again, this account by the appellant turned upon her subjective state of mind in 2020-2022. The same is true of Ms Bray's record dated 27 July 2021 referring to "the family member who had abused her as a child" making contact with the appellant's mother. Whilst that could not have been a reference to Ivan or Gordon, who by then had both died, it may have been what the appellant told Ms Bray.

Finally, the appellant's contention that no weight was placed on Ms Bray's records in the primary judge's overall assessment of the evidence ignores the primary judge's analysis at J[188], to which I have already referred.

It follows that I would reject ground 8.

### **The appellant's recall of the Want family gathering**

In ground 9 the appellant contends that the primary judge erred in finding that the appellant's recollection was not accurate in relation to the location and reason for the Want family gathering and in finding that this cast doubt upon the accuracy or reliability of the appellant's memory of the second incident of alleged assault by the respondent. The appellant accepted before the primary judge that her understanding of the reason for the Want family gathering was erroneous. She contends, however, that the primary judge should have given weight to the accuracy of the appellant's evidence as to the location of Aunt Sadie and Uncle Will's house, to the evidence of Janet Skinner and others, including the respondent and Julie Want, that the respondent was known to go to that house, and to the fact that the appellant's evidence that she frequently went to that house was corroborated by the evidence of Janet Skinner. She contends that inaccuracy as to the reason for the Want family gathering should not have been relied upon by the primary judge in assessing the reliability of the appellant's account of abuse given that this was something that the appellant was told by her mother, and it is in any event a peripheral detail which did not go to the essence of the appellant's account of abuse.

I would reject the appellant's contention that the primary judge erred in the findings he made as to the Want family gathering. The appellant's evidence as to this was detailed and specific. The inaccuracies identified by the primary judge necessarily undermined the reliability of her recollection of this instance of alleged abuse given that, as the primary judge observed at J[175], the plaintiff had a vivid memory of this event. Moreover, whilst the appellant's account of the

reason for the gathering came from her mother, implicit in the primary judge's finding is that it is unlikely that the appellant's mother would have given her an explanation for the gathering that did not reflect the facts.

The primary judge's finding, on the evidence, that there was no gathering as described by the appellant was clearly based upon his assessment of the evidence as a whole, including from the various members of the respondent's extended family who gave evidence. In this regard, the primary judge clearly had advantages over this Court and the appellant has not shown that the finding was glaringly improbable or contrary to compelling inferences. In any event, the primary judge was correct in his finding. As he said, the preponderance of evidence (which I have summarised above) was that family gatherings did not take place at Aunt Sadie and Uncle Will's house. There was also no evidence, other than that of the appellant, that the respondent ever watched television with the appellant and other children and Julie Want's oral evidence was that she did not think that would have happened. Trevor Want's evidence was that he never saw the respondent mix with children rather than adults, including at the infrequent Want family gatherings that did occur, and on the appellant's account, he was present at the time of the alleged second incident of abuse.

It follows that I would reject ground 9.

Should the primary judge have made an adverse credit finding against the respondent? (NOA grounds 10-11)

Grounds 10 and 11 relate to the primary judge's finding, at [56] above, that there came a point in the respondent's oral evidence where he deliberately sought to create a misleading impression. The appellant contends that the primary judge erred in finding that this was part of a process that was not deliberate, gave inadequate reasons for this finding (ground 10) and should have found that the respondent deliberately sought to discredit the appellant and that this displayed a consciousness of guilt (ground 11).

At the outset it should be observed that, contrary to the premise of ground 11, the primary judge did not find that the respondent had deliberately given false or misleading evidence as to never having driven a tractor on Lot 23, that a child would never ride on a tractor whilst he was operating it, the address of Lot 23, or as to when the appellant commenced paying rent at Lot 23. Ground 11 thus rests on an unsustainable, and unpromising, premise.

Grounds 10 and 11 in any event require a careful analysis of both the evidence of the respondent and the context in which that evidence was given.

The starting point is the appellant's statement dated 22 August 2024. There she described the first instance of abuse as occurring when the respondent was on the tractor riding around on the respondent's parents' property, which she said was not unusual. She described her father, the respondent and her being present and no mention was made of the respondent's father being present. In the respondent's affidavit dated 10 October 2024 (which I will call his first affidavit), he said that tractor work at Lot 23 was infrequent and was done by his father although there was

some ambiguity as to whether this was also the case after the barn on Lot 23 had burnt down (which was in 1969) following which hay had to be transported to Lot 23 using a tractor. He also explained that he did not have a driver's licence in 1971 and that the tractor would be driven by his father from where it was kept, at his home, to Lot 23. Whilst he did not in this first affidavit describe being present at Lot 23, nor did he deny ever going there or say in terms that it was not possible that he could have been driving a tractor on Lot 23.

In another affidavit, also dated 10 October 2024 (which I will call his second affidavit, and which this Court was told was prepared for the purpose of the stay application), the respondent denied that "it was common for me to drive that tractor" on Lot 23 and said that the only time that he would be on Lot 23 was if his father required his assistance, in which case his father would drive the tractor there and back, and the respondent would be at Lot 23 for the "task at hand", which I would infer included driving the tractor that his father had driven to Lot 23. When these two affidavits are read together, it is apparent that the respondent's affidavit evidence was that on occasion he was at Lot 23, and sometimes but not commonly driving the tractor, but only in the company of his father.

In cross-examination the respondent was taken to his second affidavit and he agreed that it was correct and that at times his father needed him to go to Lot 23 and help him. He was also taken to his first affidavit, and (correctly) denied that it said that he never went to Lot 23. He said that he may have been on the back of the tractor if his father was using it to throw the hay out, and that he may have been there if his father asked for his help. He also said that he would go to Lot 23 "[f]rom time to time, if they needed help".

The respondent was then taken by the cross-examiner (again) to his first affidavit and the reference to the tractor work at Lot 23 being done by his father and he said "[w]ell, that could mean I wasn't there". It was put to him that that was "exactly what the meaning was intended to portray", namely that he was never at Lot 23 during 1971 and 1972 and the respondent said that he would agree with that. The primary judge then suggested to the respondent that his second affidavit was inconsistent with the proposition that he was never involved in tractor work at Lot 23 and the respondent agreed that that "would be a fair comment". The following exchange then occurred:

Q. So, what I'm putting to you is this, that was deliberately done in the affidavit at 1, and this is at 153 --

A. The statement?

**HIS HONOUR:** That was --

Q. --of the statement, your statement was deliberately done to say you are not on the property involved in your tractor, which is how the assault took place, because you were never there. Isn't that right?

A. It could well be.

Q. And what I putting to you that that was a deliberately false and misleading statement. Do you agree?

A. No, I don't. Because I don't know if I ever actually - actually said that I was ever on the property - I helped Dad, I helped Dad with tractor work. I never said I wasn't there, then the plaintiff said everything thinking I was there.

## HIS HONOUR

Q. Just trying to understand this, it seems to me pretty clear from your affidavit at 69 that there were occasions in 1971-72 when your father, the tractor and you were all there doing some tractor work.

A. No, I agree with that statement.

Q. Paragraph 11 at 153, I think you've agreed, tends to suggest the opposite, that is that you were never there when tractor work was happening. Now, it may not say that in terms, but I think it's been put to you that it does tend to create that impression.

A. No, I agree, that does tend to create that impression. I agree with you on that.

Q: And the next thing that's being put to you is Mr Dooley saying that when you wrote paragraph 11 in your [first] statement, you deliberately sought to create that impression, knowing that it was false.

A. No, I didn't do it. No, I haven't misled anybody in any way. An unintentional mistake.

Q. There's a pretty good answer to the plaintiff's case for you to say, "Well, I was never there doing any work with the tractor." So it's actually right at the heart of what the case is about, isn't it, or at least this part. Anyway, you say unintentional mistake.

A. Mm.

The primary judge characterised the respondent as having maintained in his oral evidence that it was not possible for him to have been at Lot 23 with the tractor, having conceded that he had sought to create what he agreed was a misleading impression in his evidence and as having deliberately done so. I do not agree with any of these characterisations. When the respondent's evidence at [120]-[123] above is considered as a whole, it is apparent that the respondent denied that he had deliberately sought to create the impression that he was never at Lot 23 in 1971-1972, although he could see how his first affidavit gave that impression. However, as he repeatedly said, his second affidavit, affirmed on the same day as his first, made it very clear that in 1971-1972 he was at Lot 23 on occasion and by inference that included being involved in or helping with tractor work.

In these circumstances, it is not apparent why the primary judge found that, in his oral evidence, "[the respondent] was maintaining evidence to the effect that it was not possible for him to be at the property with the tractor" or that there came a point in his oral evidence when the

respondent “deliberately sought to create a misleading impression”. It is also not apparent, given the exchange at [123] above, why the primary judge said that the respondent had conceded that he had sought to create a misleading impression in “this evidence”. The respondent in fact clearly denied this in the exchange at [123] above.

Having regard to the matters set out above, I would reject the appellant’s contention that the primary judge erred in finding that the respondent’s evidence was not evidence of consciousness of guilt or a basis upon which to doubt his overall credibility. Moreover, whilst I have found that the primary judge characterised the respondent’s evidence in a way that was unduly unfavourable to the respondent, even on his Honour’s characterisation, there was no error in finding that the respondent’s evidence should not, for the reasons his Honour gave (as set out at [55]-[56] above), be held against him in the manner contended for by the appellant. The significance to attach to such matters was very much a matter for his Honour.

It follows that I would reject grounds 10 and 11.

## Conclusion

In the circumstances set out above the appeal should be dismissed. Costs should follow the event.

The orders I propose are:

Appeal dismissed.

Appellant to pay the respondent’s costs.

GRIFFITHS AJA: I agree with Stern JA.

Amendments

25 February 2026

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[117] amended to change “...that this was not part of a process...” to “...that this was part of a process...”.

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