



## District Court New South Wales

Case Name: **Coat v Aves (Pseudonyms)**

Medium Neutral Citation: [2023] NSWDC 560

Hearing Dates: 18, 19, 20, 21, 22, 26, 27, 28 September, 11 October, 14 & 27 November 2023

Date of Orders: 14 December 2023

Date of Decision: 14 December 2023

Jurisdiction: Civil

Before: Acting Judge Levy SC

Decision

1. Verdict and judgment for the defendant;
2. The plaintiff is to pay the defendant's costs on the ordinary basis unless a party can show an entitlement to some other costs order;
3. The exhibits may be returned;
4. The non-publication order made on 18 September 2023 is to remain in place until the further order of the Court;
5. Liberty to apply for further or other orders if required.

Catchwords: **TORTS** – intentional torts – claim by plaintiff of historical child sexual assault by defendant stepfather – denial by defendant – consideration of conflicting evidence – verdict and judgment for the defendant

Legislation Cited: Crimes Act 1900 (NSW), s 61M(2)  
Defamation Act 2005 (NSW), s 12A  
Evidence Act 1995 (NSW), s 55, s 56, s 60, s 64, s 66A, s 108(3)(b), s 128, s 140  
Family Law Act 1975 (Cwth), s 121  
UCPR r 31.27(1)(c); Sch 7, cl 5(c)

Cases Cited: Angel v Hawkesbury Council [2008] NSWCA 130  
Blacktown City Council v Hocking [2008] NSWCA 144

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34  
Brodie v Singleton Shire Council; Ghantous v Hawkesbury Shire Council (2001) CLR 512; [2001] HCA 29  
Container Terminals Australia Ltd v Huseyin [2008] NSWCA 320  
Dare v Pulham (1982) 1948 CLR 658; [1982] HCA 70  
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588; [2011] HCA 21  
Goode v Angland [2017] NSWCA 311  
Hasler v Singtel Optus Pty Ltd & Ors [2014] NSWCA 266  
Helton v Allen (1940) 63 CLR 691; [1940] HCA 20;  
HG v The Queen (1999) 197 CLR 414; [1999] HCA 2  
Larson v Commissioner of Police [2004] NSWCA 126  
Longman v R (1989) 168 CLR 79; [1989] HCA 60  
M v M (1988) 166 CLR 69; [1988] HCA 68  
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305  
Mason v Demasi [2009] NSWCA 227  
Naxakis v Western General Hospital (1999) 197 CLR 269; [1999] HCA 22  
Paric v John Holland Constructions Pty Ltd [1985] HCA 58  
Pell v The Queen [2020] HCA 12  
R v XY (2010) 79 NSWLR 629; [2010] NSWCA 181  
State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq) & Ors [1999] HCA 3  
Strinic v Singh [2009] NSWCA 15  
The Queen v Bauer (a pseudonym) [2018] HCA 40  
Twynam Agricultural Group Pty Ltd v Williams [2012] NSWCA 326  
Warren v Gittoes [2009] NSWCA 24  
Watson v Foxman [1995] 49 NSWLR 315  
Yarrabee Coal Company Pty Ltd & Anor v Lujans [2009] NSWCA 85

Texts cited: *Random House Dictionary of Popular Proverbs and Sayings* (1996)

Category: Principal judgment

Parties: Ms Coat (a pseudonym) (Plaintiff)  
Mr Aves (a pseudonym) (Defendant)

Representation:

Counsel:

Ms C Akthar (Plaintiff)  
Mr RJM Foord with Mr A Schonell (Defendant)

Solicitors:

Alidenes & Co Pty Ltd (Plaintiff)  
Sommerville Laundry Lomax Solicitors (Defendant)

File Number:

2021/327337

Publication Restriction:

A non-publication order applies to the names of the parties and non-professional witnesses – see paragraphs [45] to [47] of these reasons for the terms of the order.

# JUDGMENT

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# JUDGMENT

## PART A – INTRODUCTION AND OVERVIEW

- 1 The plaintiff claims substantial common law damages, including aggravated and exemplary damages, for psychological injury due to an alleged historical childhood sexual assault by her stepfather. The claim is contested by the defendant. The claim requires the consideration of much detail.

### Structure of these reasons

- 2 These reasons are structured as follows:

- Part A - INTRODUCTION AND OVERVIEW**  
(See paragraphs [4] to [276] above).
- Part B - RELEVANT COMMUNICATIONS**  
(See paragraphs [277] to [380] below).
- Part C - FAMILY LAW AND PRESENT PROCEEDINGS**  
(See paragraphs [381] to [393] below).
- Part D - MEDICAL / ALLIED EVIDENCE REVIEW**  
(See paragraphs [394] to [437] below).
- Part E - ORAL EVIDENCE REVIEW**  
(See paragraphs [438] to [545] below).
- Part F - EXPERT EVIDENCE REVIEW**  
(See paragraphs [546] to [672] below).
- Part G - RELIABILITY FINDINGS – MEDICAL / ALLIED EVIDENCE**  
(See paragraphs [673] to [861] below).
- Part H - CREDIT FINDINGS**  
(See paragraphs [862] to [975] below).
- Part I - FACT FINDINGS**  
(See paragraphs [976] to [1113] below).
- Part J - DAMAGES**  
(See paragraphs [1114] to [1116] below).
- Part K - DISPOSITION, COSTS, ORDERS**  
(See paragraph [1117] below).

3 Following my review of the detail of the factual expert evidence, for the benefit of the time poor reader, my findings concerning my assessment of the reliability of the expert testimony appear in **PART G** commencing at paragraph [673] below. My findings on credit and the reliability of the factual testimony appear in **PART H** commencing at paragraph [862] below, and my factual findings on the central issues calling for decision appear in **PART I** below, commencing at paragraph [976] below. For the reasons that follow, the result of that consideration is that I have found the plaintiff has not succeeded in establishing her claim against the defendant.

### Overview

4 This factually complicated case emerges from the detritus of the 13-year former *de facto* relationship between the plaintiff's mother and the defendant. That relationship failed in the stressful time of COVID.

5 The fall-out from that failed relationship has raised a serious but vehemently contested single allegation of historical sexual abuse of the plaintiff when she was a minor. The alleged circumstances warrant a close consideration of the details disclosed in the evidence. I will return to the theme of complexity at the conclusion of these overview remarks.

6 Having reviewed the evidence as a whole one cannot but empathise with the differing subjective perspectives held by all persons impacted by this case, whether they be principal actors, or the witnesses who have been drawn into involvement in the events which have led to these proceedings.

7 The plaintiff is now aged 25 years. She has brought this civil action claiming damages for what has been variously described as assault and battery involving alleged historical sexual abuse consisting of a single incident of alleged inappropriate touching.

8 On 4 May 2022, the plaintiff supplied particulars of the timing of the alleged sexual abuse. It was claimed to have occurred some time after 2009 and before

May 2011: Exhibit "47", p 1, paragraph 1. That relatively vague wide range was narrowed at the hearing.

- 9 Ultimately, the plaintiff alleged that, in early 2011, when aged 12 years and almost 13 years, in contravention of s 61M(2) of the *Crimes Act* 1900 (NSW), she was subjected to sexual abuse comprising an aggravated incident involving unlawful sexual touching by the defendant, her stepfather, who was then aged 59 years, and is now aged 71 years. An offence against s 61M(2) of that Act is a matter of considerable gravity which carries a maximum term of imprisonment of 10 years.
- 10 In essence, the plaintiff asserts that the alleged sexual abuse occurred at night, after she had entered the bedroom which the defendant shared with her mother. She said she went to their bedroom to seek comfort from her mother. At different times the plaintiff has given various reasons for doing so on that claimed occasion.
- 11 One explanation given by the plaintiff was that she was feeling sick or nauseated. Another explanation was she had a "tummy ache" or stomach pain. Another explanation was that she sought comfort after she had woken from a nightmare. Those differing explanations will be examined in more detail at a later point in these reasons. The plaintiff asserted that when she approached the bed the defendant beckoned her to his side with the admonishment that she should not wake her mother, a light sleeper, who was asleep in the bed next to him.
- 12 The plaintiff asserted that in those events, she entered the defendant's side of the bed, and after a short time, he began touching her breasts aggressively under her T-shirt (apparently whilst she was either supine or on her side). She asserts that sequentially, he then touched her on her stomach, and then between her legs, before flipping her over onto her stomach. She asserted that he somehow then moved her up onto her knees, placed a knee between her legs from behind, and then, by his ensuing movements, he simulated sexual

penetration from behind, at which time she felt his penis and pelvis in contact with her body.

- 13 The plaintiff asserted that before she was flipped onto her stomach, she was feeling scared, alarmed, and confused, and was hoping that if she stayed very still and quiet, the defendant might stop that activity. She said she was also worried about waking her mother, but eventually, she did so by crying out, whereupon the defendant allegedly stopped the described activity.
- 14 The plaintiff asserted that those described events took place over the course of some 15 to 20 minutes, whilst her mother, a known light sleeper, was asleep, close by, in the same bed, apparently undisturbed by any commotion that the described events may have caused, that is, until she cried out to wake her mother, as she claimed.
- 15 The plaintiff claimed those events have changed her life in relation to how she relates to people, how she functions, and how she sees the world. She claims those events have affected her ability to concentrate and study, and she feels that as a result, her life has been destroyed.
- 16 Those claims stand to be reviewed against the compendious objective documentary evidence comprising the plaintiff's medical history, her school records, and the content of a series of relevant communications, all of which require close consideration. Those claims must also be read in conjunction with the oral evidence of a forensic psychiatrist who stated that the plaintiff had not be highly traumatised: T215.49.
- 17 The plaintiff claimed a direct causal link between her described experiences of anxiety, panic attacks, difficulty sleeping, depression, suicidality, and triggering symptoms, including post-traumatic stress disorder (PTSD). She attributed those problems to the alleged sexual abuse which she claims. The expert evidence from a forensic psychiatrist whom the plaintiff relies upon to support her claim requires close examination because a considerable bulk of the factual

evidence tendered at the trial had not been considered beforehand by that expert.

- 18 The defendant has denied that the alleged sexual abuse had ever occurred. He argued that the plaintiff's allegations are false, improbable, and are irreconcilable with objective facts. The defendant points to inconsistencies in the plaintiff's case, and argues that these necessarily represent obstacles to the success of the case the plaintiff seeks to make against him.
- 19 The defendant also contested the plaintiff's claims for damages, and raised questions of implausibility, exaggeration, and problems concerning causation of alleged harm. The defendant relies on some inconsistencies and oversimplistic factual assumptions inherent in the case the plaintiff seeks to make to argue that those matters necessarily cast significant doubt upon the veracity of the plaintiff's claims.
- 20 At this point it is relevant to bear in mind the remarks of the High Court regarding the need for the exercise of caution before accepting claims alleging sexual abuse, where such claims are "*often easy to make, but difficult to refute*": *M v M* (1988) 166 CLR 69, at pp 76-77; [1988] HCA 68.
- 21 Similar remarks appear in the subsequent decision of *Longman v R* (1989) 168 CLR 79, at p 92; [1989] HCA 60, where the observation was made that human experience shows complainants in sexual assault cases sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute, where such stories may be fabricated for all sorts of reasons, and in some cases, for no reason at all.
- 22 In *Longman v R* (*ibid*), at pp 107-108, attention was drawn to the fallibility of human memory, as follows:

"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), at pp 269-270."

- 23 Accordingly, in an evaluation of the evidence to assess the veracity of the factual basis for this claim due recognition must be given to the ordinary human experience that memory can be fallible, and may degrade or change over the passage of time, whereby "*the processes of memory are overlaid, often subconsciously, by perceptions ... or self-interest*", resulting in plausible subconscious construction: *Watson v Foxman* [1995] 49 NSWLR 315, at 319, citing *Helton v Allen* (1940) 63 CLR 691; [1940] HCA 20.
- 24 In support of his resistance of the plaintiff's claim, the defendant draws upon the undisputed content of an extensive series of written communications sent to him in the context of the breakdown in his 13-year *de facto* relationship with the plaintiff's mother to show a different perspective for viewing the plaintiff's claim.
- 25 The defendant relies upon that material to argue that the plaintiff's claim represents the end point of an unsuccessful dishonest attempt to blackmail him into transacting private monetary settlements in favour of both the plaintiff's mother and the plaintiff, to avoid triggering a police investigation, and to avoid the threat of adverse media publicity that might appear on the front page of a newspaper of nationwide circulation. This raises the spectre of a possible motive of secondary gain which was discounted by the plaintiff's forensic psychiatrist following her examination of the plaintiff.
- 26 To state the obvious, when a court exercising civil jurisdiction is called upon to make positive findings on serious matters of contested fact such as those alleged by the plaintiff in this case, as always, a dispassionate consideration of the evidence is required.
- 27 Before a court can proceed to make adverse findings on matters of gravity of the kind raised in this case, it must be persuaded of the truth of the facts alleged according to a state of reasonable satisfaction on the balance of probabilities,

to the effect that it is more likely than not the events alleged actually occurred: *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34, pp 358-363; s 140 of the *Evidence Act 1995* (NSW).

28 In applying the principle in *Briginshaw (ibid)*, actual persuasion as to the existence of a fact in issue in contested litigation cannot be found as a result of a mere mechanical comparison of probabilities independent of the existence of a belief in the reality of a particular disputed occurrence: *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691, at p 712. Engagement with the detail is necessarily required.

29 Accordingly, in this case, to reach reasoned conclusions on the balance of probabilities to the requisite standard to determine which account of the disputed events is more likely than not to be true, the fundamentally conflicting factual perspectives revealed in the detail of the evidence in this case must be resolved by necessarily robust credit findings concerning the key aspects of the evidence of the plaintiff, her mother, and the defendant.

30 The defendant's final submissions argued that the plaintiff has not established her claim against him to the required level of the civil standard of proof that applies to serious allegations of criminality amounting to child molestation, as is alleged in this case.

31 In making that submission, the defendant cites as apt, the dissenting remarks by Weinberg JA, in *Pell v The Queen* [2019] VSCA 186, whose decision formed the cornerstone of a successful appeal to the High Court: *Pell v The Queen* [2020] HCA 12. In his dissenting decision, at [1101], Weinberg JA stated:

“In the present case, as with so many others involving historical sexual offending, the devil is in the detail.”

32 The foregoing axiomatic expression suggests that on a superficial analysis, matters which may appear to be simple, on a more thorough analysis, may be seen to be more complex and problematic than was first thought: *Random House Dictionary of Popular Proverbs and Sayings* (1996).

- 33 The aptness of the defendant's submission as to the importance of examining the detail of the evidence arises because much detail has been brought to the fore to be considered in this case.
- 34 That detail must be worked through and rationalised before making findings on matters of credit and when making findings on key matters of disputed fact concerning first, the context in which the allegations of sexual abuse emerged, and secondly, whether the plaintiff has PTSD, and if so, can the cause of that condition be confidently identified on the evidence, and finally, did the alleged sexual abuse in fact occur.
- 35 The length of these reasons is commensurate with the breadth of that detail and the gravity of the allegations made by the plaintiff.
- 36 Having regard to the fundamental conflicting disparity of disputed fact and detail in this case, it is inevitable that the nature of the credit and factual findings that are necessarily required will, in various ways, have the potential to cut across the sensitivities and sensibilities of the parties and some of their witnesses.

### **Summary of outcome**

- 37 Following my review of the extensive detail within the evidence and the related review of the submissions of the parties I am not persuaded that the plaintiff has succeeded in discharging the onus of proving that the alleged sexual abuse occurred.
- 38 In essence, the plaintiff's first disclosure of the alleged abuse to a health care professional included a fundamental inconsistent element of inherent improbability as to her age, at around 8 years, when the alleged abuse was said to have occurred. Consequently, inherent improbability arises as the plaintiff's mother and the defendant were not in a relationship at that time. Their domestic relationship commenced when the plaintiff was aged 9 years. That fact alone necessarily precludes the finding that the plaintiff seeks.



- 39 When that issue was raised in the evidence, the clarification attributed to the plaintiff, and the inferences the plaintiff sought from that evidence, resulted in a more broadly imprecise range of alternative ages of between 8 and 12, or 13 years being suggested as to when the alleged abuse occurred. That revised range of ages still incorporates a contaminating element of inherent improbability.
- 40 Overarching those considerations, I have also found the circumstances described in the plaintiff's factual account of the way the alleged abuse occurred to be improbable for additional reasons that will be identified. In those circumstances, the plaintiff's claim has not succeeded. My detailed reasons for those conclusions now follow.

### **Complexity**

- 41 The plaintiff's mother has described the plaintiff as a complex person: T270.18 – T270.29. The plaintiff's treating tertiary medical specialist responsible for overseeing the management of the of one of her several congenital health problems, has stated that it is hard to overstate the seriousness and the complexity of the plaintiff's medical condition and her ongoing medical needs: Exhibit "42", p 28. Her condition makes her vulnerable to various types of serious life-threatening illnesses, including severe septic and respiratory illnesses: Exhibit "1", Vol 1, pp 66 – 131. The plaintiff's treating general practitioner has described her health as fragile: Exhibit 1, Vol 1, p 83.
- 42 The plaintiff holds the belief that she suffers from sexual abuse-related PTSD: T40.7 – T40.36; T41.15. None of her treating health care practitioners whose materials are in evidence have made a diagnosis of PTSD. Her treating psychologist has noted that the plaintiff's presenting clinical problems (in the context of unrelated grief over the death of her father), included nightmares, feelings of guilt, difficulty sleeping, nightmares, ruminating, and being paranoid: Exhibit "B".
- 43 The plaintiff's PTSD diagnosis was made by a medico-legal expert forensic psychiatrist who appears not to have had a copy of Exhibit "B" which operates

as something of a baseline for assessing the plaintiff's psychological status. In oral evidence, that expert acknowledged causation of PTSD was complex: T266.44. When that expert's opinions were tested against a number of factual matters of history that were raised in the evidence, she indicated that she would have liked to have discussed with the plaintiff a number of those matters, of which she was previously unaware. This raised questions on the aptness and the reliability of her opinions.

44 A consideration of the detail of the case and the issues calling for decision now follows.

### **Non-publication order**

45 The litigation pseudonyms *Coat v Aves* have been assigned to these proceedings consequent upon a non-publication order made at the commencement of the hearing on 18 September 2023. That order was made to avoid breaches of s 121 of the *Family Law Act 1975* (Cwth).

46 Except as appears in these reasons, that non-publication order prohibits the publication of the names of the parties, their witnesses, or any other information that may tend to identify them.

47 In view of the array of interpersonal connections identified in the evidence, which, if identifiably referenced in these reasons, could lead to inadvertent identification of affected persons, the above non-publication order extends to the identification of specific locations and professions, with the exception of an expert witness, whose identity would not tend to identify the parties.

### **Relationships**

48 The plaintiff is the former *de facto* stepdaughter of the defendant. The plaintiff's mother and the defendant were in a domestic *de facto* relationship between 2007 and 2020.

- 49 On 10 August 2020, that relationship ultimately foundered, and ended in acrimony. This resulted in family law proceedings concerning the division of property. The evidence reveals that the relationship had been heading that way for some time beforehand: T281.9 – T281.21.
- 50 That conclusion arises because, some time earlier, the plaintiff's mother had formed an attitude of ambivalence towards the defendant, meaning that the relationship had cooled. Three weeks before the plaintiff's mother finally decided to end her relationship with the defendant, on 1 July 2020, she left the family home for a period of about 10 days to gain some "space". In that time, the defendant also travelled to a rural location to give her some "space" whilst he attended to some mutual obligations regarding the preparation of a series of their tax returns.
- 51 In that time, the ultimate stumbling block upon which the relationship finally foundered was the plaintiff's disclosure to her mother, on or about 23 July 2020, that the defendant had allegedly sexually molested her.
- 52 Following some ensuing written demands addressed to the defendant by the plaintiff's mother regarding property and money issues after the termination of their relationship, the defendant felt compelled to pre-emptively commence property proceedings in the Family Court of Australia. Those written demands included a request that the plaintiff be compensated in respect of the alleged sexual abuse.
- 53 Two weeks after the finalisation of the property proceedings between the defendant and the plaintiff's mother in the Family Court, which did not provide for any compensation to be paid to the plaintiff, the plaintiff commenced the present proceedings claiming damages framed in tort against the defendant in respect of the claimed sexual abuse she has alleged.
- 54 In these reasons, to establish the appropriate context for the consideration required in this case, it is necessary to refer to some de-identified details concerning those Family Court proceedings. This has been enabled by a

facilitative order made by the Family Court on 16 March 2023, at the application of the defendant.

### **Anonymisation of *dramatis personae***

55 In conformity with the non-publication order referred to in paragraphs [45] and [47] in these reasons, the plaintiff, the plaintiff's mother, her sister, her former boyfriend, her godmother, her maternal uncle, her treating psychologist, her treating general practitioner, her treating specialists, and the defendant, will be referred to by those de-identified terms.

56 Non-party non-professional and other persons named in the evidence will be identified by an assigned letter of the alphabet in the series Witness A to Witness E in the case of witnesses who gave oral evidence. The term "*de-identified colleague*" will be used to describe a professional colleague of the plaintiff's mother and the defendant who is referred to in the evidence concerning relevant communications, but who was not called to give oral evidence.

57 In these reasons, to maintain the required degree of anonymity, it is not necessary to identify with particularity, the professions of the respective parties, their colleagues, and their non-professional witnesses, other than to say they are all intelligent, perceptive, articulate, and accomplished people, who are adept at choosing their words carefully.

### **Claim and Defence**

58 The plaintiff claims compensatory, aggravated and exemplary damages in respect of her claim of alleged historical sexual assault. There are some date and year ambiguities in the various descriptions when the alleged assault occurred. Ultimately, the plaintiff's case was based upon the assumption that the alleged abuse occurred in early 2011, when she was aged 12 years (and almost 13 years), whereas beforehand, significantly, she had indicated the alleged events occurred when she was aged around 8 years.

- 59 The plaintiff claims that in aggravated circumstances, the defendant unlawfully sexually touched her in the sense of a battery within the meaning of s 61M(2) of the *Crimes Act* 1900 (NSW), as described in paragraphs [10] to [14] above.
- 60 When the plaintiff was aged 21 years, she made a sequence of 5 disclosures concerning that allegation. Those disclosures were spaced over the course of some months, after a lapse of a little over 8 years following the alleged sexual abuse. The plaintiff relies on those disclosures as evidence of consistency of complaint.
- 61 The plaintiff first made a verbal disclosure of the alleged event to her then boyfriend. With his encouragement, she then made a series of further verbal disclosures to her treating psychologist, then to her sister, then to her godmother, and then to her mother. The plaintiff's mother then took some time over the course of some 17 ensuing days to take advice and to strategize as to what steps she would take as a result of that disclosure. In that time she maintained, to use her word, a "*pretence*" to the defendant, that all was well between them.
- 62 There is a dispute as to how the mother's ultimate process of strategizing should be characterised. The plaintiff claims that she and her mother sought to deal with the matter alleged against the defendant privately, to try and obtain a factual acknowledgment from the defendant, and to reach some financial settlements with both the plaintiff's mother and the plaintiff, rather than involve a police investigation and what might then follow.
- 63 The defendant maintains that the plaintiff has made a false claim of sexual abuse against him, and that she has been aided by her mother in doing so. He denies the entirety of the claimed occurrence.
- 64 The defendant characterises the plaintiff's claim, and the manner in which it emerged, as being a wrongful attempt to blackmail him in circumstances which, using the language of conspiracy adopted by counsel, amounted to a joint

criminal enterprise, formerly known as unlawful actions taken in concert according to a common purpose: T151.20 – T151.35; T602.40 – T603.4.

### **Historical time frames**

- 65 As already observed, there were varying accounts given as to the timing of alleged sexual assault. The plaintiff conceded that she did not have a clear recollection of the date on which the alleged incident occurred: T182.26. The first documentary record of the plaintiff's allegations referred to the alleged abuse as having occurred when she was aged around 8 years, which raised a question of inherent improbability.
- 66 At the commencement of the hearing, in the opening address on behalf of the plaintiff, consistent with the particulars of claim, the time frame for the occurrence of the alleged sexual touching was identified in very wide parameters, namely between 2009 and early 2011, at a time when the plaintiff would have been aged between 11 and 12 years: T3.3. Ultimately, the alleged abuse was claimed to have occurred in early 2011, when the plaintiff was aged 12 years. This was a few months before her thirteenth birthday.
- 67 The plaintiff's first verbal disclosure of the alleged sexual touching was made to her then boyfriend, in mid-2019, when she was aged 21 years. The medical evidence shows that at around that time she was having some significant health issues, including respiratory and gynaecological problems.
- 68 He encouraged her to see a clinical psychologist, and to also make a disclosure to her mother. In light of his prior overseas legal education in a common law country, he also suggested that she escalate the matter, and report it in order to take action, either of a criminal or a civil nature: T165.34.
- 69 The objective evidence shows that the plaintiff's second verbal disclosure of the alleged sexual touching was on 1 November 2019. This took place during her fourth clinical consultation with the psychologist to whom she had been referred for treatment of the significant psychological problems she was experiencing at

that time. The psychologist wrote some brief clinical notes as an *aide memoire* to record her impressions of that consultation: Exhibit “B”, p 1.

- 70 At that time the referral of the plaintiff to the psychologist was to address some specifically documented psychological problems which her referring general practitioner understood to have been due to compelling factors that did not involve alleged sexual abuse. He identified those other factors as comprising, panic attacks, daytime stress, crying, fighting with her mother and her sister, often waking sad, and thinking about her late father who had died nearly 3 years beforehand.
- 71 That referral made no mention of alleged unlawful sexual touching or of a need for the plaintiff to have treatment for psychological problems linked to the alleged sexual touching. At the time of that referral the general practitioner was completely unaware of that allegation. In evidence, the plaintiff said her purpose in seeing the psychologist was to discuss the alleged sexual abuse.
- 72 The unchallenged objective record comprising the psychologist’s report of that disclosure at the fourth consultation, suggests that the plaintiff said the alleged event occurred when she was aged around 8 years, which would necessarily have pre-dated the commencement of the relationship between the plaintiff’s mother and the defendant. That recorded account suggests an element of inherent implausibility in the plaintiff’s first recorded version, and this must be considered and taken into account when assessing the veracity of her claim.
- 73 The incongruity of the plaintiff’s discrepant accounts as to the timing of the alleged abuse, namely, at around 8 years, then 8 to 12 or 13 years, requires a reasoned attempt at factual reconciliation despite the absence of any contemporaneous evidence.
- 74 The alleged offending was never brought to the attention of police for investigation: Exhibit “1”, Vol 2, pp 457 – 461. That is so despite the plaintiff having been advised to do so, where it must have been clearly understood by

all persons in the plaintiff's camp, that what was being alleged by the plaintiff amounted to a serious allegation concerning an indictable crime.

75 The defendant was first made aware of the allegation of the alleged sexual abuse in an email that was sent to him by the plaintiff's mother on 10 August 2020, whilst they were separated. That allegation emerged some 17 days after the plaintiff made her disclosure of the alleged abuse to her mother.

76 That disclosure occurred during the breakdown of the relationship between the plaintiff's mother and defendant, albeit that the defendant was not aware of the impending termination of his relationship with the plaintiff's mother in the lead-up to that email.

77 The timing of the termination of the relationship was decided by the plaintiff's mother. It occurred in the course of a series of email exchanges and text messages which will be examined in a detailed chronological review of the documentary evidence comprising the communications involving the respective actors in this case in **PART B** of these reasons.

78 From the outset, when the defendant was made aware of the allegation that he had sexually touched the plaintiff, he has consistently denied that claim. He adamantly maintains that the events claimed by the plaintiff and her mother never occurred.

79 In these proceedings, the defendant has questioned the motive behind the plaintiff's allegation against him. He suggested the nature and the content of relevant contemporaneous emails and messages that were sent to him from the plaintiff's side indicated a sophisticated and concerted attempt to try to blackmail him into private monetary settlements with the plaintiff's mother and the plaintiff.

80 The apparent inducement for that course was the suggested avoidance of police involvement and the avoidance of adverse media publicity in circumstances where the plaintiff's mother, if not others acting on her behalf,



appear to have had sufficient access to media connections to seek media publicity, which if it occurred, was likely to cause considerable reputational harm to the defendant.

81 The suggested motive for blackmail was the mother's straightened financial circumstances and her need to obtain funds towards meeting the significant ongoing medical treatment costs associated with managing the chronic health issues affecting the plaintiff. The evidence reveals that the plaintiff's mother was in somewhat parlous financial circumstances.

82 In considering the defendant's submission of attempted blackmail it is noteworthy that in the email the plaintiff's mother sent to the defendant on 23 August 2020 (Exhibit "34"), she demanded that he transfer his interest in the properties they held both in Sydney and overseas, to her, in addition she made a demand for the plaintiff to be given financial compensation in respect of the alleged sexual abuse.

83 The issues thrown up by those dynamics will be the subject of a more detailed consideration at later points in these reasons in relation to the required credit and factual findings in **PART H** and **PART I**.

### **Central Issues**

84 A central issue in this case is whether the sexual touching alleged by the plaintiff had actually occurred, or whether the plaintiff has, for whatever reason, either deliberately made a false claim, or alternatively, whether she has falsely convinced herself that the alleged event occurred, when in reality, it had not.

85 The determination of that issue is dependent upon an assessment of the credibility and the reliability of the testimony of the respective parties and the witnesses who gave oral evidence.

86 Another central issue in this case involves assessing the reliability of the reasons that underpin the causation opinions expressed by the forensic psychiatrist who gave evidence in support of the plaintiff's case concerning her

claim of having PTSD due to the defendant's alleged conduct: UCPR r 31.27(1)(c); Sch 7, cl 5(c); *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21.

- 87 The contextual significance of that issue is that none of the plaintiff's treating health care practitioners had beforehand identified or made that diagnosis.
- 88 In undertaking those determinations, for context, it is necessary to set out the detail of the series of the plaintiff's sequential verbal disclosures of the alleged sexual assault.
- 89 In approaching that task it is also necessary to set out an overview of the array of evidence that was adduced in the course of a lengthy hearing followed by written submissions and supplementary written submissions.
- 90 At this point I take the opportunity to record that counsel and their instructing solicitors on both side sides of the record are to be commended for their efficient approach to dealing with the evidence and the difficult issues raised in these proceedings.

### **Overview of evidence array**

- 91 Both the plaintiff and the defendant gave oral evidence in the proceedings.
- 92 In the plaintiff's case, in sequence, oral evidence was also given by the plaintiff's former boyfriend (via AVL from overseas), her younger sister, her godmother, a forensic psychiatrist, Dr Karen Brown (via an AVL connection from Brisbane), and the plaintiff's mother.
- 93 In the defendant's case, in sequence, oral evidence was given by the defendant, and a series of other witnesses who are here de-identified as Witnesses A, B, C, D and E.

- 94 Numerous historical documents were marked for identification: MFI “1” to “85”. Some of those documents were ultimately tendered in evidence.
- 95 The plaintiff produced a court book: Exhibit “A”, pp 1 – 127. The plaintiff also tendered additional documentary exhibits: Exhibits “B” to “F”.
- 96 The defendant tendered a two volume court book: Exhibit “1”, pp 1 – 469. The defendant also tendered an extensive series of additional documentary exhibits, including audio visual and photographic materials: Exhibits “2” to “147”.
- 97 Reference will be made to aspects of the detail some of those exhibits where it becomes relevant to do so.

### **Overview of oral evidence**

- 98 The oral evidence on key factual matters in dispute was from the plaintiff as to the claimed occurrence and the detail of the alleged abuse, and from her mother as to her mother’s claim of a partial recollection of aspects of the circumstances in which the events were alleged to have occurred.
- 99 Subject to a proposed ruling on objections, the content of the oral evidence of the plaintiff’s former boyfriend, her sister, her godmother, and aspects of the mother’s evidence was called to corroborate the factual details of the plaintiff’s disclosures.
- 100 The defendant disputed the veracity of that entire array of evidence insofar as it suggested the plaintiff’s allegations were true.
- 101 No challenges were made to the evidence of Witnesses A, B, C, D, and E who were called by the defendant as to the context and content of relevant post-disclosure events.

## **Admissibility of hearsay content of disclosures**

102 The defendant objected to the admissibility of aspects of the confirmatory evidence called in the case for the plaintiff as to the timing and the content of her successive disclosures of the alleged sexual abuse.

103 At the time, the evidence in contention was admitted conditionally subject to those objections. This was on the understanding that a ruling on the admissibility of that evidence would be incorporated into these reasons.

104 Although the defendant's objection related to the hearsay content of those verbal disclosures, it must be recognised that the application of the hearsay rule has been disapplied by legislation in respect of cases of this kind where reliance is placed on certain contemporaneous statements: s 66A of the *Evidence Act 1995* (NSW). Section 66A, provides as follows:

**“66A Exception: contemporaneous statements about a person's health etc**

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.”

105 In the context of this case, contemporaneity must be construed by reference to the period of almost 9 years that passed from the time of the alleged abuse in early 2011 and the timing of the disclosures that took place first in mid-2019, then on 1 November 2019, then in February 2020, and then on 23 July 2020.

106 The defendant's objection related to the hearsay content of the verbal disclosures made by the plaintiff to her boyfriend, her psychologist, her sister, her godmother, her mother and her health care practitioners.

107 The common law basis for those objections was that whilst the evidence was admissible to prove the fact that disclosures were made on the respective dates, evidence of the content of those disclosures could not be used as proof of the facts disclosed on those occasions.

108 On this point, the plaintiff submits, correctly, that evidence of the content of the disclosures made by the plaintiff are not rendered inadmissible on account of the operation of the hearsay rule as the evidence is admissible because it relates to a fact in issue in the proceedings in the sense of tending to show a consistency in the plaintiff's complaints which may be used to prove that there may be some truth in those complaints: s 60, s 64, s 108(3)(b) of the *Evidence Act* 1995 (NSW).

109 Accordingly, the evidence of the content of the plaintiff's disclosures which would otherwise have been excluded as to hearsay, is admitted for all purposes subject to the usual caveat or proviso that such evidence must still be evaluated for its persuasive weight. The plaintiff accepted the applicability of that proviso: T578.9.

### **Plaintiff's health, educational, work, and related history**

110 For context, it becomes necessary to identify some undisputed aspects of the plaintiff's health and other history relating to her education, her work, and other pursuits. That need for context arises in view of the plaintiff's claim that her life has been destroyed by the alleged abuse: T17.29; T40.14.

### ***Plaintiff's health history***

111 The plaintiff has had a significant adverse health history, from birth, due to congenital factors. In view of the opinion from a forensic psychiatrist that the plaintiff has a diagnosis of PTSD, it is necessary to consider and summarise that health history, and to critically compare it with the history and assumptions considered by the forensic psychiatrist. A summary of those matters now follows.

112 Copies of the plaintiff's extensive historical medical records kept by her treating general practitioner, her treating psychologist and a series of 12 medical specialists, including some hospital records, radiological imaging reports, and a series of requests for GP Mental Health Care Plan assessments, were

produced on subpoena and tendered by the defendant: Exhibit “1”, Vol 1, pp 1 – 285.

- 113 The plaintiff’s health history is complex. Her general practitioner has described her health as fragile: Exhibit “1”, Vol 1, p 83.
- 114 The defendant tendered subpoenaed copies of the compendious print-out of the electronic records of the general medical practice the plaintiff has attended since 20 June 2002, when she was aged 4 years: Exhibit “1”, Vol 1, pp 1 – 155. In parts of those records, there were references to the existence of a separate card system of records, for example, Exhibit “1”, Vol 1, pages 7, 9, and 16. Those card records were not produced. The copied records, which include numerous copies of correspondence to and from many medical specialists, revealed the complexity of the plaintiff’s health history, and her vulnerability to various types of illnesses: Exhibit “1”, Vol 1, pp 66 – 131.
- 115 In summary, the plaintiff was born with a congenital heart malformation, dextrocardia, meaning that she has a single functioning ventricle. This required a series of neonatal and paediatric surgeries. She has had a Fontan procedure for total cavopulmonary connection surgery. She has had a Blalock shunt to prevent her from developing cyanotic heart failure, and she continues to require long term specialist cardiac and respiratory monitoring, review, and medication.
- 116 The plaintiff has a centrally located liver which has been shown on imaging to be mildly congested, requiring monitoring every few years: Exhibit “1”, Vol 1, p 187. She has asplenia from birth. The absence of a spleen makes her susceptible to infective illnesses, including sepsis. She has a history of unequal leg lengths which required orthopaedic review and advice: Exhibit “1”, Vol 1, pages 94, 250 – 253. As an adult, she has a significantly limited exercise tolerance because of shortness of breath on exertion: Exhibit “1”, Vol 1, pages 80, 133.
- 117 At the age of 20 years, the plaintiff was ultimately diagnosed with Primary Ciliary Dyskinesia (PCD), a respiratory abnormality which puts her at a significantly

higher risk of serious illnesses from infections, including from COVID-19: Exhibit “1”, Vol 1, p 134. One of the plaintiff’s respiratory physicians who had coincidentally treated her as a baby for neonatal respiratory distress syndrome, made an apparent connection to those events with the benefit of changed diagnostic criteria: Exhibit “1”, Vol 1, p 232. In 2018, the plaintiff has found the experience of obtaining hospital treatment for her respiratory problems difficult and she was “*somewhat overwhelmed by the clinical chaos*” involved: Exhibit “1”, Vol 1, p 233. Her hospital treatment was described as being traumatic: Exhibit “1”, Vol 1, p 121.

- 118 Over the years the plaintiff has required various medical certificates identifying the fact that her chronic disabilities, including PCD and bronchiectasis make her more susceptible to respiratory infections, including COVID-19 infection, and she therefore sought to be excused from compliance with the Centrelink requirement of providing proof of having sought work from four potential employers per week because to do so would expose her to heightened risk of infection: Exhibit “1”, Vol 2, p 465; Exhibit “1”, Vol 1, pp 129 – 134.
- 119 In the context of the plaintiff’s asplenia, her pathology test results included a notation to the effect that patients with hyposplenic changes (the consequence of not having a spleen) were at risk of developing severe sepsis: Exhibit “1”, Vol 1, p 59.
- 120 In 2010, when the plaintiff was aged 11 years, she was found to have mild postural hypotension but her treating cardiologist was unable to attribute this to her cardiac condition: Exhibit “1”, Vol 1, p 200.
- 121 In August 2011, when the plaintiff was aged 12 years, her treating cardiologist noted she was experiencing rapid heartbeats at rest, without apparent cause. He could not identify a cause for her respiratory symptoms at that time: Exhibit “1”, Vol 1, p 203. However, those problems had resolved by May 2013 after a change in medication: Exhibit “1”, Vol 1, p 204.

- 122 In September 2011, the plaintiff needed an orthopaedic assessment of her unequal leg length: Exhibit “1”, Vol 1, p 251. Those problems were followed up in the next year: Exhibit “1”, Vol 1, pp 252 – 253.
- 123 Also in September 2011, the plaintiff needed to see an endocrine surgeon about management of parotid cysts: Exhibit “1”, Vol 1, p 75.
- 124 In the plaintiff’s high school years, she experienced significant limits on her exercise tolerance, and in that context, it was recorded that as a precaution, she might need unimpeded access to prompt medical attention which required her treating general practitioner to write numerous medical certificates of support, including in relation to travel restrictions: Exhibit “1”, Vol 1, p 73. Representations were also required on her behalf to educational authorities and to the defendant’s employer for special arrangements to be put in place for parking and emergency access to transport should a foreseeable need arise for this: Exhibit “1”, Vol 1, pages 80, 82, 108.
- 125 The plaintiff has experienced shortness of breath and recurrent respiratory problems from an early age: Exhibit “1”, Vol 1, p 22. At age 16 years, it was recorded that she had a chronic cough since the age of 6 years: Exhibit “1”, Vol 1, p 37. Ultimately, on 2 June 2018, at age 20 years, she was diagnosed with PCD: Exhibit “1”, Vol 1, p 133. The plaintiff’s younger sister has since also been diagnosed with a more severe form of that condition.
- 126 From the age of 6 years, the plaintiff suffered from debilitating migraine headaches which were accompanied by the onset of visual auras, which, in her early years, followed no predictable pattern, but in later years, seemed to have recurred on average at the rate of twice per month, lasting up to 4 hours: Exhibit “1”, Vol 1, pages 10, 31, 34, 39, 41, 42, 43, and 44. It was noted these migraines could be triggered by stress and by altered pressure from neck movements, and they were associated with unsteadiness, and slight nausea: Exhibit “1”, Vol 1, pages 31, 92. In February 2017, her treating cardiologist noted that the plaintiff’s migraines were “*quite debilitating*” for her: Exhibit “1”, Vol 1, p 208.



- 127 In the plaintiff's high school years, her treating general practitioner issued many certificates to enable her to seek special examination consideration on account of her migraines. Examples of that correspondence appear in Exhibit "1", Vol 1, at pages 96 – 99, and 103 – 104.
- 128 The plaintiff has had a long history of an impairment in her ability to concentrate and to study at school. In that context, she experienced light sensitivity, and had issues with comfort at school: Exhibit "1", Vol 1, pages 103, 105.
- 129 The plaintiff has been referred to a series of respiratory specialists for management of sinus problems, mucopurulent congestion, asthma, and PCD: Exhibit "1", Vol 1, pages 110, 114, 116, 119, 121. She has had multiple traumatic admissions to public hospitals for treatment for pneumonia: Exhibit "1", Vol 1, p 121.
- 130 In the plaintiff's high school years, she needed medical certificates to enable her to travel overseas on billeted excursions with her school: Exhibit "1", Vol 1, p 32.
- 131 At the age of 16 years, on 11 August 2014, she sustained a head injury that produced symptoms of nausea, headache, blurring of vision, flashing light sensations, and a sore neck. This was noted as having been accompanied by post-injury violent back and forth head movements and head banging activity. She was thought to have sustained a small brain bleed or a possible vertebral artery injury. At hospital an MR angiogram was arranged: Exhibit "1", Vol 1, p 36.
- 132 On that date, an MRI of the plaintiff's cervical spine was reported as showing minor posterior disc bulges at the levels C3/4, C4/5, C5/6 and C6/7. On the same date the report of her MRI brain scan was reported as showing an ill-defined hyperintensity in the subcortical white matter in the right superior frontal gyrus 1.5mm from the midline. Another such finding was seen in the periventricular white matter of the parietal lobe. The conclusion to that imaging report stated that there was no evidence of a recent infarct. That comment did

not seem to rule out a previous infarct. At that time, an MR angiogram was yet to be arranged: Exhibit “1”, Vol 1, pp 283 – 284. The evidence does not contain an MR angiogram report. The evidence was silent on the possible cognitive effects, if any, of those findings.

- 133 In August 2015, the plaintiff suffered “*a mini stroke*” or thrombo-embolic event which required shunt occlusion surgery: Exhibit “1”, Vol 1, p 102. She was referred to multiple specialists to seek management of her complicated history of migraines, and this included hormone therapy: Exhibit “1”, Vol 1, p 108, pp 267 – 268.
- 134 On 13 January 2016, the plaintiff’s father died after an extended neurodegenerative illness. The plaintiff suffered grief over this, before and after his death.
- 135 In 2016, the plaintiff’s general practitioner wrote successive letters certifying that her history of chronic health issues had impacted on her capacity to study and to perform to an optimum level in Years 11 and 12 of high school: Exhibit “1”, Vol 1, pp 104 – 105. In October 2016, in the context of HSC examinations, the plaintiff’s medical records noted that she had migraines, she did not sleep well, and she experienced light sensitivity: Exhibit “1”, Vol 1, pp 42 – 43.
- 136 There is a gap in the continuity of her general practitioner medical records in 2017 and 2018. This may be explained by her absence overseas, where she has travelled extensively.
- 137 In May 2018, in Sydney, the plaintiff was admitted to hospital under the care of a respiratory physician for treatment of an episode of haemoptysis associated with infection: Exhibit “1”, Volume 1, p 213. Since June 2018, she has been undertaking a prophylactic regime of daily sputum clearance hygiene and respiratory physiotherapy, and nebulisation for management of her respiratory issues: Exhibit “1”, Vol 1, pages 216, 224.

- 138 On 17 or 18 October 2018, the plaintiff's treating cardiologist noted that on her recent return from Paris, she came into hospital to report an apparent neurological episode comprising a "*funny turn*", associated with a feeling of a "*sinking*" sensation and a feeling of fullness in the head, a headache and slow tongue movements in her mouth. In light of her experience of transient ischaemic attacks in 2015, this was neurologically investigated, and the conclusion was that this was "*not particularly suspicious of a TIA*". However, as a precaution, an MRI brain scan was arranged: Exhibit "1", Vol 1, p 180. The plaintiff had a similar episode three years earlier. This was ascribed to hypoxia: Exhibit "1", Vol 1, p 271.
- 139 On 23 October 2018, the plaintiff's treating cardiologist noted that an arranged MRI brain scan did not show any abnormalities suggestive of cardio-embolic or other types of infarct, although "*some other abnormalities which seemed very benign*" led to the suggestion that the plaintiff's symptoms be reviewed by a neurologist, at the discretion of the treating general practitioner: Exhibit "1", Vol 1, p 181. There is no evidence that a neurological follow-up of symptoms along those suggested lines had ever occurred.
- 140 The radiological MRI report of 23 October 2018 has not been fully copied in the defendant's evidence bundle. Only page 1 of 2 pages was copied: Exhibit "1", Vol 1, p 188. The apparently partial report stated:

"Impression:

No acute infarct or space-occupying mass or lesion is demonstrated on this study.

Multiple foci of susceptibility in the supratentorial and infratentorial brain parenchyma suggestive of prior haemorrhage for example cavernous malformations.

Focus of FLAIR hyperintensity in the deep white matter of the right frontal lobe is nonspecific in nature. There is also a subtle right periventricular tiny T2 hyperintensity. No definite abnormal signal in the corpus callosum or infratentorial brain parenchyma to suggest demyelination, however, clinical correlation is recommended and progress imaging is recommended to ensure stability.

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[Exhibit "1", Vol 1, p 188]

- 141 The description of no "*acute*" infarct appears ambiguous as it suggests there might have been signs of non-acute infarct. There is no evidence as to whether the clinical correlation which was recommended by that report was ever arranged or carried out.
- 142 On 25 October 2018, the plaintiff underwent sinus surgery at Macquarie Hospital which then required her to be admitted to Royal Prince Alfred Hospital for management of post-operative complications: T74.19 – T74.39; T76.23.
- 143 On 22 March 2019, several months before the plaintiff made her disclosure of alleged sexual abuse to her boyfriend, she was being treated at Sydney Hospital Sexual Health Clinic for pelvic inflammatory disease against a six-month background history (dating back to approximately September 2018) of dyspareunia-related pain, and supra-pubic pain which was radiating down into her lower back and bilaterally, and these problems were unresponsive to antibiotics: Exhibit "1", Vol 1, p 49. It appears that some of those problems had continued because, in the following year, as was noted on 9 December 2020, she was undergoing screening tests including for chlamydia, syphilis, gonorrhoea, hepatitis, and HIV at that clinic due to left upper tenderness, abdominal pain, and F/I, which in the context, I interpret as being fever due to infection, which called for a STI (sexually transmitted infection) Screen: Exhibit "1", Vol 1, p 52.
- 144 The plaintiff's treating general practitioners have had occasion to prepare three separate GP mental health plans for her to obtain psychological treatment. The first was in Sydney, on 30 August 2019: Exhibit "1", Vol 1, pages 125 – 128; 139 –140. The second was also in Sydney, on 20 July 2020: Exhibit "1", Vol 1, p 143. There was a third mental health plan referral from a general practitioner in Melbourne, on 11 November 2022: Exhibit "A", p 33.
- 145 The content of the first of those mental health plans, on 30 August 2019, stated that the plaintiff's underlying psychological problems were:

“PANIC ATTACKS at night mostly, stressed in daytime, crying, sometimes fights with mum and sister, now living with boyfriend. gets (sic) sad often on waking. thinks about her latr (sic) father.”

[Exhibit “1”, Vol 1, p 50]

- 146 The historical context for that mental health referral was that in August 2019, the plaintiff’s father had died three and-a-half years earlier, in January 2016, after a long degenerative neurological illness. The plaintiff had reported to her treating psychologist that in the lead-up to her father’s death there was chronic stress, and a fear of him choking due to his illness: Exhibit “A”, p 28.
- 147 The content of the second of those mental health plans referred to the plaintiff’s need for psychological counselling to resolve symptoms comprising anxiety, panic attacks, periods of sadness, her reaction to grief, and her general health: Exhibit “1”, Vol 1, pp 142 – 144.
- 148 The content of the third mental health plan was the referral of the plaintiff to a psychologist was for treatment of her anxiety and depression: Exhibit “1”, Vol 1, p 50.
- 149 In this case, contentiously, the plaintiff sought to attribute the need for those mental health plans, her history of anxiety, depression, PTSD, and her history of an undocumented claim of “*extreme*” suicidal ideation, to the alleged but disputed sexual abuse by the defendant: T40.7 – T40.36. Those matters will be reviewed and considered when identifying the required findings of fact which are the subject of **PART I** of these reasons.
- 150 On 23 March 2020, the plaintiff’s general practitioner had occasion to write the following certifying comment about to the plaintiff’s health “*To whom it may concern*”:

“Miss [Plaintiff’s name] has been a patient of mine for nearly 8 years and I have known her to be a very emotionally placid and intelligent child who when small, bore previous medical events with an equanimity beyond her years. she is not prone to tearfulness and I have never witnessed any extreme emotional behaviour.”

[Exhibit "1", Vol 1, p 79]

151 Paradoxically, on 15 September 2011, which was some months after the alleged sexual assault, the plaintiff's treating general practitioner also found it necessary to draw to the attention of one of the plaintiff's treating specialists who was investigating her parotid cysts, the following capitalised admonition: "[Name of plaintiff redacted] *IS VERY SENSITIVE TO ADVERSE FINDINGS DUE TO HER PAST H/O ONGOING MEDICAL PROBLEMS*": Exhibit "1", Vol 1, p 77.

152 Considering the foregoing history of the plaintiff's ongoing medical problems, questions arise as to the reliability of the causation opinions expressed by the forensic psychiatrist retained on behalf of the plaintiff in these proceedings, where much of the detail outlined in the above summary was not available to that expert for her consideration and analysis at the time she provided her cumulative medico-legal reports.

153 On 2 October 2020, some 6 weeks after the plaintiff's mother had ended her relationship with the defendant, the plaintiff's treating cardiac specialist wrote a report about the plaintiff's longstanding state of poor health and her related health needs in the following terms:

"It is hard to overstate the seriousness and the complexity of [the plaintiff's] medical condition and thus her ongoing medical needs. These will be expensive, time consuming and very demanding on her mother [name] in [mother's name] role as [the plaintiff's] primary carer."

[Exhibit "42", page 28]

154 That specialist's report was addressed "*To whom it may concern*". The report was used by the plaintiff's mother, apparently for quantification purposes, in seeking a resolution of the issues concerning the division of property in the Family Court proceedings between herself and the defendant.

155 I infer from the circumstances, that report was obtained as part of the mother's financial strategy for dealing with the Family Court proceedings initiated by the defendant following his separation from the plaintiff's mother. The basis for that

inference is that the specialist's file copy of that report, which was produced on subpoena, bore the handwritten notation that the report had been requested by the plaintiff's mother: Exhibit "1", Vol 1, p 178.

- 156 The plaintiff also had some significant baseline psychological issues which predated the alleged sexual abuse. She disclosed that she was an "*anxious kid*" who did not deal well with stress: Exhibit "A", p 28. She had a history of intrusive thoughts and compulsive behaviours from around the ages of 9 to 10 years: Exhibit "A", p 28. She also had vivid dreams and nightmares. The psychologist's note concerning the plaintiff's paranoia remained unexplained: Exhibit "B".
- 157 It is plain that the plaintiff has had many traumatic experiences resulting in the need for complex medical treatment, and she will continue to have significant lifetime health burdens and challenges which require that she receive ongoing medical monitoring and treatment.

### ***Plaintiff's educational and work history***

- 158 The plaintiff is a highly intelligent and articulate person. Her mother described her as a complex person: T270.18 – T270.29. That description was also in keeping with the complexity of her medical history.
- 159 The plaintiff gained admission to opportunity class for the final two years of her primary schooling. She attended a selective high school. During her high school years, she undertook several overseas trips with her school. At high school she took an interest in drama. She has achieved significant academic success in her secondary schooling, achieving a high ATAR score.
- 160 At the age of 15 years, at a time when the plaintiff was looking for part-time work, her CV projected the impression that she had a positive outlook on life. Her CV included the following narrative:

"I am a confident, outgoing person able to engage and communicate easily with others. I have a wide range of interests and skills, such as cooking, reading, talking and music. I'm eager to learn, quick with mental arithmetic and hardly ever drop plates! I am very responsible, quick to follow directions and able to

work independently and within a team. I am enthusiastic, outgoing, interesting, accomplished, modest... .”

[Exhibit “37”]

- 161 The plaintiff’s positive self-portrayal in her CV must be read in the wider context of her contrasting oral evidence in which she made the undocumented claim that she had extreme suicidal ideation between the ages of 11 and 15 years: T40.43. The positive image projected by her CV was contemporaneous to and in contrast with that evidence. There is no objective contemporaneous record made by a health care practitioner or anyone else that is reflective of her claim of suicidal ideation.
- 162 The plaintiff achieved an ATAR score of 97.8 in her HSC examinations: Exhibit “1”, Vol 2, p 394. This reflected her stellar progress through her high school years as a high achiever.
- 163 In 2011, the plaintiff’s Year 7 first semester school report referred to the fine start she had made in the commencement of her high school life, noting that she enjoyed challenges and was always willing to embrace them. It was noted that she became involved in co-curricular activities, which included drama. It was also noted that she had become involved in many aspects of school life: Exhibit “1”, Vol 2, p 306. In the second semester report it was noted that she had become involved in Junior Drama. The Year Advisor commented that she was an enthusiastic student with first class results in some areas, which demonstrated her intelligence and perception. It was noted that she continued her involvement in the intellectual and cultural life of the school: Exhibit “1”, Vol 2, p 312.
- 164 In 2012, the plaintiff’s Year 8 first semester school report referred to the plaintiff’s involvement in theatre and sports. The Year Advisor’s comment was that the plaintiff had achieved an excellent report, and that she was an intellectually curious student with a strong desire for knowledge, her enthusiasm and class participation were noted as was her keen participation in co-curricular activities. Exhibit “1”, Vol 2, p 318. In the second semester report her involvement in theatre and debating was noted. The Year Advisor



commented that her enthusiasm and willingness to learn were matched by her excellent academic achievements. Her insightful thinking and her sophisticated touch to her work were noted, as was her well rounded focus: Exhibit "1", Vol 2, p 324.

165 In 2013, the plaintiff's Year 9 first semester school report referred to her ongoing co-curricular activities of theatre and debating. Her Year Advisor commented that this was another excellent report, and that the plaintiff was an engaged student with an insightful mind with a love of learning. Her high academic standards were noted, as were her enthusiasms, which were stated as moving beyond the classroom: Exhibit "1", Vol 2, p 330. In the second semester report, her involvement in theatre, debating, high resolves and tournament of the mind were noted. Her Year Advisor, who was congratulatory in his remarks, described her as an excellent student who had an insightful ability to think with logic, depth, and clarity, in a wide range of areas: Exhibit "1", Vol 2, p 335.

166 In 2014, the plaintiff's Year 10 first semester school report referred to her co-curricular activities including tournament of minds, senior production, and peer support program. Her Year Advisor commented on some outstanding results, which demonstrated depth and insight in several areas. Her willingness to accept intellectual challenges and her continued engagement as a thoughtful student were noted, as was her positive preparation for senior high school: Exhibit "1", Vol 2, p 341. In the second semester report her Year Advisor commented that she had demonstrated many strengths in her junior years, with a love of ideas and learning. It was also noted that she was a perceptive and sophisticated thinker with a positive attitude: Exhibit "1", Vol 2, p 346.

167 In 2015, the plaintiff's Year 11 first semester school report, her co-curricular activities were noted to be a poetry club and involvement in a Shakespeare festival. The Year Advisor was congratulatory and commented that she had demonstrated a willingness to accept academic challenge and had moved into senior school with confidence and purpose. He also noted the plaintiff had insight and sophistication in a wide range of areas of her work: Exhibit "1", Vol 2, p 351. Her second semester report referred to her ongoing involvement in

the co-curricular activities of a poetry club and a Shakespeare festival. Her Year Advisor commented on her report as being another excellent report. He commented on her ability to think, analyse, and create, at the highest level, and that her work showed depth and sophistication. He expressed the opinion that she was ready to tackle the rigours of the HSC: Exhibit "1", Vol 2, p 356.

168 In 2016, the plaintiff's Year 12 first semester school report noted that the plaintiff had been appointed as a Prefect. Her Year Advisor noted she continued to be an important part of the school community and that her work as a Prefect had been outstanding, and that her academic work in some areas had been strong. He expressed the opinion that the plaintiff was a thoughtful and intelligent student who was quite capable of dealing with and developing her weaker areas: Exhibit "1", Vol 2, p 364. Her second semester report noted her ongoing role as Prefect. Her Year Advisor commented that the plaintiff had a curiosity and a natural excitement at learning, was engaged with all her subjects, and was always striving to expand her thinking. He observed that she had provided valuable leadership in her role as Prefect and had represented the school with distinction: Exhibit "1", Vol 2, p 371.

169 Each of the plaintiff's high school reports identified the total numbers of explained and unexplained absences, and explained and unexplained partial absences. As the school reports do not explain those absences, nothing seems to turn on them. It seems possible that they related to the plaintiff's regularly recurring migraine headaches.

170 The plaintiff's high school years have been summed up in a letter dated 12 May 2022, from her high school Principal, addressed to whom it may concern, in the following terms:

"To whom it may concern

RE: [The plaintiff]

Please find enclosed academic school reports for [the plaintiff] and other documents held in her school files relating to the time of her enrolment at [Redacted] High School 2011-2016, Year 7 - Year 12.

[The plaintiff] was an academically gifted student who was impressive in her achievements and love of learning. The Year Adviser comments on the front page of her academic reports give a very accurate picture of the kind of student she was. Her involvement in school life was wide ranging, including academic challenges, social justice programs, drama productions of many kinds, including the musical co-production with [Redacted] High, Shakespeare Festival and Theatresports (sic). [The plaintiff] was elected as a Prefect in her final year, a significant achievement at [Redacted] High, endorsed by teaching staff, her peers, and junior students through election.

In my role as Principal of the school, I also came to know [the plaintiff]'s parents quite well ([the plaintiff's mother], mother) and ([the defendant], stepfather), from the time she was considering options for high school in Year 6 when her parents came to see me in August 2010, until her graduation in Year 12. Given her congenital heart disease there were many times when either [the plaintiff's mother] or [the defendant] came to the school to drive her or pick her up if she was unwell during the day. From the school's standpoint, [the plaintiff] was exceptionally well supported and cared for by both parents. The school had no contact with [the plaintiff]'s biological father, Mr [Redacted], who sadly passed away after illness in her senior year, to the best of my recollection.

In summary, [the plaintiff]'s time at [Redacted] High was very positive and she made a lasting impression as a highly engaged, sociable, outward looking and thoughtful young person. ...”

[Exhibit “1”, Volume 2, p 393]

171 After finishing high school, consistent with her high ATAR score, the plaintiff was offered a tertiary enrolment in legal studies. She deferred that enrolment in favour of overseas travel. Whilst overseas, in France, she worked in the hospitality sector, as a waitress, a nanny, and as a music teacher. Whilst in France she formed a romantic relationship. On her return to Australia that relationship continued for a time until her former boyfriend's visa expired. Her former boyfriend from that relationship gave evidence in these proceedings from overseas via an AVL connection.

172 Since returning to Australia in 2019, the plaintiff has embarked upon a range of tertiary studies, including taking formal acting classes. Contrary to her evidence (at T21.50), where she said she did not take up her deferred offer to study Law at UTS, it appears that she had in fact commenced studying Law at UTS in early 2021: Exhibit “1”, Vol 1, p 184. On the evidence it is not clear as to whether or not she has continued with that course. At present, her tertiary education towards a science degree at university remains incomplete. She is presently undertaking an undergraduate degree in Communications.

### ***Plaintiff's history of other activities***

- 173 In view of the plaintiff's claim that the alleged sexual abuse has destroyed her life it is relevant to review some of her activities and achievements.
- 174 As is evident from her evidence and her school reports, the plaintiff has had an interest in drama since her school years: T48.15 – T48.25. This is reflected in her high school reports.
- 175 After returning to Australia from Europe, the plaintiff took her interest in drama to another level by enrolling in acting classes at the National Institute for Dramatic Art (NIDA). She has managed to derive some income from acting in the filming of television commercials.
- 176 The curriculum of the plaintiff's enrolment in the NIDA classes which was produced on subpoena (Exhibit "1", Vol 2, pp 411 – 423), suggests that her participation in those classes included acting elements such as spontaneity; development of vocal and physical presence, including to inform character objectives; acting techniques; rehearsal; voice pitch and tone; techniques for understanding a character; employing a variety of techniques to develop a truthful and engaging performance; connectivity with an audience; exploring characterisations and emotional psychological shifts in characters in comedy and drama; rehearsal coaching; exploration of acting processes including embodying technique in solo performance work; skills for prepared scenes; working on scenes for truthful reactions without words; and simulated screen tests which involved feedback.
- 177 As the plaintiff was not cross-examined on those course curriculum elements, in fairness, they cannot be given any weight in assessing the credibility question of the truthfulness of her evidence on the issue of the defendant's alleged sexual abuse of her, or on the issue of whether she has falsely convinced herself that the alleged abuse had actually occurred.
- 178 However, that evidence is relevant to an assessment of the plaintiff's claim for damages on the question of her claim for loss of earning capacity.

### ***Plaintiff's earning capacity as an actor***

179 The plaintiff's claim of a loss of earning capacity was brought into sharp focus when the matter was relisted on the 10<sup>th</sup> day of the hearing when the defendant made an application to re-open his case.

180 That application was made on the basis that further and previously unavailable evidence had come to light that had a tendency to show the plaintiff had a greater earning capacity than was suggested by the state of the evidence to that point. This was because on 20 September 2023, during the course of the hearing, she had obtained work in a lead role in a forthcoming feature film, a matter that was not previously particularised.

181 The defendant's submissions were to the effect that if that material had been known to the defendant during the hearing, that subject matter would have been explored in cross-examination of the plaintiff, her mother, and Dr Brown.

182 The defendant also submitted that in addition to the non-particularisation of that source of work, and the plaintiff's actions in withholding of the information concerning this future line of work raised relevant inconsistencies in her evidence which, it was argued, confirmed furtive dishonesty on her part, which served to undermine the reliability of her evidence.

183 Those arguments will be considered and taken into account when identifying my credit findings in **PART H** of these reasons.

### ***Plaintiff's travel history***

184 Copies of the plaintiff's international travel movement records were produced on subpoena by the Department of Home Affairs: Exhibit "1", Vol 2, pp 427 – 456.

185 Those records show that in total the plaintiff made 17 outward bound and return trips between 29 September 2008 (when she was aged 10 years) and 23 December 2019 (when she was aged 21 years): Exhibit "1", Vol 2, pp 455 –

456. The plaintiff has travelled to Indonesia, France, Germany, the Czech Republic, Italy, Ireland, India and Fiji.

186 Four of those trips were undertaken before the end of 2011, between 29 January 2008 and 21 July 2011, and thirteen were undertaken subsequently, between 10 December 2012 and 23 December 2019.

187 Nothing of particular significance turns on that travel history but it does raise a question as to whether, in truth, the plaintiff's life has been destroyed as she has claimed.

### **Evident family stresses and tensions**

188 As part of the factual background, it is relevant to identify some stressful domestic circumstances that were, to varying degrees, impacting on the plaintiff and her family at the time of the plaintiff's disclosure to her mother, on or about 23 July 2020, of alleged sexual molestation.

189 The plaintiff's allegation arose in the context of some evolving stressful domestic tensions and relationship tumult between the plaintiff's mother and the defendant. This occurred against a background of a prior history of spousal arguments and tensions, and a period of spousal separation shortly before the plaintiff made the disclosure to her mother of the alleged abuse.

190 At this point, it is sufficient to say of those multi-factorial stressful circumstances that existed prior to the breakdown of the relationship, that they included the following matters:

- in July 2015 the plaintiff, her sister and her mother sought out and obtained psychological counselling in relation to the declining health of the plaintiff's father over a period of about 20 months as a result of his protracted and progressively degenerative fatal illness which had impacted upon the whole family in the lead-up to his death;

- in August 2015, the plaintiff was hospitalised in connection with a “*mini-stroke*”;
- the plaintiff’s father died in January 2016, when the plaintiff was aged 17 years, when she was in her HSC year. The plaintiff and her family were in understandable grief after his death. The plaintiff sought special consideration for her ATAR score on account of chronic health issues and the death of her father;
- in 2016 the plaintiff and her family encountered the stressful burden of having to move house five times within a relatively short time frame: T19.10 – T19.15;
- there was a pressing shortage of available funds for the completion of costly domestic building works which resulted in the need for unexpected borrowings from friends and family, where the family were living with the stress of credit card debt to manage their living expenses;
- the plaintiff’s mother had pressingly dire financial concerns over her financial security stemming from her irregular employment and earnings;
- the plaintiff’s mother had ongoing worrying concerns over the emergent serious life-long health issues of the plaintiff and her sister, and her concerns over the costs associated with managing those conditions;
- the plaintiff was subjected to the domestic stress of knowing that her younger sister, who was struggling with her own PCD diagnosis, was wanting to end her own life as a result;
- there were randomly occurring stressful and disruptive communications from the defendant’s adult daughter from a previous marriage, the context being that his daughter had significant mental health issues which reverberated on the family life of the defendant in his relationship

with the plaintiff's mother. Those communications had a disruptive impact on the defendant's relationship with the plaintiff's mother;

- there were issues that emerged in the family concerning differing perspectives on the plaintiff's mother's alcohol consumption and the effect of this on the relationship between the plaintiff's mother and the defendant. The pharmaceutical evidence suggests that the consumption of alcohol could influence the effect of the mother's prescribed medications, including the effect of Valium and other drugs prescribed to assist her with her sleeping difficulties: Exhibit "D";
- between about November 2018 and April 2019, and also in December 2020, the plaintiff was experiencing significant gynaecological problems for which she was attending the Sydney Hospital Sexual Health Clinic for treatment of pelvic inflammatory disease and other issues that were not ameliorated by antibiotic treatment: Exhibit "1", Vol 1, p 49, p 254;
- there was a history of domestic arguments between the plaintiff's mother and the defendant which led to a separation prior to the plaintiff's disclosure of alleged sexual abuse by the defendant;
- the plaintiff exhibited inconsistent behaviour towards the defendant where, alternatively, she was affectionate, and at other times rude to him, and at times, she was said to have been resentful of the defendant's relationship with her mother, and this has caused tensions in the household;
- the plaintiff's mother's need for "*space*" in her relationship with the defendant, having earlier adopted a somewhat cooled or ambivalent attitude to their relationship, long before, in July 2019, as she acknowledged in her evidence (at T281.9 – T281.21), where she felt the situation was so toxic at home that she decided to leave, as she set out in her email to the defendant on 1 July 2020 (Exhibit "23"), just 3 weeks before the plaintiff's disclosure to her, of the alleged sexual assault;



- after the plaintiff's mother had left the family home her absence had created stresses for the plaintiff and her sister;
- there was a month-long period of COVID-related geographic and emotional separation that occurred between the plaintiff's mother and the defendant during which time the plaintiff had made her disclosure of alleged sexual abuse to her mother, where her mother's initial response was to adopt a separation strategy without first seeking to discuss the veracity or otherwise of the allegation with the defendant. Instead, she abruptly decided to terminate her relationship with him, but she did not inform him of this for some 17 days whilst, to use her description, she pretended to him that all was well, but in the meantime, she sought out advice as to how she should deal with the defendant, and how she should best proceed along the lines she had intended;
- the abovementioned stresses were compounded by the significantly impactful and unsettling effects and financial and other challenges associated with the COVID-19 pandemic, and the particular health and domestic challenges which those circumstances posed for the plaintiff's family due to the adverse respiratory conditions of health that affected both the plaintiff and her sister, each of whom were particularly vulnerable to the risk of harm from illness if they were exposed to the COVID-19 virus, and its related strains;
- in the background to those latter events, the defendant described his relationship with the plaintiff's mother, as of May 2020, as being "*not great*": T417.44. There "*was a lot of stress*" in the relationship: T418.9. This appears to have continued up until early July 2020: T421.1 – T421.13. It would seem inconceivable that these stresses would not have also had some impact on the plaintiff.

191 On an ordinary common sense analysis, to varying degrees, the abovementioned stresses had the obvious potential to have adverse impacts on the psychological wellbeing of the whole family, including that of the plaintiff.

Very little of those details were made available for Dr Brown's forensic consideration of the plaintiff's circumstances when she made her diagnosis that the plaintiff had chronic PTSD which she attributed to the alleged sexual assault.

- 192 Significantly, Dr Brown acknowledged there were a number of emergent matters in the evidence which she would have liked to have discussed with the plaintiff. Although Dr Brown said the additional matters drawn to her attention did not necessarily invalidate her opinions, that is a matter which must be determined in terms of whether those opinions are reliable in this case.

### **Plaintiff's successive verbal disclosures of the alleged abuse**

- 193 A summary of the sequence of events involved in the alleged sexual touching appears at paragraphs [10] to [14] above. Various accounts of the alleged sexual touching have been given by the plaintiff in five successive verbal disclosures. These are set out under the headings and in the paragraphs that now follow.

### ***Plaintiff's description of alleged abuse in her oral evidence***

- 194 In the plaintiff's oral evidence given at the hearing, at times in hesitant and halting terms, she described the alleged sexual touching. Her evidence on this topic is set out here in full to avoid omitting relevant content and context which might be thought to have occurred if that evidence had only been summarised:

"Q. You've explained in terms of year when you think this event happened. You have said you were in your bedroom. Do you remember anything about what time of day, what day of the week, or anything like that it was?

A. I do. I remember that it was at night. I remember that I had been in bed in the bedroom that I was sharing with my sister, [name redacted]. I believe that we had bunk beds still at that time and that I slept on the top bunk. I remember waking up in the night and feeling sick and wanting to go to my mother to tell her that I felt sick. I remember climbing down the ladder of the bunk bed and going into my mother and stepfather's room, which was just **kind of** around the corner; it was quite close. I remember the carpet, the feeling of the carpet. I remember what I was wearing, and then I remember going to my mother's side of the bed, which was from my memory the she slept on the left side of the bed, so I went round and was about to wake her up to tell her that I didn't feel

well, and I remember [the defendant] saying realising that he was awake and him saying, "Don't wake your mother up."

Q. When you say [the defendant], who are you referring to?

A. The defendant. Saying, "Don't wake your mother up. Come round to this side of the bed and just get into this side of the bed."

Q. Is that usual, unusual?

A. Unusual. Not unusual for me to go to my mother, if I was feeling sick, at all. Not unusual for me to be in the bedroom, if I was feeling unwell in the middle of the night. But unusual for me not to wake her up to tell her I was sick and to be encouraged to not wake her up and to not tell her.

Q. Was there any discussion about any reason

FOORD: I object.

AKTHAR

Q. Was there any other discussion at that time?

A. Between myself and the defendant?

Q. Was there any other discussion with anyone?

A. No.

Q. I think you said you remembered what you were wearing?

A. Yes.

Q. Can you tell us about that?

A. I was wearing an old T shirt of my mother's, which was blue. It had yellow, **kind of** plasticity(as said) yellow print on it that was, sort of, peeling off, and underwear.

Q. What happened next?

A. What happened next was that I got into bed on on the defendant's side of the bed and tried to go to sleep, and that was when the event occurred and the defendant started touching me sexually, initially under my T shirt. He then removed my underwear and started touching me between my legs. That was how it started."

Q. What, if anything, do you remember about where everybody was in the bed?

A. The defendant was in the middle. I was on the other side of him. My mother was asleep on the other side of him, on the right side of him.

Q. You've just given us a description of what happened. Is there, step by step, any detail that you remember other than what you've said?

A. Yep. So my memory is that the defendant was touching me as I said, underneath my T shirt.

Q. For how long?

A. For quite a while. I would estimate around five minutes. And quite aggressively, firmly. And then, as I said, that progressed. He removed my underwear.

Q. Can you describe how he did that?

A. I was on my lying on my back, so that's that's fairly just simply. He just removed my underwear. That's how I remember that and that's my memory of that.

Q. Do you remember what part of his body he used to remove your underwear?

A. His hands. Then he was touching my stomach for a while, as in a few minutes. And then he touched me between my legs for a while. And then I was you know, my memory of how I was feeling was was very scared and alarmed and also confused, and feeling that it would stop if I was very, very still and very quiet. Also feeling worried to wake my mother up, still, because that's what he had said not to do. After that went on for a while, the defendant flipped me on to my stomach.

Q. How did he do that?

A. **I guess** with his body, sort of pushed me on to my stomach.

Q. Do you remember anything about what part of his body he used to do that?

A. His hands and, **you know, sort of**, his torso and just **kind of** weight of himself, **I guess**. And at this point the defendant didn't have any underwear on. I'm not sure if he removed it or if he wasn't wearing underwear in the first place. He moved me on to my knees in the bed.

Q. How did he do that?

A. With his hands. And **I guess, sort of**, his legs, again just with his body. Then he, **sort of I guess** it was a **kind of** simulation of penetration, where he had his knee between my legs and was behind me.

Q. By this time, do you have any sense of how long it had been going on for?

A. I think probably yeah, my sense of it at the time was endless, but I think probably around 15 to 20 minutes.

Q. What happened next?

A. I realised that it was I remember having, **kind of** it felt at the time like an idea. I was like, "Oh, if I cry, maybe it will stop. Maybe I shouldn't be as quiet as possible. Maybe I should be as loud as possible." And that was when I started crying very, very, very loudly, because I was scared and upset, and also in a **kind of** a genuine attempt to make it stop. And then my mum, **kind of**, woke up and [defendant's name redacted] the defendant stopped and I got out

of bed and went round to her side of the bed and told her that I was feeling sick, which is what I had initially wanted to tell her.

Q. What makes you say the defendant wasn't wearing underwear?

A. Wasn't wearing underwear? Because I remember the feeling of not wearing not having underwear on.

Q. Was there any particular point you had that feeling?

A. That was apparent to me when he was, sort of, pressed against me from behind.

Q. Do you remember what part of his body was pressed against you from behind?

A. His **kind of** pelvis and penis, yes.

Q. At what point did you feel that?

A. That would have been at the point that I was turned around, so I guess, **you know**, ten to 15 minutes into the assault.

Q. You gave some evidence about his knee?

A. Mm.

Q. Where in the sequence of events was he pressing his knee?

A. I feel like when he **kind of** turned me over, that was, **sort of** it was dark, so I didn't see him using his knee, but that was what I felt. And then also when he was behind me, that I could, **kind of**, feel his knees or his knee, **you know**, maybe. Yes."

[Emphasis added]

[T13.45 – T16.29]

195 The plaintiff's evidence of the alleged events then continued as follows:

"Q. And then what happened next?

A. And then I as I said, I went around to her side of the bed and I was really, really upset. I remember how, **kind of** and I think she was worried that I was unwell, because that was what I was saying. I was saying, "My stomach hurts. I feel really, really sick. My stomach hurts." And she, **kind of**, calmed me down, **you know**, gave me a hug, told me to get into bed next to her, gave me a hug, **you know**, was wanting me to go to sleep. And that's **you know**, my memory is of going to sleep next to her.

Q. Do you remember anything about the day after?

A. I remember how I felt, which was quite numb, **kind of**, quite blank that day. I don't remember exactly where I went or what I did. I do have a feeling that I may have gone up to my grandparents' house."

[Emphasis added]

[T16.34 – T16.46]

196 The plaintiff's evidence was also marked by significant frequent expressions of imprecision and uncertainty within that cited description, involving the recurring use of terms such as "*I guess*", "*sort of*", "you know", and "*kind of*", as is emphasised in the above extract of her evidence.

197 The defendant denied that any of those described events had in fact occurred.

### ***Disclosure to plaintiff's then boyfriend – mid 2019***

198 The plaintiff's first verbal disclosure of the alleged abuse was to her then boyfriend. He said this occurred some eight years after the alleged event, in about mid-2019. The plaintiff mistakenly thought this conversation occurred before April 2019: T24.39 – T25.1. He stated that the plaintiff disclosed the alleged sexual assault to him in the following terms:

"A. Yeah. She asked me my opinion on [the defendant], I gave my opinion. She said listen, there's something I really need to tell you, I haven't told anyone else. And she said that when she was younger I don't remember what age she was, I don't know if she told me but she said that she remembers vividly one night feeling ill, wanting to get into her mother's bed that was shared with [the defendant] at that time, getting into the bed, and that while she was in there, [the defendant] pulled her underwear down, touched her inappropriately on her vagina."

[T161.37 – T161.43]

199 The plaintiff explained that she disclosed those matters to her boyfriend at a time when she felt she had become sufficiently close and comfortable with him to enable her to feel she could take him into her confidence on such a sensitive issue. There is no evidence to the effect that the former boyfriend had made a contemporaneous note of the circumstances or the content of that cited disclosure.

### ***Disclosure to her treating psychologist – 1 November 2019***

200 The objective records show that the plaintiff's second verbal disclosure of the alleged abuse was to her treating psychologist on 1 November 2019. In contrast, the plaintiff mistakenly thought this had occurred in April 2019: T25.1. That could not have been so because the first consultation with the psychologist was on 8 October 2019. The plaintiff's oral evidence was that she thought, also mistakenly as it transpired, that she had made her disclosure to her treating psychologist at their second or third consultation. In fact this occurred on the fourth consultation.

201 Those circumstances exemplify how the phenomenon of fallible memory can become manifest.

202 There is no room for doubt that the objective record shows the plaintiff's disclosure to her treating psychologist occurred in the course of her fourth consultation with her psychologist on 1 November 2019. That disclosure was summarised by the psychologist in her report dated 7 December 2020, where she described the disclosure in the following terms:

“... As therapy continued [the plaintiff] reported that when she was a child, around the age of 8 years old she experienced a sexually abusive incident involving her step-father, [the defendant]. [The plaintiff] reported that when she was a child she recalled having a nightmare, after waking she entered her mother's and step-father's bedroom. [The plaintiff] reported that her mother was asleep, but [the defendant] was awake. She reported telling him that she had a nightmare and her stomach hurt. [The plaintiff] said that she laid on the bed, where she reported [the defendant] hugging her, she then reported that he had his hand around her crouch (sic for crotch). [The plaintiff] reported that [the defendant] had then removed her underwear and was touching her around her crouch (sic for crotch) area. [The plaintiff] reported feeling confused and began to cry, she then reported to leaving the bedroom. [The plaintiff] said that she knew that this was a sexually inappropriate touch. [The plaintiff] said that it never happened again, she said that she was too afraid to tell her mother at the time. ...”

[Exhibit “A”, p 29]

203 In the circumstances which evolved in the clinical setting of the plaintiff's consultations with that psychologist, the disclosure of alleged sexual abuse

provided a further plausible explanation for the plaintiff's psychological symptoms which were the subject of the referral.

204 The apparent plausibility of a connection between the belated emergence of alleged sexual abuse and the plaintiff's presenting psychological symptoms most likely provided the psychologist with a plausible working hypothesis for her to continue with her counselling sessions to treat the plaintiff on a practical basis to relieve her symptoms without seeing a need to undertake a deeper forensic evaluation of the cause or causes for those symptoms.

205 At this point it is relevant to observe that if the alleged abusive event had occurred when the plaintiff was aged around 8 years, as was recorded by the psychologist without challenge to the accuracy of that record, improbably, this would necessarily have occurred in around 2006, at a time before the plaintiff's mother and the defendant had commenced their cohabitation. That perspective will be taken up and considered in the reasoning for arriving at relevant findings of fact in **PART I** of these reasons.

206 On 1 November 2019, in the contemporaneous clinical notes made by the plaintiff's treating psychologist, some abbreviated handwritten notes of her consultation with the plaintiff were recorded in the form of an aide memoire in the following terms:

"spoke about anger & resentment towards step-father who sexual (sic) abused her.

problem solving around relationship tension around this

validating & normalising feeling of (*indecipherable word*) & sexual abuse"

[Exhibit "B"]

207 The indecipherable word in the above citation is difficult to reliably interpret in the absence of explanatory evidence from the author of those notes, and remains unexplained.

208 A matter to be considered in terms of the reliability of the plaintiff's memory is the apparent disconnect between her specifically stated intention of seeing the



psychologist to discuss the fact of the alleged sexual abuse and the fact that it was not until her fourth consultation with the psychologist on 1 November 2019 that she first raised the topic with her psychologist. This must be assessed against the background of the content of the general practitioner's mental health care plan referral dated 30 August 2019, which made no mention of the alleged sexual abuse.

### ***Disclosure to sister – February 2020***

209 The plaintiff's third verbal disclosure of the alleged abuse was in terms of having been "*molested*" by the defendant "*when she was a kid*": T187.3. The disclosure was made in about February 2020: T185.23. She made that disclosure to her younger sister, who described it in the following terms:

"A. Yeah. So she told me that it was one night when me and [the plaintiff] were still sharing a bedroom when we lived in [address redacted]. And we she woke up in the middle of the night and had a tummy ache. And so she went to mum and [the defendant's] bedroom. At the time, our mum was working late or she was working late or she has always struggled with sleeping. She'd had insomnia parts of her life, and so we knew not to wake her up, because she would struggle to get back to sleep, so [the plaintiff] woke [the defendant] up, on his side of the bed, complained of a tummy ache and he, kind of, told her to come in to his side, to cuddle her to sleep. That is when he, I think, removed her underwear and started fondling around her vagina.

From what I remember, [the plaintiff] told me that he never went up her vagina, but it was all on the outside. And it went on for a little while before [the plaintiff] told me that she didn't know how to get out of the situation, so she just started crying, which woke our mum up. And then she went over to mum's side of the bed."

[T187.31 – T187.45]

210 At this point, given the nature of the expressions adopted in that evidence, a question arises as to whether the plaintiff's sister's account of the plaintiff's disclosure to her should be seen to have been based on surmise and unreliable reconstruction as it differs in some marked respects from the plaintiff's account.

### ***Disclosure to godmother – 17 February 2020***

211 The plaintiff's fourth verbal disclosure of the alleged abuse was on 17 February 2020, to her godmother, who described that disclosure in the following terms:

“... A. [the plaintiff] said, "There's a lot of tension at home. **Mum is upset because I'm hostile towards [the defendant]**. Mum is upset because I haven't been studying."

Q. [Name of godmother], I'm sorry to interrupt. You understand the topic that the Court proceedings is about today?

A. Yeah.

Q. I'm just going to ask you, can you give us your best recollection of the words the plaintiff said about that topic?

A. Okay. [The plaintiff] said, "And there's something else. When I was a kid, [the defendant] touched me." And the exact words that followed, I don't recollect, but there was a very clear message to me that he touched her in an upsetting sexual way."

*[Emphasis added]*

[T240.17 – T240.29]

- 212 It appears that the plaintiff's godmother did not seek to develop that disclosure by seeking additional details.
- 213 The reference in the above account to the plaintiff's hostility towards the defendant is consistent with the defendant's evidence of his perception that the plaintiff displayed an attitude of resentment to him, with alternatingly ambivalent affection and rudeness, and inconsistent behaviours: T484.16; T487.50; T483.44 – T484.1; T486.10.

### ***Disclosure to plaintiff's mother – 23 July 2020***

- 214 The plaintiff's fifth verbal disclosure of the alleged abuse, which was made to her mother, occurred in July 2020. There was an apparent dissonance in the variations in the evidence as to the particular date on which the plaintiff made her disclosure to her mother. The plaintiff's mother said that on reflection, she believed it occurred on 23 July 2020. In contrast, the plaintiff's godmother, who claimed to have followed the course of events in real time on social media, claimed the mother was told on 27 July 2020: T242.7 – T242.16.
- 215 The general practitioner's objective record of the date on which the plaintiff's mother made her disclosure to him was on 25 July 2020. That evidence conflicted with the evidence of the plaintiff's godmother who was adamant the

plaintiff's mother was told on 27 July 2020. In my view, the general practitioner's contemporaneous objective record indicates that the godmother's evidence as to the date of disclosure was not correct.

216 In an affidavit filed by the plaintiff's mother in the Family Court proceedings she identified the date of the plaintiff's disclosure to her as being 23 July 2020. At face value, those inconsistent date variations appear to be of marginal if any significance.

217 Those dissonant dates may be seen to be either peripheral and therefore not particularly relevant.

218 In giving evidence on those matters, the plaintiff's mother interpolated some of her subjective interpretations of the surrounding events: T246.40 – T248.16.

219 The plaintiff's mother described the plaintiff's disclosure as follows:

“Q. What did she say?

A. She said, "[the defendant], on that night, when I was in bed, [the defendant] touched me inappropriately". And I prompted her, "What do you mean by that?" She was speaking gently. And she then described that she had been touched by him sexually, on various parts of her body, but she wasn't specific, but she said it was sexual, and she was scared and froze, and didn't know what to do, and that when I asked her, "How long did it take, how long did it happen for", she said it she felt that it was about 15 minutes.

And then she said, at one point he turned her over, and she also said that she felt him doing something with his hand, down on the low part of her back. She didn't describe any further about that. And then she said she felt really paralysed, I think. She didn't use the word paralysed, she said frozen, I think. And then she thought, what can I do, how can I stop it, and she realised if she could wake me up, she could stop it. So, she started to cry, and that's when I think she succeeded in waking me up.”

[T247.22 – T247.37]

220 There is no evidence that the plaintiff's mother had either made or had relied upon any contemporaneous notes concerning her description of that disclosure.

221 The above account by the plaintiff's mother, and other aspects of her evidence will form the focus of credibility assessments at a later point in these reasons.

***Significance of delayed timing of disclosures***

222 The delayed timing of the plaintiff's claim of having been sexually touched by the defendant must be carefully considered, especially where the allegation was raised for the first time over 8 years after the claimed single event, assuming it occurred in 2011.

223 In current times, it is more commonly recognised that delayed disclosure often occurs in cases involving historical allegations of child sexual abuse. It is well understood that for a variety of valid reasons, where a first complaint is only made years after the alleged event, delayed disclosure does not necessarily serve to cast determinative doubt on the veracity of late emergent allegations. This is because a range of recognised and imponderable factors intrinsic to an individual might possibly operate against a victim making an earlier disclosure: *The Queen v Bauer* (a pseudonym) [2018] HCA 40 at [89]; *R v XY* (2010) 79 NSWLR 629; [2010] NSWCA 181, at [91] – [92], [98] – [99].

224 In conformity with that commonly held modern view, in the circumstances of this case, in the plaintiff's favour, I consider that a delay of about 8 years until the age of 21, of itself, does not necessarily serve to discredit the plaintiff's claim of having been sexually abused by the defendant when she was a child but it has some relevance to assessing the reliability of recollections concerning such matters.

225 In that regard, on behalf of the plaintiff it was submitted that before she found her voice to make her first disclosure, she had, to use her mother's words, damagingly, carried the heavy burden and shame for a decade: Exhibit "33". It was submitted that the plaintiff's delay in disclosure of the alleged abuse occurred for sound reasons, which were partly influenced by the defendant's overshadowing presence in her life.

226 In support of that submission, if the alleged abuse had in fact occurred, generally speaking, possible reasons for such delay in disclosing it in this case could have included the plaintiff's relatively young age at the time, her state of emotional maturity and fortitude, her concern that raising such an allegation might have had a detrimental effect on the family's financial position, especially the financial position of her mother, and, in hindsight, a claim that there was an overshadowing power of the defendant's presence in the family, where, in effect, his presence provided the family with financial security that could have at any time been withdrawn by him.

227 The expert evidence of Dr Brown, the forensic psychiatrist called in the plaintiff's case, referred to the possibility that the latter factor might apply and relate to a potential attitude of victim appeasement of the alleged abuser. This raises a factual question to be considered.

228 In Dr Brown's oral evidence the term appeasement was identified as being the precursor equivalent DSM descriptor of what used to be known as the "*Stockholm Syndrome*", where the victim is said to have remained under the power and the control of the perpetrator, a fact which might militate against disclosure. The terminology was explained as follows:

"Q. Are you talking about what used to be known as the Stockholm syndrome?"

A. I am, your Honour, but that's not a recognised diagnosis in the DSM and I don't use it for that reason, but yes. It's now termed more "*appeasement*". In fact, there was a paper quite recently in one of the European journals about it. It's not uncommon in these situations, but I don't use the word "*Stockholm syndrome*". I think that's outdated."

[T201.28 – T201.33]

229 In contrast, the defendant submitted that the weight of the evidence suggests that the plaintiff has either invented a false story of sexual abuse to inculpate the defendant for whatever motive, or that she has falsely convinced herself that the claimed sexual abuse by the defendant had in fact taken place.

230 The defendant also submitted that the plaintiff's allegation against him was part of a sophisticated joint enterprise with her mother, or to attempt to blackmail

him against the background of the emergent social phenomenon known as the “*Me Too*” movement. That topic was described in the evidence of the defendant as follows:

“Q. The second topic is something that Mr Foord raised with you concerning your awareness of what's become known as the "me too. Movement." When did you acquire that awareness, and what did you understand it to be?

A. Well, it was all well, I guess it began in America with, you know, the accusations in Hollywood and Harvey [incorrectly stated surname redacted] stuff.

Q. Harvey Weinstein.

A. Harvey Weinstein. But then, of course, there were the Four Corners programmes that were going to air in 2020 about [a politician] and about the Canberra bubble and so and [a complainant], and so it was very much a sort of zeitgeist or whatever you could say. There was it was in the media everywhere, this business of sexual harassment and assaults and that kind of thing.”

[T509.17 – T509.29]

- 231 One of the challenges made to the credibility of the plaintiff’s late emergent claim of sexual touching by the defendant was the submission which raised the background factor that the plaintiff’s family were, to a significant degree, subjectively attuned to and invested in publicly supporting the rights of victims of alleged sexual abuse.
- 232 In effect, the submission was that if the plaintiff was truly affected by PTSD due to the alleged sexual touching as she has claimed, she ought to have been “*triggered*” by a significant event in May 2019, as was described in the evidence. That submission found some support in the oral evidence of Dr Brown, who thought that triggering would have been expected in the circumstances. This will be analysed at a later point in these reasons when the evidence of Dr Brown is analysed in **PART I** of these reasons.
- 233 The foundation for that latter submission was in reference to the fact that in May 2019, the plaintiff, her mother, and the defendant had attended a court hearing in Sydney to support a particular person, who was described by the mother as a dear friend, who had complained of having been sexually abused whilst he

was a minor, by a prominent person, who was facing a trial by jury over those events: T263.25 – T263.33.

234 Following the conviction of that person for an historical sexual crime against a minor, members of the plaintiff's family attended the sentencing hearing where a victim impact statement was read.

235 In her evidence-in-chief, the plaintiff initially claimed that she did not recall being in the courtroom at that sentencing hearing: T71.16 – T71.44. In cross-examination she was confronted with a copy of her own SMS message which she had sent to the defendant on that occasion, proving she was there, and that she had been saving him a seat in the public gallery in the courtroom: T205.17; Exhibit "82".

236 The defendant seeks an inference that the events involving the sentencing hearing occurred in the plaintiff's presence, and significantly, at that time there was no evidence that she had been observably "*triggered*" by those events.

237 Accordingly, it was submitted that those events serve to detract from the veracity of the plaintiff's claim of having been traumatised by the defendant's alleged actions. In contrast, the plaintiff's submissions suggested, speculatively, in my view, that any otherwise observable signs of triggering may have been suppressed by the plaintiff, and as such, they were not readily displayed or discernible.

238 On that sentencing occasion, on 17 May 2017, after the sentence had been imposed, the plaintiff's mother (as is shown in a copy of a video recording of a television newscast comprising Exhibit "40") stood outside the Downing Centre Court complex in front of the assembled media and read out the following pre-prepared impact statement she had written out beforehand at the behest of the complainant victim in that case:

"He says 'my immediate response to this conviction is to reassure any abuse survivors thinking of coming forward, and also to those victim currently in the process of coming forward that the feeling of relief brought about by the release from the oppressor far outweighs the doom and gloom of the time spent

bringing the accused to justice. The liberation gained by the conviction is profound but even more so was the opportunity to stand before the Court and tell my story. This is where true freedom is found. So with joy and optimism I thank my beautiful wife my dear friends and family and my five amazing children. To the Police and the entire legal team at the DPP, thank you all for your unwavering commitment and support’.”

[Exhibits “41” and “40”]

239 The plaintiff avoided providing a direct answer to the question as to whether she was present outside the Court when the above statement was read out by her mother: T91.40 – T91.50.

240 The defendant seeks an inference that the plaintiff was either present, or that she knew of the circumstances, and in the context of her claim of having PTSD, significantly, she was not “*triggered*” by those circumstances. The defendant submitted that those circumstances also serve to detract from her claim of being so affected, as was referred to in her repeated references to having experienced triggering circumstances since the occurrence of the events she has alleged: T32.31; T32.44; T33.12 – T33.30; T37.22; T145.35.

241 The plaintiff’s evidence in that regard will be analysed in due course at a later point in conjunction with the forensic psychiatric evidence of Dr Brown, the focal point being that the plaintiff has never been given the clinical diagnosis of PTSD, other than in the medico-legal setting, in 2022, by Dr Brown, who assessed her for the purpose of this case.

242 The competing submissions as identified above will be considered in **PART I** of these reasons, when determining findings of fact concerning the central issues identified at paragraphs [84] – [86] above.

### **Mother’s disclosure to the treating general practitioner**

243 The plaintiff has had the same treating general practitioner since 20 June 2002, when she was aged 4 years. He has been her primary medical health care provider and trusted medical confidant since that time. She said she had confidence and trust in him: T172.40.



- 244 It therefore seems unusual that the plaintiff did not see fit to disclose the alleged sexual abuse to her trusted doctor at any stage, even including after her mother had disclosed that allegation to him in July 2020, particularly where she claimed to have been experiencing psychological problems which she considered to be directly linked to the claimed event, including, in her words, “*extreme*” suicidal ideation, that had persisted for about 3 years.
- 245 Instead, it appears the plaintiff chose to withhold details of the alleged sexual abuse from her doctor and was apparently content to keep such knowledge of it concealed where it is plain that, as a traumatic event, if shared, it ought to have been included as a relevant detail to be considered in relation to the basis for her referral for psychological counselling.
- 246 According to the report in evidence from the plaintiff’s general practitioner, on 25 July 2020, when the plaintiff was aged 21 years, the plaintiff’s mother disclosed to him that the alleged sexual abuse occurred when the plaintiff was aged around 12 years. The evidence shows that the general practitioner made an objective record of that disclosure when the plaintiff’s mother had informed him so.
- 247 There was no suggestion that the general practitioner’s objective record concerning that disclosure was factually incorrect in any respect. His report to the plaintiff’s former solicitor was in the following terms:

“...I am a general practitioner currently practising in [Suburb redacted], having qualified in medicine from the University of NSW in 1977 and have read and agree to be bound by the code of expert witnesses. I have been the GP of [the plaintiff] since 20/6/2002 but was only informed via her mother, [mother’s name redacted] on 25/7/2020 of an alleged sexual assault which took place when [the plaintiff] was around 12 years old.

[The plaintiff] has not directly or specifically brought up the subject with me since then but on 30/8/2019, she did complain of being stressed in the daytime with panic attacks mostly at night. Symptoms include crying and she reported fights with her mother and sister. She claims she felt sad often on waking and thought often about her late father [name redacted] who died of Motor Neurone Disease in 2016. A GP mental health care referral was supplied at the time. ...”

[Exhibit “2”]

- 248 The date of 30 August 2019 in the above narrative would seem to have followed the plaintiff's disclosure to her boyfriend in about mid-2019 as he had stated: T164.1 – T164.4; T166.7.
- 249 In providing the above narrative the plaintiff's general practitioner did not seek to give a diagnostic opinion as to the cause of the plaintiff's described psychological symptoms. This was understandable especially as he did not have any direct history from the plaintiff of the alleged sexual abuse.
- 250 Exhibit "2" was the only report in evidence from the plaintiff's treating general practitioner. However, his clinical records are in evidence: Exhibit "1", Vol 1, pp 1 – 138.
- 251 An examination of those records does not reveal any notes which chronicled the mother's disclosure of the alleged sexual abuse of the plaintiff, although it is possible that the described disclosure made on 25 July 2020 may have been recorded in the mother's medical records which were not in evidence.
- 252 Also of significance is the fact that the general practitioner's records make no mention of the plaintiff having a diagnosis of PTSD.
- 253 The plaintiff's medical records show that her general practitioner had attempted to have a telephone consultation with her on 28 July 2020, and that this resulted in a voice message being left for the plaintiff: Exhibit "1", Vol 1, p 51.
- 254 Those records also show that on 29 July 2020, a surgery consultation with the plaintiff took place, and that a GP Mental Health Plan was prepared. On that date no note was made of the plaintiff having been subjected to an incident of sexual touching or abuse: Exhibit "1", Vol 1, p 51.
- 255 Extraordinarily, the clinical notes of the plaintiff's treating general practitioner in relation to his treatment of the plaintiff do not contain any reference at all to the alleged sexual touching. It would be extraordinary if such a subject of significance had been made and no record of it was made.

256 In those circumstances, the compelling inferences are first, that the plaintiff had not discussed the alleged sexual assault with her general practitioner even after her mother had disclosed that most serious allegation to him, and secondly, the inference is he did not seek to discuss her mother's disclosure with the plaintiff. If it were otherwise, the expectation would be that such a discussion of significance would have been the subject of a corresponding clinical note about such a sentinel event.

### **Unexplained evidentiary gaps**

257 A review of the documentary evidence shows there are a number of significant evidentiary gaps in the chain of events which followed the plaintiff's disclosure of alleged sexual touching by the defendant.

258 Extraordinarily, in a case where the plaintiff has been given the medico-legal diagnosis of PTSD in 2022, in the context of a medical assessment for the purpose of litigation, where she claims to have had an undocumented 3 year period of quite extreme suicidal ideation, it seems unusual that such suicidality had not come to the notice of her treating general practitioner, and that he had not referred her to a psychiatrist for the clinical assessment, management, and treatment of such a serious issue.

259 It also seems extraordinary that if the plaintiff truly had extreme suicidal ideation over the course of three years that her mother, who was vigilantly attentive to the plaintiff's health and her health maintenance needs, did not notice any indications of this phenomenon, and did not contemporaneously bring it to the attention of at least one of the plaintiff's several treating doctors.

260 The plaintiff has been referred for 3 separate mental health care plans. The implementation of the first plan commenced on 8 October 2019, when the plaintiff had started seeing her treating psychologist in Sydney. The second plan was the subject of a referral from the same general practitioner on 29 July 2020: Exhibit "1", Vol 1, p 51. The third plan was proposed on 11 November 2022, by another treating general practitioner, in Melbourne, when the plaintiff

was referred to a psychologist with a referral diagnosis of anxiety and depression: Exhibit "A", p 33.

261 It seems extraordinary that there is no evidence of any follow-up feedback from those referrals, especially where the most recent referral by the Melbourne general practitioner included a request of the psychologist that he be informed of the outcome of therapy and consultations.

262 There is no evidence as to the plaintiff's attendance at any of those proposed sessions, where 8 sessions were suggested pursuant to a Medicare mental health item number 2715, for counselling and cognitive behavioural therapy. It is possible that the plaintiff's claim of impecuniosity might have been a factor for not pursuing mitigatory treatment but that is not entirely clear on the evidence.

263 Also remarkable as an apparent gap in the clinical evidence in this case is the fact that nowhere in the medical and allied clinical records is there any mention of the plaintiff's PTSD diagnosis before Dr Brown gave her that diagnosis in 2022.

264 Since the plaintiff holds the belief that she has sexual abuse-related PTSD, a question arises as to where she obtained that diagnosis. If it was from a treating doctor, the evidence for this is absent. If it came from Dr Brown, the basis for that opinion requires critical examination in the context of a legal causation analysis.

265 Those factual matters will be considered in the course of the evaluation of the plaintiff's evidence for credibility and reliability in **PART H** and **PART I** of these reasons.

### **Post-disclosure reactions of the plaintiff's mother**

266 On an empathic level, the shocked and dismayed reaction of the plaintiff's mother at the plaintiff's disclosure of the alleged sexual touching was entirely understandable.

- 267 It is also understandable that, as a protective mother, she chose to unquestioningly believe the plaintiff's account of events. She did not seek to question this with the defendant. It is understandable that she then proceeded to stridently support her daughter's account, and to staunchly advocate for her in a variety of ways that became manifest in the documentary evidence, and in her own oral evidence.
- 268 On 10 August 2020, against the stressful background described in the evidence, and as summarised at paragraphs, [188] to [191] above, a series of emails and text messages flowed between the plaintiff's mother and the defendant. Some of those communications also involved third parties whom the plaintiff's mother sought to enlist to further her attempts to engage the defendant in communications with her or other family members.
- 269 In that mix, later, on 30 August 2020, the plaintiff also sent the defendant an email of significance which will shortly be examined in detail in the context of other relevant communications in **PART B** of these reasons.
- 270 The defendant has identified some of those emails as relevant elements that demonstrate there had been an attempt to blackmail him with regard to the plaintiff's allegation against him.
- 271 In the course of the defendant's initial email exchanges with the plaintiff's mother prior to 10 August 2020, he came to realise that his relationship with her mother had ended. This occurred in hostile circumstances, which he did not at first fully understand.
- 272 In those evolving circumstances, where ultimately, the defendant became increasingly concerned at the gravity of what was being alleged against him, where he believed he was innocent of any wrongdoing. He became alarmed at what was being suggested. Therefore, proceeding in accordance with sound and conventional legal advice, he did not answer or otherwise respond to what he described as a bombardment of communications that were being directed

at him, a circumstance which was identified as affecting his mental health: T493.20; T503.30; T506.29.

273 In hindsight, it appears that the defendant's non-responses to the attempts to engage him in discussions were interpreted by the plaintiff's camp as "*radio silence*" on his part (T147.14), which seems to have been misinterpreted as some form of avoidant behaviour evidencing a consciousness of guilt on his part.

274 Those circumstances then led to more diverse and concerted attempts by members of the plaintiff's family and a de-identified friend and colleague of the plaintiff's mother to seek the defendant's engagement in discussion about the subject matter of the plaintiff's disclosure. It is clear that the defendant avoided such discussions out of caution, on sound legal advice, in circumstances where he had formed the reasonable view that he was being set up for blackmail: T467.2.

275 In that regard, the defendant described the actions of the plaintiff's mother as a massive betrayal of their relationship: T493.32 – T493.40.

276 For context, as a prelude to identifying relevant credit findings and findings of fact, at this point it is appropriate to undertake a chronological review of significant aspects of the sequence of communications that had proceeded by various means, including those that involved third parties. That review now follows, in **PART B** of these reasons.

## **PART B – RELEVANT COMMUNICATIONS**

277 In preparing for the hearing of this case the defendant has searched through his accumulated archive of 16 years of contemporaneous emails and text messages. He has extracted an array of communications of relevance to the issues raised in this case. They are set out below in the order in which they were generated, cross-referenced to relevant exhibits, and aspects of the oral evidence.

278 Having considered those communications and the context of them, in my view, the critical suggestion made on behalf of the plaintiff that the defendant was unduly selective in his assembly of those messages, has not been made good on the evidence. It seems that the selection process, if it was selective, was salient, and was guided by relevance to the issues raised in the case.

### **Mischaracterisation of circumstances by plaintiff's mother**

279 Before reviewing those communications, by way of relevant background, it is convenient to identify the content of paragraph 7 of an affidavit filed by the plaintiff's mother in the Family Court proceedings between the defendant and herself aimed at furthering her own interests in that litigation:

“On 23 July 2020, I regarded my relationship with [the defendant] as over. On that date [the plaintiff] disclosed to me that she had been sexually assaulted by [the defendant] in 2011, when she was twelve. I was, and am, in shock about the [the plaintiff's] disclosure to me. On 10 August 2020, while [the defendant] was visiting family, I emailed him saying I knew about the alleged event and that our relationship was at an end.”

[Exhibit “42”, paragraph 7]

280 That account in the plaintiff's mother's affidavit appears to be something of an oversimplification if not a mischaracterisation by her with regard to the defendant's absence from the family home. She had left the relationship earlier, on 1 July 2020, and the defendant later left Sydney to give her “*space*”.

281 The defendant had been away from Sydney for an extended period of little over a month, during which time he was attending to family matters, including the preparation of 7 years of delayed tax returns for the plaintiff's mother, as well as 2 years of his own tax returns during the time of COVID-19 travel restrictions. This also coincided with the defendant giving the plaintiff's mother “*space*” as she had left the relationship and separated on 1 July 2020. It therefore appears to have been something of a mis-characterisation for the plaintiff's mother to simply say the defendant was “*visiting family*” as was stated in that affidavit.

282 In that period, the defendant's absence from Sydney was punctuated by a short but unproductive return home for 2 days. The dates are unclear, but having

regard to Exhibit “25” which shows that an unanswered call was logged at 10:25am on 22 July 2020. On that date the plaintiff’s mother left a message on the defendant’s phone. On the mother’s account, the plaintiff made her disclosure to her on 23 July 2020, which was when she said the plaintiff had disclosed the alleged event to her.

283 In that two day visit, the defendant had gained a sense of apprehension that the family were being remote and distant with him. Whatever was occurring, he felt that he was on the outer in the dynamics that prevailed in their home at that time.

284 The plaintiff’s mother’s view concerning those events was that following the plaintiff’s revelation of alleged sexual abuse, she was initially too scared to raise the subject with the defendant because of apprehensions she had over the ramifications of doing so. She said she felt she needed support for herself and she needed to understand what steps would be available to her to protect her own interests. Therefore, she said she felt she was not in a sound position to raise with the defendant the subject matter of the plaintiff’s revelation: T287.10 – T287.14.

285 In those events, on 23 July 2020, in her own mind, the plaintiff’s mother determined that her relationship with the defendant was at an end. However, she delayed communicating this and decided to maintain the deception of an amiable “*pretence*” to the contrary (T287.13), whilst she sought legal and psychological advice as to how to strategize what was going to occur from that point: T288.13.

#### **Email to defendant on 1 July 2020**

286 Before the events described in the preceding paragraphs, by 1 July 2020, the plaintiff’s mother had decided to separate from the defendant, and leave the relationship. This is evident from the terms of the email she sent to the defendant at 8:29am on 1 July 2020, as follows:

“Hi [the defendant],



After your comments about what all my friends and family were saying about me, **I made the decision to leave – as it felt too toxic.** I told [the plaintiff] and [the plaintiff's sister] on Sunday morning when it was still fresh in my head and they understood. They thought your comments were untrue and designed to hurt me, which they did.

The irony is that when I'd brought up my concern about your description of me as 'a handful' I was only seeking a bit of reassurance. It felt weird to be described like that, as if I needed be managed or controlled [sic]. It wouldn't have taken much on your part to make me feel better.

My heart sank when I read your email and understood it's not how you see it at all. I can't see myself sitting in front of your psychologist and remaining calm and clear and I feel stressed at the thought. There's no point in seeking validation through him as you will probably use whatever I say against me down the track."

[Emphasis added]

[Exhibit "23"]

- 287 That email was sent by her in response to the defendant's email he had sent her at 7:31am on 1 July 2020, in a context where the mother had not been responding to his text messages. His email referred to the stress of the separation at that time and expressed concern as to what the mother had told the plaintiff and her younger sister about their separation as the youngest sister was stressed by the separation.
- 288 The defendant's email made reference to the couple's forthcoming appointment with a psychologist they had arranged to see in a consultation arranged for Monday 6 July 2020. That email referred to the defendant being sad and worried about her, and about their relationship. It referred to payment of bills and credit cards. It concluded with the defendant asking the plaintiff's mother to let him know of her plans.
- 289 Plainly, on that evidence, the relationship was well and truly on the rocks at that point. The plaintiff's mother had made it clear that she was not interested in seeing a psychologist with the defendant. The evidence shows that at that time she had taken great umbrage at the defendant having considered her to be "*a handful*": T284.31 – T284.37. It is clear from the circumstances that the relationship had irredeemably soured.

290 In addition, the stress of the separation and the absence of the plaintiff's mother at that time had affected the plaintiff and her sister, who it appeared, were staying either with him, or with their grandparents, or a combination of those arrangements: Exhibit "23".

### **Series of emails between 22 July and 7 August 2020**

291 On 22 July 2020, at 10:25, either in the morning or later, the plaintiff's mother called the defendant but did not leave a voice message. A related iMessage from her stated: "*Sorry – call again*": Exhibit "25". Those exchanges occurred before the defendant had returned home for two nights during the period of the mother's "*pretence*" that all was well.

292 On 23 July 2020 the plaintiff had disclosed her account of the alleged sexual touching, which led to her mother ending the relationship with the defendant.

293 On 24 July 2020, at 12:23pm, the plaintiff's mother sent a text message to the defendant asking for the names of "*the therapists*" as she wanted to make an appointment with a therapist. The defendant replied by text message attaching a photograph of a handwritten note in which the names of 4 therapists appear: Exhibit "26". That message was sent in the period in which she was maintaining her "*pretence*".

294 In hindsight it appears the mother's purpose in arranging for a therapist for herself was to assist in extricating herself from her relationship with the defendant, which by then had ended, at least so far as she was concerned.

295 On 27 July 2020, at 4.51pm, the plaintiff's mother rang the defendant but she did not leave a voice message: Exhibit "26A". The defendant had by then returned to his sister's home quite some distance away from Sydney.

296 On 3 August 2020, at 6:27am, and again at 6:24pm, the defendant and the plaintiff's mother exchanged emails of mundane content concerning financial matters regarding their subscriptions to periodicals where the plaintiff's mother suggested that they "*should tighten belts wherever we can??*": Exhibit "26B".

- 297 The mother's level of "*pretence*" evident in hindsight in those emails did not suggest or give any hint that the relationship was about to be more formally terminated.
- 298 In examining these messages in chronological order in the context of paragraph 7 of the affidavit of the plaintiff's mother as filed in the Family Law proceedings, in which she stated that she regarded the relationship as being over on 23 July 2020, objectively, it seems somewhat incongruous that 7 days later, on 3 August 2020, they would be exchanging mundane emails about subscriptions to periodicals.
- 299 On the version propounded by the plaintiff's mother, it seems that this may have been part of the duplicitous "*pretence*" of normality she had decided to portray to the defendant before eventually telling him their relationship was terminated: T287.1.
- 300 On 7 August 2020, at 8:14am and at 8:30am, the defendant and the plaintiff's mother respectively exchanged emails about where he should stay as he had nearly completed the preparation of their tax returns whilst staying away from Sydney at the home of his sister. He noted he had been away for three weeks. She responded by suggesting some places where he could stay: Exhibit "28".
- 301 Up to that point there was no discernible or apparent hint of anger or hostility within the written communications from the plaintiff's mother to the defendant. On the face of it, the earlier request by the plaintiff's mother for the name of a therapist seemed to be an innocuous request in the context of those dates. Hindsight shows otherwise.

### **Sentinel email exchanges on 10 August 2020**

- 302 On 10 August 2020, at 1:02am, the first significant email in a series of sentinel written communications passing between the plaintiff's mother and the defendant was sent by the defendant to the plaintiff's mother.

303 The background context was that there had been a geographic separation for some weeks whilst the defendant was away from Sydney during which time he gave the plaintiff's mother some "*space*". It appears from the defendant's email that the defendant was at that time feeling a sense of alienation.

304 That email from the defendant at 1:02am on 10 August 2020 was in the following terms:

"I thought we would always be friends.

Could we please talk on the phone in the morning?"

[Exhibit "29"]

305 This was the first objective indication of the defendant's perception that there was a problem in the air concerning the continuation of the relationship.

306 At that time the issue for discussion was not clearly apparent. Something had obviously occurred in the background to create that apprehensive vibe or a sense of foreboding in the defendant's mind. The evidence does not identify precisely what it was at that point from the defendant's perspective. What the evidence does make clear is that beforehand, there had been a history of discord and argument in the relationship: T122.46 – T123.6; T327.42; T374.26 – T374.45.

307 In that period of "*space*" the defendant's perception was that he thought that the mother may have been dealing with her "*demons*": Exhibit "30".

308 The second email on 10 August 2020, at 6:40am, was from the plaintiff's mother to the defendant. It was in the following terms:

"Stay at your Mum's. Do not call me."

[Exhibit "29"]

309 The third email on 10 August 2020, at 7:57am was from the defendant to the plaintiff's mother. It was in the following terms:

“Whatever happened, I thought you’d always be my friend.

I’ve been away for more than a month now, apart from two nights.

I feel numb.

I want to be home.

And I’d like to hear what you now think about our future.”

[Exhibit “29”]

310 The fourth email on 10 August 2020, at 8:10am, was from the plaintiff’s mother to the defendant. It was in the following terms:

“You may already be starting to guess why I have asked you to stay away.

[The plaintiff] has described to me in detail an event in her childhood, that she believes took place when she was twelve years old. She knows you’ll remember it. I clearly recall her distress immediately after the event she disclosed.

We have sought advice, including legal advice.

[The plaintiff’s] wellbeing and protection is the priority. You cannot return to live with us or have any further contact with her or [the plaintiff’s sister]. We will make a mutually acceptable arrangement to have your belongings removed. We will then enter into an agreement for the separation of our financial affairs.

I will only communicate with you via email.”

[Exhibit “29”]

311 It is interesting to observe that at that time the mother’s belief was that the alleged abuse occurred when the plaintiff was aged 12 years. This was different to the plaintiff’s view as expressed to her psychologist that it had allegedly occurred when she was aged around 8 years.

312 The detail of the legal advice sought by the plaintiff’s mother was not included in the evidence. It would have been surprising if that legal advice had not included advice to report the alleged abuse to the police as a crime.

313 Despite that definitive declaration by the plaintiff’s mother ending the relationship, as events subsequently transpired, the plaintiff’s mother later abandoned her earlier stipulation that communication between the defendant

and herself should only be via email. It appears she had a strategy in mind in changing her position.

314 By that last-cited email, the plaintiff's mother brought the plaintiff's allegation of sexual impropriety to the defendant's attention. She did so after seeking legal advice. It was clear that by this stage she was contemplating the need for a separation of their finances. The defendant did not receive that message very well, as appears from his email in reply, as follows.

315 The fifth email on 10 August 2020, at 9:42am, was from the defendant in reply to the 8:10am email from the plaintiff's mother. It was in the following indignant terms:

"[First name of plaintiff's mother],

What the hell?

I have no idea what you or [the plaintiff] are talking about.

What precisely am I supposed to have done?

You seem very certain.

If the accusation is that I molested her it is completely untrue.

I am speechless and very angry and upset.

This is not right. Not at all. How dare you say that I must have already guessed. It is completely unexpected and I am totally shocked. Fuck that! I don't know what to think. What? When? Where? How?"

[Exhibit "29"]

316 On behalf of the plaintiff it was submitted that the defendant's reference to molestation was some kind of admission of a consciousness or awareness of wrongdoing on his part. I do not read it that way. Plainly, in his bewilderment the defendant was casting about to seek an understanding of what had allegedly occurred between him and the plaintiff. His reply was a reasonable but bewildered response that speculated on the detail of what was being alleged against him, in veiled terms.

317 The sixth email on 10 August 2020, at 1:04pm, was from the defendant to the plaintiff's mother. It was in the following terms:

"I am completely gobsmacked.

What has [the Plaintiff] said? Remind me of this incident you remember.

I have never, ever, done anything to her. Why would she say I have? I do not know what to think.

Can you please tell me what I am supposed to have done?

What is it that [the plaintiff] has said? You say you've sought legal advice. Bloody hell! Have I exposed myself? Tried to rape her? What? Isn't it a bit odd that I have no idea about whatever it is I am supposed to have done?

I just do not know what to say.

At the very least you need to tell me what I have been accused of.

How could it come to this?

[Name of the plaintiff's mother] this is SO not right. Do you really think so little of me that you would treat me like this?

Have you no trust in me whatsoever?

Is your judgement so flawed that you loved me once, but now think I'm a monster who shouldn't be spoken to?

I just can't believe it and I am heartbroken, angry and confused.

I didn't get much sleep last night in any case, lying awake wondering about whether I should come home, which frankly I wanted to do. I've been away now for more than a month, with two days in the middle. Here I was thinking you needed "*space*" to deal with your demons and actually what you have been doing is locking me out. I'm too tired and too upset to go on any more. I'll go sleep at mum's place and try to collect my thoughts.

Re-reading your email just then leaves me cold. I still find it amazing. I doubt we can ever come back from it.

What precisely are you planning to do, and what do you want me to do? And what do you say I have done?"

[Exhibit "30"]

318 The seventh email on 10 August 2020, at 7:19pm, the defendant sent a further email to the plaintiff's mother, also indignantly, in the following terms:

"I most certainly don't remember any "*event*". Where? What?

[Name of plaintiff's mother] - you must at least tell me what this is about.

I feel like I've been king hit.

This is quite unfair.

I have given you space...only to be clobbered with this. I don't know whether to come back or what.

I would never hurt either [the plaintiff] or [the plaintiff's sister]. I have spent a large hunk of my life looking after them.

Who drove them around? Moved furniture? Picked up? Worried about them. Bloody hell, what do you think I am? This is crazy.

What you have said is still sinking in. I can't believe it. What are you doing? Call me. At the very least email me with some explanation"

[Exhibit "31"]

- 319 In the course of their respective email exchanges the defendant's response was an unmistakably vehement and indignant denial of the truth of any alleged impropriety on his part. The tone of his denial indicated his state of upset at the time.
- 320 In those events, it was the plaintiff's mother, and not the defendant, who was operating on "*radio silence*". She was not speaking to him and he did not know why that was so.
- 321 Those events led the defendant to obtain legal advice from a barrister acquaintance who was known to specialise in the practise of the criminal law. Her advice was to the effect that, for good reason, and to protect his interests, he should not communicate with the plaintiff's mother concerning the allegation she had raised. That barrister also knew the plaintiff's mother and the family.
- 322 The reasoning behind that barrister's advice was sound, as was explained in her oral evidence. She told the defendant that he had a right of silence in the face of an allegation of criminal conduct (which he denied) and in the circumstances, it was wise for him to avoid a possible attempt to entrap him in circumstances such as those she outlined in her evidence, citing some examples from within her own experience in practice, which justified that advice.



323 The plaintiff's mother nevertheless continued her unsuccessful attempts to engage the defendant in communications. She did so by emails, and text messages.

324 The plaintiff's mother also attempted to contact the defendant by telephone on several occasions, but without success, including through attempts to enlist the involvement of mutual friends in the process.

325 These attempts seemed contrary to the terms of the mother's 6:40am and 8:10am emails sent on 10 August 2020 in which she told him not to call her and to only communicate with her by email.

#### **Email from plaintiff's mother on 11 August 2020**

326 On 11 August 2020, at 2:02pm, the plaintiff's mother sent the defendant a text message in the following terms:

"Your clothes and belongings are boxed and your paintings bubble wrapped. I'll arrange to have them delivered to a Sydney address when you provide it. Don't feel rushed. I haven't packed your tools. They can be sorted at a later date.

If I have missed anything you can let me know and I'll forward."

[Exhibit "32"]

#### **Email from plaintiff's mother on 14 August 2020**

327 On 14 August 2020, at 7:13am, the plaintiff's mother sent a further email to the defendant in the following terms, which were more specific:

"To answer your question – [the plaintiff] describes an experience that seems to match an offence known as aggravated sexual touching of a child.

As I've already said, I clearly remember her distress – after she got away from you and came to me for comfort.

[The plaintiff] told her psychologist nearly a year ago. I learnt a few weeks back when you were at your sister's.

I was shocked to find this out, but there is absolutely no doubt in my mind it happened, as recalled by [the plaintiff].

I am having counselling to deal with the information and to understand the long-term negative impact on [the plaintiff], who has carried a burden of shame for a decade.”

[Exhibit “33”]

328 It seems by that stage the plaintiff’s mother had identified a theory for this case and she identified the fact that she claimed a relevant recollection of the event in question. The truthfulness of that evidence is a matter to be determined.

329 The mother’s reference to the plaintiff having endured a decade of shame was not reflected in any contemporaneous health care record tendered in the proceedings.

330 The compelling inference from the words of the opening sentence of the mother’s email dated 14 August 2020 is that by this stage the plaintiff’s mother had obtained focussed legal advice from someone versed in the language of the criminal law.

331 In that regard the mother’s oral evidence identified a solicitor versed in criminal law as the person she consulted for informal legal advice: T296.45 – T297.20. That solicitor, a family friend, gave her some ideas on how she might write something (to the defendant) about the plaintiff’s allegation of sexual touching: T296.20.

332 It seems that advice was reflected in the mother’s 14 August 2020 email to the defendant comprising Exhibit “33”, and possibly the subsequent email dated 23 August 2020, in which she set out the financial and property demands she was making of him: Exhibit “34”.

### **Email from plaintiff’s mother on 23 August 2020**

333 On 23 August 2020, at 9.11pm, the plaintiff’s mother sent a significant email to the defendant in the following terms:

“I’d like to have a productive and unemotional conversation with you on how to move quickly to a settlement that will be in your interests, as much as [the

plaintiff's] and mine. Despite what happened, we believe you to be an honourable man who will do the right thing by us.

[The plaintiff's] strong preference is to deal with the matter privately. She needs an emotionally and financially secure future – with ongoing psychological support to help her regain her confidence and proceed with her delayed tertiary education.

I want our conversation to cover key points in addressing my needs and [the plaintiff's] needs.

1. a settlement that gives me the properties in [redacted Sydney location] and [redacted overseas location],
2. limited spousal support allowing me time to find a job so that I can pay the [Sydney location] mortgage,
3. some financial support/compensation for [the plaintiff] to redress the compounding emotional damage she has suffered for a decade,
4. repayment of the \$80,000 lent to you by my Mum.

The settlement will be fair and based on what I brought to our recent property purchases as well as the very reasonable expectation I held of my financial security in our ongoing partnership.

This settlement will be achieved without the potentially crippling costs of family lawyers and court processes. It will enable us to end relationships cleanly and finally and it will allow us all to continue our lives without any fear or obligation.”

I suggest we talk tomorrow morning. I will call you around 10am.”

[Exhibit “34”]

334 That email from the plaintiff's mother was written in a far more conciliatory tone when compared to the terseness of her previous emails to the defendant.

335 Despite that apparent change in tone in the email communication from the plaintiff's mother, on legal advice, the defendant did not respond to any of the mother's further attempts to contact him.

336 On receipt of that 23 August 2020 email, the defendant understandably interpreted it as an attempt to blackmail him. It had some significant characteristics which tend to suggest that his view of the situation was correct because it demanded a financial settlement to the plaintiff's mother and referred to potentially crippling costs. In commenting on that email, the defendant noted

that the claim for the repayment of a loan of \$80,000 was in fact a joint debt, and not his debt alone.

337 The cumulative events of those communications led the defendant to then set upon a pre-emptive course of seeking Family Law advice and relief in the Family Court.

338 In taking the position of not responding to the mother's emails the defendant was very much aware of his right to remain silent. The legal advice he had obtained to that effect had caused him to become suspicious of the motives behind the allegations and the correspondence which flowed from those allegations.

339 The defendant therefore ceased all communications with the plaintiff's family. Arrangements were subsequently made for his boxed personal belongings to be retrieved from the formerly shared family home.

### **Third party attempts to contact the defendant**

340 In those circumstances, where, on advice, the defendant had not responded to communications, the plaintiff's mother, and persons acting on her behalf, or in her interest, undertook a series of unsuccessful attempts to contact the defendant. This included making unsolicited contact with the defendant's colleagues and friends, to seek to engage him in discussion on the subject matter of the plaintiff's allegations made against him.

341 On 24 August 2020, at approximately 10:01am, the plaintiff's mother called the defendant, and a minute later, left a text message for him, stating: "*Please call me*": Exhibit "121".

342 On 27 August 2020, at 8:11am, following a call he received from the plaintiff's mother, Witness D sent the defendant a text message in the following terms:

"Morning [defendant's name], just had a call from [plaintiff's mother] that I let go through to message. Just received a text from her asking me to ring. I won't do anything till I hear from you about what you want us to do.

Cheers Mate.”

[Exhibit “123”]

343 On 27 August 2020, the defendant’s solicitor, Ms Amanda Alidenes, sent a letter to the plaintiff’s mother informing her that the defendant had instructed her in relation to family law matters arising from the breakdown of their relationship. That letter requested relevant financial information and documents from the plaintiff’s mother: Exhibit “36”.

344 On 28 August 2020, at about 5:15pm, the plaintiff’s mother sent the defendant a text message in the following terms:

“Got your lawyer’s letter this afternoon. I can’t say enough the importance of us having a private chat – there’s critical info you need to have before you going down this legal route.”

[Exhibit “35”]

345 Consistent with the legal advice the defendant had been given, he did not reply to that last text message from the plaintiff’s mother.

346 On 28 August 2020, at 5:06pm, the plaintiff’s sister rang the defendant. That call was logged as a missed call: Exhibit “124”.

### **Plaintiff’s filing of a SARO Report**

347 On 28 August 2020, the plaintiff filed an online Sexual Assault Reporting Options questionnaire (SARO). The claimed sexual assault was not reported to the police as a complaint warranting investigation. The SARO lodgement contained the following narrative of the event in question:

“I woke up in the middle of the night feeling sick and went into the room that [the defendant] shared with my mother. I went to wake my mum up but [the defendant] told me not to and told me to come around and get into bed on his side and that I could sleep there. He hugged me and pressed his body against mine. After a while he reached under my tshirt (sic) and squeezed my breasts hard and continuously for about five minutes. He was hurting me but I thought that if I pretended to be asleep or just stayed quiet he would stop. Eventually he moved his hand down to stroke my stomach. Then he took off my underwear and began touching between my legs. I tried to keep my legs pressed closed as tight as possible, but didn’t know how to make him stop. I was scared that if

my mum found out I would get in trouble. After about five or ten minutes of this I realised that if I turned over onto my stomach he wouldn't be able to touch me anymore, so I did. He left me alone for a few minutes but then pushed his leg up between mine, forcing me onto my knees. He pressed his penis between my legs, he wasn't wearing underwear. He thrust against me for a few minutes. I started to cry very loudly and he stopped."

[Exhibit "A", p 105]

348 In final submissions the defendant drew attention to aspects of the SARO form completed by the plaintiff which, it was submitted, operated against the plaintiff's credit as a witness of truth.

### **Plaintiff's email to the defendant dated 30 August 2020**

349 On 30 August 2020, in light of the continued absence of any communicated response from the defendant regarding the series of unsuccessful approaches described above, after the plaintiff had spoken with her mother and to her uncle, (a distinguished lawyer and an academic), she then wrote and sent what was obviously a very carefully drafted email to the defendant, with a flavour of legality. It was in the following terms:

"Hi [Defendant's first name]

I am writing to give you some information that I feel might be useful to you when you are thinking about your options. As you know, I've recently told Mum about what you did to me in 2011.

I also told my psychologist, [name of psychologist], last year and have been speaking to her about it since then. Recently [name of psychologist] suggested to me that I file a Sexual Assault Reporting Option form with the police, which I've done. This doesn't trigger a police investigation but is confidential and kept on file and can be referred back to if necessary.

I think for a few reasons it would be preferable for me not to follow it up with them, but without any relevant communication from you it may be the only path for me.

It would be great if you could speak to Mum so that we can hopefully address this privately. If you don't feel comfortable with that [first name of the mother's brother] said he could talk to you. If you prefer to speak with [first name of mother's brother], let me or him know when you would like to talk.

[Plaintiff's first name]"

[Exhibit '5"]

- 350 It is interesting to note that by 30 August 2020, the plaintiff was asserting the alleged abuse took place in 2011. It is surprising that her psychologist's report dated 7 December 2020 (Exhibit "A", p 29), which referred to this having occurred at around the age of 8 years, was allowed to remain uncorrected.
- 351 The defendant did not reply to that email from the plaintiff. He took that position in conformity with the legal advice he had been given. He said that he perceived the above-cited approach by the plaintiff to be an attempt at blackmailing him, so he did not respond.
- 352 That email conveyed the thinly veiled threat of police involvement if the defendant did not communicate with the plaintiff's mother or her uncle to "*address this privately*".
- 353 Ultimately, for reasons that were not completely spelled out in the evidence, the plaintiff appears not to have proceeded along the pathway of informing the police of her allegation as she had foreshadowed in her email dated 30 August 2020. If the contrary was correct, this would have been apparent from the answer to the subpoena issued to the Commissioner of Police at the request of the solicitor for the defendant.

#### **Further third party attempts to contact the defendant**

- 354 On 8 September 2020, at 10:59am, the defendant received a text message from Witness D which provided him with a copy of the text of a message from the plaintiff's mother informing him of the nature of the allegation against the defendant. The text message was in the following terms:

"from [name of plaintiff's mother] last night – I understand completely [Witness D] and [Witness E]. We love you and hopefully we can see each other some time in the future, but if we don't please know that we think you are both fantastic, generous people. If [The defendant] hasn't told you about this, you need to know. He sexually abused [the plaintiff] one night in our bedroom when she was 12, a devastating experience she kept secret from me until very recently. I was completely shocked. I'm still in shock. But I clearly remember what I filed personally as the 'tummy ache' night and her intense emotional distress straight after what happened. She disclosed it all to her psychologist last year at [name of plaintiff's former boyfriend]'s encouragement, and continues to receive therapy. [The defendant] needs to talk to me or my brother.

We don't wish him harm but he may not appreciate how disastrous it will be for him if this gets out. There is a way to deal with it privately. [The plaintiff] is clear and she does not lie. She is damaged by what happened. She has been deeply ashamed for ten years and has protected him for that time. But no longer. She found the courage to tell people last year about the abuse, and then her Godmother, [name], and [sister's name] early this year. [The defendant] needs to know this is not going away. As her mum, I support her 100%".

[Exhibit "126"]

355 The defendant saw that communication as representing part of a process of bombardment to apply pressure to him.

356 On 8 September 2020, at 7:40pm and 7:45pm respectively, the plaintiff's maternal grandmother attempted to call the defendant. She then sent a text message stating: "*Can you call me please*": Exhibit "127".

357 On 10 September 2020, at 1:42pm, the plaintiff's maternal uncle sent the defendant a text message in the following terms:

"Hi [The defendant]. I hope you're ok. I know it must be very hard but we need to talk. You need to understand exactly where all this could head if you don't engage with [the plaintiff's mother] and [the plaintiff], either directly with [the plaintiff's mother] or via me. There will be some very bad consequences which I don't want and which I'm sure no one else wants. I do appreciate how difficult this is for you. As a first step let's set up a time to talk and at least I can let you know what's happening.

[Name of plaintiff's maternal uncle]"

[Exhibit "128"]

358 The defendant interpreted this email as representing part of a bombardment process aimed at pressuring him to act in conformity with the wishes of the plaintiff's family. The veiled threat within that email is obvious.

359 On 14 September 2020, at 12:18pm, the defendant received a text message from a de-identified colleague, in the following terms:

"[Name of the defendant],

I have been asked by [plaintiff's mother], as a long standing friend of both of you, to try and communicate with you. [The plaintiff's mother] trusts me to act in confidence and so I hope would you. The key point is that over and above



emotional distress [the plaintiff's mother] is in acute financial distress. Not knowing how she's to pay the mortgage is putting huge strain on her and by extension on the girls. You've always expressed to me your deep concern about their welfare. Well clearly they need financial stability. [plaintiff's mother] wants to deal with things privately, not through lawyers. Sounds to me like that's the most sensible course.

Please communicate with [plaintiff's maternal uncle].

And of course you can talk to me at any time.

[Name of the de-identified colleague]"

[Exhibit "122"]

360 It appears that the defendant also interpreted that message as being part of the process of applying pressure to him.

361 The plaintiff's mother was in acute financial distress as cited in the above email: T334.27. This topic will be taken up in the course of the analysis of the credibility and reliability of her evidence.

362 On 13 September 2020, at 7:12pm, the defendant received an email from Witness B, a solicitor with whom he had a prior professional association in connection with his work. That email was in the following terms:

"[Name of the plaintiff's mother] tang (sic for rang) me at 6:00pm tonight.

She asked me if I had spoken to you. I asked her why and she said she needed you to speak to you or her about a serious matter. I said you had a lawyer and any communication needed to be with the lawyer. The conversation went back and forth with me repeating any communication should be with [the defendant's] lawyer. She said she had spoken to the lawyer but that was not what this was about, this was a criminal matter. I said in that case it should be handled by the police. She said she said (sic) some Hong (sic for thing) like she may have to do that but was trying to speak to you. Eventually she gave up."

[Exhibit "129"]

363 The defendant also interpreted the content of that message as part of the plaintiff's mother's process of attempting to pressure him into compliance with her demands. By that stage, he felt his mental health was being adversely impacted.

364 On 16 September 2020, at 7:32pm, Witness D sent the de-identified colleague an email in the following terms:

“Hi [name of de-identified colleague], I’m a friend of [the defendant] who has shown me your emails.

Please be assured that [the defendant] is concerned for the welfare of everyone involved. However, it seems, given your comments, that you are not aware of the very serious nature of the issues and that whatever you’ve been told bears no resemblance to the truth or reality.

[The defendant] greatly admires and values you as a colleague and friend. However, his current personal position is not one he is able to discuss with others.

Again, [the defendant] wants to thank you for your concern but asks that there be no further communication about his personal issues.

All the best,

[Witness D]”

[Exhibit “141”]

365 On 16 September 2020, the plaintiff’s maternal grandmother sent the defendant a letter of demand seeking repayment of loans totalling the amount of \$84,000 within 14 days: Exhibit “131”.

366 On 16 September 2020, at 1:20pm, the defendant’s mobile phone logged a missed call from the plaintiff’s mother: Exhibit “130”.

367 On 20 September 2020, 1:29pm, the plaintiff’s mother sent an email to Witness D, copied to the defendant, in the following terms:

“Hi [Witness D],

[Name of de-identified colleague] forwarded your correspondence to me.

**I agree there is a serious issue at the heart of my split with [the defendant].** I disagree with your assertion that what I’ve told [name of de-identified colleague] bears no resemblance to truth or reality. It suggests [the defendant] is calling [the plaintiff] a liar.

Victims of child sex abuse do not lie. Almost 100% of children keep the abuse secret, until they feel strong enough to disclose it – which can be decades later.

[The plaintiff] did not lie in 2019, when she disclosed to her psychologist the details of [the defendant's] indecent assault of her in 2011. She carried the secret of [the defendant's] abuse for nearly ten years. It was [the plaintiff's boyfriend] who encouraged her to seek professional support in the second half of 2019. She told [plaintiff's sister] and her Godmother in early 2020 and she told me finally on the 23rd July 2020.

Obviously, I could not continue in a relationship with [the defendant] after receiving the information. He knows this.

[The plaintiff] is a highly moral, intelligent and clear-thinking young woman with an excellent memory. She has sought professional assistance to help rebuild her life after years of compounding psychological damage caused by having to pretend nothing happened.

Although she has lodged a description of the incident in a confidential NSW Police data base (SARO), she has no wish to be publicly identified as a victim of child sexual abuse or to go through the inevitable trauma of a criminal trial, if police were to charge [the defendant]. The SARO lodgement does not trigger an investigation. It helps police understand the scope of sexual abuse in the community, which (sic) largely unreported.

[The plaintiff] deserves privacy and support. She is a kind person who does not wish any harm to [the defendant]. It is her absolute right to tell a few close people about what happened to her as a child, as a necessary step in regaining her confidence and focus and rebuilding her sense of self. [The defendant] may not have appreciated the damage done to her, but I have already sent him an account to help him see it from her perspective. I have attached it.

Love,

[Plaintiff's mother]"

[Emphasis added]

[Exhibit "132"]

- 368 The tone of strident advocacy of that email from the plaintiff's mother is self-evident. Her flag had been firmly nailed to the mast of what would become the plaintiff's case.
- 369 The emphasised portion of text in that 20 September 2020 email stating there was "*a serious issue at the heart of my split*" with the defendant was plainly disingenuous and untrue because the plaintiff's mother had already left the relationship on 1 July 2020, which was three weeks before that "*serious issue*" had been disclosed to her. The content of the second line of that email was therefore misleading.

370 The sign-off using the word “Love” in the above email appears to involve an ironic element of sarcasm in light of the evidence of the plaintiff’s mother that after 2 May 2020, some four months earlier, a state of friendship no longer existed between herself and Witness D: T283.2 – T283.8; T283.27.

371 Following that 20 September 2020 email sent by the plaintiff’s mother, she was served with a Concerns Notice issued pursuant to s 12A of the *Defamation Act 2005* (NSW) over her publication of the allegations against the defendant to third parties: Exhibit “45”. When she was cross-examined about that fact she became combative in her answer, and initially sought to avoid the question of whether she had been given a Concerns Notice by the defendant’s solicitor. My clear impression was that she sought to deflect the question with an unresponsive answer: T250.37 – T251.6.

372 At the time of that email correspondence, both the plaintiff and the plaintiff’s mother were aware of the processes of a criminal trial, as is evident from Exhibit “42”, and from their attendance at the Downing Centre Court for a sentencing hearing following the conviction of a person as described at paragraphs [231] to [238] above.

373 On 29 September 2020, at 8:32am, the defendant received a text message from the plaintiff’s maternal uncle in the following terms:

“hi [the defendant]. I wanted to get in touch with you again out of concern for [plaintiff’s mother] and [the plaintiff], and for you. I’m not sure who is advising you about all this but I think it may be bad advice. You should be aware that the path you’re going down – of pretending that all of this is not happening and that it will somehow go away – is not a good one you surely know that trying to hide from this not going to end well for you or for anyone else. Please for your own sake have another think about engaging with both [plaintiff’s mother] and [the plaintiff], either directly or through me or someone else if you prefer. It is not too late and despite what you told [name of de-identified colleague], what happens in the future is very much in your hands. I am happy to talk at any time. [Plaintiff’s maternal uncle]”

[Exhibit “111”]

374 Consistent with the legal advice the defendant had earlier been given by the barrister he had consulted, he did not respond to the above text message.

375 On 29 September 2020, at 10:16am, the defendant forwarded to himself, and to Witness C, a copy of the above email that had been sent to him by the plaintiff's maternal uncle: Exhibit "133".

376 In the circumstances which had evolved to that point, objectively, the maternal uncle's suggestion that the defendant had perhaps been given "*bad advice*", was plainly wrong, ill-informed and presumptuous. It is clear that the defendant had been soundly advised.

377 On 30 September 2020, Witness D prepared a file note of his conversation with the plaintiff after she had contacted him. That note was in the following terms:

"I received a phone call from [the plaintiff] just before mid-day on Wednesday 30 September 2020. She opened by assuring me that what her Mum, [the plaintiff's mother], had told me about the allegation relating to [the defendant] was not made up by [the plaintiff's mother] but was true.

She asked me whether I was still in contact with [the defendant] and I replied I was.

[The plaintiff] then asked me to urge [the defendant] to talk to [the plaintiff's mother] or her brother [the plaintiff's maternal uncle] about the allegation as "*it is not in his best interest not to talk to them*".

**[The plaintiff] said that unless [the defendant] did so, she would have no option other than to go to the Police and that the alleged incident was not something he can hide from.**

[The plaintiff] told me that [the defendant] should not make it more difficult for everyone and that she did not want to make it a "*criminal matter*". [The plaintiff] said that in order to stop the "*situation from spiralling out of control*", [the defendant] needs to talk to [the plaintiff's mother] or [the plaintiff's maternal uncle].

I listened to [the plaintiff] without comment throughout the call that lasted 4-minutes. It ended with me assuring [the plaintiff] that I would pass on her message to [the defendant]"

[Emphasis added]

[Exhibit "140"].

378 The defendant interpreted the above approach by the plaintiff to Witness D as a further and more direct attempt at pressuring him to engage in discussions with the plaintiff's family under the implied threat of police action against him.

Ultimately, the plaintiff did not take up the option of going to the police with her story.

379 On 14 October 2020, at 4:02pm, the defendant received an email from the solicitor acting for the plaintiff's maternal grandmother enclosing a sealed copy of a statement of claim filed in the Local Court seeking recovery of a claimed debt of \$84,000 without any discount or offset for the portion of that amount owed by the plaintiff's mother: Exhibit "134". It appears that claim involved a factual misrepresentation of the true position.

380 There were no further communications of relevance tendered in evidence. From that time the litigation pathway seemed inevitable.

### **PART C – FAMILY LAW AND PRESENT PROCEEDINGS**

381 In those evolving circumstances, the defendant moved quickly to file the Family Law proceedings. Plainly, he felt compelled to do so in view of the disclosed detail of what the plaintiff's mother indicated she was seeking from him.

382 On 4 November 2020, after fulfilling some pre-filing procedures, the defendant pre-emptively commenced proceedings against the plaintiff's mother in the Family Court of Australia to seek to define and conclude his financial obligations to the plaintiff's mother and to her children.

383 Thereafter, the only communications that passed between the defendant and the plaintiff's mother occurred through their lawyers. In the course of those events, affidavits were filed and procedural steps were taken to advance those proceedings towards a conclusion.

384 The Family Court proceedings concerned the division of assets and money. The plaintiff's mother's affidavit of 17 November 2020 filed in those proceedings (Exhibit "42"), set out some details of her financial situation and needs, including the plaintiff's needs. As follows:

“57. I am the main carer of two adult children with serious ongoing health issues that make them highly vulnerable to Covid-19. [The plaintiff] has complex congenital heart disease with only a single ventricle, no spleen and a genetic lung and sinus disease called Primary Cilia Dyskinesia (PCD) which prevents her from working at present. [The plaintiff’s sister] also has PCD with severe lung damage known as bronchiectasis. They and I need physical and financial security at this time”

...

62. In 2018, the combined out-of-pocket costs for their hospitalisations, surgeries, consultations and medical supplies was approximately \$10,000. Over the past 3 years my bank balance has fallen below \$100 on several occasions.”

[Exhibit “42”]

385 It is plain from those cited portions of the plaintiff’s mother’s affidavit, that she was seeking money from the defendant in circumstances where her own parlous financial position was somewhat straightened.

386 That evidence will be considered when assessing issues of credit.

387 On 3 November 2021, the proceedings between the defendant and the plaintiff’s mother in the Family Court were concluded with the filing of consent orders that terminated their financial ties: Exhibit “43”. Those orders also provided for the withdrawal and the dismissal of certain proceedings in the Local Court of NSW.

388 Although not the subject of evidence, it appears from the orders made in the Family Court (Exhibit “43”), that those Local Court proceedings may have related to a claim the plaintiff’s grandmother had brought against the defendant in respect of monies she had loaned to both the defendant and the plaintiff’s mother. That said, in the consideration required in these proceedings, nothing turns on the fact of the dismissal of those Local Court proceedings.

389 The defendant’s Family Law proceedings were filed on 4 November 2020. They were concluded on 3 November 2021.

390 On 17 November 2021, just 2 weeks after the Family Law proceedings had concluded, the plaintiff filed these proceedings claiming substantial damages

from the defendant in respect of the alleged sexual assault. The plaintiff's schedule of damages exceeded the jurisdictional limit of this Court: MFI "5".

391 At all stages, including before and after initiation of these proceedings, the defendant has maintained his adamant denial of the actuality of any of the material events alleged by the plaintiff.

392 Accordingly, the defendant vigorously disputes the plaintiff's claim of an entitlement to any damages. He claims that the plaintiff and her mother have sought to blackmail him in respect of the alleged events.

393 A review of the medical and allied evidence relating to the plaintiff now follows in **PART D** of these reasons.

#### **PART D – MEDICAL / ALLIED EVIDENCE REVIEW**

394 Aspects of the plaintiff's prior medical history have been summarised at paragraphs [111] to [157] above.

395 The exhibited medical and allied evidence which touches upon or has relevance to the allegations that are central to the factual dispute in this case is reviewed in the paragraphs that now follow.

396 That review follows the chronological order in which that evidence came into existence, and includes references to the location of that evidence within the documentary exhibits.

#### *23 March 2010 – General practitioner*

397 On 23 March 2010, before any alleged sexual abuse, the plaintiff's treating general practitioner wrote a letter to whom it may concern, in an unknown context, stating that the plaintiff:

"... has been a patient of mine for nearly 8 years and I have known her to be a very emotionally placid and intelligent child who when small, bore previous medical events and with an equanimity beyond her years. She is not prone to tearfulness and I have never witnessed any extreme emotional behaviour."



[Exhibit “1”, p 79]

398 That letter did not suggest that the plaintiff had, to his knowledge, ever exhibited any “*triggered*” reactions to the stressors of those medical events.

*22 September 2016 – General practitioner*

399 On 22 September 2016, the plaintiff’s treating general practitioner certified that the plaintiff had suffered a mini stroke in the form of a transient visual disturbance in August 2015, which required hospitalisation and shunt occlusion surgery: Exhibit “1”, p 102; p 104. The potential neurological or cognitive consequences, if any, of that mini-stroke, are not dealt with in the medical evidence.

*2 November 2016 – General practitioner*

400 The plaintiff’s treating general practitioner certified that the sad circumstances of the death of the plaintiff’s father 10 months earlier, on 13 January 2016, was causing her much difficulty in concentrating at school due to her understandable grief: Exhibit “1”, p 105. The plaintiff was aged 17 years at that time. According to the plaintiff, she was at the time withholding from her doctor significant additional information concerning the defendant’s alleged sexual touching of her, five years earlier.

*18 December 2018 – Prince Alfred Hospital discharge summary*

401 On 18 December 2018, the plaintiff was discharged from Royal Prince Alfred Hospital after management of her respiratory illness. At that time it was noted she had a history of concerns over anxiety and her mental health, where it was noted that she had a complex medical history including panic attacks: Exhibit “1”, pp 276 – 282, at p 278.

*12 January 2019 – General practitioner*

402 On 12 January 2019, a referral letter from plaintiff’s treating general practitioner to a respiratory physician, noted that the plaintiff’s medical history included

recent traumatic admissions to Royal Prince Alfred Hospital, and a past history of a cardio-pulmonary Fontan procedure involving total cavopulmonary connection surgery: Exhibit “1”, p 121.

*17 April 2019 – Gynaecologist*

403 On 17 April 2019, the plaintiff consulted a gynaecologist regarding an increasing history of pain with intercourse over the previous 6 months, which roughly equated to a commencement of symptoms in about September 2018. On examination he noted marked contraction of identified groups of pelvic muscles. He recommended pelvic floor physiotherapy: Exhibit “1”, Vol 1, p 254. This consultation was in the context that on 28 March 2019, the plaintiff was attending the Sydney Hospital Sexual Health Clinic for gynaecological problems involving pelvic inflammatory disease and other issues that were unresponsive to antibiotics as observed at paragraph [143] above: Exhibit “1”, Vol 1, p 49.

404 The relevance of this evidence is twofold. First, it is likely that the subject matter of the plaintiff’s need for gynaecological treatment was very likely to have been an emotional stressor for her. At this time, the plaintiff was living away from home with her boyfriend. In that context, the inference is that she was no longer in close contact with the defendant, and it was therefore less likely that there was a need for her to engage in the posited “*appeasement*” of the defendant by refraining from disclosing the alleged abuse out of possible apprehension over the consequences of a change in the assumed power dynamic that had earlier prevailed. It was not until months later that she made her disclosure of alleged sexual abuse to her then boyfriend.

*30 August 2019 – General practitioner*

405 On 30 August 2019, the plaintiff’s treating general practitioner recorded that he had written a GP Mental Health Care Plan for the plaintiff to be seen by a psychologist for treatment: Exhibit “1”, p 50. In that record, he reported the following background history without any reference to alleged sexual abuse:

“PANIC ATTACKS at night mostly, stressed in daytime, crying, sometimes fights with mum and sister, now living with boyfriend. gets (sic) sad often on waking. thinks about her latr (sic) father.”

406 In another evidentiary copy of that mental health care plan, the plaintiff’s treating general practitioner noted that the plaintiff was euthymic, with a normal mental state examination, but with a past diagnosis of anxiety and depressive episodes. The mental health treatment plan suggested by him was for treatment of the plaintiff’s presenting issues, which were described as “*anxiety, panic attacks, periods of sadness, reactive to grief and general health*”. The plan was aimed at providing psychological treatment for those problems, including cognitive behavioural therapy: Exhibit “A”, pp 31 – 32; pp 139 – 141.

407 It is significant to note that at the time, in August 2019, the plaintiff was no longer living at home. She was living with her boyfriend and no longer in close daily contact with the defendant, and was no longer under his shadow or influence.

#### *8 October 2019 – Clinical psychologist*

408 On 8 October 2019, at the referral of plaintiff’s treating general practitioner, the plaintiff was assessed by the clinical psychologist to whom she had been referred. That consultation marked the beginning in a series of 12 psychological therapy sessions which were described in a letter “*To whom it may concern dated 7/12/2020*”: Exhibit “A”, pp 28 – 30: Exhibit “1”, pp 156 – 157.

409 On 8 October 2019, the plaintiff’s treating clinical psychologist also wrote to her treating general practitioner following a consultation which took place on that day for assessment and management of anxiety, panic attacks, periods of sadness, and grief and adjustment issues regarding her chronic health issues: Exhibit “1”, pp 146 – 152.

410 In that letter, (Exhibit “A” at p 146), the plaintiff’s treating clinical psychologist noted that the plaintiff was then 21 years old and was living with her boyfriend in an apartment. Reference was made to the significant history of loss and grief, where her parents had divorced when she was young, her mother had re-partnered with the defendant (her stepfather). Reference was also made to the

death of her father from motor neurone disease. The letter referred to the plaintiff having experienced intrusive thoughts and obsessive-compulsive behaviours around 9 or 10 years of age. Psychological test results revealed the plaintiff's scores were in the severe range for stress and in the moderate range for anxiety and depression.

- 411 The plaintiff's treating clinical psychologist's letter made no contemporaneous reference to a history of sexual assault or abuse at that time. At that stage the plaintiff had not informed her psychologist of this other alleged stressor which she claimed was affecting her on the very day she was tested for her stress scores, where, on the same day she had financial stress about payment of the fees for her acting course at NIDA: T103.30 – T104.1.
- 412 The plaintiff was seen again by her clinical psychologist on 11 further consultations on 15 October 2019, 24 October 2019, 1 November 2019, 19 November 2019, 29 November 2019, 21 January 2020, 4 February 2020, 4 August 2020, 3 September 2020, 28 August 2020, and 23 October 2020.
- 413 In correspondence (at Exhibit "A", p 28), the clinical psychologist described the focal point of those consultations to have been reported symptoms of intrusive thoughts and compulsive behaviours from the age of 9 to 10 years, including around the health and wellbeing of her family against a background of anxiety as a child, and not being able to deal well with stress, leading to the need to address the plaintiff's generalised anxiety about the health, wellbeing, and safety of her mother and her sister. Those symptoms obviously pre-dated the alleged sexual abuse which was claimed to have occurred when the plaintiff was aged 12 years.
- 414 The clinical psychologist's letter dated 7 December 2020 described (at Exhibit "A", p 29), the plaintiff's disclosure of the alleged sexually abusive incident involving the defendant in the following terms:

"As therapy continued [the plaintiff] reported that when she was a child, around the age of 8 years old she experienced a sexually abusive incident involving her step-father, [the defendant]. [The plaintiff] reported that when she was a

child she recalled having a nightmare, after waking she entered her mother's and step-father's bedroom. [The plaintiff] reported that her mother was asleep, but [the defendant] was awake. She reported telling him that she had a nightmare and her stomach hurt. [The plaintiff] said that she laid on the bed, where she reported [the defendant] hugging her, she then reported that he had his hand around her crouch (sic for crotch). [The plaintiff] reported that [the defendant] had then removed her underwear and was touching her around her crouch (sic for crotch) area. [The plaintiff] reported feeling confused and began to cry, she then reported to leaving the bedroom. [The plaintiff] said that she knew that this was a sexually inappropriate touch. [The plaintiff] said that it never happened again, she said that she was too afraid to tell her mother at the time.

In psychology consultations [the plaintiff] was able to continue to process this reported sexual abuse and talk about the affect (sic) it had on her and her relationships. [The plaintiff] spoke about feeling 'silenced' by [the defendant], she said that she felt anger but also embarrassment that she had to endure this experience and to continue to live with him and have a relationship with him. [The plaintiff] also considered how the trauma made her a private person, she said that she would not share things with other people, she would 'squash' her feeling and be stoic. During therapy [the plaintiff] considered telling her best friend about the experience, we were able to talk through this and [the plaintiff] was able to tell her friend. [The plaintiff] reported that this was a positive experiencing of disclosing. [The plaintiff] began to talk about this rising experience within her saying it feels 'impossible to say anything but impossible not to say' when thinking about disclosing to her mother."

415 The clinical psychologist's initial formulation of the plaintiff's presenting problems (at Exhibit "A", p 30), was as follows:

"[The plaintiff] is experiencing acute stress, anxiety and lowered mood, generalised anxiety and adjustment disorder. Her reported sexual abuse experience is highly likely to be negatively impacting her psychological wellbeing and associated to the psychological conditions she is experiencing. The reported sexual experience is also highly likely to impact her relationships in terms of safety, trust and intimacy, including emotional and sexual. [The plaintiff] initially presented with an avoidant 'squashed' coping style likely influenced by her repressive adaptation to the sexual trauma. Ongoing therapy provided an opportunity to uncover this episode and to provide an opportunity to have better psychological insight and to learn alternative coping strategies.

Treatment has help (sic) [the plaintiff] process the trauma and feel empowered enough to disclose to close and significant people around her, although [the plaintiff] continue (sic) to experience anxiety, stress and chronic worry involving the safety and wellbeing of her sister and mother."

416 The psychologist's impression of a "*highly likely*" connection between the alleged sexual abuse in childhood and the plaintiff's reported symptoms was not proffered in the form of a reliably reasoned definitive forensic opinion within the meaning of the rules that apply to expert opinion evidence.

417 The reliability of the psychologist's correspondence for determining the issues in this case will be analysed in **PART G** of these reasons.

*29 July 2020 – General practitioner*

418 On 29 July 2020, the plaintiff's treating general practitioner prepared a further mental health care plan for the plaintiff: Exhibit "1", pp 142-144. The documentation for that plan made no mention of the plaintiff's mother's disclosures to him, five days earlier, of the alleged sexual touching of the plaintiff by the defendant.

419 The stated goals of that mental health care plan were identified to be psychological counselling to resolve symptoms which were identified as being anxiety, panic attacks, periods of sadness, reactive to grief and general health.

420 The background history content of that plan referred to the plaintiff's health conditions comprising congenital heart disease requiring long term medication, and a diagnosis of primary ciliary dyskinesia requiring long term respiratory preventative treatment.

421 That plan referred to the plaintiff's current mental state examination assessment as "*euthymic, normal*" and it listed the plaintiff's risks and co-morbidities as "*anxiety/depressive episodes*". No mention was made of the plaintiff having had any suicidal tendencies, whether extreme or otherwise, where the referral document contained a specific prompting field that enabled the inclusion of that factor if it was considered to exist.

422 This document is of relevance to the assessment of the credit of the plaintiff and the reliability of her evidence.

*2 November 2020 – Clinical psychologist*

423 On 2 November 2020, the plaintiff's treating clinical psychologist wrote to the plaintiff's treating general practitioner to provide an update on an earlier referral for management of the plaintiff's anxiety, low mood (which was referred to as

the presenting problem), in the context of significant loss, being the significant loss of her father (nearly 5 years earlier), a traumatic experience with her stepfather, and serious diagnosed medical conditions: Exhibit “A”, pp 26 – 27; Exhibit “1”, pp 156 – 173.

424 The psychologist’s letter identified a pattern of therapy sessions, initially fortnightly, and then monthly, including cognitive behavioural therapy. She suggested the plaintiff have a further 10 Medicare subsidised sessions, having been “*working on chronic health management, changes to family structure and coping during a very stressful and uncertain time*”.

425 In passing, the psychologist’s letter obliquely described the detail of the plaintiff’s disclosure of the traumatic experience she alleges against the defendant in the following terms:

“... In our session (sic for sessions) together [the plaintiff] disclosed a traumatic experience which occurred to her when she was young, we have managed to speak and process this and look at how this trauma has impacted her and her life. [The plaintiff] has been able to speak to close friends and family about what occurred and despite this being a difficult process, she said that it has been the right thing for her to do.”

[Exhibit “A”, p 26; Exhibit “1”, Vol 1, p 156]

426 The brief mention of the “*traumatic experience*” in that letter does not suggest that the psychologist had undertaken a comprehensive or detailed forensic analysis of the details relating to the alleged underlying circumstances.

427 What seems to have emerged from the extract cited above is that the plaintiff’s processing of the alleged abuse in therapy with the psychologist has involved her piecing the story together, as was described by Dr Brown in her oral evidence: T213.40 – T214.35.

#### *7 December 2020 – Clinical psychologist*

428 On 7 December 2020, the plaintiff’s treating clinical psychologist wrote a letter to whom it may concern, in similar terms to her letter in the same terms she had written to the general practitioner on 2 November 2020, as already cited. That

letter referred to the plaintiff having been able to “process” the claimed sexual abuse and talk about it and the effect it has had upon her: Exhibit “1”, pp 158 – 160, at p 159.

*28 July 2022 – Dr Karen Brown – forensic psychiatrist*

429 On 28 July 2022, at the request of her solicitors, the plaintiff was examined by Dr Karen Brown, a consultant psychiatrist in Queensland. Dr Brown’s report of that consultation was dated 15 August 2022: Exhibit “A”, pp 1 – 10. In her report which followed that consultation, Dr Brown recorded the plaintiff’s history (at p 2), of having been allegedly sexually assaulted by the defendant when she was “*about 12 years of age*”.

430 By this stage the plaintiff’s account of her age at the time of the alleged sexual abuse had undergone a material change from around 8 years of age to about 12 years of age. This is consistent with what the plaintiff’s mother wrote in her email to the defendant on 10 August 2020, as cited at paragraph [310] above.

431 The history the plaintiff provided to Dr Brown was summarised in the following terms:

“· [The plaintiff] was sexually abused by her stepfather, Mr [defendant’s initial], when she was about 12 years of age. At the time she was living with her mother and Mr [defendant’s initial], in [address redacted], Sydney.

· Just prior to the sexual assault [the plaintiff] woke up feeling sick and went into the bedroom shared by her mother and [defendant’s name]. She went to wake her mother up, but Mr [defendant’s initial], told her not to, and to come around to his side of the bed and get in. Mr [defendant’s initial], hugged her and pressed his body against hers and reached under her T shirt and squeezed her breasts, hard and continuously for about 5 minutes. He then moved his hand down to stroke her stomach and began touching between her legs for about 5 minutes. [The plaintiff] then turned over onto her stomach so that [defendant’s name], could not touch the front of her body. Mr [defendant’s initial], then pushed his leg up between her legs, forcing her onto her knees and pressed his penis between her legs and thrust against her for a few minutes. Mr [defendant’s initial], was not wearing underwear at the time. [The plaintiff] cried very loudly and Mr [defendant’s initial], stopped.

· As a result of the sexual assault [the plaintiff] sustained psychiatric injuries, including anxiety, depression and eating disorder symptoms. Her relationships with her family and friends were impacted. She was a bright student at school



but as a result of the sexual assault she did not cope well with her tertiary studies.”

432 This was the first of two forensic reports from Dr Brown which made a diagnosis of PTSD relating to the plaintiff’s alleged experience of sexual abuse.

*11 November 2022 – A different treating general practitioner*

433 On 11 November 2022, the plaintiff consulted a different general medical practitioner in Victoria, who wrote a letter referring the plaintiff to an unnamed psychologist, noting the plaintiff had been diagnosed with anxiety and depression. The letter suggested that she would benefit from counselling and cognitive behavioural therapy under a Medicare mental health plan: Exhibit “A”, p 33. It is curious that the referral made no mention of alleged sexual abuse.

434 The evidence does not disclose what if any follow-up then ensued as a result of that referral.

*1 June and 17 July 2023 – Dr Karen Brown – forensic psychiatrist*

435 On 1 June and 17 July 2023, at the request of her solicitors, the plaintiff was re-examined by Dr Brown, whose report of that consultation was dated 19 July 2023: Exhibit “A”, pp 11 – 24. Dr Brown reiterated the history (at p 12), of the plaintiff having been sexually assaulted.

436 Dr Brown gave oral evidence at the hearing: T198 – T235. Her earlier expressed diagnosis of PTSD relating to the alleged sexual abuse remained unchanged, but she did make some significant concessions in her oral evidence.

437 Dr Brown’s opinions, and the basis for those opinions, will be reviewed and evaluated for reliability in **PART F** and **PART G** of these reasons.

**PART E – ORAL EVIDENCE REVIEW**

438 The salient features of the oral evidence on critical matters in dispute is summarised below in the sequence in which it was adduced.

- (1) The evidence of the plaintiff;
- (2) The evidence of the plaintiff's former boyfriend;
- (3) The evidence of the plaintiff's sister;
- (4) The evidence of the plaintiff's godmother;
- (5) The evidence of the plaintiff's mother;
- (6) The evidence of the defendant;
- (7) The evidence of the defendant's supporting witnesses, namely:
  - (a) Witness A;
  - (b) Witness B;
  - (c) Witness C;
  - (d) Witness D;
  - (e) Witness E.

439 The review of the evidence of these witnesses now follows.

### **Evidence of the plaintiff**

440 The plaintiff gave oral evidence on the first, second and third days of the hearing: T11 – T157; T171 – T184. The large bulk of that evidence comprised cross-examination, including on the content of a series of numerous emails and text messages which she had sent to the defendant over the course of time. The defendant relies upon the affectionately expressed content of those communications as a source of contradiction of the plaintiff's claim that she has been fearful of the defendant and has been distant with him.

### ***Summary of effect of plaintiff's cross-examination***

- 441 The cross-examination of the plaintiff traversed numerous topics. Significant matters of relevance, from within that array that touch upon the credibility and the reliability of her evidence, will be considered in **PART G** of these reasons.
- 442 On the key questions of whether the plaintiff had invented her account of sexual assault by the defendant, or alternatively, whether she has falsely convinced herself that such an assault occurred, she firmly denied each of those propositions: T180.6; T180.34.
- 443 Those denials had some tangential support from Dr Brown, who considered that the plaintiff was neither exaggerating nor malingering her symptoms: Exhibit "A", p 23. The basis for those opinions requires examination.
- 444 The plaintiff also denied the proposition that she and her mother had planned to opportunistically use the allegation of sexual assault to blackmail the defendant: T179.28.
- 445 The credibility and the reliability of the plaintiff's denials must be assessed in the context of the many answers and non-answers she gave to the questions which were raised as challenges to her evidence.

### ***Summary of plaintiff's evidence-in-chief***

- 446 The plaintiff's evidence-in-chief in which she described the claimed sequence of events involving alleged sexual touching has already been summarised at paragraphs [10] to [14] above, and that evidence has also been set out in full between paragraphs [194] and [196] above, and requires no further summary at this point.
- 447 On reading the objective records, and comparing the content to the plaintiff's oral evidence, it became apparent that there were some inconsistencies in what was recorded by her treating psychologist as part of the plaintiff's history, and

what she believed to be the position, which suggested the need to view her evidence with caution on account of fallible memory.

448 For example, whereas the plaintiff said in oral evidence that her intrusive thoughts and compulsive behaviour started after the alleged abuse (T173.24 – T173.37), in contrast, her psychologist recorded that those behaviours occurred at around the age of 9 to 10 years: Exhibit “A”, p 28.

449 Another inconsistency was the plaintiff’s imprecise account of the timing of the alleged abusive event. She had initially told her psychologist that the alleged assault had occurred when she was aged around 8 years: Exhibit “A”, p 29. This was markedly different to the case that was opened on the first day of the hearing.

450 In her oral evidence she stated that on reflection, it was her belief or guess (T12.45 – T13.3), that the event occurred between late 2010 and early 2011, probably in 2011, just before an overseas family holiday: T12.45 – T13.39. That array of imprecise evidence raises the question as to whether her account was of an actual recollection, or instead, involved an unreliable construction. That question stands to be resolved.

451 When the plaintiff’s attention was drawn to her description of the alleged sexual abuse appearing in the SARO report which she had filed, she stated that the factual summary contained in that online report, as cited at paragraph [347] above, had been expressed in her own words: Exhibit “A”, p 105; T38.48.

452 The evidence-in-chief given by the plaintiff concerning the effects that the alleged assault had upon her appears at T17.1 – T20.2, and it is summarised as follows.

453 The plaintiff said that she felt the alleged event had changed everything in her life. She said that she had immediately felt a sadness which pervaded her life and made her feel different. She said she felt she had become alienated from her friends and was unable to relate to them because of a sense of shame and

because of an inability to share the knowledge of the event, and she said she wanted to forget the event in question.

454 The plaintiff said that because of her sense of sadness, she found it difficult to concentrate on classwork and homework, and she stated that she felt her life “*had kind of been destroyed somehow about what happened*”: T17.30; T40.14.

455 Despite that evidence, the plaintiff managed to obtain glowing school reports, a high ATAR score, and secure an offer of enrolment at university to study Law at the conclusion of her secondary education. She has since gone on to pursue other tertiary studies, including studying acting, and she has worked in a variety of jobs.

456 The plaintiff said that after the alleged event she felt there was no way for her to remain living in the family home. She said she felt the need to distance herself from the defendant and said that she did so by going overseas instead of enrolling to the university course that was offered to her. She said she felt trapped living with the defendant and that she could not imagine herself surviving there, and that she felt that she had to leave: T20.4. There was no objective evidence of those matters.

457 That evidence must be read in the context of the plaintiff’s evidence that she had remained living with the defendant in the family home in Sydney for about a further 5 or 6 years after the alleged event, until early 2017, when she left to travel to France.

458 In early 2017, the plaintiff moved to France, where she variously worked as a nanny, a music teacher, and as a waitress in a café. Whilst in France she formed a relationship with her boyfriend at the time, and she lived and travelled with him in Europe.

459 In early 2018, after the plaintiff’s travels, she eventually returned to Australia. Her boyfriend followed her, and for a time they lived together in Sydney. They

variously lived in shared housing, and for a short time they lived in the family home with her mother, her sister, and notably, with the defendant.

460 The plaintiff said that on her return to Australia she did not take up her deferred offer of enrolment for legal studies because "*in some ways it felt like returning to the kind of old life that [she] hated and didn't want and was quite scared of in some ways*" and because she felt a lot of shame at being left out and being left behind by her peers: T22.1 – T22.8. Instead, she worked as a waitress, and enrolled at NIDA to take acting classes, as has been described at paragraphs [175] to [176] above.

461 The plaintiff's stated reasons for not pursuing legal studies seemed incongruent with the content of a medical report which suggested otherwise: Exhibit "1", Vol 1, p 184. That matter will be taken up in the consideration of the reliability of the plaintiff's testimony.

462 In April 2018, the plaintiff was diagnosed with PCD, a chronic lung condition, which became an obvious focal point of concern in her life, requiring life-long daily exercise and treatment: T21 – T22; Exhibit "1", Vol 2, p 412.

463 The plaintiff said that she made her first disclosure of the alleged sexual assault in 2019, to her then boyfriend, some 8 years after the alleged event. It appears from her general practitioner's referral to the treating psychologist on 30 August 2019, that this disclosure was made shortly beforehand, or in about mid-2019. She said that she did so at a time when she felt that she was close enough to him to feel able to share such personal details. She said that she was upset when telling him of the alleged event. She did not remember the exact words she used in that discussion.

464 Following that disclosure, her boyfriend encouraged her to see a psychologist: T22.16 – T23.42. This led to the plaintiff's prompt referral to a clinical psychologist: T24.47. That referral was through her treating practitioner, who did not include any reference to the alleged sexual abuse in that referral because he did not know anything about that matter at that time.

- 465 Several years earlier, on 29 July 2015, the psychologist to whom the plaintiff had been referred, had seen the plaintiff, her sister and their mother for psychological counselling in relation to their psychological needs after learning of the terminal diagnosis of the plaintiff's father. The notes of those counselling sessions were tendered: Exhibit "B".
- 466 Those notes show that the plaintiff had been having nightmares and was experiencing high anxiety in the context of feeling under pressure to do well at school. The notes also described the plaintiff feeling guilty if her mother was required to drive her around, being scared, paranoid, having dreams about her father, having difficulty sleeping, ruminating, and weeping. The notes concluded with the comment that the plaintiff was "*quite anxious*": Exhibit "B".
- 467 In the plaintiff's oral evidence, her recollection as to the timing of her disclosure to her psychologist was vague and widely imprecise. She said that it occurred "*sometime in late 2019 or ... early 2021*": T26.28. Such imprecision raised doubts about the reliability of her evidence.
- 468 As already observed, the objective records show that it was not until the plaintiff's fourth psychological treatment session on 1 November 2019, that she disclosed the alleged sexual abuse to her treating psychologist: Exhibit "A", p 29; Exhibit "B", p 1. She said that she had intended to do so at the outset of those consultations, but that it took her some time to get to that point of feeling able to do so.
- 469 During the discussions that followed the first disclosure to her psychologist, the plaintiff has since then repeated her account of the alleged events on multiple occasions. The effect of that process of reinforcement by repetition needs to be considered. Repeated disclosure of such matters in discussions does not necessarily provide evidence of the truth of the content of those disclosures but it might tend to suggest that, reinforcedly, the plaintiff came to genuinely believe in the truthfulness of that processed account.

- 470 The treating psychologist recorded a history of the alleged sexual assault occurring when the plaintiff was aged “*around the age of 8 years*”: Exhibit “A”, p 29. This was in significant contrast to the plaintiff’s evidence given in these proceedings where, ultimately, she alternatively framed the alleged events as occurring around the age of about 12 years: T130.24.
- 471 Following those early sessions with her treating psychologist, and with the encouragement of her psychologist, over the course of time the plaintiff also disclosed her account of the alleged sexual abuse to her sister, her godmother, and then to her mother, in that sequence: T25.10 – T26.31. The evidence of the content of those disclosures appears at paragraphs [193] to [213] above.
- 472 The plaintiff described her present-day mental health burden from the alleged sexual abuse as comprising anxiety, depression, and PTSD. She said her PTSD was manifested by triggered memories of the alleged assault, and that she has had difficulty sleeping, she has issues with panic attacks at night, and she has difficulty with her “*ability to focus and to just kind of function, I guess*”: T16.4.
- 473 The plaintiff’s experience of panic attacks at night, which she said could affect her ability to go to university the next day (T33.1), was explained by her as follows:

“AKTHAR

Q. Describe what you mean when you say, "have a panic attack".

A. A panic attack for me, I guess, looks like, you know, waking up and feeling a sense of quite extreme dread. Often panic attacks for me are triggered by dreams, which are often in relation to the incident with the defendant, so sometimes I'll kind of wake up into a panic attack, and I guess that will be like - you know, there's physical symptoms, so it will be like kind of heart racing, heart palpitations; feeling very, very scared; feeling kind of pain, physical pain, in my right arm, I get a lot; and just feeling kind of extreme, really quite extreme, terror, I guess. Not being able to go back to sleep, definitely; you know, crying and feeling scared to go back to sleep because not wanting to go back into the dream that might have kind of triggered the panic attack in the first place. I guess that's kind of like a typical - what a panic attack might look like for me. Yeah.

Q. What are the dreams?



A. Often it'll just be a dream - you know, it could be triggered by a dream just that [the defendant] is present in. It's not necessarily an explicit kind of dream of the assault. It has been dreams of kind of other violence in relation to [the defendant]. Often my sister, [name of sister redacted], will be - you know, it'll be a dream where I have to look after her; I have to, like, protect her from him. Yeah, kind of things like that will often trigger a panic attack.

Q. When you say other violence, is it replaying real events or this is in the dream?

A. This is in the dream, yeah.”

[T33.7 – T33.34]

474 The plaintiff gave a range for the timing of the onset of her panic attacks and feelings of sadness in her mid-teenage years, namely, when she was aged “14, 15, 16”, when she experienced her first full panic attack, and she vaguely timed the onset of her symptoms of anxiety and sadness to pre-date those attacks, namely when she was “12, 13 years old when they sort of began”: T34.10 – T34.23. The inherent vagueness of that account was striking.

475 The plaintiff said she struggled to focus as a teenager and lost her enjoyment from reading (T87.30), and felt she was caught in the family dynamic not of her own making: T129.42.

476 That evidence of the timing at “14, 15, 16” years of age must also be considered in juxtaposition of the timing of the diagnosis of her father’s declining health due to his neurodegenerative illness and the plaintiff’s other health issues as summarised at paragraphs [111] to [157] above, and the matters referred to at paragraph [190] above.

477 The plaintiff stated that her symptoms which had resulted from the alleged assault included random episodes of a racing heartbeat, severe stomach pain, and anxiety: T41.1 – T41.11. When asked about the present impact of those symptoms upon her she gave the following evidence:

“Q. What impacts you the most today?

A. What impacts me the most today was the symptoms of what I would consider the symptoms of my PTSD, which are the panic attacks and kind of general anxiety, general depressive symptoms and, I guess, the kind of impact

that they have on my relationships and just the kind of secondary, like, worry about that and worry about the ways that they impact my life, kind of like the two layers of it.

Q. How does it impact your relationships?

A. I guess because it impacts my behaviour so it impacts my sort of physical state in that it impacts how I feel and, you know, whether I slept or what I'm kind of - yeah, it impacts my behaviour in that way which has an impact on relationships because - on my relationships because it's kind of - I guess it puts something between you and another person, it's a sort of barrier to a relationship, to, yeah.

Q. Are you undertaking any treatment at the moment--

A. No.

Q. --for these impacts?

A. At the moment, no.

Q. Why not?

A. Because of the cost."

[T41.13 – T41.36]

478 The diagnostic source of the plaintiff's belief that she has PTSD, as mentioned in the above extract of her evidence, requires close consideration in view of the medical evidence reviewed thus far.

479 The plaintiff described the intensity of her PTSD symptoms in the 2-month period leading up to the hearing as follows:

"Q. Is there any reason for that?

A. I in the last two months have, kind of, been experiencing, sort of, a - and I guess I would describe these symptoms of PTSD and other, kind of, psychological symptoms as, you know, often quite - go through intense periods and sometimes ease off and that's, kind of, you know, not necessarily a totally consistent thing. In the last two months I've been in the period of really, kind of, worsening symptoms. And, kind of, as a - yeah, just that - that's, kind of, stopped me from working in the last few months.

Q. Is there anything in particular that's triggered a worsening of symptoms, in your mind?

A. Well, I guess, you know, the - this hearing and, kind of, revisiting - you know, obviously there's a lot of revisiting the assault that took place and that's, kind of, inevitably triggering to me. And that can really kick off a, kind of, longer period of worsening symptoms."

[T37.10 – T37.24]

- 480 The plaintiff described her feelings of extreme sadness, depression and of having “*quite suicidal*” thoughts, which she did not act upon. She said this made her feel that her life had been destroyed by the alleged sexual assault: T40.7 – T40.21. She said that she thought she had disclosed those thoughts to her treating psychologist and to Dr Brown: T40.25. A review of their reports reveals that there was no evidence in the form of a written notation by her psychologist to confirm that she had done so. It is clear that Dr Brown’s note of the plaintiff’s past feelings of suicidality represented a significant understatement compared to the plaintiff’s oral evidence on that topic, where she described her extreme suicidality over a period of three years.
- 481 In circumstances where the plaintiff said her symptoms were worsening, she said she stopped seeing her psychologist initially because she could not afford the expense, and subsequently noted that psychologist had ceased practising during a period of maternity leave: T34.5. In the course of final submissions it was indicated that the plaintiff’s legal representatives had encountered difficulty in locating the present whereabouts of that psychologist.
- 482 Whilst that may have been so, the plaintiff had since been referred to another psychologist pursuant to a GP Medicare Mental Health Plan whilst she was living in Melbourne, in November 2022, but there is no report in evidence resulting from that referral: Exhibit “A”, p 33. The plaintiff’s explanation for this appears to be that her impecuniosity precluded her from pursuing treatment.
- 483 In considering the plaintiff’s present situation, it is noteworthy that there is no evidence from any general medical practitioner, psychiatrist, or psychologist, describing any current clinical treatment or management regime that might be in place concerning her present claim of psychological problems and needs, as they might relate to the alleged sexual abuse for which she claims damages from the defendant.

## Evidence of the plaintiff's former boyfriend

484 The plaintiff's former boyfriend gave evidence via an AVL connection from overseas: T158 – T168. Their relationship was between 2017 and the end of 2019. He has had an overseas legal education in a common law country: T165.11. When he was in Sydney the defendant assisted him in finding employment in Witness B's law firm, in an administrative capacity: T167.13 – T167.38.

485 He confirmed that he was first asked to recall the detail of the subject matter of his evidence about two months before the hearing, in circumstances where he had not made contemporaneous notes that might have refreshed his memory of the events the plaintiff had disclosed to him four years earlier: T164.26 – T164.37.

486 He stated that he had arrived in Australia on 1 January 2019: T169.42. He believed that the plaintiff had made her disclosure to him in mid-2019: T160.27 – T160.31. He said the plaintiff told him she had a vivid memory of being inappropriately touched by the defendant when she was a younger girl: T161.15; T161.40. He recounted the detail of the plaintiff's disclosure as follows:

"Q. Please tell us - remembering as best you can - what she said, and what you said, in this conversation. As much detail as you can.

A. Yeah. She asked me my opinion on [the defendant], I gave my opinion. She said listen, there's something I really need to tell you, I haven't told anyone else. And she said that when she was younger - I don't remember what age she was, I don't know if she told me - but she said that she remembers vividly one night feeling ill, wanting to get into her mother's bed that was shared with [the defendant] at that time, getting into the bed, and that while she was in there, [the defendant] pulled her underwear down, touched her inappropriately on her vagina.

Q. Do you remember any more about anything you said in response, or anything more that she said in this conversation?

A. I remember being shocked. She said that she didn't tell anybody at that time. She didn't know what to do with the information. I remember - pardon me - I remember she said that in large part she felt that that explained, at the time, there was maybe a little - at the time, and indeed before, there was regarded as being a certain amount of tension between the two. Not

necessarily tension, but that she could be a little bit short with him, for example, and she said that she believed that this shortness, as it were, was as a result of this incident.

Q. When you say at the time, are you talking about the time of the incident, or of the time that she told you?

A. The shortness, that it is?

Q. Yes.

A. It continuing throughout the relationship that they had, throughout the period that they knew each other, I think that she was telling me, and indeed at the time as well. There was kind of always maybe that she was being a bit short with him, both when I was there, but indeed in the preceding years also. And that she felt at--

Q. Are you saying it's something that you observed, or is this just what she's telling you?

A. I observed. I would go so far to say that I think my impression was that she was making more of an effort, perhaps, when I was there to be that bit more amiable. But there was maybe a little bit of shortness with [the defendant]. Maybe, I say, there was. There was a bit of shortness with [the defendant], which I directly observed, yes.

Q. Do you remember anything else about that conversation, or is that everything you remember?

A. The - certainly the most important details that stand out to me. Oh, well, I suppose following that - not following that conversation, at - closer to the end of that conversation, I sort of asked her why she had told no one, and in particular why it was coming out now. I think that one thing that became very clear in that conversation was that she had a concern that recounting this at that time - that is to say, the time that she was with me - she was very nervous about the effect and the fallout that that would have, particularly on her mother, who was still in a relationship with [the defendant] at the time.

Q. When you say she was nervous, is there anything that she said that gave you that impression, or is that just an impression that you had?

A. No, she was very explicit about that, and she was very explicit about the fact that - and indeed I was there in that year, and they had various property dealings, they sold a house, they bought another house, and she was quite clear that she was very nervous about the possible effect it would have, given the fact that my understanding was - well, I don't know the legal arrangements, but that they essentially had gone in on a house together, and that that would be - they also had another holiday home in [redacted overseas location] - and that there would be some degree of fallout as a result of this and she was - she was nervous about that. So she was explicit about that, yes."

[T161.35 – T162.46]

487 The former boyfriend suggested to the plaintiff that she take action, and report the details to others, including to her mother, and to her sister, as a priority, and to escalate it in a legal sense, whether that be in a criminal sense or a civil sense: T163.38 – T164.7; T165.29. He said that he was unaware that the plaintiff had at any stage disclosed the alleged incident to her psychologist: T166.6.

488 There were two aspects of the evidence of the plaintiff's former boyfriend that were at odds with the plaintiff's evidence. First, whereas the plaintiff portrayed herself as having had her life destroyed by the alleged abuse, according to his knowledge of her during their relationship, he agreed she had an outgoing and effervescent personality: T164.48. Secondly, whereas she said she had lost the enjoyment of reading, he described her as "*a big reader*": T166.50.

#### **Evidence of the plaintiff's sister**

489 The plaintiff's younger sister, now aged 22 years, gave oral evidence: T184 – T197. She has been diagnosed as having the same respiratory condition of PCD as the plaintiff, which for a time resulted in her wanting to end her life: T193.49; T194.15; Exhibit "17".

490 Although the evidence as to the extent to which that intention was shared with the plaintiff is not clear, given the closeness of the two sisters, it seems unlikely that the plaintiff did not know about her sister's thoughts in that regard.

491 The plaintiff's sister said that in May or June 2023, she was first approached by the plaintiff's solicitor to give her evidence. She stated that she was reliant upon her memory about those events which she was asked to relate in her evidence: T191.8.

492 She said that she became aware of the plaintiff's allegation of sexual assault in February 2020, following the questioning of the plaintiff over her apparent attitude of open rudeness to the defendant at the dinner table, where the plaintiff then left the room after her mother rebuked her for that behaviour: T186.41.

493 She said that when she questioned the plaintiff about that occurrence, the plaintiff broke down, struggled to explain, and when she had calmed down, told her that the defendant “*had molested her when she was a kid*”: T186.45 – T186.48. She could not recall the exact words of that disclosure: T187.11; T187.50.

494 The plaintiff’s sister then volunteered the following summarised narrative of what the plaintiff had told her:

“...she woke up in the middle of the night and had a tummy ache. And so she went to mum and [the defendant]’s bedroom. At the time, our mum was working late or - she was working late or she has always struggled with sleeping. She’d had insomnia parts of her life, and so we knew not to wake her up, because she would struggle to get back to sleep, so [the plaintiff] woke [the defendant] up, on his side of the bed, complained of a tummy ache and he, kind of, told her to come in to his side, to cuddle her to sleep. That is when he, I think, removed her underwear and started fondling around her vagina.”

[T187.32 – T187.40]

495 At that time, the plaintiff’s sister’s response to the plaintiff’s disclosure was to encourage the plaintiff to tell their mother about those events. She said the plaintiff’s response to such encouragement was to indicate she was not ready to do so and she was uncertain as to whether she was ever going to tell their mother: T188.5. Over time, she assisted the plaintiff to process what she alleged had happened by being supportive and listening to her: T188.43 – T189.15. She said in those conversations, the plaintiff’s account was always the same: T189.20.

496 The plaintiff’s sister also stated that she and the plaintiff visited their godmother on 17 February 2020 to disclose the alleged sexual assault: T189.27.

497 The plaintiff’s sister confirmed that she had a good relationship with the defendant, and she confirmed that she had no difficulty with him. She also confirmed that the defendant had looked after her when her mother was away from home for her work: T191.3 – T191.16.

## Evidence of the plaintiff's godmother

498 The plaintiff's godmother has known the plaintiff since she was born. She identified 17 February 2020 as the date on which the plaintiff disclosed to her the fact of the alleged event: T236.32; Exhibit "C".

499 The context was that the plaintiff told her godmother that the plaintiff's mother was unhappy with the plaintiff being hostile towards the defendant: T237.5. The evidence of the godmother in that regard was as follows:

"A. [the plaintiff] said, "There's a lot of tension at home. Mum is upset because I'm hostile towards [the defendant]. Mum is upset because I haven't been studying."

Q. [name redacted], I'm sorry to interrupt. You understand the topic that the Court proceedings is about today?

A. Yeah.

Q. I'm just going to ask you, can you give us your best recollection of the words the plaintiff said about that topic?

A. Okay. [the plaintiff] said, "And there's something else. When I was a kid, [the defendant] touched me." And the exact words that followed, I don't recollect, but there was a very clear message to me that he touched her in an upsetting sexual way."

[T240.17 – T240.29]

500 The godmother further explained that she recalled that the plaintiff had said the defendant had "*touched me*" but could not now recall what other words had been said by the plaintiff. She recalled the plaintiff appeared to have been "*choked up*" at that time, and was holding back tears: T241.14 – T241.21.

501 The plaintiff's godmother confirmed that following the plaintiff's disclosure she limited her role to being a listener and a supporter (T241.31) in the context of ongoing conversations with the plaintiff on this topic: T242.3. She said that supportive role ceased on 27 July 2020, which was when, on her understanding, the plaintiff had told her mother of the alleged sexual assault: T242.11 – T242.38; T243.10; T243.33. That evidence was in conflict with the evidence of the plaintiff's mother, who said the plaintiff had told her on 23 July 2020: T287.37.



502 The plaintiff's godmother acknowledged she has been invested in these proceedings from their inception, having also been the mother's support person in the concluded Family Court proceedings: T243.47 – T244.2.

### **Evidence of the plaintiff's mother**

503 The detail of the plaintiff's mother's account of the plaintiff's disclosure of alleged sexual abuse by the defendant has already been set out at paragraphs [214] to [216] above.

504 Without identifying the profession of the plaintiff's mother it is sufficient to say she is well versed in the careful use of words and is able to convey meaning concisely. At her current age of 62 years, she has had a successful career involving the articulate use of language.

505 The plaintiff's mother claimed she had a partial recollection of the night of the alleged abuse. That claim of a recollection along those lines must be considered in light of the evidence that at the time the mother was a known poor sleeper (T343.20 – T343.40), she had access to a variety of prescribed medications for that problem (Exhibit "D"), and she said that she "*potentially... could have taken portion of a Stilnox*" tablet to assist her to sleep on that night: T344.42. That evidence bears close analysis in view of some related pharmaceutical records: Exhibit "D".

506 She said she remembered the evening in question as the "*tummy ache night*": T247.20. She said she remembered the plaintiff coming into the bedroom in the middle of the night; T247.49. She said she also remembered asking the plaintiff what it was that she wanted, and she remembered the plaintiff's reply that she had a tummy ache, and that she had then asked the plaintiff how bad it was: T247.50 – T248.2.

507 She said she also remembered an alleged conversation, which is disputed by the defendant, where the defendant is alleged to have said "*Hey, you can jump into bed with me*", and she remembers feeling a sense of relief that the defendant had said that because she trusted him to provide the plaintiff with

care and comfort, and she remembers the plaintiff “*got into bed with him*”: T248.5 – T248.10.

508 She re-iterated that she had a memory of the plaintiff coming to the bed seeking comfort. She said her next memory of the plaintiff was that she was crying as both she and the defendant walked around the bed: T343.9 – T343.12. The defendant disputes that such events or conversations took place.

509 That memory claimed by the plaintiff’s mother was in the context of her saying she had been woken in darkness, she did not know the time, and she recalled seeing the small shape of the plaintiff walking around the edge of the bed towards her, crying in what she described as a “*high-pitched keening sound coming out of her mouth*” (T248.20 – T248.23; T344.1), whilst also seeing the larger shape of the defendant appearing behind her: T343.12.

510 She explained that she thought that when the plaintiff started to cry, she had succeeded in waking her up: T247.37. In those events she said she remembered asking the plaintiff what was wrong, and getting no reply, but sensing a lessening intensity of crying, and then hearing the defendant say: “*it’s her tummy ache*” or “*it’s her stomach ache still*”, and then beckoning the plaintiff to come to her for a cuddle: T248.24 – T248.26.

511 She said that following that sequence of events, she remembered the defendant leaving the bedroom to sleep in the living room, and the plaintiff was not speaking, but was instead making a sound of “*high keening distress*”, and of her being “*in quite extreme emotional distress*”: T248.35 – T248.40.

512 It appears that at the time, the plaintiff’s mother did not seek to explore with the plaintiff the factual basis for her observation of her daughter’s “*quite extreme emotional distress*”.

513 As to the events that were described by the plaintiff concerning the alleged actions of the defendant whilst in the bed before the plaintiff claimed to have

started crying, the plaintiff's mother said that she could not recall whether she had sensed movement in the bed.

514 She proffered the speculative explanation that she might "*potentially*" have taken *Stilnox* sleeping medication beforehand, and she might still have been under the effect of that medication when she was woken by the plaintiff crying, and then went back to sleep: T344.16 – T344.44.

515 The reliability of that evidence must be evaluated considering the evidence that between 2009 to 2012, she was not a good sleeper, she had trouble getting to sleep, and if woken, she would sometimes find it difficult to get back to sleep once woken: T343.20 – T343.40.

516 The defendant maintains that none of the foregoing critical events described by the plaintiff's mother as recounted above in fact occurred.

517 The plaintiff's mother's evidence of her recollections as summarised in the preceding paragraphs must be assessed in terms of whether it represents her actual recollections, or instead, whether that evidence is a convenient construction designed to assist the plaintiff's case.

### **Evidence of the defendant**

518 After hearing the entire range of oral evidence levelled against him regarding the alleged sexual assault of the plaintiff, the defendant gave oral evidence in response on the sixth and seventh days of the hearing: T363 – T510.

519 Beforehand, the defendant had received legal advice, including independent legal advice, in view of the subject matter that was likely to be canvassed in his evidence. In anticipation of giving evidence, he indicated that he did not seek any protection that might otherwise have been available to him if he had asked for a grant of a certificate pursuant to s 128 of the *Evidence Act 1995* (NSW): T 362.2.

- 520 Short of identifying the defendant and his professional status, it is sufficient to say that at the age of 71 years, he has had an accomplished professional life with an undoubted high capacity for critical concentration and articulate verbal communication.
- 521 At the time of the alleged sexual offending, the defendant would have been aged about 59 years, and in the fourth year of a *de facto* domestic relationship with the plaintiff's mother. They both worked in different fields of endeavour within the same profession.
- 522 In summary, the effect of the defendant's evidence was that of a complete denial of having sexually touched the plaintiff as she has alleged. He denied that he had any such inclination to engage in such misconduct. There was nothing in his history that raised a suggestion to the contrary.
- 523 The defendant was extensively cross-examined. His evidence was given in a calm and measured manner. His steadfast denial of the disconcerting conduct alleged against him was given in a dignified manner.
- 524 Specifically, the defendant completely denied the truth of the evidence given by the plaintiff and her mother to the effect that on the night in question, after the plaintiff had entered their bedroom, and their bed, that the alleged misconduct had occurred, whilst the plaintiff's mother, a light sleeper, was asleep close by, in that same bed.
- 525 To my observation, the only time the defendant became hyperbolic and was slightly elevated in his tone was when he was provoked by the terms and the pace of the question that was put to him, as follows:

"Q. I suggest to you that after you forcefully touched her on the breast area for about five minutes, you then moved your hand to her torso or stomach area.

A. It's not true. I'm not suicidal. If the mother who's an insomniac is sleeping right next to us, then for me to forcefully touch her breasts would seem a really stupid thing to do, if I were that way inclined, which I'm not. So it's just not true"

[T491.6 – T491.11]

- 526 The context of that allegation and the defendant's answer was explored with him in greater detail (at T490.6 – T492.8), where he said he found the plaintiff's account of the alleged events to be incredible.
- 527 There was nothing that emerged from within the defendant's evidence to suggest that any aspect of it was inherently or glaringly improbable.
- 528 Consistent with the work practices of the defendant's profession, and within his rights as a litigant, he was observed to take notes during the plaintiff's oral evidence. On behalf of the plaintiff, it was submitted that in effect, this could have been intimidatory of the plaintiff. From my observation of the dynamics of the courtroom, I saw nothing which would reasonably support that view.
- 529 The defendant's denial of the allegations against him will be revisited at a later point when considering the credibility and the reliability of his testimony in **PART H** of these reasons.

### **Evidence of the defendant's supporting witnesses**

- 530 In the paragraphs that now follow, the evidence of the defendant's Witnesses A, B, C, D and E is summarised.

#### **Witness A**

- 531 Witness A was called to give evidence in the defendant's case: T517 – T522. He is a former colleague of both the plaintiff's mother and of the defendant. He had been made aware of the subject matter of these proceedings: T517.12. His evidence referred to a telephone call he received from the plaintiff's mother in about August 2020. His recollection of those circumstances was as follows:

"Q. I'll take you back to the phone call with [name of plaintiff's mother] . Doing the best you can, when do you recall that having occurred?

A. I think it was about August in 2020. I was at my home, then in [suburb redacted] and took a mobile call from [name of plaintiff's mother] and she said she wanted to tell me something disturbing about [name of defendant], and she then went on to describe how her daughter was in therapy and had a memory that she had been inappropriately touched sexually by [name of defendant]

when they were all in bed together, and as a consequence of that recollection she also recollected her daughter was, at one time, years before, was inexplicably distressed. I didn't interrogate her on, you know, all the details, I didn't take notes. I was shocked and immediately sympathetic to [name of plaintiff's mother] and her daughter.

Q. Do you recall any further part of the conversation?

A. She said that she was raising, or had raised the matter with New South Wales Police, and was looking at options to take the matter further. My contribution at that stage was that that was the best course for her in the, what I said was, an historic and these historic cases, and I remember commenting as I've written or tweeted on many occasions, that when it comes to child sexual abuse the obligation on all of us is to call the police immediately, before you do anything else about protecting your reputation or the reputation of your organisation."

[T518.9 – T518.28]

532 Witness A was not cross-examined on any aspect of his evidence.

### ***Witness B***

533 Witness B was called to give evidence in the defendant's case: T523 – T524. She is a solicitor who was socially acquainted with both the defendant and the plaintiff's mother. She had been made aware of the subject matter of these proceedings: T523.33. She gave evidence of a telephone call she received from the plaintiff's mother at 6:00pm on Sunday 13 September 2020. Prudently, she prepared a contemporaneous file note of that conversation: Exhibit "129". She gave the following evidence in accordance with that file note:

"Q. Just taking your time, and with the benefit of having refreshed your recollection from that document, can you tell us what was said in the phone call?

A. It wasn't a very long phone, and it was a phone call that went round and round in circles. [Name of plaintiff's mother] asked me if I'd spoken to [name of defendant] , and then said I needed to get him to call her, and I repeatedly said, "You need I understand [name of defendant] got a lawyer. You need to speak to the lawyer." That conversation happened three or four times, and then eventually, she said to me, "This is about a criminal matter," and I said, "Well, then you need to speak to the police," and she said to me words to the effect of, "Well, I might have to do that if I can't speak to [name of defendant]"."

[T524.16 – T524.26]

534 Witness B was not cross-examined on any aspect of her evidence.

### ***Witness C***

535 Witness C was called to give evidence in the defendant's case: T535 – T543. She is a barrister specialising in criminal law cases. She was a close friend of the defendant and was also socially acquainted with the plaintiff's mother, the mother's deceased husband, and other family members. Her evidence related to some telephone advice she had given the defendant after he had told her of the allegation and the claim being made against him for compensation. She said her advice to the defendant at the time was to not communicate with anyone at all on the plaintiff's side and to be aware of possible difficulties that might arise from entrapment: T537.5 – T537.26; T537.47; T538.1 – T538.7; T538.34. She also said she knew the plaintiff's maternal uncle, the brother of the plaintiff's mother, and she knew he was a lawyer: T537.30.

536 Witness C was not cross-examined on any aspect of her evidence.

### ***Witness D***

537 Witness D was described by the plaintiff's mother as a friend until 2 May 2020, and a former friend thereafter: T283.2 – T283.8. There was no elaboration in the evidence as to the significance of that date on the basis upon which the friendship had ceased. They have not spoken for about three years: T283.27.

538 Witness D was called to give evidence in the defendant's case: T546 – T554. He was a professional colleague of the defendant and the plaintiff's mother. In that context he also knew the plaintiff and her sister. They had stayed at Witness D's holiday home away from Sydney during the time when certain parts of Sydney were known as COVID hot spots because of concerns over the plaintiff and her sister being vulnerable to harm from that virus.

539 Witness D gave evidence that he had received a call from the plaintiff's mother on 27 August 2020 and let it go through to message. The content of that message was for Witness D to ring her. He sent a text message to the defendant to that effect, informing him he had not responded pending contact with him: Exhibit "123". At that time, the defendant had been staying with

Witness D and his partner, Witness E, and he was concerned about the defendant's mental health following the allegation made against him by the plaintiff: T549.11 – T549.22.

540 Witness D spoke about the occasion on which, by arrangement, he and his partner went to the home of the plaintiff's mother to pick up boxes containing the defendant's belongings. He gave evidence of a conversation that took place between himself and the plaintiff's mother in the following terms:

"Q. What did you do then?

A. We proceeded, myself and [name of Witness D's partner], with this bloke, and with [name of plaintiff's mother] and her sister-in-law, proceeded to go and collect these boxes and things that were packed up with [name of defendant] material in them, took them out. We have a sort of station wagon car. We took them out, start loading up. Once we go the first load out, [name of plaintiff's mother] asked me to stay, and she wanted to have a talk with me, so I stayed there, and the other three went about removing the boxes, putting them in the car.

Q. Was there a conversation then with you and [name of plaintiff's mother] ?

A. Yeah, it was, and--

Q. Just doing the best you can now, I appreciate it's three years ago, can you try and use the format, "I said, she said"?

A. Certainly, yep. Yep. Yeah. So I did the - most of the listening. [Name of plaintiff's mother] was very keen to talk, and she said along the way, "Look, you need to get [name of defendant] to contact me or my brother because he needs to contact us. He needs to be aware, and he needs to take responsibility." And I said, "Look, all I can do is pass on any messages you have to [name of defendant]. Can't speak on his behalf. I can't promise anything." And she said, "Look, this could be very, very bad for him. It could end up on the front page of The Australian. It's in his interests to contact either [plaintiff's uncle] or me."

Q. What did you understand you were being asked to do?

A. I thought it was a touch of blackmail about it."

[T551.5 – T551. – T551.30]

541 Witness D also gave evidence about a telephone call he received from the plaintiff on 30 September 2020. His evidence on that topic was as follows:

"Q. Did you receive any contact at all from the plaintiff, that's [name of plaintiff], in respect of this matter?



A. We did, yeah, and we went up to [name of location], I think about a week later. Again, like - just like today is the 28th. It's our wedding anniversary. So we went up to [name of location]. We usually like to do that at the end of school holidays when it's - you know, when it's only the locals. And I got a phone call from [name of plaintiff],

Q. Do you remember when that was?

A. It was probably around - just around the time of our anniversary. Probably around the 28th or that period in September.

Q. Did you recognise [name of plaintiff] voice on the phone?

A. I had her number in the phone.

Q. I see.

A. Yeah, so, you know, it showed it was [name of plaintiff].

Q. Do you remember what time the phone call came? It was around lunchtime. Yep.

Q. Just once again, doing the best you can, what do you recall was said?

A. I didn't engage in much conversation. I listened, and [name of plaintiff], was assuring me that what [name of plaintiff's mother] had told us about that alleged incident was true. [Name of defendant] needed to come to terms with it. He needed to either ring [name of plaintiff's mother] or [name of plaintiff's uncle], her brother, because it could go very bad for him if he didn't.

Q. Did she go any further?

A. Conversation, I think, lasted - I wrote it down afterwards. It lasted about three or four minutes, and all I did was assure [name of plaintiff] at the end - I didn't comment on any of these things. I just said to her, "Look, I'll talk to [name of defendant] ."

Q. Did you make a note of this conversation at about the time it occurred?

A. Yeah, I did. Yeah."

[T551.32 – T552.15]

542 Witness D made a file note of that conversation: Exhibit "140". He was not cross-examined on any aspect of his evidence.

### ***Witness E***

543 Witness E was called to give evidence in the defendant's case: T557 – T560. She is the partner of Witness D. She was present when the defendant's packed and boxed goods were collected from the home of the plaintiff's mother. Her

evidence confirmed the accommodation arrangements that were made for the family at the time of COVID because of the health conditions of the two sisters: T557.35 – T557.49.

544 Witness E gave evidence of a 27 August 2020 telephone call she had received from the plaintiff's maternal grandmother and a message she had texted back: T559.26. She also gave evidence of parts of a conversation she heard at the home of the plaintiff's mother when the defendant's boxed belongings were collected by her husband and herself, as follows:

“Q. After some introductory conversation, did you start moving boxes about?

A. [Name of plaintiff's mother] had everything sort of, yes, set up sort of on the - in the hallway and - to go into the car. It was all sort of boxed up, everything.

Q. Do you recall moving the boxes about?

A. Yeah. Yeah. I had to put them in the car.

Q. What sort of car did you have?

A. Subaru station wagon.

Q. Whilst you were doing that, did you have any further conversation with [name of plaintiff's mother]?

A. No, she was talking to [name of witness D] but I was sort of trying to get all the stuff into the car.

Q. Did you hear any part of that conversation at all?

A. Maybe a little bit, but I didn't sort of - about [name of defendant] contacting her brother, but I didn't sort of stand and listen to the conversation.

Q. Was there anything that you did here?

A. Yeah, about - I heard that [name of plaintiff's mother] was saying to [name of defendant] that he - well, yeah, **she did say something about the - it would be in his best interests to actually contact her brother because this allegation may be all over The Australian the next day or something. The Australian newspaper.**”

[Emphasis added]

[T560.16 – T560.39]

545 Witness E was not cross-examined on any aspect of her evidence.

## **PART F – EXPERT EVIDENCE REVIEW**

546 An assessment of the reliability of the plaintiff's testimony requires a consideration of the clinical evidence of the plaintiff's treating general practitioner and her treating psychologist, together with the opinion evidence of the plaintiff's retained forensic psychiatrist, Dr Brown.

### **Treating general practitioner's materials**

547 The clinical material obtained from or produced by the plaintiff's treating general practitioner did not record any direct history from the plaintiff of the alleged sexual touching by the defendant. Nor does that material record any psychological symptoms that were stated to be referable to the alleged sexual abuse. This is in circumstances where, since 25 July 2020, as a result of speaking with the plaintiff's mother, the plaintiff's general practitioner was made aware of the alleged sexual abuse.

548 The treating general practitioner's correspondence and records do not provide any evidence that would assist in making a temporal or a causal connection between the plaintiff's allegation of sexual abuse and her psychological symptoms. Instead, other plausible causes are identified in the referral.

549 Nor does that material contain any contemporaneous record of the plaintiff having had suicidal ideation, extreme or otherwise, as she has stated. If the general practitioner had been aware of suicidal ideation, especially "*extreme*" suicidal ideation, it most probably would have been brought to the attention of the psychologist to whom the plaintiff was referred for treatment.

550 It is against that background, that the reports and records of the plaintiff's treating psychologist require close consideration before moving on to an examination of the evidence, and the opinions of the forensic psychiatrist who was retained by the defendant to provide a medico-legal opinion which provided a causal connection between the alleged sexual abuse and the plaintiff's PTSD, as she claims.

## **Clinical psychologist's correspondence**

- 551 In reviewing the plaintiff's medical history and the many stresses that were impacting on the plaintiff and her family before she saw her treating psychologist, it must be recognised that the plaintiff was referred to that psychologist on the basis of information that was of a much more limited nature than that which has subsequently become available for consideration in the lead-up to and during the course of these proceedings.
- 552 In that regard, the clinical psychologist was not made aware of the alleged sexual abuse until her fourth consultation with the plaintiff.
- 553 The focus of the general practitioner's referral to the psychologist was limited to the management of the plaintiff's symptoms of anxiety, panic attacks, sadness, grief over the death of her father, and adjustment issues concerning her general health, as was identified in his referral, which was made without knowledge of the alleged sexual abuse: Exhibit "A", pp 31 – 32; Exhibit "1", Vol 1, pp 139 – 141.
- 554 On 8 October 2019, the date the psychologist's first consultation with the plaintiff, she contemporaneously wrote to the referring general practitioner acknowledging the referral in the following terms:

"Thank you for referring [the plaintiff] for assessment and management of anxiety, panic attacks, and periods of sadness, grief and adjustment issues to chronic health issue. I saw [the plaintiff] for an initial consultation today, 08/10/2019.

[The plaintiff] is a 21-year-old young woman who currently lives with her boyfriend in an apartment together.

[The plaintiff] presents with a significant history of loss and grief her parents divorced when she was young. Her mother re-partnered with her step-father, [the defendant]. Her father was diagnosed with Motor neuron disease when she was 15 and her family cared for him in their home, until he passed when [the plaintiff] was 17 years old and finishing her last year of school. [The plaintiff] reported some experiencing (sic) some intrusive thoughts and obsessive compulsive behaviours around the age of 9 or 10 years of age.

[The plaintiff] completed the Depression Anxiety and Stress Scale (DASS-21) at her initial consultation; she scored in the severe ranges for stress and in the moderate ranges for anxiety and depression.

[The plaintiff] engaged well in the initial consultation and had good insight into the presenting difficulties. We have scheduled a subsequent consultation and sessions will predominantly focus on the management of [the plaintiff's] difficulties through cognitive behavioural therapy.

I will keep you updated on [the plaintiff's] progress. Please do not hesitate to contact me should you have any queries or concerns regarding her management.”

[Exhibit “A”, p 25]

- 555 It is noteworthy from the above factual summary, it appears that the plaintiff had incorrectly told her psychologist that her parents had divorced when she was young. In fact they had never divorced: T340.46. Nor did she tell the psychologist about the three year period, when as a teenager, she claimed to have had extreme suicidal ideation.
- 556 When incorrect information is provided to a treating practitioner, or when critical information is withheld from disclosure, the approach taken by a treating practitioner is apt to become misdirected as to the nature, the cause, and the appropriate management of the particular clinical problem under review.
- 557 In that regard, in my view, the fact that the plaintiff withheld from her psychologist critical information (namely disclosure of the alleged sexual abuse, which was relevant to her assessment and treatment), this serves to undermine the reliability of the clinical impressions gained by the psychologist concerning matters of diagnosis, and any implied attributability of symptoms to the late emergent disclosure by the plaintiff of alleged sexual abuse.
- 558 Absent a disclosure by the plaintiff of the alleged sexual abuse at the outset of the psychologist's consultations commencing on 8 October 2019, and absent explanatory oral evidence from that psychologist, it seems to me that the psychologist's analytical thinking was most likely grounded upon an earlier and plausibly assessed baseline that was established on 29 July 2015, when the plaintiff and her family were seen in psychological consultation in the context of adjusting to her father's terminal illness.

- 559 On 29 July 2015, that objective baseline was established when a focussed one hour consultation took place between the psychologist and the plaintiff's mother, the plaintiff, and her younger sister. This was in the context of the family needing psychological assistance because the plaintiff's father (from whom the plaintiff's mother had been separated for at least 7 years at that time), was in declining health and was slowly dying on account of diagnosed motor neurone disease: Exhibit "B", pp 2 – 4.
- 560 The psychologist's notes recorded that the plaintiff's father's health had been declining over a period of 20 months to that point, where he had also been exhibiting signs of frontal lobe damage. In my view, those underlying events would more likely than not have been psychologically disturbing to the plaintiff in her teenage years.
- 561 The psychologist noted that the plaintiff's father had lost his ability to speak some 10 months earlier, in about July 2014. This was undoubtedly a significant stressor for the plaintiff, who was close to him. The psychologist noted the plaintiff had been having nightmares, had high anxiety, felt under pressure to do well at her selective school, and felt guilty if her mother had to drive her around.
- 562 At that 2015 consultation, the psychologist noted that the plaintiff, then in Year 11, had been having nightmares, and had been feeling quite anxious, scared, paranoid, and had been dreaming about her father. It was noted that the plaintiff had been having difficulties sleeping, and had been ruminating and was teary. In that context, the psychologist was asked to send a letter to the plaintiff's school for the plaintiff's assistance as the plaintiff's school did not know of those matters: Exhibit "B", pp 4 – 5.
- 563 The psychologist's notes of that 2015 consultation concluded with the expectation that the family would attend for further sessions as needed: Exhibit "B", p 6. However, there were no further notes of any further consultations until the plaintiff attended on 8 October 2019, at the referral of her general practitioner.

- 564 In view of the nature of the plaintiff's psychological problems outlined at paragraphs [561] to [562] above, and in view of the death of the plaintiff's father on 16 January 2017, it cannot be reasonably assumed from the absence of further attendances, that those psychological and adjustment problems had either resolved or had been completely overtaken by other events.
- 565 In August 2015, the plaintiff was hospitalised and diagnosed as having suffered a "*mini-stroke*". This would undoubtedly have caused her and her family stress and distraction. This may explain why the sessions with the psychologist did not continue after 29 July 2015.
- 566 Two noteworthy matters emerge from the circumstances described above.
- 567 First, it is remarkable that in 2015, there was no contemporaneous letter of acknowledgment from the psychologist to the referrer, presumably the general practitioner, to confirm that a psychological consultation had taken place with the family, and secondly, also remarkably, the psychologist's 8 October 2019 letter to the referring general practitioner made no mention of that earlier 2015 family consultation as a relevant historical and clinical baseline.
- 568 On 20 November 2020, thirteen months after the 8 October 2019 letter from the psychologist to the referring general practitioner, the psychologist provided him with a second letter which provided the foreshadowed update on the progress of the plaintiff's psychological therapy. That letter was in the following terms:

"I am writing to update you on [the plaintiff's] progress in psychological therapy. [The plaintiff] was referred to me by you for assistance in the management of anxiety and low mood (presenting problem) that occurs in the context of significant loss of her father, traumatic experience with her step-father and serious diagnosed medical conditions.

[The plaintiff] has a history of worry and anxiety and OCD type checking behaviours. [The plaintiff] recalls that some of these symptoms presented around the time of her parents divorcing. [The plaintiff] has not had any previous psychological assistance. She reports the OCD behaviours resolving in time, however, worry and anxiety persisting.

[The plaintiff] has engaged well in therapy and has been attending on an approximate fortnightly to monthly basis. Sessions have been mostly cognitive behavioural in nature and have focused on the management of worry, mood

and stress. **In our session together [the plaintiff] disclosed a traumatic experience which occurred to her when she was young, we have managed to speak and process this and look at how this trauma has impacted her and her life. [The plaintiff] has been able to speak to close friends and family about what occurred and despite this being a difficult process, she said that it has been the right thing for her to do.**

We have also been working on chronic health management, changes to family structure and coping during a very stressful and uncertain time.

I believe that [the plaintiff] would benefit from the further 10 Medicare sessions subsidised by Medicare.

Future sessions will occur on an approximate fortnightly to monthly basis. The focus of therapy will be on the continued management of trauma, anxiety, anxiety, low mood and worry.

I look forward to updating you on [the plaintiff's] progress over the coming few months. Please do not hesitate to contact me should you have any queries or concerns regarding her management.”

[Emphasis added]

[Exhibit “A”, pp 26 – 27]

- 569 The psychologist’s comment that the plaintiff has not had any previous psychological assistance appears to be based on a face value acceptance of the plaintiff’s history to that effect. That statement attributed to the plaintiff is contradicted by the content of Exhibit “B”, comprising the handwritten psychological consultation notes dated 29 July 2015. This suggests the psychologist had proceeded on the false premise that the plaintiff did not have any previous psychological assistance. This also suggests the psychologist’s analysis proceeded on a factually incorrect baseline.
- 570 In the intervening period between 8 October 2019 and 20 November 2020, the plaintiff saw her treating psychologist on 8 October 2019, 15 October 2019, and 24 October 2019, before she made her disclosure of alleged sexual abuse on 1 November 2019: Exhibit “1”, Vol 2, pp 161 – 165.
- 571 It is noteworthy that in the abovementioned letter, the referring psychologist did not make a formal diagnosis of depression, which Dr Brown later explained was a different diagnosis to low mood.



- 572 In considering the psychologist's 8 October 2019 letter to the referring general practitioner, it is important to bear in mind that it did not purport to express a definitive causative opinion as to which, if any, of the plaintiff's psychological problems were due to an emergent disclosure of alleged sexual abuse.
- 573 On the contrary, that topic, referred to as a "*traumatic experience*", is mentioned by the psychologist in passing, somewhat elliptically, in just a few lines, as is emphasised in the evidence extracted at paragraph [568] above.
- 574 In that regard, according to the content of that cited letter, the ongoing focus of the psychologist's treatment sessions with the plaintiff referred to the psychologist having also worked with the plaintiff on several issues which included her chronic health management, changes in the structure of the plaintiff's family, and with regard to the plaintiff coping during a very stressful and uncertain time, as was stated in that letter.
- 575 It appears from that correspondence that the treating psychologist did not see a need to diagnostically differentiate, ascertain, or discern, which of the plaintiff's reported health issues, concerns, and symptoms, appeared to be referable to the disclosure of the alleged sexual abuse as distinct from the other stressors that were operative at the time of the initial referral, and that would have been likely to be adversely influential upon the plaintiff's psychological wellbeing.
- 576 As the psychologist issued no further reports and was not called to give evidence it is not possible to identify how, if at all, she sought to diagnostically differentiate which of the plaintiff's psychological symptoms related to the alleged abuse the plaintiff had disclosed to her.

### **Medico-legal reports and evidence of Dr Brown**

- 577 The plaintiff relies upon the expert forensic psychiatric opinion of Dr Karen Brown to support a conclusion that she has PTSD because of alleged sexual abuse by the defendant. Before reviewing Dr Brown's opinion evidence, the preliminary question of the admissibility of her evidence must be determined.

### ***Determination of admissibility of Dr Brown's evidence***

- 578 At the commencement of the hearing the court book was tendered without objection and marked Exhibit "A": T6.44. The court book contained the two expert reports by Dr Brown which the plaintiff relies upon to prove her claim that she has suffered mental harm because of the alleged sexual abuse by the defendant: Exhibit "A", pp 1 – 24. Those reports were served in accordance with the requirements of the applicable procedural rules. On the first day of the hearing, the defendant indicated that Dr Brown would be required for cross-examination: T24.3.
- 579 Subsequently, the defendant raised objections concerning the admissibility of Dr Brown's reports: T196.35. In those circumstances, for expediency, to avoid undue disruption to the programme of evidence, Dr Brown's two reports remained in the court book subject to the determination of the defendant's objections after her evidence had been taken. This was on the understanding that the admissibility of her evidence would be determined following the consideration of submissions, with the reasons for that determination to be included in these reasons. Dr Brown's oral evidence was received on the same basis.
- 580 On 22 and 25 September 2023 the parties presented their respective written submissions concerning the admissibility of the evidence of Dr Brown: MFI "79" (defendant); MFI "80" (plaintiff).
- 581 Having considered the respective submissions on point, I conclude that Dr Brown's reports, and consequently, her oral evidence, are relevant to an issue in the proceedings. This is so because, if her evidence is accepted it could rationally affect the assessment of the probability of the existence of a relevant fact in issue in the proceedings concerning a causation question, namely, whether the plaintiff has PTSD because of the alleged sexual abuse. Therefore, her evidence must be seen to be admissible: s 55 and s 56 of the *Evidence Act 1995* (NSW).

582 The defendant made an alternative submission that the plaintiff's reliance on Dr Brown's reports, and by extension, her oral evidence, should be the subject of a limiting order because of a danger that the use of that evidence might cause unfair prejudice to the defendant, or might mislead or confuse: s 136 of the *Evidence Act*. In my view, in this context, this being a non-jury case, that submission takes on less significance.

583 I conclude that the defendant's alternative submission for a limiting order to be made should not be accepted. In my view, Dr Brown's opinions, as set out in her two reports, and in her oral evidence, are readily amenable to rational analysis that would facilitate a proper determination of the factual question of whether the assumed facts which base her opinions are sufficiently like, or substantially like, or appropriately correspond with, the facts revealed in the evidence, so as to enable a determination of the reliability of her opinions on matters of diagnosis and attributability of symptoms, subject to the usual consideration on questions of weight: *Paric v John Holland Constructions Pty Ltd* [1985] HCA 58, at [9]; *Makita v Sprowles (ibid)*, at pp 743-744; *Dasreef Pty Ltd v Hawchar (ibid)*, at [83].

584 For the above reasons I accept the plaintiff's submission that Dr Brown's evidence should be admitted into evidence without limitation, but subject to the usual reliability consideration of determining the weight that should be given to her views. That consideration now follows.

585 In final submissions the defendant asserted that Dr Brown's opinion that the plaintiff has PTSD as a result of the alleged sexual abuse provides an unreliable basis of support for the case the plaintiff seeks to make.

586 The defendant's submission is based on the contention that, on a comparison of the factual assumptions made by Dr Brown and the evidence adduced in this case, there is a significant dissimilarity between (a), the underlying assumptions upon which Dr Brown formed her opinions, and (b), some relevant factual details, or lack of detail, which has become evident in the course of these proceedings: *Paric v John Holland (Constructions) Pty Ltd (ibid)*, at [9].

- 587 In the required evaluation, the opinions expressed by Dr Brown must be assessed according to the Uniform Civil Procedure Rules 2005 (NSW) which require that the content of an expert report must identify the reasons for each opinion expressed within the expert's report: UCPR, r 31.27(1)(c); Sch 7, cl 3(e). By extension, the same approach must apply when evaluating the reliability of the oral evidence of an expert witness.
- 588 The obvious purpose of those provisions is to enable the expert's reasons for opinion to be examined for transparency and persuasive rational cogency in order to establish whether the opinions should be accepted as an appropriately reliable guide to determining significant factual matters in dispute, recognising that expert evidence does not necessarily determine the outcome issues in such proceedings.
- 589 This raises the factual question of whether or not Dr Brown's opinions are afflicted by reason of non-compliance, or alternatively, insufficient compliance, with those provisions.
- 590 The determination of that question, which will form **PART G** of these reasons, requires a close examination of the content of Dr Brown's two reports, respectively dated 15 August 2022 and 23 July 2023, as well as the content of her oral evidence.
- 591 Dr Brown's second report was substantially repetitive of the first report, but with some added commentary which was based on updated interviews with the plaintiff. She said that the second report was essentially an update of her first report and it represents her final opinions: T198.24 – T198.31.
- 592 The examination and exposition of Dr Brown's evidence now follows, commencing with the identification of some relevant remarks and concessions that she made in her oral evidence.

### ***Dr Brown's concessions in oral evidence***

593 Dr Brown gave evidence on the third day of the hearing: T198 – T235. In her evidence, she made the following concessions which must be taken into account when assessing the reliability of the opinions she has set out in her reports.

594 Dr Brown was asked to confirm that her thesis was that the sexual abuse alleged by the plaintiff caused PTSD. Unusually, her answer to that question appeared to be qualified, and was indirect if not ambivalent, and in that sense, it was not entirely clear, in that she said: "*Causation is complex*": T226.44.

595 Dr Brown explained that a diagnosis of PTSD required that a relevant trauma be identified which has manifested itself in symptoms: T226.8.

596 That answer is significant in this case as the plaintiff has experienced quite a number of traumatic events in her life in addition to her claim of sexual abuse, and those traumatic events need to be identified in the order in which they either arose or prevailed.

597 Dr Brown acknowledged the general proposition that in any consideration of a story of the kind found in the plaintiff's proffered history, that had been "*pieced together*" over time, there could be a difference between an actual memory and reconstruction of memory, as it is recognised that memory can be imperfect. She explained this in the following terms:

"Q. Well, pardon me for asking this question, but lawyers, when they hear the word "piece together", they immediately think of reconstruction. And you're

A. Yes.

Q. aware of that process. Do you have a differentiation to make here between reconstruction and an actual memory?

A. Well, memory is not perfect. It's not a video recording. And I accept that. And generally the central memory or the gist memory is held better than the peripheral memory, so detail. Also, over time, there tends to be more memory, so the more people talk about it, the more they recall it. Memories more gets put into that memory. I accept that is it's not completely inconceivable that's

happened, but **I do think that her explanation to me, which was given without any hesitancy or difficulty on her part, was reasonable.**"

[Emphasis added]

[T214.21 – T214.34]

598 Questions of possible explanatory hesitancy on the plaintiff's part will be taken up in the reasons for assessment of the reliability of the plaintiff's testimony in **PART H.**

599 In my view, Dr Brown's acknowledgment that it was conceivable the plaintiff's claimed memory had more detail "*put in*" over time, was significant in this case.

600 Dr Brown was asked to consider the phenomenon of what is understood to be false memory, leaving aside deliberate lies. In that context, she gave the following evidence:

"Q. One of the issues that may confront his Honour is, leaving aside whether or not the plaintiff's deliberately lying, is the allowance for what I describe and please correct me if I'm wrong false memory?

A. Yeah.

Q. I think you began to allude to that a moment ago, when the more things are travelled over and the more they're perhaps contaminated, the more that such a factor needs to be put into the equation; do you agree with that?

A. I agree that memory is not perfect, and **I agree that there can be detail placed into memories that, you know, has not come from the actual event. And that can get worse, the number of times that the event is recalled,** if you like. But there's more evidence that suggests that the gist memory, the central memory, is more stable and particularly biographical memories are - have, you know, moderate stability over time, so I would have to consider it. Of course, I would have to consider it.

PTSD cases such as this always have a consideration of these types of issues, but there was nothing I could find that made me think that that was more relevant than any other case, so, as I've said before, she didn't talk about spontaneously or in therapy remembering this event. She doesn't have a personality disorder that makes me think that she's more vulnerable to that.

She's not a high outside of this event, she's not alleged event, I should say **she's not a highly traumatised woman. And those types of factors would be relevant, and I obviously considered them, but I can't say that there's major evidence that made me think this was a - you know, a false memory.**"

[Emphasis added]

[T215.26 – T216.1]

- 601 In my view, the first emphasised portion of the above extract should be read as referring to a subconscious process whereby added detail can be placed into memory where that added detail does not come from the actual events.
- 602 Significantly, as I read Dr Brown's testimony, the last emphasised portion of the extract of her evidence referring to the absence of "*major evidence*" suggests that there was some evidence that supported the proposition which she had discounted. The emergent difficulty for assessment is that Dr Brown did not identify those other factors, and she did not indicate why she had discounted them.
- 603 In light of Dr Brown's observation in her reports to the effect that the plaintiff had spoken to her in a normal manner when interviewed in her video consultations, she was asked to consider a different impression that appeared from the plaintiff's oral evidence, as follows:

"Q. Coming back to the manner of speech, because this is something that I have to consider, so I'd appreciate your input here. When she presented to you, her speech was spontaneous, fluent, and normal in rate and tone. Presumably, even though you had a Zoom assessment, it was probably a nonthreatening situation, or not unduly uncomfortable situation, that might have impeded or impacted upon speech and delivery. But here in court, when questioned about matters of sensitivity, the impression I gained was that her speech was hesitant and was punctuated by significant delays whilst she considered in detail her answers before delivering them. And this took an unusual amount of time comparative to what one usually sees.

A. Yes.

Q. So, I'm just wondering how you see that. Does it need reconciling in your view, or is it mutually consistent?

A. In describing the mental state, I essentially have described somebody who does not have a range of different disorders. **So, she wasn't depressed, she wasn't elated, she didn't have mania, she didn't have a disorder of speech organically, et cetera, et cetera. She presented with entirely normal speech to me, and obviously that also reflects her thought processes.**

She was relatively comfortable when she spoke to me, I think, although I've already described to you that she was dysphoric, particularly on second assessment. I'm speculating, your Honour, but I haven't been present during

the proceedings, but I would have anticipated that she would find these proceedings very stressful, and anxiety provoking, and **what you're describing is not inconsistent with situational anxiety.**"

[Emphasis added]

[T216.32 – T217.7]

- 604 The line of questioning and evidence arose because of an impression that was exposed to the plaintiff for her comment concerning the considerable pauses which were apparent in the course of her oral evidence, which involved significant and unusually long time delays and lapses in fluent delivery during the completion of many of her answers to questions: T183.17.
- 605 In light of the last-mentioned highlighted passage in Dr Brown's evidence cited at paragraph [603] above, a matter to be considered is whether the plaintiff was affected by situational anxiety at the time she gave her oral evidence, as was posited by Dr Brown. In that regard the plaintiff did not claim situational anxiety. Instead, she explained that her pauses were to ensure accuracy and honesty in her answers.
- 606 Dr Brown acknowledged that whilst in consultation, when the plaintiff related the details of the alleged sexual abuse to her, she was dysphoric, which, at T216.5, she defined as being glum, a little withdrawn, or a little low, but not overly distressed: T217.18. Specifically, she noted that the plaintiff was not depressed: T216.47.
- 607 The observation that the plaintiff was dysphoric was in contrast to the impression of the general practitioner who described her as euthymic. Dr Brown explained and acknowledged that the plaintiff could have presented to her general practitioner as euthymic, and in contrast, as dysphoric when she examined the plaintiff: T218.16.
- 608 Dr Brown considered the presence of feelings of nausea and tachycardia as elements which formed part of a PTSD condition: T219.6. It appears that she did not have access to the plaintiff's medical records that identified the fact that the plaintiff also had those symptoms at an earlier point in time, when she was



aged 11 years, for which she required medication to control that phenomenon: Exhibit "1", Vol 1, p 200.

609 Dr Brown explained that it takes time to establish a therapeutic relationship with a treating practitioner: T223.19. That statement was proffered as a possible explanation as to why it took a number of consultations with the psychologist before the plaintiff made her disclosure of alleged sexual abuse.

610 As to the role of a skilled counsellor, Dr Brown was asked a question which she answered as follows:

"... it seems that a referral to counselling provides an independent opportunity for someone outside the dynamic of a family to explore the stressors which are causing difficulty. And if one is referred for a specific stressor, I imagine that a skilled counsellor would inquire as to whether there are any co stressors in the environment which are causing concern or maladaptive behaviour.

A. Yes. That's reasonable. Yes, your Honour. Yes.

Q. So if the defendant referred the or suggested the plaintiff go to counselling for the specific issue of the impending bereavement her father, surely he would be exposing himself to the risk of his behaviour being exposed during that counselling session, if it --

A. Potential.

Q. -- in fact occurred?

A. Potentially.

Q. So that's the point of Mr Foord's question, as I understand it, but

A. Yes, I understand a little better now, thank you. Yes, potentially, but I can't comment any further than that."

[T221.42 – T222.11]

611 Dr Brown was asked to indicate whether, in the psychiatric literature, or in her experience, there were any particular criteria for establishing the reliability of a complaint about a sexual assault. She gave the following evidence on that issue:

"Q. Are there any particular criteria for establishing the reliability of complaint about sexual assault from your experience, or indeed, the psychiatric literature?

A. I mean, from my point of view as a psychiatrist, we would do an assessment, and an objective mental state, look at the corroborative information that was provided, and put that all together. And in doing so, look at the potential for malingering, which I did, and I have commented on that in my report.

Q. Having all the information, quite a good deal of which you didn't have before you wrote the two reports, obtaining a reliable history is absolutely essential in reaching a diagnosis, isn't it?

A. Obtaining a history and matching it to the objective observations is important. Corroborative information is important, as it can be provided. But that **history and examination is the core basis of a psychiatric assessment.**"

[Emphasis added]

[T223.28 – T223.42]

- 612 The significance of the above highlighted portion of Dr Brown's evidence is the truism that the applicability of her expressed opinion is dependent upon the extent and the veracity of the history that was provided to her by the plaintiff in her consultations.
- 613 Dr Brown acknowledged that from her reading of the notes of the plaintiff's treating psychologist, the psychologist had not diagnosed PTSD in the plaintiff: T226.30. In that context, Dr Brown expressed a marked reluctance to rely upon the diagnostic terms used by the treating psychologist where she was uncertain as to whether the words used by the psychologist were used in a qualified sense: T226.35 – T226.40.
- 614 In the context of potential multi-factorial causes for PTSD, Dr Brown did not consider "*parental separation, problems in the family relationship et cetera*", to be "*confounders that change the associations*" of trauma and PTSD "*symptoms that*" she "*described*": T226.15.
- 615 That relatively loose explanation was not further developed to the point of elaboration with detailed reasons that enable an assessment to be made as to whether the potential "*confounders*" were discounted on a reasoned basis. Instead, I gained the impression that those statements by Dr Brown were impressionistic rather than reasoned.

- 616 Dr Brown was in effect asked to acknowledge that there could have been another causative factor, that is, other than the alleged sexual abuse, that could operate as a trigger to justify her diagnosis of PTSD if that diagnosis was indeed correct: T227.10. In her answer to that question, aptly to this case, she made it clear that it is important to separate the process of psychiatric practice, which includes clinical practice, from the legal process: T227.12.
- 617 Consistent with Dr Brown's evidence (at T227.15 – T227.46), I took that answer to mean that in psychiatric practice and assessment, where the clinician accepts the history provided by the patient at face value (subject to identified improbabilities or inconsistencies), in contrast, the legal process, which requires that a probabilistic determination be made as to the existence of matters of disputed fact, these are entirely different processes.
- 618 In that regard, in effect, Dr Brown said that if she were to assess the plaintiff again, she would do so on all the information that has become available: T227.17. In that context she was referring to information that had come to light during the hearing, which was not available to her when she prepared her assessments and reports. That new information was extensive.
- 619 Dr Brown acknowledged that in considering matters of history there were differing pathways of assessment. In clinical practice, the clinician accepts the history provided by the patient at face value unless the history is shown to be internally inconsistent (T227.33), whereas the role of the forensic psychiatrist, whilst adopting a similar investigative process, is to also do so, but with a critical eye looking for confirmation or contradiction, before forming a concluded view: T227.37. Dr Brown also acknowledged that those pathways were different to the process of litigation where, absent empirical evidence, decisions on contested factual issues are made on the balance of probabilities: T227.43.
- 620 Since several matters of additional detail were drawn to Dr Brown's attention for the first time on the day she gave her evidence, and because she had either not considered them or had not fully considered them beforehand, in light of her oral evidence as cited above, it is entirely understandable that she would have

preferred to have explored that additional material with the plaintiff. This suggested that there was a need for her to examine her opinions for aptness in light of the new information that was not previously available to her when she prepared her two reports.

621 Whilst Dr Brown stated that the additional material which had been drawn to her attention did not necessarily invalidate the opinions she expressed in her reports, her evidence, which was based on the foundation of her reports, nevertheless requires careful evaluation to assess the probative value of her reasons for opinion as guidance for determining disputed matters of fact.

622 To the extent that Dr Brown said that the further material drawn to her attention at the hearing did not invalidate her earlier opinion, her reasons for that view stand to be evaluated in terms of probative value.

### **Overview of Dr Brown's reports**

623 It is convenient to commence the consideration of Dr Brown's opinions with an overview of the sequence of the methodology which led to the formation of her opinions. This involves an examination of the content and the extent of the materials that were provided to her for her consideration in respect of each of her two reports, followed by a consideration of the interview process, and what was obtained from the plaintiff in that process.

### ***Material for Dr Brown's first report***

624 Dr Brown first interviewed the plaintiff on 28 July 2022. This was by means of a two hour video link between Brisbane and Melbourne. The plaintiff and her partner were living in Melbourne at that time. Dr Brown's first report, which followed that interview, was dated 15 August 2022.

625 When Dr Brown prepared her first report, she had documents consisting of the plaintiff's statement of claim, and three letters from the plaintiff's treating psychologist, identified as being dated, respectively, 8 September (sic) 2019, 2 November 2020, and 7 December 2020.

626 The exhibits in this case do not include a psychologist's letter dated 8 September 2019 as was stated by Dr Brown, and Dr Brown did not annex any such letter to her own report. It appears that date reference should be taken to be a typographical error and it should be read as 8 October 2019, as this was the date of the plaintiff's first consultation with her treating psychologist.

***Material for Dr Brown's second report***

627 Dr Brown's second report, dated 19 July 2023, was based on two AVL interviews of the plaintiff, each of one hour duration. She carried out those interviews on 1 June 2023 and then six weeks later, on 17 July 2023. Dr Brown's second report, which followed, was dated 19 July 2023.

628 Dr Brown was provided with four categories of additional information for the preparation of her second report. These are identified as follows:

- (1) "*Documents*" of an unspecified nature from the practice of the treating psychologist. It is not entirely clear as to whether this material only comprised the three clinical letters identified in paragraph [625] above, which were provided for the preparation of Dr Brown's first report, or whether in addition, this documentation also included the psychologist's handwritten notes that were also in evidence (as Exhibit "B" and Exhibit "1", Vol 1, pp 161 – 173), or whether there were some other documents or additional correspondence. That opacity remains unresolved on the evidence.
- (2) "*Documents*" from the plaintiff's high school. Although not entirely clear, it appears that those documents have been tendered as part of Exhibit "1", Vol 2, pp 286 – 393.
- (3) "*Records*" of the medical practice of the treating general practitioner. Although not entirely clear, it appears that those documents have been tendered as part of Exhibit "1", Vol 2, pp 1 – 138. That may, or may not have been the case in view of some items of history which did not appear in the exhibit version of those records.

(4) “Records” comprising the GP Mental Health Care Plan dated 11 November 2022 prepared by the plaintiff’s Melbourne general practitioner. Although not entirely clear, it appears that those documents have been tendered as part of Exhibit “A”, p 33.

629 As identified in sub-paragraph (3) of paragraph [628] above, an unexplained curiosity emerges from Dr Brown’s second report in relation to the plaintiff’s history of an eating disorder and her weight. Dr Brown noted the plaintiff’s medical records show that on 27 August 2011, the plaintiff’s weight was 40.5kgs; Exhibit “A”, p 20. Dr Brown also noted that on 3 December 2015, the plaintiff’s weight was recorded at 48kgs: Exhibit “A”, p 20.

630 A review of the records produced by the plaintiff’s general practitioner, which form part of Exhibit “1”, does not reveal that information. This raises a question as to whether Dr Brown had a copy of the same records that were tendered in evidence. The general practitioner’s computerised health records in relation to consultation with the plaintiff were continuous and chronological in the date range 20 June 2002 to 3 December 2015: Exhibit “1”, Vol 2, pp 1 – 53.

631 The two dates referred to by Dr Brown where the plaintiff’s weight was noted, do not appear in those records. This anomaly remains unexplained and unresolved. It raises an unanswered question as to what records were provided to Dr Brown. Her report dated 17 July 2023 simply refers generically to “Records” of the general practitioner: Exhibit “A”, p 12. The records that were provided to Dr Brown were reviewed by her in her second report, between pages 20 to 21 of Exhibit “A”.

632 The significance of variations in the plaintiff’s weight over the course of time needs to be considered. The following tabulation is extracted from the evidence.

Item	Date	Weight	Source
1.	09.11.2007	28kg	Exhibit “1”, Vol 1, p 18
2.	01.04.2011	41kg	Exhibit “1”, Vol 1, p 26
3.	21.06.2011	42kg	Exhibit “1”, Vol 1, p 26
4.	27.08.2011	40.5kg	Dr Brown

5.	28.02.2012	38kg	Exhibit "1", Vol 1, p 30
6.	12.04.2013	44kg	Exhibit "1", Vol 1, p 33
7.	20.03.2014	48kg	Exhibit "1", Vol 1, p 35
8.	03.12.2015	48kg	Dr Brown

633 The plaintiff's weight recorded at 28kgs at age 9 years appears to be an insignificant non-baseline factor because she was obviously growing at that time.

634 The plaintiff's weight reduction of 3kgs as shown on a comparison of items 2 and 5 in the above table, at ages 12 to 13 years appears significant, but it also needs to be considered in context.

635 When the weight was recorded at 38kgs the plaintiff was being treated with antibiotics for an undisclosed illness: Exhibit "1", Vol 1, p 30. At that time she was also getting accustomed to having been fitted with dental braces, where she was experiencing pain on chewing food: Exhibit "1", Vol 1, pp 27 – 28. At around that time, from September 2011, the plaintiff was also being treated for swelling of her parotid glands and sialoparotitis: Exhibit "1", Vol 1, pages 28, 29, 77. Those combined factors, which could have had a temporary effect on the plaintiff's weight, have not been the subject of focussed medical consideration in relation to the issue of the plaintiff's weight.

636 The records do not state whether the plaintiff's apparel was taken into account as a weight variable or a constant factor. Dr Brown's note (at Exhibit "A", p 15), that the plaintiff developed an eating disorder when aged 12 to 13 years after the alleged incident must be viewed in the context of those additional items of history which she was not made privy.

637 On the issue of the plaintiff's diagnosis of PTSD, it is noteworthy that none of the identified medical records and materials contain a reference to a diagnosis of the plaintiff as having PTSD. It is also noteworthy that neither of Dr Brown's reports had annexed the letters of instruction which commissioned her reports as contemplated by UCPR, r 31.27(1)(b). It is therefore not known whether the issue of PTSD was put to Dr Brown as a question for her consideration, or

whether it was based on the plaintiff's stated belief that she had PTSD, or whether it was an opinion arrived at by Dr Brown independently of any such belief on the plaintiff's part.

### **Review of Dr Brown's first report – 15 August 2022**

638 Dr Brown's first report was constructed on the basis of a series of six elements.

639 The first element comprised the plaintiff's account of the alleged sexual touching: Exhibit "A", p 2. The second element comprised the products of Dr Brown's interview with the plaintiff on specific topics on 28 July 2022: Exhibit "A", pp 3 – 6. The third element comprised details extracted from collateral information from the treating psychologist and the plaintiff's treating general practitioner: Exhibit "A", pp 5 – 7. The fourth element comprised Dr Brown's mental state of examination of the plaintiff: Exhibit "A", pp 7 – 8. The fifth element comprised Dr Brown's psychiatric diagnoses of the plaintiff: Exhibit "A", p 8. The sixth element comprised Dr Brown's opinions and recommendations: Exhibit "A", pp 8 – 10.

640 As a letter of instruction to Dr Brown was not attached to her first report, as contemplated by UCPR, r 31.27(1)(a), an unresolved opacity remains concerning the extent of the information with which Dr Brown was instructed. The absence of an annexed letter of instruction necessarily precludes a fully transparent analysis that permits a comparison between the evidence in the proceedings and the factual matters which Dr Brown was asked to assume.

641 That difficulty becomes evident on examining Section A of Dr Brown's first report, where the following preamble statement is made:

"[The plaintiff] has made the following allegations (as detailed in the Letter of Instruction and Statement of Claim):"

[Exhibit "A", p 2]

642 It is unclear from the three dot points which then followed that statement, on page 2 of Exhibit "A", which are relevant to a causation analysis, represent the



plaintiff's views, or a summary prepared by Dr Brown, or whether they are direct quotes from the content of the letter of instruction. That difficulty would have been resolved if Dr Brown had simply attached the letter of instruction to her report as was contemplated by the provision in the rules previously cited.

643 Dr Brown's first report was divided into the following six sections:

- (1) SECTION A: Details of claim;
- (2) SECTION B: Interview with plaintiff 28 July 2022;
- (3) SECTION C: Collateral information;
- (4) SECTION D: Mental state examination;
- (5) SECTION E: Diagnoses;
- (6) SECTION F: Opinion and recommendations.

644 In the paragraphs that now follow, those six elements within Dr Brown's first report are analysed.

***Section A: Plaintiff's account of alleged sexual abuse***

645 Dr Brown recorded the plaintiff's account of the alleged event as follows:

"Just prior to the sexual assault [the plaintiff] woke up feeling sick and went into the bedroom shared by her mother and [the defendant]. She went to wake her mother up, but [the defendant] told her not to, and to come around to his side of the bed and get in. [The defendant] hugged her and pressed his body against hers and reached under her T shirt and squeezed her breasts, hard and continuously for about 5 minutes. He then moved his hand down to stroke her stomach and began touching between her legs for about 5 minutes. [The plaintiff] then turned over onto her stomach so that [the defendant] could not touch the front of her body. [The defendant] then pushed his leg up between her legs, forcing her onto her knees and pressed his penis between her legs and thrust against her for a few minutes. [The defendant] was not wearing underwear at the time. [the plaintiff] cried very loudly and [the defendant] stopped."

[Exhibit "A", p 2]

- 646 Immediately following the above summary, Dr Brown stated: *“As a result of the sexual assault [the plaintiff] sustained psychiatric injuries, including anxiety, depression, and eating disorder symptoms. Her relationships with her family and friends were impacted. She was a bright student at school but as a result of the sexual assault she did not cope well with her tertiary studies.”*
- 647 It is noteworthy that, in contrast to the statement that the plaintiff sustained the psychiatric injury of depression, in her oral evidence, Dr Brown stated that the plaintiff was not depressed: T216.47.
- 648 It is also noteworthy that the evidence does not include any documentary material that corroborates any of the difficulties the plaintiff claims to have experienced in coping with her tertiary studies. In that regard, Dr Brown appears to have accepted the plaintiff’s account at face value.
- 649 Dr Brown’s comments, as cited in paragraph [646], indicates that they are in the form of statements of concluded fact rather than reasoned opinion. They imply a causal connection between the plaintiff’s stated symptoms and her claim of having been sexually abused. They appear to be a recitation and an acceptance of the plaintiff’s belief as to the existence of a causal connection, rather than comprising Dr Brown’s reasoned conclusions to that effect.
- 650 In respect of the plaintiff’s claimed symptom of depression, it is significant that none of the materials provided to Dr Brown from the treating psychologist and the plaintiff’s treating general practitioner that were supplied to Dr Brown made a definitive causal connection between the plaintiff’s complaint of depression and a prior history of sexual abuse. The psychologist referred to low mood, not depression.
- 651 On the evidence, the only basis for such a connection would be an acceptance of the plaintiff’s evidence that such abuse in fact occurred as she has claimed, an acceptance of her evidence which described her subsequent feelings about that alleged event, and an acceptance of her claims as to the impact that those

matters are said to have had upon her wellbeing. Those matters of assumed fact are in substantial dispute in this case.

652 The reasons for decision on those disputed matters of fact will be identified in **PART I** of these reasons after the consideration of matters concerning the reliability of testimony, including expert testimony.

***Section B: Interview topics canvassed in first interview of plaintiff***

653 As would be expected of a forensic psychiatric examination, Dr Brown's interview of the plaintiff canvassed an array of topics as identified in Section B of her first report. The narratives on those topics appeared between pages 3 to 6 of Dr Brown's first report. In sequence, these topics included:

- (1) Family, developmental and early educational history;
- (2) Relationship history;
- (3) Alcohol and substance use history;
- (4) Forensic history;
- (5) Medical and psychiatric history;
- (6) Sexual abuse by the defendant (as alleged by plaintiff);
- (7) Senior schooling, employment and psychiatric history;
- (8) Plaintiff's current presentation.

654 At page 3 of Exhibit "A", Dr Brown noted that an item of detail in the plaintiff's family history included a history of the plaintiff's younger sister having anxiety in relation to schoolwork and she had received brief psychological treatment for those issues.

655 That history, which obviously came from the plaintiff, is a somewhat gloss involving understatement. The evidence was that the plaintiff's sister, with whom she is very close, had for a time, wanted to end her own life as a result of her own diagnosis of PCD: T194.15. The plaintiff said she was aware that her sister had struggled with her own diagnosis of PCD: T88.1. In my view, the sister's "*struggle*" must have been a matter of great concern to the family at the time, and was very likely a matter of great concern to the plaintiff. This was a relevant item of history, and most probably a significant stressor, that was not made known to Dr Brown.

656 There were other stressors in the plaintiff's background relating to those topics that were not placed before Dr Brown in sufficient detail. These will be addressed in the analysis of the reliability of Dr Brown's opinions.

### ***Section C: Collateral information considered by Dr Brown***

657 In Section C of Dr Brown's first report, she identified the collateral information she had relied upon as comprising the treating psychologist's correspondence respectively dated 8 October 2019, 2 November 2020, and 7 December 2020.

658 Some background information from within the psychologist's correspondence was not the subject of a full consideration by Dr Brown. This is identified as follows:

- (1) The plaintiff's recorded history, as stated by the psychologist (at Exhibit "1", Vol 1, p 166), was that the alleged sexual abuse occurred when she was aged around 8 years, and this was not critically considered in Dr Brown's first report. On a factual analysis that history must necessarily be seen to be inherently improbable. This is because the defendant was not living with the plaintiff and her family at that time. In her report, Dr Brown did not set out any discussion to indicate that she had explored or reconciled that glaringly improbable item of recorded history. This item of recorded history was taken up in Dr Brown's oral evidence, where she was asked about this topic. The significance of Dr Brown's explanatory

evidence will be considered on the question of the reliability of her opinions in **PART G** of these reasons.

- (2) The plaintiff's parents were incorrectly described as having divorced. That erroneous assumption concerning the family dynamics was not corrected by the plaintiff or made known to Dr Brown. On the evidence, the plaintiff's parents obviously had a complicated relationship.
- (3) Dr Brown's reference to the plaintiff having had some now resolved obsessive compulsive symptoms that she had exhibited when she was aged about 9 years, was not explored, whereas in fact, that blandly stated item of history was internally inconsistent with the history of disclosed longstanding obsessive-compulsive behaviours as recorded at Exhibit "A", p 7. The psychologist's handwritten abbreviated clinical note made in her records on 8 October 2019 suggested that problem ("OCD →"), had been an ongoing problem since the age of 9 to 10 years, in the context of the plaintiff having been an "*anxious little kid*": Exhibit "1", Vol 1, p 161. It appears that Dr Brown was given a copy of that material when she wrote her second report. The topic of the plaintiff's anxious past, its timing of onset, and the extent of that problem was not further or differentially explored in Dr Brown's second report.
- (4) When Dr Brown referred to the plaintiff's DASS-21 test scores for measuring stress, she was not aware of the fact that on the very day the plaintiff completed that test she was stressed about the payment of her NIDA acting course fees, a stressor which had nothing to do with the alleged sexual abuse. The possibility of that stress being a situational contributor to the test result and therefore a potentially confounding factor, does not appear to have been a matter that was made known to Dr Brown for her consideration and evaluation.
- (5) Dr Brown had assumed that the plaintiff had maintained a formal therapeutic journal as was suggested by her treating psychologist as part of the progress of her psychological therapy. In contrast to that

assumption the evidence showed this was not quite so. The plaintiff had only made a few notes recorded on her phone. She did not keep a therapeutic journal: T152.35 – T153.37.

- (6) The psychologist's opinion to the effect that the plaintiff had adopted an avoidant coping style likely influenced by her repressive adaptation to sexual trauma was not explained. It is possible that Dr Brown did not explore or expand upon that aspect of the psychologist's opinion because of her uncertainty and hesitancy concerning the aptness of the terminology used by the psychologist: T226.35 – T226.40.

#### ***Section D: Mental state examination of the plaintiff***

659 Section D of Dr Brown's first report summarised her assessment of the plaintiff's mental state. Putting aside any limitations that might have arisen from the fact that the consultation took place via Zoom, as that was the best practical measure that could be achieved in those peri-COVID times, nevertheless, several noteworthy contrasting matters have emerged, as follows:

- (1) Dr Brown stated that in her consultations, the plaintiff's speech was spontaneous, fluent, and normal in rate and tone. This was in marked contrast to the manner of many of the plaintiff's answers to questions in these proceedings, where her evidence was marked by frequent delays and unusually long pauses, as was observed during her evidence. Dr Brown speculated that this could have been due to situational stress but that was not in conformity with the plaintiff's own explanation.
- (2) Whereas the plaintiff reported experiencing chronic dysphoric mood, when her treating general practitioner referred her for psychological treatment, he specifically noted that her mood was euthymic. It appears that Dr Brown did not have that contrasting information and consequently she was unable to make a reasoned evaluative comparison of those contrasting factors at the time of her assessment.

- (3) Dr Brown recorded a history that the plaintiff “*admitted to intermittent passive suicidal ideation*”, and provided a history of a denial of “*current suicidal or violent ideation*”. However, because of the plaintiff’s apparent non-disclosure of the true position concerning her claim of extreme suicidal thoughts, Dr Brown was not in a position to critically or objectively evaluate that more detailed history of quite extreme suicidal thinking which the plaintiff claimed had persisted for three years.
- (4) Dr Brown did appear to have explored an apparent internal inconsistency that was evident at the time she prepared her first report. In that regard, there was an apparent inconsistency between the plaintiff’s cited history of resolved obsessive compulsive symptoms from the age of 9 years, as noted in Exhibit “A”, at page 6, in contrast to her “*reported longstanding mild obsessive-compulsive behaviours*”, as was noted by Dr Brown at Exhibit “A”, page 7. This is in the context where, in her oral evidence, the plaintiff stated that she believed these symptoms had started after the alleged abuse (T173.37), which must be seen to be objectively incorrect in light of the history obtained by Dr Brown and the treating psychologist. In that regard, in abbreviated form, the psychologist noted the ongoing nature of those earlier behaviours that had been present since the age of 9 years: Exhibit “1”, Vol 1, p 161.
- (5) The plaintiff’s evidence of experiencing distressingly vivid dreams at times involving violence (T180.8 – T180.31; T33.27), was not explored in the context of the plaintiff’s history of experiencing nightmares and unreality, as recorded at Exhibit “A”, page 7, and her use of psychedelics and illicit MDMA.

660 Those matters will also be considered and taken into account when determining the reliability of Dr Brown’s opinions.

### **Sections E and F: Diagnoses and Opinions**

661 At this point it is not necessary to summarise the diagnoses, opinions and recommendation Sections E and F of Dr Brown’s first report because those

sections were subsequently updated in her second report, following her further interviews with the plaintiff. Those matters have been subsumed into her second report. As a result, they will be analysed in that context, as now follows.

### **Review of Dr Brown's second report – 19 July 2023**

662 Dr Brown explained that her second report, dated 19 July 2023, was an update of her first report. The additional materials provided to Dr Brown for the preparation of her second report are described at paragraph [628] above.

663 Although Dr Brown conducted two further 1 hour interviews with the plaintiff on 1 June 2023 and 17 July 2023 in order to prepare her second report, there were no material changes made to Section A and Section D of her first report concerning the details of the plaintiff's claim, the history set out in the first report, and the description of her mental state examination of the plaintiff.

664 As to Dr Brown's revised version of Section B of her reports following those further interviews, she included a series of eight extra dot points of updated history in that revised section: Exhibit "A", pp 17 – 18. Those points will be reviewed shortly.

665 As to Dr Brown's revised Section C, she summarised her reading of the new "*collateral information*" obtained from the four categories of documents identified at sub-paragraphs (1) to (4) of paragraph [628] above, namely, progress letter from the treating psychologist including records, records from the plaintiff's high school, and the records of her treating general practitioner: Exhibit "A", pp 18 – 21.

666 Dr Brown's additional impressions gained from her updated mental state examination of the plaintiff was that in addition to the plaintiff's previous "*reported chronic dysphoric mood*", Dr Brown added that "*objectively, she presented the same*": Exhibit "A", p 21.

667 Section E of Dr Brown's second report, which identified her diagnoses of the plaintiff, remained unchanged, and she repeated the same diagnostic text of



Section E of her first report in which chronic PTSD, chronic mild obsessive-compulsive symptoms and vulnerability to developing an eating disorder in the future, were identified: Exhibit “A”, p 22.

668 In Section F of Dr Brown’s second report, she set out her opinion and her recommendations in a series of dot points that expanded upon the dot points in this section of her first report: Exhibit “A”, pp 22 – 24.

669 The additional text included in the second report served to clarify and expand upon her earlier opinion, as follows:

- (1) Dr Brown identified the plaintiff’s diagnosis of chronic PTSD, stating that the plaintiff’s mental condition may improve or worsen at times of stress;
- (2) Dr Brown added to her first report by stating that she did not consider that the plaintiff was exaggerating or malingering her symptoms, and she considered the plaintiff’s “*self-report was largely correlated to the notes from her psychologist and GP (and where discrepancies were found she was able to give a logical explanation as to why)*”. In that regard, in my view, the explanations for the discrepancies were not readily apparent from reading Dr Brown’s second report, and appeared to be in the form of oracular *ipse dixit* statements, unadorned by reasons of the calibre and quality required by UCPR, r 31.27(1)(c).
- (3) Dr Brown repeated her earlier opinion that “*the [alleged] childhood sexual assault was causative with regard to the diagnosis of post-traumatic stress disorder*”. Her reasons for that opinion were that:
  - (a) the plaintiff’s reported symptoms “*began (and relate to) the incident of childhood sexual abuse*”. This is a matter of disputed fact that must be determined on the basis of an assessment of the reliability of the plaintiff’s testimony;

- (b) the symptoms “*became chronic and entrenched as she continued to live with the perpetrator (who was a parental figure) for the next 8 years*”. That aggregation of stated facts requires evaluation against the evidence available for consideration in these proceedings to determine the factual accuracy of that statement;
  - (c) the plaintiff “*felt unable to report the abuse or seek assistance as the perpetrator was in a relationship with her mother, a father figure to her sister, and a caregiver and financial provider*”. The validity of those reasons is dependent upon an assessment of the credibility and the reliability of the plaintiff’s testimony;
  - (d) those matters “*led to chronic post traumatic stress symptoms and maladaptive strategies including obsessive thinking, compulsory behaviours, and disordered eating habits*”. This statement raises a question of causation that must be determined in light of the disputed factual evidence.
- (4) Dr Brown expanded upon her first report by adding the following opinion:

“To further clarify, it is my opinion that the sexual abuse incident was the primary causal and precipitating factor for the development of PTSD. I note that all mental disorders are the product of a complex interplay between hundreds of genetic and environmental factors and it is possible that [the plaintiff] has some genetic predisposition to the development of anxiety and trauma disorders and/ or that her various environmental experiences predisposed her to the development of mental disorder. I note that she reported some (expected) distress associated with her parents divorce and the death of her father to professionals at the time and afterwards. However, there are numerous papers that robustly demonstrate that childhood sexual abuse leads to more harmful outcomes (including mental health disorders) than any other form of childhood abuse and the association persists when other adverse childhood incidents (such as parental divorce) are controlled for. In my opinion the other known stressors in [the plaintiff]’s life (ie parental separation, death of father, physical illness) were not primarily responsible for the development of PTSD as described, although these events may have led to some adjustment symptoms.”

[Exhibit “A”, p 23]

- (5) The published papers to which Dr Brown made reference in the above-cited opinion were not identified or attached to her report as is required by UCPR, r 31.27(1)(c). Dr Brown's opinion based on those cited papers did not explain how other factors (such as parental divorce, and presumably, previous stressful experiences) were "*controlled for*". Nor did the terms of her opinion provide a reasoned basis for the curiously qualified Delphic conclusion that "*the other known stressors*" in the plaintiff's life were "*not primarily responsible for the development of PTSD*". In my view, Dr Brown's unawareness of other significant stressors in the plaintiff's life, as identified in these reasons, necessarily raises doubts over the aptness of those qualified conclusions. Her qualified expression of what was "*not primarily responsible*" for the plaintiff's PTSD was left largely unexplained in terms of relative or material contribution.
- (6) Dr Brown concluded that the alleged childhood sexual abuse and the subsequent development of PTSD "*significantly impacted on [the plaintiff's] progression with undergraduate studies*", "*she is likely underperforming to some extent due to her chronic symptoms*". The applicability of that omnibus statement must be evaluated against relevant matters of detail which emerged from the factual evidence concerning the plaintiff's studies and other activities, and the absence of corroborative evidence of such assumed underperformance at the tertiary level. Those conclusions by Dr Brown also depend upon an assessment of the veracity of the plaintiff's evidence on those matters.
- (7) Dr Brown speculated that although the plaintiff is likely to finish her current university course and achieve high marks, she may take longer due to PTSD symptoms and her lifetime occupational achievement is likely to be lower than expected. It is not clear whether she was referring to the plaintiff's science degree course or her communications degree course. There was no evidence as to whether or why she was not continuing with her law degree as was mentioned at Exhibit "1", Vol 1, p 184. Those matters were not explored in the evidence.

- (8) Dr Brown expanded upon her earlier opinion as to the plaintiff's loss of enjoyment of life by stating:

"[The plaintiff]'s general enjoyment of life has been affected by her symptoms of post traumatic stress disorder. [The plaintiff]'s symptoms have impacted upon her relationships with her family members, her friends and affected the quality of her intimate relationships. She reports chronic feelings of detachment from others, she has cognitive distortions about herself (shame guilt, low self esteem) which affect her confidence in social situations and her post traumatic symptoms are triggered by some types of sexual interaction (eg touching hair). Her relationship with her mother was significantly impacted during her childhood and adolescence. Her relationships with men, in particular older men have been (and will continue to be) disrupted. Her post traumatic symptoms have affected (and will continue to affect) her motivation to engage in activities and her enjoyment of those activities."

[Exhibit "A", p 24]

- 670 Dr Brown's unreasoned statement in sub-paragraph (8) of paragraph [669] above, that the plaintiff's relationships with men, in particular older men, have and will continue to be disrupted, must be seen to be of doubtful aptness. This is because the evidence shows, and the plaintiff has acknowledged that she has had relationships with men, including with an older man: T178.26 – T179.9. With the exception of the relationship with her former boyfriend, which seems to have ended for geographic and visa reasons, the evidence does not elaborate on how or why, if at all, those relationships were disrupted. Dr Brown seems to have uncritically accepted the plaintiff's account of claimed relationship disruption at a superficial level of acceptance of the plaintiff's account without critical evaluation of those matters.
- 671 The cognitive distortions referred to in sub-paragraph (8) of paragraph [669] above, were not explained, either as to how they had connectedly arisen, or as to how they had impacted, or had become manifest.
- 672 The matters set out above will be considered when determining the reliability of Dr Brown's opinions.

## **PART G – RELIABILITY FINDINGS – MEDICAL AND ALLIED EVIDENCE**

- 673 In assessing the evidentiary probative value of expert opinion I am mindful that the function of expert evidence is to guide the Court in its consideration of the factual evidence in light of the facility experts have for applying knowledge, training, skill, and experience to the analysis of matters within their expertise when evaluating the factual basis of a case.
- 674 There is no requirement that a court must accept as determinative, expert evidence, which on analysis and testing, is revealed to be unconvincing, and in a form and content that amounts to no more than an *ipse dixit* oracular pronouncement that does not identify how the expert's specialised knowledge leads to the expert's conclusion: *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305, at [87]-[89]; *HG v The Queen* (1999) 197 CLR 414; [1999] HCA 2, at [41]; *Naxakis v Western General Hospital* (1999) 197 CLR 269; [1999] HCA 22, at 306; *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury Shire Council* (2001) CLR 512; [2001] HCA 29.
- 675 The reliability of any opinions apparent from the correspondence from the treating psychologist and the opinions within the evidence of Dr Brown must be assessed in light of a range of relevant factual matters that have emerged from the evidence when read as a whole, including the relevant background stressors outlined at paragraph [190] above.

### **Assessment of reliability of psychologist's evidence**

- 676 Following my detailed review and consideration of the evidence I conclude that the correspondence and notes in evidence from the plaintiff's treating psychologist, whilst providing evidence of complaint of sexual abuse, do not provide reliable factual evidence to corroborate that the defendant had committed the alleged sexual abuse.
- 677 I also conclude that the content of the correspondence and notes within the evidence from the treating psychologist do not provide reliable evidence that

the plaintiff's psychological problems, for which treatment was given, were relevantly caused by the alleged sexual abuse.

678 My reasons for the above conclusions are as follows.

679 In considering the significance of the detail within the correspondence and the notes of the treating psychologist, the chronological context identifies an important limiting consideration, namely that the general practitioner's referral of the plaintiff to the psychologist on 30 August 2019, was to arrange for treatment of the plaintiff by way of counselling. That referral did not seek from the psychologist a forensic analysis as to the cause or causes of the plaintiff's symptoms.

680 Instead, the referral was for the treatment of specific and clearly defined psychological issues. It was clear that, in the opinion of the plaintiff's long standing general practitioner, the plaintiff's presenting issues merited skilled psychological counselling. It is noteworthy that this referral identified a *prima facie* plausible association between the stated symptoms and the plaintiff's presenting circumstances, that is, the plaintiff's health concerns and her grief over the death of her father, without any suggestion of historical sexual abuse being a relevant factor.

681 That was the paradigm or model which was set as the focus of the psychologist's assessment and treatment of the plaintiff.

682 As a result, when the psychologist first saw the plaintiff on 8 October 2019, she was not alerted to any need to forensically consider or delve into other possible causes for the plaintiff's presenting psychological problems, such as a history of other possible traumas that might be relevantly causative of or contributing to those presenting problems.

683 The specific clinical issues that were referred to the psychologist for treatment concerned the assessment and management of the plaintiff's anxiety, panic attacks, periods of sadness and grief, and adjustment issues regarding her

chronic health issues: Exhibit “A”, pp 31 – 32; Exhibit “1”, Vol 1, pp 139 – 141, pp 146 – 152. The referral made no specific mention of depression in that mix of symptoms and issues.

- 684 Those specific issues were acknowledged by the treating psychologist in her first letter to the referring general practitioner, on 8 October 2019, immediately following her first consultation on that date, whereby she informed him of the progress of her treatment of the plaintiff for those specific presenting problems: Exhibit “A”, p 25.
- 685 Consistent with that paradigm, and also consistent with the plaintiff’s stated position of maintaining her initial attitude of non-disclosure of alleged sexual abuse in the consultations on October 8, 15 and 24, on those occasions the psychologist made no notes suggesting that the topic of sexual abuse had been raised in her clinical discussions: Exhibit “1”, Vol 1, pp 161 – 164. In examining those notes it is recognised that they are not in the form of a transcript. They appear to be in the form of an *aide memoire*, and as such, in part, they are difficult to fully interpret.
- 686 The psychologist’s materials confirm that in her sessions with the plaintiff, she had obviously worked within the parameters of the general practitioner’s referral paradigm, that is, until 1 November 2019, when that paradigm must be seen to have necessarily changed by force of the plaintiff’s sentinel disclosure that, as a child, she had been allegedly sexually abused by the defendant.
- 687 The psychologist’s letter dated 2 November 2020, which was addressed to the referring general practitioner 12 months after the plaintiff’s disclosure of an alleged “*traumatic experience which occurred when she was young*”, provided no other detail of the allegation. Whilst it is possible that the psychologist and the referring general practitioner may have discussed the plaintiff’s disclosure outside the confines of correspondence, there is no evidence that any such conversations had ever taken place.

688 The psychologist's letter dated 2 November 2020 was remarkable in two respects. First, in relation to continuity of patient care, it is remarkable that the details of the alleged traumatic experience were not formally communicated to the treating general practitioner. This was so especially since he was the provider and the co-ordinator of her primary medical care, and that information had an obviously relevant bearing on his management of the plaintiff's health care needs, and as to how he should consider the available pathways for the medical management of those needs, especially with regard to her mental health. Secondly, it seems extraordinary, and remarkable, that psychologist did not share the information concerning the fact of the alleged traumatic event with the referring doctor until a period of 12 months had elapsed. As neither the psychologist nor the treating general practitioner were called to give oral evidence in these proceedings, those matters remain unexplored and unexplained.

689 Be that as it may, on a fair reading of the entire material provided by the psychologist, this being the identified correspondence and the handwritten clinical notes, she did not purport to provide a definitive causation opinion to the effect that the alleged sexual abuse was the relevant or contributing cause of the plaintiff's presenting psychological problems.

690 On 1 November 2019, when the plaintiff told the psychologist of the alleged sexual abuse, an apparently plausible connection emerged, which the psychologist appears to have accepted at face value, without further critical evaluation, analysis, or inquiry.

691 In making that observation, I do not intend these remarks to be a criticism of the professionalism of the clinical psychologist. Clearly, her approach was dictated by the confines of the information that the plaintiff had presented to her, and on the terms the plaintiff chose to disclose in the context of psychological treatment.

692 In the circumstances which had evolved in the clinical setting of the plaintiff's consultations with her psychologist, the disclosure of alleged sexual abuse may



have provided the psychologist with a further potentially plausible explanation for the plaintiff's psychological symptoms.

693 A common sense analysis indicates that the newly disclosed history of alleged sexual abuse merited a differential clinical evaluation as to what had been driving the plaintiff's presentation and her symptoms to that point. There is no evidence to suggest that any such evaluation or reset had been undertaken.

694 It seems that the apparent plausibility of a connection between the late emergence of alleged sexual abuse and the plaintiff's presenting psychological symptoms most likely provided the psychologist with a plausible working hypothesis for her to continue with her counselling sessions to treat the plaintiff on a practical basis to relieve her symptoms. In the absence of any medico-legal issues being apparent at that time, this seems to have been a reasonable approach for the psychologist to have adopted.

695 Nevertheless, a critical evaluation of the cause or causes for the plaintiff's symptoms does not appear to have been undertaken despite a change in the assessment paradigm which necessarily arose from the plaintiff's disclosure.

696 Against that background, I conclude that the treating psychologist's clinical acceptance of the plaintiff's account of alleged sexual abuse by the defendant, without further evaluative inquiry, must be seen as being forensically superficial, and therefore, it should not be taken to be evidence of the truth of the allegation made by the plaintiff.

697 In that regard, without criticism of the clinical approach taken by the psychologist in the circumstances identified, absent a critical analysis or evaluation of that newly emergent item of history, I find that the evidence comprising the correspondence and notes of the clinical psychologist do not provide persuasive evidence of the veracity of the content of the plaintiff's disclosure of alleged sexual abuse by the defendant. Nor does that material provide reliable evidence of a relevant causal connection between that

allegation and the plaintiff's presenting psychological symptoms. The material is simply further evidence of consistency of complaint.

698 Ultimately, the psychologist reached the conflated formulation that the reported sexual abuse was highly likely to be negatively impacting on the plaintiff's psychological well-being "*and the associated psychological conditions she is experiencing*" and was "*highly likely to impact her relationships in terms of safety, trust and intimacy, including emotional and sexual*": Exhibit "A", p 30.

699 In my assessment, the following series of conclusions arise as to the reliability of the cited views of the treating psychologist.

700 First, although the fact of the plaintiff's disclosure to the psychologist that sexual abuse had occurred was relevant, in view of the way the disclosure was communicated to the treating general practitioner, that is, by the plaintiff's mother, I consider that little weight should be given to the psychologist's views when determining the likely truth of whether the defendant had in fact abused the plaintiff in the manner described by the plaintiff. Instead, the principal relevance of the evidence of disclosure of the alleged abuse to the psychologist is the fact that the disclosure made provided some evidence of consistent complaint by the plaintiff and it provided some subsequent focus for the course of the proposed further consultations and treatment. In short, the referral of the plaintiff to the psychologist was for treatment of the presenting symptoms. The referral did not seem to be for the purpose of investigating the definitive cause of those symptoms.

701 Secondly, to my mind, the content of the psychologist's correspondence does not represent a rigorously reasoned causation assessment because she did not undertake a forensic analysis. Instead, her analysis was more temporal in the continuum of counselling for the plaintiff's problems of anxiety, panic attacks, sadness, grief, and adjustment to her chronic health issues, where, in that mix, the alleged sexual abuse was only belatedly disclosed. The psychologist obviously took the approach of assisting the plaintiff to "*process the [alleged] trauma*" as well as providing treatment for her "*acute stress, anxiety and*

*lowered mood, generalised anxiety, and adjustment disorder*”: Exhibit “A”, p 30. The psychologist’s correspondence and notes do not suggest an attempt was made to reach a reasoned causation conclusion concerning what might have been driving the plaintiff’s presentation.

702 Thirdly, following on from the above analysis, where multiple potential causative factors could have contributed to the plaintiff’s psychological problems, where the individual components have not been teased out for separate identification and analysed for operative causative potency, in my view, the psychologist’s correspondence and notes should not read as providing proof of a reliably reasoned causation analysis. In my view, the plaintiff has not discharged the evidentiary onus in that regard.

703 Fourthly, in fairness to the psychologist, lest this analysis be misunderstood, I do not interpret her materials as intending to provide an opinion in the form of legal causation analysis. Instead, her correspondence simply represents a course of clinical communication which has subsequently been harvested in this litigation with the aim of assisting a causation analysis.

704 Finally, and overarching those factors is the fundamental question to be determined in these proceedings, namely that of the truth or otherwise of the factual allegations of sexual abuse made by the plaintiff, where the starting point for that analysis is the unchallenged history recorded by the treating psychologist, that the alleged abuse occurred when the plaintiff was aged around 8 years, noting that the plaintiff did not disavow giving that history.

705 The notation that the alleged sexual abuse occurred at around 8 years of age cannot be dismissed as being a mere typographical error. This is because that notation replicated the psychologist’s handwritten clinical note to the same effect, when she noted the plaintiff had told her that the alleged abuse occurred when she was “*around eight years old*”: Exhibit “1”, Vol 1, p 166. Clearly, the psychologist had a clinical interest in making an accurate record of the basis for the disclosure. That account, which could only have come from the plaintiff,

raised a question of glaring improbability which was not explored or resolved by the psychologist.

706 I now turn to an assessment of the reliability of the opinion evidence of Dr Brown.

### **Assessment of the reliability of Dr Brown's evidence**

707 Dr Brown's qualifications and experience as a forensic psychiatrist are unquestioned. Her opinions in this case are based on the assumed veracity of the factual material presented to her by the plaintiff during a total of 4 hours of Zoom interviews that took place on 4 separate occasions, in 2022 and 2023, aided by her review of the documents she has described in her two reports.

708 The accuracy and the extent of the detail of the information the plaintiff provided to Dr Brown in those consultations bears close examination. That information must also be viewed in conjunction with the content of some undisputed objective records.

709 The defendant's primary challenge to the utility of Dr Brown's opinions in this case is made on the basis that the plaintiff's account of the alleged sexual abuse is untrue. That question will be considered and determined in **PART H** of these reasons, when identifying findings on the reliability of the plaintiff's evidence, and in **PART I** when recording findings on factual matters in dispute.

710 The defendant has raised some secondary challenges as to the extent and the adequacy of the plaintiff's account of the history which she provided to Dr Brown, where it appears from the evidence that history was incomplete in material parts in relation to the multiple stressors that applied to the plaintiff. The defendant also pointed out that when Dr Brown formed her initial opinions, she did not have the opportunity to consider some relevant facts from within the sheer volume of medical evidence tendered in this case, some of which has been summarised at paragraphs [111] to [157] above.

- 711 Consequently, the defendant submits that Dr Brown's opinions in this case provide an only limited but nevertheless unreliable guide to making findings on disputed matters of fact. That submission is particularly relevant to the question of whether the plaintiff has sexual abuse-related PTSD, where the dynamic precondition is that there must not only be an exposure to a relevant trauma, but there also must be a pattern of relevant trauma related symptoms, not just one symptom: T203.24.
- 712 That argument by the defendant was based on the proposition that the substratum of assumptions that were considered by Dr Brown were insufficiently like, or substantially unlike, or had insufficiently corresponded to, the detail within the facts revealed in the evidence in these proceedings, contrary to the essential threshold requirements for reliability of expert evidence: *Paric v John Holland Constructions Pty Ltd (ibid)*, at [9], and the other cited authorities which followed that decision.
- 713 In her oral evidence, Dr Brown expanded upon aspects of the reasoning within her two reports. This was in the context where, shortly before giving evidence, she had been asked to read a considerable volume of documentary material which had been tendered in evidence, including a series of text messages the plaintiff had sent to the defendant: T199.30. That process of updating the factual context for an expert on the run was fraught with difficulty in terms of an opportunity for a carefully reasoned forensic analysis because Dr Brown did not have the opportunity of discussing that new material with the plaintiff.
- 714 That process placed Dr Brown in the invidious position of having to consider a relatively large bulk of material at relatively short notice under time pressure, without the opportunity of discussing the import of that material with the plaintiff to gain an understanding of the plaintiff's subjective perspective on the content and on factual matters in contention, where this new material could have impacted upon the applicability of Dr Brown's views and her diagnostic opinions.

- 715 Expert witnesses who find themselves in such invidious circumstances deserve every sympathy.
- 716 That said, in the dynamics of the litigation, the course taken by the defendant in withholding pre-trial disclosure of the material affecting witness credibility was in the circumstances, a necessary exception to the usual cards on the table approach for the avoidance of ambush, which is the default position in modern litigation.
- 717 Without intending any criticism of that tactical decision made by the defendant's legal representatives (to keep their metaphorical powder dry until opportune), as was explained at the hearing, given the nature of the material, the defendant's legal representatives were plainly justified in withholding disclosure of the material until the completion of her evidence-in-chief and until the cross-examination on relevant factual matters, including, notably, on her credit.
- 718 In those circumstances, Dr Brown's evidence had to wait until the plaintiff's evidence, and the challenges to her evidence, had been completed.
- 719 Unavoidably, and unfortunately, this meant that Dr Brown was necessarily required to consider a considerable bulk of the new material at short notice, on the run, in less than ideal if not disadvantageous circumstances.
- 720 When Dr Brown was cross-examined on aspects of that new material, understandably, and unsurprisingly, she took the professionally prudent course of stating that it would have been helpful to her analysis, and for answering questions posed to her in cross-examination, if she could have beforehand discussed some relevant aspects of that new material with the plaintiff to more comprehensively inform her opinion: T202.4; T206.50; T211.28; T227.18; T231.16 – T231.25.
- 721 In doing the best that she could in those pressured circumstances, Dr Brown nevertheless stated that the new material did not invalidate her diagnostic opinions: T199.50 – T200.1; T200.33; T201.7; T201.45; T205.1. Those

answers should be viewed in the context that they were not supported by detailed explanatory reasons.

- 722 The questions asked of Dr Brown on that new material, which challenged the plaintiff's case, related to whether the affectionate content of the plaintiff's multiple text messages to the defendant invalidated her PTSD diagnosis (T199.50 – T200.1; T200.33), where Dr Brown said that corroborative (and I infer, non-corroborative) information would have to be taken into account in a reassessment: T227.18.
- 723 That comment also applied to analysing whether the plaintiff's apparent non-display of PTSD symptoms at a time that triggering would ordinarily have been expected, contraindicated a diagnosis of PTSD: T231.16 – T231.25.
- 724 Nevertheless, despite the obvious position of disadvantage in which Dr Brown found herself, her reasons for opinion stand to be assessed in terms of the rigour of the requirements of the Uniform Civil Procedure Rules that apply to expert evidence.
- 725 When some of those additional matters of detail concerning the plaintiff's history were raised with Dr Brown, as already identified, recurrently, she fairly conceded that if she had the opportunity, she would have liked to have clarified with the plaintiff the new matters that had been raised.
- 726 In my view, the compelling conclusion to be reached in view of those qualified answers is that Dr Brown's opinions on key matters of dispute in this case must be seen to be incomplete and inconclusive in terms of providing reliable expert guidance to the task of fact finding on those important matters of contention.
- 727 Echoing the cited remark from the decision in *Pell v The Queen* (*ibid*) referred to at paragraph [31] above, some salient additional matters of pivotal detail that were not previously considered by Dr Brown, and which in my view, compel the conclusion identified in the preceding paragraph, are set out under the headings and sub-headings that appear below.

- 728 In her oral evidence, Dr Brown accepted the general proposition that the method by which forensic psychiatric assessment proceeds, involves not just accepting the veracity of the plaintiff's provided history at face value, but if possible, to also apply a critical evaluation of the available material to seek the resolution of apparently contradictory historical facts: T227.33.
- 729 On my review of Dr Brown's first report, it appears that she did not critically analyse a fundamentally important element of conflicting information as to the age at which the plaintiff claimed that she had been sexually abused by the defendant.
- 730 In my assessment, Dr Brown's first report therefore did not meet the essential requirements necessary for establishing the reliability of expert evidence because her first report did not include any analytic discussion that sought to achieve a rational reconciliation of the fundamental factual conflict within the plaintiff's history concerning the age at which she claimed to have been sexually abused by the defendant.
- 731 The following paragraphs trace the evolution of Dr Brown's opinions in her two reports.

*Dr Brown's first report*

- 732 When Dr Brown prepared her first report, she was provided with copies of the correspondence from the plaintiff's treating psychologist which identified an historical account that the plaintiff had provided to her on 1 November 2019. This was when the plaintiff was aged 21 years. On that occasion she stated that the alleged sexual abuse had occurred around the time she was aged 8 years.
- 733 That evidence raised a pivotal question of inherent improbability of the alleged abuse occurring at that time. This is because in 2006, when the plaintiff was aged 8 years, the defendant was not part of the household in which the plaintiff resided at that time. As such, given the plaintiff's detailed factual description of



the alleged abuse as set out at paragraph [194] above, put simply, it could not have occurred at that time.

734 In contrast to that element of history recorded by the plaintiff's treating psychologist, in Dr Brown's initial interview with the plaintiff, she obtained a history that the alleged sexual abuse occurred when the plaintiff was aged 12 years. Those fundamentally conflicting factual versions required a rational forensic reconciliation. Dr Brown's first report did not contain an analysis along those lines.

735 In identifying this issue I do not discount the possibility Dr Brown may have thought that in the context of alleged child sexual abuse, precise memories as to the timing of such events may be confused due to the age of the child. However, Dr Brown's first report did not identify any reasons supporting a consideration along those lines. This may be revelatory of the different analytic processes of psychiatric and legal analysis.

736 Nevertheless, in the medico-legal setting, those differing versions from the plaintiff as to her age at the time of the alleged abuse raised obvious questions concerning the reliability of the plaintiff's memory concerning critical matters in dispute, especially in light of Dr Brown's explanatory oral evidence to the effect that memory is not perfect, and is amenable to the inclusion of further non-actual, that is, non-factual detail, that could be laid down over time following the process of repeated discussion of the subject matter.

737 Despite the glaring and fundamentally inconsistent nature of those two versions for the factual foundations for the plaintiff's claim, significantly, as already identified, Dr Brown's first report did not contain any analytical discussion to indicate that she had sought or had attempted to explore and reconcile this factual inconsistency in her series of lengthy consultations with the plaintiff.

738 In my view, the omission from Dr Brown's first report of any discussion involving a reconciliation along those lines represents a flawed foundation for her second report. This raises a question concerning the soundness of Dr Brown's overall

analysis which led to her diagnostic opinion that the plaintiff had PTSD, and that such condition had resulted from the alleged sexual abuse.

*Dr Brown's second report*

739 When Dr Brown issued her second report, she reiterated the earlier opinions she expressed in her first report, which raises the question of whether the flawed foundations of the first report similarly afflict the second report.

740 Dr Brown's second report was prepared a little over a year after her first report: Exhibit "A", p 17. It included some additional discussion aimed at clarifying the validity of the conclusions she had set out in her first report concerning the discrepant record of the ages at which the alleged abuse occurred.

741 The *ex post facto* nature of that discussion drew upon a further item of history obtained from the plaintiff in consultation in 2023, namely, her claim (noted at Exhibit "A", p 17), that she had told her treating psychologist that the alleged abuse had occurred when she was "*between 8-13 years old*", which was a materially different version to the version of age 12 years, which she gave to Dr Brown: Exhibit "A", p 17.

742 However, that wide 5-year time range which, is said to have been given to the psychologist, still included a confounding historical element of glaring improbability because that range was stated to have commenced at the inherently improbable age of around 8 years. That inclusion introduced a further element of imprecision or vagueness in the historical basis for Dr Brown's opinions.

743 In later evidence, Dr Brown stated the plaintiff had told her that, after having "*pieced it together*", meaning that in assembling her version of events, she realised that she had incorrectly told the psychologist the alleged abuse occurred when she was 8 years old. Dr Brown stated that she took that *ex post facto* account from the plaintiff to be a logical explanation, which she had accepted in the clinical setting: T214.13 – T214.18. However, Dr Brown's

conclusion did not address the plaintiff's initial inherent imprecision in that wide 5-year time range between ages 8 – 13 years.

- 744 Whilst Dr Brown considered the plaintiff's explanation for those age discrepancies to be "*quite a logical explanation... as to why she had previously got it wrong*" (T214.19), it is plain that explanation has arisen as a result of a process of reconstruction, where the reliability of that process must be considered in terms of whether the earlier stated memory has been overlaid with a perception that serves and advances the plaintiff's interests: *Watson v Foxman* [1995] 49 NSWLR 315, at 319, citing *Helton v Allen* (1940) 63 CLR 691; [1940] HCA 20.
- 745 A fundamental difficulty in the path of acceptance of the plaintiff's emergent explanation for nominating the wrong age as to when the alleged abuse occurred, is that it did not reflect the content of the contemporaneous correspondence and the handwritten notes of the treating psychologist as to the alleged sexual abuse having occurred at around the age of 8 years, where that history recorded by the psychologist was not the subject of direct explanatory evidence, either from the plaintiff or from the psychologist.
- 746 The initial version of the plaintiff's age at the time of the alleged abuse obtained by the psychologist was as stated by the plaintiff, as she had apparently acknowledged to Dr Brown. The psychologist obviously had a professional interest in making an accurate record of that age. The scope for now impugning that record without explanatory evidence from the psychologist is somewhat limited.
- 747 The explanation for the absence of evidence from the treating psychologist that emerged in argument was to the effect that the plaintiff's psychologist has since become unavailable to clarify matters. Absent cogent supporting evidence of that claimed fact, that is not an effective answer because the identified inconsistency was identifiable in the psychologist's correspondence at the outset, as soon as that correspondence came to light.

748 For the reasons explained at paragraph [705] above, the treating psychologist's reference to the timing of the alleged sexual abuse as having occurred at the plaintiff's age of "*around 8 years*" cannot now be simply dismissed or discounted as a typographical error, absent reliable and cogent evidence to that effect. That is so especially where the plaintiff has acknowledged to Dr Brown that she had nominated that age as the reference point when she initially spoke to the psychologist.

749 A further obstacle to the rational resolution of this difficulty in favour of the plaintiff is that Dr Brown's second report did not specifically or transparently identify, or differentiate the date on which the plaintiff had provided her with that further item of history. The possible dates could have been either 1 June 2023, or 17 July 2023: Exhibit "A", p 17.

750 Dr Brown's evidence concerning the plaintiff's changed history on this critical point remains untestable by reference to any objective historical record. Whilst the plaintiff's convenient correction of the age range when this was raised by Dr Brown satisfied Dr Brown's query, I consider that the inherent vagueness on such an important point is unpersuasive.

751 The lasting impression which emerges from the way in which Dr Brown's opinions have evolved over the course of preparation of her two reports is that there is a crucial element of imprecision and vagueness concerning this element of history which bases her analysis that has not been satisfactorily resolved by a rules-compliant forensic analysis based on persuasive evidence.

*Purported clarification in Dr Brown's oral evidence*

752 When the date inconsistency for the alleged abuse was taken up with Dr Brown during her oral evidence, she expanded upon the additional commentary within her second report.

753 She did so by stating that the explanation provided by the plaintiff concerning that factual inconsistency was in her view, "*logical and reasonable*", where, "*speaking from [Dr Brown's own] memory*", the plaintiff's explanation was that,

when she was older, in the context of a series of consultations with the psychologist, as the plaintiff had “*pieced it together*”, she had come to the view that earlier, “*she had incorrectly reported it [to the psychologist] as [having occurred when she was] eight years old*”: T213.40 – T214.35.

754 That said, in my view, that erroneous timing cannot be simply brushed aside as being insignificant or inconsequential where the outcome of this case is dependent upon the veracity of the plaintiff’s evidence on critical matters in dispute.

755 The only snippet of added detail which Dr Brown included in her second report concerning the purported correction of that error by the plaintiff was that at the time of her consultation with the psychologist “*she was trying to piece together the incident in relation to other life events*”: Exhibit “A”, p 17. That process suggests that the plaintiff has engaged in a process of convenient but unsatisfactory reconstruction on a vitally important aspect of history.

756 Where an allegation of criminal behaviour of a serious kind is raised in civil litigation, persuasion is not readily achieved on such loose and imprecise historical foundations which seem to have conveniently shifted over the course of time to suit the case the plaintiff seeks to make: *Briginshaw v Briginshaw* (*ibid*).

### *Reconstructed memory*

757 The additional evidence cited above must be considered alongside Dr Brown’s oral evidence as to the way in which memory functions. This was in the context of a discussion on reconstructed memory, where Dr Brown identified the concept of how the “*gist of memory*” is held, and the fact that memory is not perfect, and the more things are discussed, the “*more [detail] gets put into memory*”, not all of which may be actual: T214.21 – T214.34.

758 In my view, the commentary by Dr Brown cited at paragraph [753] above, represents a description of the process of constructed memory that has been “*pieced together*”, where detail has been built upon by the plaintiff’s successive

opportunities for repeated discussions on the alleged underlying subject matter with the psychologist, with her sister, and her godmother, as was disclosed in the evidence. This must necessarily be seen to be different from simply recounting an actual memory of the alleged events. In my view, what was being described by the plaintiff was a belief rather than an actual memory.

759 In addition to the above analysis, there are other considerations which arise to cast doubt as to the reliability of Dr Brown's opinions in this case, as follows.

***Non-corresponding elements of history and evidence***

760 Dr Brown's analysis and opinions in this case must be also assessed alongside aspects of the evidence which, it appears, were not correspondingly reflected in the factual foundations upon which she based her opinions.

761 When the factual evidence as a whole is examined, in my view, Dr Brown's analysis appears to be incomplete in that it was not sufficiently like, or sufficiently similar, or correspondingly similar to, some important elements of the plaintiff's history that have more comprehensively emerged in the evidence, and which Dr Brown did not have available for her consideration when she prepared her two reports which have in turn formed the basis of her oral evidence.

762 In my view, those elements of incompleteness, which have obvious relevance to a forensic psychometric assessment, are identified as follows:

- (1) The significance of the plaintiff's head injury in 2014 and the related MRI brain findings, and the possible cognitive effects of that injury and those findings, which were unexplored;
- (2) The plaintiff's "*mini-stroke*" in 2015 and the potential for adverse cognitive effects from that event;

- (3) The plaintiff's illicit use of psychedelics, cocaine and MDMA, and the potential for mind-altering sequelae, including possible cognitive sequelae from such drug use;
- (4) The plaintiff's history of vivid dreams concerning the defendant;
- (5) The full picture concerning the plaintiff's prior history of mental health issues;
- (6) The plaintiff's family history concerning psychological issues;
- (7) The incongruent absence of expected triggered responses when the plaintiff was exposed to events where PTSD triggering would have been expected;
- (8) The incongruent affectionate content of the plaintiff's numerous historical written communications with the defendant;
- (9) The plaintiff's uncorroborated claim of difficulty with her tertiary studies;
- (10) The history of maternal financial distress;
- (11) Pre-disclosure of domestic stresses impacting on the plaintiff due to a domestic separation of the plaintiff's mother from the defendant;
- (12) Dr Brown's adjusted view on the possibility that the plaintiff could have been actuated by secondary gain;
- (13) The reliability of Dr Brown's opinion as to the cause for the plaintiff's PTSD presentation in view of a series of other stressors that had the potential to impact on the plaintiff.

763 The above sequence of elements are examined in the consideration appearing below.

*(1) Plaintiff's previous head injury in 2014 and related MRI findings*

- 764 A significant element of the plaintiff's medical history recorded in Dr Brown's first report, was that at age 16 she suffered a moderate concussion after banging her head at a visual arts exhibition, following which she went to hospital for a few hours and made a good recovery: Exhibit "A", p 4.
- 765 In Dr Brown's second report that history was repeated (at Exhibit "A", p14), and at a later point in that second report, that history was expanded upon to include a reference to the plaintiff having developed a headache and blurred vision as a result of that head injury: Exhibit "A", p 20.
- 766 It became apparent that both of those summaries involved substantial understatement in the plaintiff's history of those events in view of some clinical details that have emerged in the objective clinical evidence as examined below.
- 767 In that regard, Dr Brown did not appear to have been given details of a more extensive recorded history of the plaintiff's symptoms and signs of having experienced flashing light sensations, and post-injury violent back and forth neck movements and head banging activity (which I hasten to add, non-determinatively, evokes images of convulsion-like activity) where, in view of those factors, substantive investigations were arranged on account of a possible vertebral artery bleed, as described in more detail at paragraphs [131] to [133] above.
- 768 The medical investigations which followed that injury included an MRI brain scan where abnormalities were reportedly found in the cortical and periventricular white matter of the plaintiff's brain, with some frontal lobe findings noted as well, where an infarct could not be found, but a previous infarct could not be ruled out, and there was no reported result of a follow-up MR angiogram that was suggested to investigate those pathologies: Exhibit "1", Vol 1, p 36; Exhibit "1", Vol 1, pp 283 – 284.



- 769 The significance of those additional items of medical history, and any possible cognitive or perception sequelae of those described brain pathologies, were not explored by Dr Brown because that information had not been available to her for her consideration.
- 770 Nevertheless, in my view, that information merited a forensic analysis to assess it for potential significance, if any, to the plaintiff's cognitive functioning, especially where there were literally scores of instances in the transcript of the plaintiff's evidence where she said that she was unable to recall some historical events which she would ordinarily have been expected to recall when these were explored in cross-examination.
- 771 The additional detail in the newly emergent material outlined above merited forensic inquiry and consideration. This has not occurred.

*(2) Plaintiff's "mini-stroke" in 2015*

- 772 When Dr Brown examined the plaintiff in 2022, where she recorded a brief history of the plaintiff's head injury at age 16 as described above, it appears that the plaintiff did not disclose, or Dr Brown was not able to discern from the material provided to her at that time, that when the plaintiff was aged 17, she had also suffered a "mini-stroke".
- 773 It appears that additional item of history only became available to Dr Brown in 2023, either because of a disclosure by the plaintiff, or more likely, because of Dr Brown's reading of the collateral material comprising the records produced by the treating general practitioner, where that information was recorded.
- 774 After that information came to light, Dr Brown summarised it, referring to the plaintiff as having experienced some visual changes, unsteadiness, and nausea related to neck movements, and she also referred to a diagnosis of a mini stroke from micro-emboli from the heart, with a related history of shunt occlusion surgery: Exhibit "A", p 21. In this context, the reference to micro-emboli seems to be a reference to emboli that could potentially affect brain parenchyma.

775 The possible significance of the factor of the plaintiff's history of violent neck movements and a 2016 report of an MRI scan (at Exhibit "1", Vol 1, pp 283 – 284, which noted multi-level disc bulges in the plaintiff's cervical spine, as is more fully described at paragraph [132] above was unexplored.

776 Dr Brown's second report did not refer to any potential cognitive sequelae from the "mini-stroke" suffered by the plaintiff when she was aged 17 years, particularly with regard to memory function, if not other aspects of cognition, including perception. Those matters remained unexplored. In my view, that history merited a forensic consideration.

*(3) Plaintiff's illicit recreational use of psychedelics, cocaine and MDMA*

777 Dr Brown obtained a history from the plaintiff, that in adult life, she had recreationally used illicit drugs, namely psychedelics, cocaine and MDMA, two to four times per year: Exhibit "A", p 3, p 14. These proscribed substances are known in the community to be illicit, with potentially mind-altering effects, depending on the quality and the quantity of the drugs taken.

778 Given that the plaintiff first reported the alleged sexual abuse in adult life, it seems odd that Dr Brown's reports did not include any investigatory detail or discussion which explored or commented upon whether or not the plaintiff's illicit substance abuse, either alone, or in combination with other considerations that might affect behaviour and cognition, could possibly have impacted upon the accuracy and reliability of her memory of the alleged abuse at the various times she made her disclosures to the various recipients, where all of those disclosures occurred in adult life, and were then reinforced by repetition over the course of time.

779 For example, it would have been of forensic interest and relevance to explore the juxtaposition of the extent and effect of the plaintiff's substance abuse and the timing of the plaintiff's first verbal disclosure of alleged sexual abuse. Dr Brown's evidence was non-contributory in that regard.

(4) *Plaintiff's vivid dreams*

780 Another element of the plaintiff's history which was not the subject of exploration or detailed comment by Dr Brown was the plaintiff's evidence that she experiences vivid dreams, including dreams involving the defendant, where violence has been an element.

781 In those dreams, which feel real to the plaintiff, she felt the need to protect her sister from the defendant. Those dreams, also referred to as nightmares, caused her distress on waking, and which could trigger panic attacks: T33.10 – T33.34; T180.9 – T180.31.

782 The plaintiff said that her dreams have a very real impact on her: T180.31. That evidence must be weighed in the context that the plaintiff had described to her treating psychologist that she had a nightmare on the night of the alleged abuse, which must necessarily mean the nightmare had occurred before the alleged sexual abuse was said to have occurred: Exhibit "A", p 29. The potential psychodynamics of those circumstances were not explored.

783 That standout item of history contrastingly diverged from the plaintiff's other accounts on the night in question of having "*a tummy ache*" or a stomach ache that hurts. In my view, that divergent element of conflicting history seems significant and relevant. It remained unexplored and unexplained.

784 The historical variations were that of "*a nightmare*", as disclosed to the psychologist (at Exhibit "A", p 29), "*feeling sick*" as disclosed to Dr Brown (at Exhibit "A", p 2 and p 12), "*feeling nauseated*" (at Exhibit "A", p 4), and then at a later point she told the psychologist that she had told the defendant she had "*a nightmare and her stomach hurt*": Exhibit "A", p 29. Whereas, in her oral evidence she said she was "*feeling sick*"(T14.2; T16.3), later expanding to feeling "*really sick*" with her stomach hurting: T16.38.

785 In those descriptions, in my view, there is an inherent standout distinction between the description of having the emotional experience of having had a

disturbing nightmare and of feeling the physical sensation of being sick, nauseated, and in pain.

786 The psychologist at one point conflated the two concepts. She first cited the plaintiff's nightmare as the precipitating event which was claimed to be the cause of the plaintiff going to the bedroom on the night in question. She then conflated the description by adding the stomach ache: Exhibit "A", p 29.

787 The conflated lack of precision in that latter account is self-evident, which raises a question over the starting point of the plaintiff's account of events. This is not a peripheral matter. The detail was not explored in the evidence.

*(5) Plaintiff's denial of previous mental health issues*

788 Dr Brown recorded the plaintiff's account in which she denied she had any mental health symptoms prior to the alleged sexual abuse, even in the context of her physical ill health: Exhibit "A", p 17.

789 Dr Brown was not aware of the content of the clinical note made by the treating psychologist which referred to the plaintiff as paranoid: Exhibit "B". That note was worthy of forensic exploration because in the mental health context, it had an ordinary meaning, along the lines of being unreasonably or irrationally suspicious or mistrustful. It was within the remit of the psychologist to either record such an item of history or to make a conclusion to that effect.

790 Perhaps that note was not disclosed to Dr Brown by the plaintiff because she had not been made aware of its existence in light of her treating general practitioner's note of caution to the effect that the plaintiff was "*very sensitive*" to adverse findings due to her past history of ongoing medical problems: Exhibit "1", Vol 1, p 77.

791 Alternatively, if Dr Brown had this note, perhaps she may have discounted its relevance because of her hesitancy in relying on the terms used by the psychologist: T226.40. However, absent an explanation from Dr Brown along those lines I doubt the aptness of that possible explanation.

792 After Dr Brown became aware of the plaintiff's early history of being an "*anxious kid*" who did not deal with stress well, and the history of having had pre-existing symptoms of obsessive-compulsive disorder from the age of 9 years (Exhibit "A", p 28), in her report she did not set out any detailed forensic analysis of the potential origins of those symptoms, or the likely future course of them, irrespective of any impact of the alleged sexual abuse on those underlying problems. Those baseline symptoms were significant, and they pre-dated the alleged sexual abuse.

793 On a common sense analysis, there is little room for doubt that if the psychologist's note referencing the plaintiff as "*paranoid*", and the general practitioner's note concerning the plaintiff's sensitivity to adverse medical information about her had been made known to Dr Brown, those matters would most likely have been explored clinically for their significance as to matters of psychiatric diagnosis, especially with regard to exploring the potential for the overlay of time and emotion to distort memory: *Watson v Foxman (ibid)*, citing *Helton v Allen (ibid)*.

794 The validity of Dr Brown's opinions is entirely dependent and subject to the veracity and the limitations of the detail (or the absence of relevant detail) of what the plaintiff had disclosed to her concerning her past mental health issues.

*(6) Plaintiff's personal and family history of psychological issues*

795 The plaintiff either did not disclose, or was not questioned about, her sister's past emotional ill-health. Either way, this was a relevant matter of family history which had the potential to adversely impact on the plaintiff's mental health in the context that both she and her sister were diagnosed with PCD.

796 The plaintiff and her sister were close: T26.33. The circumstances were that her sister, who was diagnosed as having a more severe form of PCD than the plaintiff, wanted to end her own life: T194.15. Given the closeness of the plaintiff to her sister it seems unlikely that the plaintiff was unaware of her sister's struggles in that regard. Those matters, which warranted a forensic

consideration of what if any impact this had on the plaintiff. This issue was not put before Dr Brown for her consideration.

797 Furthermore, Dr Brown did not seem to have had before her any details of the frontal lobe findings that were reportedly part of the health conditions suffered by the plaintiff's father. Given Dr Brown's evidence that genetic factors may play a relevant role in the development of psychological problems, this was an issue worthy of examination. For example, the MRI findings concerning the investigation of the plaintiff's brain following her head injury in 2014 would have been a relevant forensic inquiry.

798 Dr Brown did not have before her any details of the reported history of arguments that had arisen in the history of the dynamics of relationship disharmony between the plaintiff's mother and the defendant, as emerged in the evidence in these proceedings: T122.46 – T123.6; T327.42; T374.26 – T374.45. The effect, if any, of those arguments on the plaintiff's emotional state remained unexplored.

799 Dr Brown was not made aware of the situation of the plaintiff's mother, in October 2018, when she was expressing anger and disappointment in herself, for apparently ignoring her own health needs, which I infer from the context of the evidence to relate to her own use of alcohol, where she said in a text message that she has been asking for help for quite a few months, and would be getting professional help in a proper facility were it not for the fact that she could not "*leave the girls*", who were at that time adults aged 18 and 20 years respectively: Exhibit "15".

800 Dr Brown was not made aware that at times, the plaintiff's mother exhibited mood swings (T194.21), and that she and the defendant had fights: T194.28.

801 Nor did Dr Brown have the opportunity to consider the plaintiff's reported attitude of resentment of the defendant in the family setting, including the origins, the cause, and the significance of those matters (T484.24; T487.50;

T483.44 – T484.1; T486.10), the context being the defendant’s role as a father replacement figure.

802 It seems from those circumstances that Dr Brown did not have the opportunity to more fully explore what if any effect those stressful family circumstances had on the plaintiff’s mental health, and as to whether those matters operated as additional stressors on the plaintiff, and if so, to what effect.

*(7) Incongruent absence of triggered PTSD responses by plaintiff to situations where Dr Brown considered that triggering would have been expected*

803 In this case, aspects of the plaintiff’s PTSD diagnosis has been questioned by the defendant. Although Dr Brown stated that she did not consider the plaintiff to be “highly traumatised” (at T215.49), or “overly distressed” (at T217.17), she agreed that in effect, an incongruity arose concerning situations where triggering of the plaintiff would have been expected, yet she had not shown any outward signs of triggering: T208.17; T208.26; T231.16 – T216.25.

804 Specifically, as was argued by the defendant that, on 17 May 2019, at a sentencing hearing in a historical case of sexual offending against a minor, the plaintiff showed no outward signs of triggering when present at the reading of the victim impact statement in that case. Those circumstances merited an appropriately focussed forensic consideration.

805 Dr Brown was not given the opportunity to fully consider the detail of those circumstances before preparing her reports and giving evidence. In her evidence, she in effect agreed that the absence of a triggered reaction in those circumstances appeared to be an unexpected incongruity: T206.39.

*(8) Plaintiff’s incongruent affectionate communications with the defendant*

806 Within the array of the documentary exhibits there are numerous text messages from the plaintiff to the defendant. Those messages contain words, symbols and emojis, which plainly indicate that the plaintiff had, over time, expressed herself in very affectionate terms towards the defendant, including by the use

of affectionate nicknames, abbreviations, and symbols of affection: Exhibit “51”, Exhibit “53” to Exhibit “63”, Exhibit “65”, Exhibit “68” to Exhibit “78”, Exhibit “80”, Exhibit “81”, Exhibit “83” to Exhibit “86”, Exhibit “88”, Exhibit “89”, Exhibit “92”, Exhibit “94”, to Exhibit “100”, Exhibit “102” to Exhibit “105”.

807 Significantly, those messages post-dated the alleged sexual abuse and pre-dated the plaintiff’s disclosure of the alleged abuse.

808 On an ordinary reading of those communications, the obviously affectionate content seemed inconsistent with the plaintiff’s expressed disdain, fear and avoidant need to keep herself distant from the defendant: T19.50 – T20.2; 20.43; T59.24; T124.30.

809 Without an appropriately reasoned forensic evaluation of the broad extent and detail of those messages, in my view, those messages cannot be simply dismissed on the speculative basis of an assumed phenomenon “*appeasement*” of the defendant in the context of an imbalance in the power dynamics of the relationship, as was posited by Dr Brown. The issue was not explored in Dr Brown’s consultations with the plaintiff because the communications were not made known to her at those times.

810 Dr Brown did not have the opportunity to undertake a detailed appraisal and consideration of those messages, nor did she have an opportunity for exploratory discussions with the plaintiff on the content of those messages. A similar comment applies to the appearances in the assembled photographs comprising Exhibit “4”, and the video comprising Exhibit “3”, which shows the plaintiff and the defendant in close proximity of each other, whilst on holidays, not long after the alleged abuse, without any apparent display of interpersonal difficulty.

811 Although it would have been helpful if Dr Brown had the opportunity to explore those materials in consultation with the plaintiff to consider whether the plaintiff in fact truly held an attitude of disdain, fear, and avoidance towards the defendant, and needed to maintain distance from him, the defendant’s legal



representatives were plainly justified in withholding that material from pre-trial disclosure in circumstances where it was to be used as a tactical means of testing the evidence anticipated to be given by the plaintiff.

*(9) Plaintiff's claim of difficulty with tertiary studies*

812 No cogent evidence was tendered to support Dr Brown's view that the plaintiff might have had difficulty pursuing her tertiary studies. Past academic transcripts, examination results and tutor's comments would have been a useful source of corroborative material to enable a reliable consideration of the plaintiff's claim in that regard.

813 Instead, all that Dr Brown had before her on this issue was the plaintiff's subjective perception of an impediment to her studies based on her own stated notions of the cause of her PTSD: T32.30; T34.17; T35.17; T35.22. There is no objective corroborative evidence for that proposition.

814 Dr Brown acknowledged that there was no means by which she could objectively corroborate the plaintiff's history where she claimed to have been underperforming in her tertiary studies: T225.18.

815 This area was a relevant topic for analysis because, in her evidence, the plaintiff said she was unable to separate any symptoms from the alleged sexual assault as impacting on her day-to-day struggles with her current studies or her abilities to work: T35.15 – T35.22.

816 Dr Brown accepted the plaintiff's perceptions at face value, which led her to express the untestable opinion that the plaintiff is underperforming academically "*to some extent due to her chronic symptoms of post-traumatic-stress-disorder*": Exhibit "A", p 23. Absent objectively corroborative evidence, I consider that little weight should be given to that assessment.

817 In my view, the basis for Dr Brown's assessment regarding the plaintiff's academic performance was rather limited in the forensic setting, especially where other factors could have been operative, such as the possibility that the

plaintiff could have been carrying some lasting sequelae from her 2014 head injury, and also regarding her 2015 mini stroke. Absent a neuropsychological or neuropsychiatric assessment of those matters, I consider that Dr Brown's assessment of this question must be seen to remain incomplete, and as a result, her views should be discounted.

818 Another factor that needs to be considered with regard to the plaintiff's studies is the matter of the plaintiff's chronic ill-health. On 23 September 2016, the plaintiff's mother wrote to the plaintiff's school applying for extra ATAR consideration being afforded to her because of "*her chronic ill-health and the loss of her father*": Exhibit "13". Whilst the bereavement factor has since then receded, the factor of the plaintiff's chronic ill-health still continues. That factor does not seem to have been given much focus in Dr Brown's analysis.

819 Before leaving the topic of the plaintiff's tertiary studies, it is relevant to note that there is a curious mismatch between the plaintiff's evidence concerning her history of tertiary studies and an aspect of her tertiary studies history as recorded by her treating cardiologist.

820 The plaintiff stated that on her return to Australia in 2018, she did not take up the offer of enrolment in Law at UTS because she felt she would be left behind by her peers: T22.1 – T22.8. Her evidence on this topic is more fully summarised at paragraph [413] above.

821 In contrast, on 27 May 2021, the plaintiff's treating cardiologist noted that the plaintiff had "*just started Year 1 of Law at UTS*": Exhibit "1", Vol 1, p 184. That factual inconsistency remains unexplored and unexplained.

822 Whatever the position might have been, and for whatever reason, the plaintiff appears not to have continued with her legal studies at UTS and has instead pursued degrees in the fields of Communications and Science, but not yet to completion. An alternative possibility is that she is undertaking multiple concurrent courses. Whatever the situation might be, there is no objective evidence that the plaintiff failed to satisfactorily progress in any of those courses

due to any difficulty studying on account of a claimed diagnosis of sexual abuse-related PTSD.

823 In addition to the considerations outlined above, the factor of a potential for secondary gain for the plaintiff from the litigation also merited focussed consideration. This topic will be examined after first considering some relevant financial and domestic stresses that affected the family.

*(10) Previous history of maternal financial stress*

824 There is little room for doubt there was maternal financial distress in the plaintiff's family at the time the plaintiff made her disclosures of alleged sexual abuse: T256.46. That financial distress very clearly related to the plaintiff's medical conditions and her ongoing need for costly treatment: Exhibit "42", paragraphs 57 and 62, as referred to at paragraph [384] above.

825 When Dr Brown was taken to this topic of financial distress in the family, she indicated she was not made aware of that significant family stressor, and she would have liked the opportunity to discuss this in an interview with the plaintiff.

*(11) Domestic stress impacting on the plaintiff at the time the plaintiff's mother separated from the defendant and left home*

826 On or about 1 July 2020, three weeks before the plaintiff's disclosure of the alleged sexual abuse to her mother, the plaintiff's mother had decided to separate from the defendant. Accordingly, she left the family home because, to her, "*it felt too toxic*" to stay in such circumstances: Exhibit "23".

827 At that time, the plaintiff's mother was obviously "*stressed*", and she was decidedly resistant to seeing a psychologist along with the defendant to discuss their relationship problems. Instead, she told the plaintiff and her sister of her decision to leave the relationship with the defendant. It seems that this was because the defendant had made a comment to her to the effect that she was "*a handful*". She took umbrage and reacted badly to that comment. She then separated from the defendant.

- 828 In those events, the plaintiff's mother left the family home. At that time she also left the plaintiff and her sister behind, and she was not responding to text messages from the defendant. In those circumstances, the defendant had emailed her, referring to undefined circumstances where both daughters were described as being tense and stressed. The reasonable inference arising from those circumstances is that the family circumstances were stressful.
- 829 In that email the defendant wrote to the mother about the two girls, and expressed his view that at least one of them was stressed by their separation, and that the plaintiff had experienced "*bad luck*" in failing a test of some kind. From the context this was possibly a test for a driver's licence as he had been giving the plaintiff driving lessons. The defendant's email went on to discuss money matters which indicated there was an element of prevailing financial stress in the relationship at that time.
- 830 That email gave rise to an impression that the plaintiff's mother had left the plaintiff and her sister in the care of the defendant at the time of their separation, which the defendant described as an opportunity for the mother to have some "*space*" to deal with her "*demons*": Exhibit "30".
- 831 The details of when, in the course of that separation, the defendant left the house, and when the mother returned, remains ill-defined in the evidence. However, what is apparent is that those unclear circumstances, which involved domestic stress in the weeks before the plaintiff made her disclosure to her mother of alleged sexual abuse, was that the details of those circumstances were not placed before Dr Brown for her forensic consideration at the times she assessed the plaintiff.
- 832 This was in circumstances where it seems indisputable that such potential stressors existing in the family situation had relevance to an assessment of the potential causes of the plaintiff's PTSD presentation.
- 833 Dr Brown was not given the opportunity to delve into those relevant matters of detail.

*(12) Dr Brown's adjusted view as to the possible factor of secondary gain*

834 When Dr Brown first consulted with the plaintiff in 2022 she had the plaintiff's statement of claim as a reference point. That document simply revealed the existence of the plaintiff's claim for monetary compensation. Although that document merely indicated that the plaintiff was exercising her legal right to claim compensatory damages, the factor of potential secondary gain obviously arose for forensic consideration. Dr Brown raised this question herself and discounted its relevance.

835 In oral evidence, Dr Brown said she was unaware of the significant financial stressors in the plaintiff's family. Whilst Dr Brown appeared to have an ambivalent view as to whether that factor "*broadly changes*" her diagnosis, she agreed that it would have been helpful to have discussed such matters with the plaintiff: T209.46 – T210.36. It is difficult to discern the meaning of the term "*broadly changes*", where at the least, a liminal relevance arises for consideration.

836 In a forensic evaluation of whether there was a possibility of secondary gain, the monetary and other demands made by the plaintiff's mother in her 23 August 2020 email to the defendant (Exhibit "34"), and the implications of the plaintiff's own email to the defendant dated 30 August 2020 (Exhibit "5"), loom large, and obviously merit a forensic analysis on the question of possible secondary gain. That is so particularly where, reasonably, the defendant construed the context and content of that correspondence as blackmail.

837 That view is reinforced when the correspondence is read in conjunction with the unchallenged evidence involving a conveyed threat of prominent front page newspaper publicity if the defendant did not engage in discussions with the plaintiff's family on the terms that were stipulated to him in that email correspondence: T551.5 – T551.30.

838 That view is further reinforced by the extent to which the plaintiff's mother, who was obviously acting in the interests of the plaintiff, having believed her allegation against the defendant without question, resorted to applying third-

party pressure on the defendant, exhorting him to engage in discussions which could have been used as a potential means for entrapment of the defendant.

839 In my view, contrary to Dr Brown's dismissal of the factor of secondary gain, on the evidence she had before her, having regard to the more extensive evidence now available for consideration, I consider that a strong impression of the existence of a factor of secondary gain emerges from the evidence.

840 In those circumstances it is clear that Dr Brown's assumptions are significantly dissimilar to the emergent evidence. This factor must affect the reliability of her opinion on a critical matter in issue.

841 Plainly, Dr Brown's statement (at T209.50 – T210.2), that she could find no motive or evidence of secondary gain, must be read in conjunction with the concession she made in her evidence that it would have been helpful to discuss with the plaintiff relevant matters that had not been presented to her in her consultations with the plaintiff as the matters identified above represented relevant matters to be taken into account "*when considering gain*": T210.31 – T210.36.

842 The point Dr Brown was addressing when giving that evidence was that she was unaware that there were significant financial stressors in the plaintiff's family: T210.30. The mother's affidavit in the family law proceedings shows otherwise.

*(13) Reliability of Dr Brown's diagnosis of PTSD in view of other stressors*

843 Dr Brown acknowledged that the diagnosis of PTSD was a complex undertaking: T226.44. She acknowledged that her diagnosis of the plaintiff having PTSD was dependent upon the information provided to her, and when making an assessment of PTSD, corroborative information was important and relevant: T227.18.

844 Dr Brown said that in making her diagnosis of PTSD she was reluctant to base it on the psychologist's terminology (T226.40), where low mood was not

considered to be a diagnosis (T226.38), where dysphoria is not considered to be the same as depression (T216.14), and acute stress, on its own is not determinative: T226.38.

- 845 Dr Brown stated that a diagnosis of PTSD requires the occurrence of a trauma that has manifested itself in symptoms: T226.9. She also noted that not everyone who has been traumatised develops PTSD: T226.6. She stated that there are numerous variable factors at play, including genetic factors: T226.3. She referred to the DSM criteria concerning traumatic exposure as a basis for a diagnosis of PTSD, including an exposure to threatened death, serious injury or sexual violence (T218.31), followed by a pattern of relevant symptoms: T203.24.
- 846 Whilst Dr Brown identified a strong association between childhood sexual abuse and the development of PTSD (T226.12), as I read her evidence, she also acknowledged that confounding factors could exist that might affect the validity of such a diagnosis, the context being that the plaintiff has experienced other traumas in her life: T226.10 – T226.15. The truism that proof is not established by association alone must be observed.
- 847 Whilst Dr Brown dismissed the factors of “*parental separation, problems in the family relationship et cetera*” as confounders (T226.13 – T226.15), her analysis did not include a focussed evaluative analysis of the juxtaposition and possible interaction of other known traumas that have occurred in the plaintiff’s life.
- 848 Dr Brown acknowledged that the plaintiff has been exposed to many illnesses in her life: T225.30. It became apparent that Dr Brown had not been made aware of some of those stresses involved in those illnesses, and had not been made aware of the extent of the impact of some of them.
- 849 Non-exhaustively, in this case, relevantly, some of those other traumas and stressors include the following factors of potential relevance to a PTSD diagnosis:

- (1) The medical evidence shows that, in addition to the plaintiff's underlying physical illnesses, she has stoically borne and internalised the stress of the accumulated burden of her dextrocardia and the consequential multiple cardiac surgeries that followed, both in neonatal, paediatric and teenage life. Some of the burdensome consequences of those conditions are that the plaintiff has required daily cardiac and blood pressure medications and she also needed to undertake periodic specialist cardiological surveillance, where the potential detriments which can arise from her adverse health issues cannot be overestimated: Exhibit "42", p 28. The plaintiff's evidence has downplayed the significance of the burden of those objectively identified problems: T35.27 – T35.44;
- (2) The plaintiff's congenital condition of asplenia has understandably left her with a significant consequential burden of vulnerability and concern for her wellbeing. She is vulnerable to developing life-threatening sepsis on account of impaired immunity to infection, including from COVID-19 and similar illnesses: Exhibit "1", Vol 1, p 134. This is a matter of obvious ongoing concern regarding her wellbeing;
- (3) The plaintiff has endured recurrent debilitating migraines since the age of 6 years. These recur about twice per month and last for about 4 hours at a time, as referred to at paragraph [126] above. In her oral evidence she sought to downplay her health concerns over her migraines: T66.23. She downplayed her significant absences from school on account of her migraines: T66.25 – T66.31. Her school records, which have been reviewed at paragraphs [158] to [172] above, reveal much more than the occasional days off from school than she had disclosed to Dr Brown;
- (4) The plaintiff suffered the burden of parental separation at the age of 6 years. Dr Brown wrongly assumed the plaintiff's parents had divorced. The circumstances were unusual. When the plaintiff's mother later re-partnered with the defendant, the plaintiff has subsequently experienced resentment towards the defendant: T483.44 – T484.1; T484.16;



T486.10; T487.50 – T488.1; Exhibit “B”. No doubt those circumstances had their stresses;

- (5) At the age of 11 years the plaintiff was found to have been suffering from mild postural hypotension unrelated to her cardiac disease: Exhibit “1”, Vol 1, p 200;
- (6) The plaintiff experienced unexplained respiratory symptoms from the age of 12 years, with rapid heartbeats that required medication: Exhibit “1”, Vol 1, p 204. She was years later diagnosed with PCD;
- (7) Although it has been objectively documented that the plaintiff has had significantly limited exercise tolerance since her teenage years, and this restricted her activities due to shortness of breath (Exhibit “1”, Vol 1, p 80; p 133), the plaintiff gave contrary evidence at the hearing to suggest she was very active: T36.6 – T36.17. The relativity of that evidence was not explored in detail at the hearing to the point of a reconciliation;
- (8) The plaintiff suffered a concussive head injury at the age of 16 years. She appears not to have described the full extent and effect of that injury to Dr Brown, as is evident from the medical evidence summarised at paragraphs [131] to [132] above. Perhaps the full extent of the effect of that injury has been kept from the plaintiff: Exhibit “1”, Vol 1, p 77;
- (9) The plaintiff’s father died in 2016 when she was aged 17 years. At that time she was in Year 12 in her final year of high school. Understandably, this caused her to suffer grief. Beforehand, from the age of 15 years, the plaintiff experienced a prolonged period during which she observed the progressive health decline of her father’s health from motor neurone disease, which ultimately led to his untimely death. This was in circumstances where, beforehand, she had to deal with the fact that her father had lost his power of speech at an early stage along that pathway of decline, and she needed psychological help to assist with the impact

of those circumstances on the family, and to assist her to mourn in advance of his impending death: Exhibit “B”;

- (10) The plaintiff’s diagnosis of PCD, at age 20, a congenital respiratory disease, has significantly burdened her with the need to take daily prophylactic measures for mucus and respiratory management, and she has had traumatic hospital admissions for treatment for pneumonia (Exhibit “1”, Vol 1, p 121), including the distress of finding herself located in hospital wards with elderly patients: T275.36;
- (11) After the plaintiff’s sister was diagnosed with a more severe form of PCD she wanted to end her own life. The plaintiff was aware of her sister’s consequential struggles over that diagnosis: T89.1;
- (12) The plaintiff has serious and complex ongoing medical needs involving significant ongoing expense (Exhibit “42”, p 28), and she claims she had not pursued treatment because she could not afford to do so: T34.4; T41.36; T303.45;
- (13) The plaintiff said that she has had a prolonged period of extreme suicidal ideation which lasted for about 3 years between the ages of 11 and 15 years, which must have necessarily commenced before the alleged sexual abuse, which is claimed to have occurred at the age of 12 years: T40.43. This adds a confounding element to the plaintiff’s belief that the alleged sexual abuse has destroyed her life, where on that account, it appears that her suicidality may have pre-dated the alleged abuse;
- (14) The plaintiff has been assessed by her treating general practitioner as having a reactive sensitivity to adverse medical findings about her own health: Exhibit “1”, Vol 1, p 77.

850 Plainly, in combination, the above series of traumatic and potentially traumatic events and confounding factors in the plaintiff’s life appear to have some *prima facie* relevance to a forensic analysis of the plaintiff’s stated claims and beliefs

concerning the impact that PTSD has had on her life, where she has stated her belief that her life has been destroyed by the alleged sexual abuse: T17.29; T40.14.

851 Not only has the plaintiff's mother described the plaintiff as complex, a factor that of itself merits forensic consideration, but Dr Brown has acknowledged that causation of PTSD is a complex undertaking.

852 Added to the above mix of factors, there is the most recent disclosure of the plaintiff obtaining a lead role in a feature film: Exhibit "146". Those circumstances also merit a forensic evaluation in relation to her earning capacity as an actress.

853 The importance of analysing those factors is underscored and emphasised in view of Dr Brown's comment that "*were [she] to assess [the plaintiff] again [she] would do so on the information [that would become] available [to her]*": T202.5; T206.39 – T206.46; T212.5; T227.16 – T227.20.

854 That rider to Dr Brown's evidence is particularly pertinent in this case because Dr Brown had not been given the opportunity to undertake an analytical consideration of a significant body of evidentiary material which appears to be *prima facie* relevant to her opinion as to the cause of the plaintiff's PTSD presentation. Plainly, there is much to consider.

855 From the Court's non-expert perspective, Dr Brown's recurring comment in cross-examination to the effect that it would have been helpful to speak with the plaintiff again about some of those newly emergent matters of history that she has not previously considered, suggests the compelling desirability for a reassessment of the plaintiff before a PTSD diagnosis could confidently be made.

856 In view of the above considerations, Dr Brown's comments in oral evidence suggesting that the new matters brought to her attention in cross-examination do not necessarily invalidate her opinions (T199.50 – T200.1; T201.7; T201.45)

are not definitive. Instead, in my view, those answers should be seen to be oracular *ipse dixit* remarks that are unsupported by sufficiently detailed reasons, with the result those views should be significantly discounted.

857 The strong impression gained from Dr Brown's comments as cited in paragraph [853] above is that her assessment of the plaintiff appears to be open to a differential reappraisal in view of the material that she has not had an opportunity to previously consider, noting that Dr Brown held the view that the plaintiff was in her assessment, "*not a highly traumatised woman*" (T215.50), who was not "*overly distressed*": T217.17.

858 In addition to the foregoing considerations, an unexplained and irreconcilable difficulty has emerged concerning Dr Brown's review of the records of the plaintiff's general practitioner. As identified at paragraphs [629] to [633] above, Dr Brown appears to have reviewed some general practitioner practice records that are not in evidence in these proceedings. This is a problematic circumstance that cannot be overlooked as being insignificant.

### ***Conclusion concerning reliability of Dr Brown's evidence***

859 For the reasons outlined above, I consider that Dr Brown's diagnostic opinions concerning sexual abuse-related PTSD should be given significantly diminished weight because her diagnosis has been shown to have been based on only a limited amount of material compared to the broader range of the material that has been tendered in evidence, as has been identified in the preceding paragraphs.

860 In my view, the assumed factual basis of Dr Brown's opinions does not sufficiently correspond to, or reflect the factual complexity of the plaintiff's history, which belies her presentation. In those circumstances, I conclude that it would be unsafe to regard her opinions in this case as forming a reliable basis for making determinative findings of fact on issues which have serious implications for the parties.

861 I therefore conclude that Dr Brown's evidence does not provide a reliable guide to determining critical factual matters in dispute in this case, especially the question of whether the plaintiff's PTSD presentation to her was caused by alleged sexual abuse by the defendant, a matter which he strongly denies.

## **PART H – CREDIT FINDINGS**

862 Before moving on to identify my findings of fact on relevant matters in dispute, it is necessary to say something about the role of demeanour in the assessment of the credibility of testimony, noting the distinction between the concept of demeanour and the separate question of the way in which the evidence of a witness was given. In that regard it is recognised that limitations apply when determining matters of credibility and reliability of testimony based only on demeanour.

### **Assessment principles**

863 Observation of the demeanour of witnesses when giving evidence is an unavoidable concomitant of receiving and observing oral testimony. In that process, it is inevitable that impressions are formed as to the demeanour of witnesses.

864 That said, it is necessary to give due regard to the well understood caution against making assessments concerning the credibility of testimony based only on an assessment of the demeanour of a witness without also engaging with the force of the case sought to be made by the respective parties: *Hasler v Singtel Optus Pty Ltd & Ors* [2014] NSWCA 266, at [157], following the decision in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq) & Ors* [1999] HCA 3.

### **The force of the respective cases**

865 The cases sought to be made by the respective parties are diametrically opposed.

866 The force of the plaintiff's case is she claims that the alleged sexual abuse occurred as she has described, and as a result, she suffers from PTSD. To prove that case, in addition to expert psychiatric evidence, in sequence, she relies upon her own evidence comprising her recollections, the evidence of the series of disclosures or complaints she has made, and the reasonable inferences that may be drawn from that body of evidence.

867 In contrast, the force of the defendant's case is that he maintains his outright denial that the alleged abuse had ever occurred. In the alternative, the defendant argues that the plaintiff has acquired a false memory for the event she claims to have occurred. In support of those defences he invokes and relies upon the broad range of documentary material that identifies argued inconsistencies that should preclude the plaintiff's case from succeeding.

### **Assessments**

868 The assessment of the credibility and the reliability of the testimony of the respective witnesses on factual matters may be conveniently grouped into two categories, the first, being the witnesses whose evidence related to peripheral matters that were not the subject of substantive challenge, and the second, being the evidence in contention as given by the principal actors.

869 The first category involves the assessment of the testimony of the plaintiff's sister, her godmother, and the witnesses identified in these reasons as Witnesses A, B, C, D, and E.

870 The second category involves an assessment of the testimony of the principal actors, namely the plaintiff's former boyfriend, the plaintiff, the plaintiff's mother, and the defendant. That body of evidence is relevant to the determination of the central issues in dispute.

### ***Credibility and reliability of witness testimony in the first category***

871 It is convenient to first undertake a review of the credibility and reliability of the witnesses whose testimony was either not challenged or was not the subject of

material dispute. The evidence of those witnesses did not involve any elements of inherent probability.

*Plaintiff's sister*

872 The plaintiff's sister, who is younger than her by two years, is highly intelligent and articulate. To avoid identifying her it is sufficient to say she is an undergraduate student of one of the social sciences. She was the recipient of the plaintiff's second disclosure of the alleged sexual assault by the defendant. Her evidence is summarised between paragraphs [489] to [497] above.

873 Her evidence was directed first, to the fact of the timing and content of the plaintiff's verbal disclosure to her, in early 2020, and secondly, as to the events which followed, including some observations she has made of the plaintiff over the course of time.

874 Over the years since receiving the plaintiff's disclosure of alleged sexual abuse, the plaintiff's sister had naturally adopted a sisterly role supporting the plaintiff and listening to her to enable her to regularly talk about and process the alleged event: T188.47 – T189.1.

875 Although the plaintiff's sister is, understandably, emotionally aligned with the plaintiff, I consider that she gave her evidence in a careful matter-of-fact manner.

876 Unlike the plaintiff, she has had a good relationship with the defendant and has had no difficulty in relating to him, including in his historical role as a care giver, notwithstanding the content of the allegations the plaintiff has made against him which had shocked her: T191.1 – T191.17. She confirmed that her relationship with the defendant was very different to that of the plaintiff. Significantly, she said that the plaintiff had never warned her that she should be wary of the defendant: T192.16 – T192.25.

877 In my view, no doubts or credit concerns arose as to the content or the reliability of her testimony.

*Plaintiff's godmother*

878 The evidence of the plaintiff's godmother is reviewed and summarised between paragraphs [211] to [213] above.

879 She is a close and supportive friend of the plaintiff's mother and has known the plaintiff since birth. She was the recipient of the plaintiff's third verbal disclosure of the alleged sexual abuse. The relevance of her testimony related to the facts and circumstances surrounding that disclosure.

880 Although the godmother is emotionally aligned to the plaintiff, there were no substantive challenges made to her evidence. In my assessment, no doubts or credit concerns arose as to the content or the reliability of her testimony.

881 The discrepancies between her evidence and the evidence of the plaintiff's mother as to the date on which she believed the plaintiff disclosed the alleged abuse to her mother, namely 27 July 2020 as opposed to 23 July 2020, seems to be a peripheral non-determinative matter. The difference arises from her perceptions gleaned from following information derived from a social media account where the primary source material was not in the evidence. In my view, nothing turns on that divergence in the evidence.

*Witnesses A, B, C, D and E*

882 Witnesses A, B, C, D and E, gave evidence in the defendant's case. Their testimony was not the subject of challenge or cross-examination. Accordingly, no credit or reliability issues arose from their respective testimonies.

***Credibility and reliability of testimony of the principal actors***

883 The assessment of the credibility and the reliability of the evidence of the principal actors now follows.



*Plaintiff's former boyfriend*

884 The plaintiff's former boyfriend gave evidence of the timing and the circumstances of the plaintiff's first disclosure of the alleged sexual abuse. His evidence is summarised between paragraphs [198] to [199] above.

885 He gave his evidence on factual matters with due care and restraint. Although he had some difficulty recalling the particular months when relevant events had occurred (T160.27), I gained the impression that he was seeking to ensure that his evidence was accurate.

886 His evidence was that the plaintiff's disclosure to him occurred in the "*middle of the year.*" Initially, he mistakenly identified the year as being in 2020, but in an answer to a leading clarification question, not objected to, he corrected that disclosure as having been made to him by the plaintiff in the middle of 2019: T160.31.

887 He qualified his answers where that seemed appropriate, and he avoided embellishment. Although there was no substantive challenge to the truthfulness or the reliability of his evidence, the defendant's submissions critically examined aspects of his evidence.

888 The defendant's submissions drew attention to several claimed "*oddities*" about the evidence of the plaintiff's former boyfriend.

889 Those submissions pointed to the fact that the former boyfriend had maintained a cordial relationship with the defendant even after the alleged disclosure, including travelling and working together. In that regard, they worked together co-operatively to move the library of the plaintiff's deceased father into a storage facility located some hours' drive away from Sydney, following which they shared a few beers.

890 The defendant's submissions also pointed to the former boyfriend's evidence that he had accepted the defendant's help in obtaining a job as office manager in the employ of a solicitor, Witness B, and that he and the plaintiff had accepted

the defendant's assistance to move their belongings when they moved premises on occasions when this was required. Those interactions occurred during the full calendar year that he was in Australia: T165.48 – T166.3.

891 Those submissions also pointed out that after the former boyfriend had left Australia to return to his country of origin following the expiry of his tourist visa, in 2020, he had occasionally stayed in touch with the defendant: T167.7.

892 Despite those submitted "*oddities*", the former boyfriend was not challenged as to the factual content of the plaintiff's verbal disclosure to him. It was not suggested to him the disclosure had not occurred.

893 However, in submissions, the defendant did raise some critical questions, namely; (a) if the disclosure to the former boyfriend had in fact occurred as stated, why would he and the plaintiff have made the request to live with the defendant and her mother again following their return to Australia; and (b) why would he have had any relationship at all with the defendant after learning of the content of the disclosure he received, where the natural response from a person in his position, being in a relationship with the plaintiff, would have been to have regarded the defendant with contempt, and not accept any assistance from him, including on the significant occasion of a premises break-in, where the plaintiff sent a message asking for the defendant's assistance at a time of stress: Exhibit "93".

894 Whilst those questions were raised reasonably, in my view they involve a degree of speculation which ought not be determinative on credit issues.

895 The defendant's submissions pointed to a tension between the plaintiff's account (at T22.33 – T22.41), in which she said that she had first disclosed the alleged sexual abuse to her former boyfriend before she had disclosed it to anyone else, compared to the evidence of the former boyfriend, where he said he was unaware the plaintiff had made a disclosure to her psychologist: T166.8.

896 Having reviewed the evidence and those submissions, I do not consider the identified “*oddities*” and tensions have the effect of undermining the reliability of the evidence of the former boyfriend.

897 In my view, the fact that the former boyfriend had maintained a relationship with the defendant was not necessarily inconsistent with the plaintiff having made the described disclosure to him. His relationship with the defendant was not entirely conjoined or in tandem with that of the plaintiff. It was not inherently improbable that he would maintain a civil relationship with the defendant, as did the plaintiff’s sister, in contrast to the plaintiff.

898 Furthermore, the former boyfriend was not challenged on the veracity of the substance of the plaintiff’s disclosure to him, which he had described in his evidence, as cited at paragraph [486] above.

#### *Plaintiff*

899 The plaintiff’s evidence is summarised between paragraphs [440] to [483] above. I was left with significant disquiet and significant reservations about the truthfulness and the reliability of her evidence, as explained below.

900 The plaintiff was well aware of the defendant’s profession. In cross-examination she was asked a question aimed at confirming her knowledge of his occupation: T139.16. She answered that question by saying “*I’m not aware of what he does*”: T139.18. In view of her longstanding association with the defendant as her stepfather I found that dismissive answer to be disingenuous. Her answer had a similar attitude of dismissiveness that her mother later gave to a similar question that was asked of her: T249.46 – T250.3. The similar tone of those answers indicated a common animus of hostility towards the defendant. This provided some support for the defendant’s submission that there was a common enterprise between the plaintiff and her mother against his interests.

901 At the age of 25 years, the plaintiff presented as highly intelligent, articulate, and confident. She demonstrated an ability to express herself with precision when this was required, although this did not always occur where, at times, her

evidence appeared to have been based on a state of belief rather than recalled facts: T11.16; T11.28; T12.15; T12.46; T12.49; T12.50; T13.3; T13.13; T13.50; T19.7; T19.22; T20.49; T28.10; T29.46; T30.30; T39.1; T45.50; T50.25; T68.1; T68.4; T70.48; T91.42; T91.45; T93.1; T99.1; T100.40; T128.43; T130.18; T130.46; T133.34; T134.24; T134.30; T136.33; T139.34; T141.17; T142.17; T142.28; T142.39; T143.6; T143.10; T143.14; T143.16; T143.19; T146.2; T146.9; T150.40; T150.45; T151.22; T151.41; T154.23; T173.7; T173.13; T173.37; T175.17; T182.32; T182.35. In the overall context of her evidence I do not accept that the plaintiff's resort to that manner of expression should be disregarded as just being a figure of speech.

902 The plaintiff has achieved a high ATAR score at the end of her high school education. She has travelled overseas extensively and has worked in a variety of short-term jobs. She has embarked upon a series of tertiary studies in several differing disciplines, although she is yet to complete an undergraduate degree.

903 As already observed at paragraphs [175] to [176] above, in early 2019, the plaintiff took acting classes at NIDA. She has had an agent for her acting career. She has performed some paid acting work for a television advertisement, and more recently it was disclosed that she has secured a lead role in a feature film.

904 The plaintiff's oral evidence was given in segments over the course of three hearing days and comprised just under 8 hours of evidence. The audio recording of her evidence was extracted and is marked as Exhibit "144".

905 With the consent of the parties, whilst judgment was reserved, the opportunity was taken to access and listen to the audio of the plaintiff's evidence for the purpose of testing the initial impression of the considerable pauses that were evident in the course of her answers to certain questions, especially in her evidence-in-chief, and the significance of that observation.

906 At the conclusion of her evidence, without intending any criticism, at the time, the observation that she made such pauses was raised with her for comment. She agreed with that observation (at T183.17), stating that those pauses

occurred because, she was reflecting and searching for accuracy and honesty for her answers: T183.20.

907 In light of that evidence, and in view of the extensive and at times drawn out length of those pauses, the opportunity was taken to re-read the transcript whilst also listening to the recording comprising Exhibit “144”, in order to review and consider the significance of the initial impression obtained from her evidence.

908 The parties were informed that this course would be taken in chambers whilst judgment remained reserved: T607.33. The parties agreed the audio could be reviewed in chambers in their absence: T611. At a subsequent listing of the case on 14 November 2023 to deal with transcript errata and to identify some questions concerning the interpretation of some documentary exhibits, the parties were informed they could obtain uplift access to Exhibit “144” with liberty to make supplementary submissions on it if they wished to do so. The parties did not see the need to take that course.

909 As a result of my review of the plaintiff’s oral evidence, the initial impression of non-spontaneity of many of her answers has been confirmed.

910 Given the plaintiff’s undoubted capacity to speak with articulate precision, a surprising feature of her evidence was that her evidence comprised literally scores of answers that contained faltering, loose, and non-definitive expressions, such as: “*I guess*”; “*kind of*”, “*sort of*”, “*like*”, “*you know*”, and “*would’ve*”, which in my view, suggested a lack of confidence in the accuracy of her answers.

911 In the plaintiff’s answers to questions asked in cross-examination, a remarkable number of her answers were to the effect she could not recall the subject matter: T54.38; T55.3; T56.19; T68.46; T70.18; T70.33; T70.38; T89.36; T90.48; T91.8; T91.38; T92.42; T93.4; T93.7; T93.26; T96.24; T96.34; T105.45; T106.21; T106.24; T106.35; T106.41; T109.30; T109.42; T109.46; T109.49; T110.2; T110.5; T110.11; T123.10; T123.13; T124.48; T125.27; T149.38;

T150.2; T151.2; T151.9; T179.43; T179.46. This list of transcript references is not intended to be exhaustive.

- 912 Significantly, at times, long flat, deliberately thoughtful pauses occurred in her evidence. At other times there was dramatic emphasis. Long pauses occurred variously, at the end of some questions before she commenced her answers, and pauses also occurred mid-answer, before she completed her answers.
- 913 The pauses in the plaintiff's answers to questions asked of her in her evidence-in-chief were at times remarkably lengthy and were therefore significant in my view. The pauses were less significant in her answers to questions asked of her in cross-examination because the pauses were in large measure due to the need for the plaintiff to take time to read documents that she was asked to consider and comment upon.
- 914 The plaintiff's many answers to questions in which she referred to her recurring resort to the use of loose expressions such as "*I guess*", "*kind of*", "*sort of*", "*like*", "*you know*", and "*would've*" suggested that, rather than describing a direct recollection, significant aspects of her evidence on critical matters in dispute involved reconstruction. Many such responses arose during her evidence-in-chief, which suggested there was uncertainty in her answers, or that she was tailoring aspects of her evidence.
- 915 The plaintiff was cross-examined on the content of a series of photographs the defendant had assembled within the folder comprising Exhibit "4", and the video recordings comprising Exhibit "3"; T155.25 – T156.26. The apparent object of that cross-examination was to canvas support for an argued attitude of the plaintiff's self-esteem, confidence, and apparent happy engagement in leisure activities. It was argued that those matters raised impressions that were contrary to what the plaintiff sought to convey in her evidence.
- 916 Although it is understandable that the defendant would seek to rely on that evidence to contradict aspects of the plaintiff's evidence concerning the claim her life has been "*destroyed*" by the alleged sexual abuse, I must observe the

required caution and not take that material into account when determining the issue of the plaintiff's credit.

- 917 Photographic evidence alone, being snapshots in time, can be misleading, and therefore could represent an unsound basis for determining matters of fact concerning, for example, attitude and emotion: *Blacktown City Council v Hocking* [2008] NSWCA 144, at [7]-[10], [167]-[170]; *Angel v Hawkesbury Council* [2008] NSWCA 130, at [69]-[72]; *Warren v Gittoes* [2009] NSWCA 24, at [2]-[3]; *Yarrabee Coal Company Pty Ltd & Anor v Lujans* [2009] NSWCA 85, at [8], [20]-[29]; *Twynam Agricultural Group Pty Ltd v Williams* [2012] NSWCA 326, at [66]; *Goode v Angland* [2017] NSWCA 311, at [89]-[96].
- 918 The plaintiff was cross-examined and pressed on an apparent inconsistency between her oral evidence as to what she had disclosed to her psychologist and to Dr Brown concerning her claimed dynamic attitude of distancing herself from the defendant, and the array of documentary evidence which contained an array of affectionate words and symbols she had communicated to the defendant over the course of time. Despite the content of that material, the plaintiff disagreed that she had an affectionate relationship with the defendant: T97.16.
- 919 In my view, this was an example of the plaintiff's reluctance to make reasonable concessions when such concessions were due when confronted with contrasting documentary material comprising her friendly and affectionate text messages to the defendant.
- 920 In my view, on that topic, the plaintiff obfuscated and dissembled in a rambling and unconvincing answer, in which she vaguely suggested that there was a friendly dynamic with the defendant which she "*would've spoken about*" and "*probably did describe this kind of dynamic, to some degree*" to Dr Brown: T76.21 – T77.16. I considered that evidence to be an evasive and unconvincing attempt to deal with an apparent inconsistency in her evidence concerning her at times affectionate relationship with the defendant.

- 921 There were literally scores of questions where the plaintiff claimed a lack of recall on some factual matters raised in cross-examination. I gained the impression that some of those responses were avoidant of the questions, where the answers had the potential to not serve her interests in the litigation.
- 922 A standout example was her claim of a lack of recollection of attending a sentencing hearing and hearing a victim impact statement involving allegations of child sexual abuse as referred to in paragraph [239] above, where (at T91.8, T91.37, and T91.42), she said that she did not recall being in the courtroom. In the context of this case and the issues raised, having regard to the content of her text message to the defendant comprising Exhibit “82”, I find that evidence to be incredible.
- 923 That evidence provided another example of the plaintiff’s marked reluctance to make reasonable concessions: T85.14 – T85.19. This aspect of her oral evidence contrasted with the objective evidence which showed that she had sent the defendant a text message from the courtroom whilst he was parking his vehicle, indicating to him that a seat in the public gallery was being kept for him: T206.17; Exhibit “82”. I considered that her avoidant answers to those questions were evasive and unconvincing.
- 924 The evidence referred to in the preceding paragraph was of obvious relevance to the issue of whether the plaintiff had PTSD due to alleged abuse by the defendant. The absence of signs describing triggering of the plaintiff when in a courtroom where a sentence was imposed in a case of sexual abuse of a minor, was a material point of focus to the consideration of that issue. This was confirmed by Dr Brown in her oral evidence in which she said triggering would have been expected in the circumstances.
- 925 On the topic of the plaintiff’s claim of experiencing adverse emotional effects from the alleged sexual abuse, her evidence concerning her facility for conveying an admittedly false impression as to her true feelings in a given situation was of interest.



926 In that regard, the plaintiff has shown an acknowledged facility within her written communications to her family, to describe her feelings in a way which was not completely indicative of her true feelings. This occurred in relation to her description that during her stay in France, when she was there with her high school class in Year 7, she said she wrote to her family in Australia in terms that did not express her true feelings, as follows:

“Q. I suggested with you yesterday, "I couldn't have been with a better family." You're reporting back to your family.

A. That's an email back to my family. That's -- I don't believe that that was indicative completely of how I felt.

Q. About how happy you were being in France at the time?

A. I emailed back to my family, yes.

Q. To your family, yeah. So, once again, is that you saying something but really meaning the opposite?

A. It's me meaning anything else. It's just.”

[T133.32 – T133.42]

927 In my view, that evidence was revealing. It provides an additional reason for viewing her evidence with caution before acceptance.

928 The overall impression I gained from the plaintiff's performance as a witness was that her answers to some material questions asked in her evidence-in-chief, were delivered with delayed, non-spontaneous vagueness and hesitancy, where she gave slowly evolving answers that were not in keeping with the precise nature and fluid delivery of language that she employed in other and less contentious parts of her evidence. There were many examples of this: T11.25; T11.28; T12.15; T12.46; T13.38; T15.14; T16.44; T17.40; T20.40; T21.50; T22.17; T23.4; T23.13; T25.1; T25.24; T25.28; T25.43; T25.47; T26.5; T26.18; T26.37; T27.13; T28.38; T28.43; T29.2; T29.46; T31.2; T32.12; T33.25; T34.11; T36.40; T37.20; T37.27; T38.1; T40.8; T40.24; T40.48; T41.9; T41.24; T43.6; T43.10; T48.15; T53.19; T55.13; T58.47; T63.15; T67.20; T68.29; T91.49; T92.46; T102.23. This list of transcript references is not intended to be exhaustive. In my assessment, at times, those responses

indicated that she was evading a definite commitment to answers on material questions.

929 I also gained the impression that in the course of cross-examination, the plaintiff sought to parry and deflect questions, at times giving relatively dilute concessions, where the questions were clear enough and called for more direct answers, as in her answer at T133.42, as cited in the preceding extract from her evidence in paragraph [926] above. There were many other examples where I considered that the plaintiff was parrying and seeking to deflect questions without proper responses: T42.24; T45.40 – T45.47; T45.50; T50.21; T56.26; T56.45; T58.43; T58.47; T67.16 – T67.25; T69.5; T74.35; T76.7; T90.37; T93.21; T101.47; T108.27; T112.32; T122.27; T122.47; T123,15; T123.44; T124.4 – T124.22; T136.28. These transcript references are not intended to be exhaustive.

930 Another example of that phenomenon was when the plaintiff was cross-examined on the content of her 30 August 2020 email she had sent to the defendant (Exhibit “5”), which referred to the disclosure she had made to her mother, and to having filed a SARO form which could be referred to in a police investigation if she found there was no other option for her, this being an implied threat to involve the police if he did not engage in communication with her family.

931 In my view, the plaintiff gave obfuscator answers when questioned about that subject, as follows:

“Q. Were you aware that your mother had emailed the defendant about this allegation prior to 30 August 2020?

A. I don't think so.

Q. Did you understand at that time that the defendant was not responding to phone calls, or email communications, from your mother?

A. I did understand that at the time after I you know, there was a period of time after I disclosed the assault to my mother, that we weren't in communication with the defendant.

Q. I'm suggesting it's a realisation of that that is, no communication from the defendant you sent an email to the defendant on 30 August 2020.

A. I do believe that I emailed [the defendant], I don't remember the exact date.

Q. Do you remember the terms of that email now?

A. What I don't remember the exact content of the email.

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Q. What was the gist of it?

A. Sorry?

Q. What was the gist of it?

A. I believe that I was trying to reach him, and trying to kind of just engage in some form of communication with him, because we hadn't heard from him.

Q. What was the gist of what was being communicated to him?

A. I my memory of that email is that I didn't go into any kind of specifics of the assault or anything. It was more an email trying to quite maturely just receive a response, like a, are you there? Like, kind of an acknowledgement.

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Q. Couldn't possibly be categorised as a threat?

A. I don't believe so."

[T142.5 – T142.39]

932 Contrary to the plaintiff's explanation cited above, her email to the defendant dated 30 August 2020 contained an obvious threat to him. I considered that answer to be disingenuous.

933 The plaintiff gave obfuscatory and non-committal evidence where she said she did not recall a significant conversation she had with Witness D: T179.46. She was questioned about a telephone conversation she had with Witness D on 30 September 2020. That call was made to follow up her email to the defendant dated 30 August 2020. She claimed she could not recall the conversation. It is undisputed that she had told Witness D the allegation of sexual abuse by the defendant, as was related to him by her mother, was true. This was plainly a significant conversation. When that evidence was tested in cross-examination

I considered her answers claiming a lack of recall on this topic to be unsatisfactorily evasive and obfuscatory: T149.6 – T152.22.

934 When the plaintiff was further questioned about the content of her 30 September 2020 conversation with Witness D, she denied she had used the threat of criminal proceedings to seek an acknowledgment from the defendant. I found her denials and her repeated claims of a lack of recollection to be unconvincing and obfuscatory: T151.30 – T152.22.

935 As is evident from those evolving interchanges, the plaintiff vacillated between not having a relevant recollection of the call and the content of the call to Witness D, and then proceeded to identify the purpose for the call. I find it difficult to accept the plaintiff's evidence that she could not recall such a significant conversation with Witness D, and that she could not recall the details of that conversation.

936 The lasting impression of the plaintiff's evidence was that she had prevaricated in her answers on key matters of fact in dispute. I considered the plaintiff to be an unimpressive, unsatisfactory, and unreliable witness, whose evidence should not be accepted on contentious matters of disputed fact unless objectively corroborated.

#### *Plaintiff's mother*

937 The evidence of the plaintiff's mother is summarised between paragraphs [503] to [517] above. She presented as an intelligent professional who well knew how to choose and use her words with emphasis.

938 Essentially, her evidence was relevant to three components of the plaintiff's case. First, there was a claimed element of corroboration concerning the plaintiff's disclosure to her of the defendant's alleged offending circumstances. Secondly, the content of the plaintiff's disclosure to her on or about 23 July 2020 was admissibly relevant by force of statute: s 66(2) of the *Evidence Act 1995* (NSW). Thirdly, her evidence had some relevance to the assessment of damages.

- 939 In considering the context in which the plaintiff's mother gave evidence in this case, it must be recognised that it was only natural for her loyalties to be aligned with the interests of her daughter. This is especially so considering her consistently supportive role over the years in relation to assisting and supporting the plaintiff with her many health-related and other traumas that she has endured in her life to this point.
- 940 An objective historical example of the mother's forceful and strident advocacy for the plaintiff's interests, which occurred well before the timing of any alleged sexual abuse which is the subject of this claim, appears in the content of Exhibit "109".
- 941 That document comprised a closely typed four-page missive in which the plaintiff's mother lambasted school authorities over the perceived way in which the plaintiff had been treated at a Selective Schools examination when she was in an opportunity class and was seeking entry to the selective high school which she ultimately attended.
- 942 In that document the plaintiff's mother pressed school authorities for an inquiry into the role taken by an examination supervisor; she called for the disciplining of the examination supervisor; and she called for a review and adjustment of the plaintiff's examination results.
- 943 In that lambaste, the plaintiff's mother argued that "*damage ... was done*" to the plaintiff's "*confidence, concentration, and self-esteem*" resulting in "*rising panic*", "*tears*", "*humiliation*", "*distress*", feeling "*anguished*", feeling "*deep shame*", being "*overwhelmed by stress*", "*crying*", "*having cried in front of other students*" and leaving "*the examination room introverted and unhappy*". The document concluded with the mother's statement that: "*Over the ensuing weekend [the plaintiff] broke down in tears on several occasions as she related the story*".
- 944 One of the complaints made in that lambaste was that in between examinations, an examination supervisor had (non-injurious) "*tapped or patted* [the plaintiff]

*twice on the head*", which the plaintiff's mother described as "*inappropriate physical contact*" which had "*served to confuse and distract her*".

945 In light of the plaintiff's repeated claim in her evidence in this case that the alleged sexual abuse has destroyed her life, Dr Brown would doubtless have been interested in exploring with the plaintiff her perceptions of the matters that had been related by the plaintiff's mother, as cited in the preceding two paragraphs, where some of those matters of psychological reaction by the plaintiff were later echoed in this case, but in a different context.

946 Those matters aside, I found the plaintiff's mother to be an unsatisfactory and unimpressive witness on key matters in dispute. It appeared to me that on such matters, whether consciously or subconsciously, at times she coloured her evidence by adopting the role of advocate for the plaintiff's interests, to the detriment of the defendant.

947 For example, knowing the defendant's accomplishments in his profession, in responding to the very first question put to her in cross-examination, she was combative, and sought to question the questioner to deflect the force of the question, and she sought to gratuitously portray the defendant's professional standing in a diminished way, when the appropriate answer would simply have been "Yes": T249.46 – T250.3.

948 The plaintiff's mother gave what I considered to be unconvincing evidence in which she rejected the proposition that her relationship with the defendant was tumultuous (T281.45), when the evidence suggested the contrary was true.

949 The plaintiff's mother repeatedly denied that she had a problem with alcohol which affected her behaviour in the family home where there was evidence of disagreements about the presence of alcohol in the home: T275.14; T275.45 – T276.2.

950 Those denials did not sit well with the objective evidence of a text message she had sent to the defendant on 25 October 2018, at a time when the plaintiff was

in hospital. In that message she expressed anger about alcohol being kept in the house, where she had stated that she would have sought out professional help on that matter from a proper facility if she could have taken the time away from the needs of her daughters: Exhibit "15".

- 951 At times, the plaintiff's mother revealed herself to be a combative witness who took opportunities to seek to deflect important questions when she must have known that her evidence in support of the plaintiff's case was being tested. This reflected poorly on her credit as a witness. There were many examples of that attitude in her answers to questions put to her in the course of cross-examination: T250.39; T252.4; T255.5; T264.25; T277.46; T297.21 – T297.32; T298.31; T300.10; T305.5.
- 952 Whilst the plaintiff's mother admitted that she disclosed to the plaintiff's solicitor the confidential content of the terms on which the family law proceedings had been resolved (at T250.23; T338.41), I doubt the correctness of her proffered explanation that she did not know it was unlawful for her to do so. Her actions in that regard indicated that she was significantly invested in the outcome of these proceedings.
- 953 The plaintiff's mother reacted in an angrily defensive and aggressive manner in rejecting the suggestion that she had breached the confidentiality of the orders made in the Family Court proceedings by disclosing certain contents of those proceedings to the plaintiff's solicitor immediately after those proceedings had concluded, as part of "*a crusade to try and destroy the defendant*": T250.15 - T250.39.
- 954 There were other examples of her combative and deflective responses which reflected poorly on her credit where she took an opportunity to disparagingly refer to the defendant as having "*disappeared*" (T252.43; T299.3; T299.14; T303.6; T311.29), whereas the true fact was that after she had decided to terminate her relationship with the defendant, she wrote to say she would have no further contact with him other than by email: Exhibit "29".

955 In those circumstances it ought to have been unsurprising to her that the defendant had declined to engage in communications with her, or anyone on her behalf, especially after she had in effect accused him of having committed a serious crime. In my view, any properly advised reasonable person of average intelligence faced with such an allegation would have been concerned about the issue of entrapment and the right to maintain silence in the face of such a serious accusation. It appears she did not see things that way. The defendant was well advised in that regard.

956 It seemed to me that the plaintiff's mother had adopted an advocacy role for her daughter in this case. This became apparent during her evidence-in-chief, where her role was to give evidence of the facts as best she knew them to be in response to specific questions. Instead, despite the plaintiff being represented by competent counsel, the mother sought to prompt counsel on a number of topics in addition to those raised by counsel. In doing so she was plainly seeking to advance the plaintiff's case by giving evidence beyond the boundaries that had been selected by counsel: T247.14; T248.47.

957 The evidence-in-chief of the plaintiff's mother was also characterised by dramatic and adjectival emphasis (T247.50; T249.8), and was marked by the expression of opinion, which in my view was clearly aimed at bolstering the plaintiff's case: T249.1. She also sought to defensively bolster the plaintiff's case when she was asked whether she had ever questioned the plaintiff's account of the defendant's alleged offending behaviour. In her response she defensively argued that the plaintiff had no reason to make up a story about the claimed event: T257. 45.

958 As to the key question of the likelihood of the offending conduct having ever occurred as alleged by the plaintiff, I gained the impression that the plaintiff's mother framed her evidence in an over-inclusive way aimed at assisting the plaintiff's case.

959 For example, she did so by gratuitously claiming, without prompting, and without supporting evidence, that the mattress on the bed where the offending



conduct was alleged to have occurred was expensive, and had movement absorbing characteristics. That evidence went well beyond the reasonable ambit or call of the question that was put to her: T248.9. In my view, her response was in the nature of unsubtle advocacy aimed at inoculating the plaintiff's case against an attack based on an obviously emergent argument that the alleged abusive event, as claimed by the plaintiff, was improbable.

960 There was no real scope for accepting certain denials made by the plaintiff's mother in her evidence (at T251.21; T251.46; T252.2), concerning the damaging content of some conversations she had with Witness A, Witness B and Witness D. In the evidence of those witnesses, it was noted that she had said things that amounted to threats concerning possible criminal proceedings and potentially adverse front page publicity about the defendant in a national newspaper.

961 The inescapable evidentiary constraint which precludes acceptance of the evidence of the plaintiff's mother on those matters is that the testimony of those witnesses was not challenged in any way.

962 The plaintiff's mother sought to deflect cross-examination by giving unresponsive answers with irrelevant content: T252.5. She also sought to fence with the cross-examiner with querulous and obfuscatory answers. This was in circumstances where the questions asked of her were clear and unambiguous, and which otherwise called for straightforward answers: T298.28 – T298.34.

963 Whilst the plaintiff's mother stridently rejected the suggestion that she had been seeking to "*shake down*" or blackmail the defendant (at T332.40 – T332.49), the evidence of self-interest within her email to the defendant dated 23 August 2020 seeking the transfer of the defendant's interests in properties, suggests otherwise: Exhibit "34".

964 The plaintiff's mother acknowledged that in November 2020, (which was after she had terminated the relationship with the defendant), she was under financial stress, and had represented that she was reliant on charity, and on

friends, to provide her with food, and to cook for her and her daughters:  
T334.28; Exhibit "42".

965 That evidence, together with her email of 23 August 2020, and the portions of her affidavit filed in the Family Court proceedings and cited at paragraph [384] above, identifies a financial motive that could support the notion of possible secondary gain to the family if not just to the plaintiff. When Dr Brown considered and dismissed the possibility of secondary gain she did not have that information available for her consideration. It is noteworthy that at the time that email was sent by the plaintiff's mother, the plaintiff was already an adult, yet her mother was still claiming carer status.

966 Having considered the evidence of the plaintiff's mother from those perspectives, for the above reasons, regrettably, I have concluded that she was an unsatisfactory partisan witness whose evidence should not be accepted on key matters of factual dispute unless objectively corroborated by other sources.

#### *Defendant*

967 The evidence of the defendant is reviewed at paragraphs [518] to [529] above. Although his evidence was extensive (T363 – T510), the focus was essentially twofold.

968 First, the defendant maintained his complete denial of the central allegations made by the plaintiff. Secondly, his evidence traversed extensive explanatory detail on background and peripheral matters that arose in the plaintiff's case against him, including with regard to the many documents which featured in the evidence.

969 Despite an extensive and thorough cross-examination aimed at impugning the defendant's evidence, in my assessment, that evidence was not shown to be inherently wrong or disingenuous in any respect.

970 In my view, the defendant gave his evidence in a considered and measured manner. He made concessions when these were duly required by the questions

that were put to him. He did not seek to avoid or deflect answering difficult questions.

- 971 As already observed and cited at paragraph [525] above, in my assessment, the only time the defendant's evidence became slightly elevated was when he seemed to have been provoked by the force of a question by which he was being asked to concede that he had touched the plaintiff inappropriately, as she had alleged, where, in his denial, he answered by invoking hyperbole and incredulity, stating that he was "*not suicidal*": T491.8
- 972 That response was prompted by a persistent but legitimate line of questioning on the disputed central issue of alleged sexual touching: T490.11 – T491.29. The defendant forcefully defended his denial of that allegation by reference to the known and undisputed factual circumstances. He faced persistent accusatory cross-examination on the detail of the plaintiff's allegations against him with dignified denials that did not seem inherently improbable: T490.11 – T491.29; T492.12 – T493.9.
- 973 The point he made in his own defence at that time was to the effect that even if he had been inclined to the kind of transgressive behaviour the plaintiff has alleged against him, which he said he was not, it would have been foolhardy of him to have done so, noting that the plaintiff's light sleeping insomniac mother was in the bed in close proximity to where the alleged abusive conduct was said to have taken place: T491.40.
- 974 The defendant's description of his shocked disbelief, upset, emotional reaction, and trauma, following the allegation made by the plaintiff, on its face seemed genuine: T428.38 – T428.44; T448.8; T493.5 – T493.33; T498.49; T499.5 – T499.8. A position to the contrary was not put to him in cross-examination.
- 975 In my assessment, the defendant was an impressive witness, I consider that his evidence was not inherently improbable in any respect, and it was capable of acceptance without reservations as to his credit as a witness.

## **PART I – FINDINGS ON DISPUTED MATTERS OF FACT**

- 976 The fundamental matters of fact in issue in this case are whether on the night in question the plaintiff entered the bedroom of her mother and the defendant as she has claimed, and whether the alleged abuse she described actually occurred. The defendant denies each of those alleged matters of fact.
- 977 In essence, the array of evidence in relation to those described circumstances is the affirmative evidence of disclosure or complaint by the plaintiff, the plaintiff's evidence, the evidence of her mother, and the evidence of denials by the defendant.
- 978 The plaintiff bears the onus of proving her allegation that the defendant unlawfully sexually touched her. She also bears the onus of proving that as a consequence, she has developed PTSD.
- 979 As explained at paragraphs [967] to [975] above, the defendant has given credible evidence by which he has denied the entirety of the plaintiff's sexual abuse allegations.
- 980 Absent the existence of reliable contrary evidence, those denials are capable of acceptance as the defendant's evidence has not been discredited in any way. The defendant has not made any admissions on any issue that might operate to alleviate the plaintiff's obligation to prove her case.
- 981 In identifying this position, I should not be misunderstood to be indicating a reversal the onus of proof, which always remains with the plaintiff on any factual issue which she asserts.
- 982 Unless and until the plaintiff reaches the point of discharging that onus by presenting evidence that supports an arguable case the evidentiary burden does not shift to the defendant. He is not obliged to prove or disprove anything before that point is reached.

### **Construction of s 66A of the *Evidence Act 1995 (NSW)***

983 In this context complaint or disclosure evidence comprises a “*contemporaneous representation*” about a person’s health, feelings, sensations, intentions, knowledge or state of mind: s 66A of the *Evidence Act*.

984 In the context of this case I construe the words “*contemporaneous representation*” in s 66A to refer to statements made by the plaintiff at the time of her respective disclosures. In this context, contemporaneous should not be taken to refer to statements made in close or immediate juxtaposition to the event which is the subject of the representation.

985 That is why the evidence admitted pursuant to s 66A must be assessed for its determinative weight. That is particularly so because in this case, the disclosures relate to events that occurred almost 9 years beforehand. That said, that period of delay, of itself is immaterial. This is because generally speaking, there are many acceptable reasons for a complaint of the kind disclosed by the plaintiff to be raised at a time distant to the alleged events.

### **Complaint evidence**

986 As observed at paragraphs [102] to [109] above, in cases involving allegations of historical child sexual abuse, disclosure or complaint evidence is admissible pursuant to s 66A of the *Evidence Act 1995 (NSW)* as an exception to the hearsay rule. Once admitted, that evidence must be evaluated in terms of its consistency, reliability, relevance, and probative weight.

987 Having concluded that the plaintiff was an unreliable witness whose evidence should not be accepted on contentious matters in dispute unless objectively corroborated, as explained at paragraphs [899] to [936] above, it is necessary to consider the utility of the evidence comprising a series of disclosures or complaints made by the plaintiff some 9 years after the alleged events.

988 In this case, there is a general theme of consistency in the disclosure or complaint evidence in that it refers to the plaintiff as a child victim of sexual

abuse allegedly perpetrated by the defendant in the bedroom which he shared with the plaintiff's mother. However, there were some material inconsistencies in that evidence as to when those events were said to have occurred, especially as to her age at the time of the alleged abuse, and as to what was reportedly said at the time, and described by the plaintiff in her disclosures.

989 My assessment of the complaint or disclosure evidence in this case is that it should be seen to carry no determinative weight in relation to the proof of the claimed abuse on account of its sparse and varied descriptive factual detail. My reasons for that view are as follows.

990 The evidence of the plaintiff's former boyfriend concerning the plaintiff's disclosure to him is summarised at paragraphs [198] to [199] above. His recollection was hazy in terms of the timing of the disclosure, and it did not refer to the plaintiff's age at the time of the alleged abuse. In that evidence she was simply described as a "*younger girl*". That disclosure was made almost 9 years after the alleged event. Subsequently the further disclosures then followed.

991 The evidence of the plaintiff's sister concerning the plaintiff's disclosure to her is summarised at paragraphs [209] to [210] above. It did not identify a time frame as to when the alleged offending conduct was alleged to have occurred. In that evidence the plaintiff was described as being a "*kid*". The sister's use of words such as "*I think*", and "*from what I remember*" (T187), indicate her evidence was largely based on a process of uncertain reconstruction rather than an accurate recall.

992 The evidence of the plaintiff's godmother concerning the plaintiff's disclosure to her is summarised at paragraphs [211] to [213] above. That evidence did not reliably identify the timing of the alleged offending conduct. The plaintiff was referred to as being a "*kid*" at the time of the alleged abuse. The godmother did not remember the words used by the plaintiff to convey the "*message*" in her disclosure.

993 Vague evidence along those lines does not meet the requirements for satisfactory proof in cases involving such serious allegations of the kind made by the plaintiff: *Briginshaw v Briginshaw* (*ibid*).

994 The evidence of the plaintiff's online SARO report, the disclosure to her treating psychologist, and her disclosure to her mother, will be addressed separately after identifying some relevant inconsistencies.

### **Inconsistencies in the complaint or disclosure evidence**

995 The disclosure evidence in this case includes some significant inconsistencies, as follows.

996 Different reasons were given by the plaintiff for having entered the bedroom on the night when the alleged abuse was said to have occurred. The former boyfriend was told the plaintiff was feeling ill. The psychologist was told she had a nightmare. The sister was told the plaintiff had a "*tummy ache*". The psychologist later recorded the conflated version of a nightmare and a tummy ache. The godmother's evidence did not include any evidence along those lines. The plaintiff's mother variously referred to the plaintiff as having had a "*tummy ache*" or a stomach ache. Dr Brown recorded that the plaintiff told her she was feeling sick and nauseated.

997 The standout distinction between the physical phenomenon of feeling pain and discomfort from experiencing a stomach ache compared to the intangible emotional experience of a nightmare, and the inherent inconsistency of those differing explanations, has already been identified in detail at paragraphs [783] to [785] of these reasons.

998 There were inconsistent accounts of the plaintiff's age within the disclosures as to the age at which the alleged abuse was said to have occurred. The former boyfriend's evidence was that it occurred when she was a younger girl, the sister's evidence referred to the plaintiff being a kid, the psychologist recorded it as around the age of 8 years, the godmother was told it occurred when the

plaintiff was a kid. Dr Brown and the plaintiff's mother identified the year as being 2011, which must be taken to mean the plaintiff was aged almost 13.

999 I consider that the disclosure evidence adduced in this case should not carry determinative weight concerning proof of the facts alleged by the plaintiff because of the wide range of variations in the age descriptions within that array of evidence.

1000 That conclusion arises because of the vagueness, variation, and the limited factual details within the recounted disclosures concerning the alleged offending conduct, and also because of the relative lack of specificity of the age of the plaintiff when the alleged offending was said to have occurred.

1001 In my assessment, those vague and imprecise descriptions fall well short of the requirements for satisfactory proof on the balance of probabilities concerning a serious allegation of the kind raised by the plaintiff in this case: *Briginshaw v Briginshaw (ibid)*.

### **SARO report by plaintiff**

1002 In my view, the complaint evidence comprising the SARO report prepared by the plaintiff on 28 August 2020 should similarly not carry any determinative weight. This is because the preparation and filing of that document was a strategic step taken by the plaintiff after the family had taken legal advice. It was not based on any contemporaneous records. The report was filed by the plaintiff on-line in the context of anticipated legal action. That report was formulated some 9 years after the alleged event with some form of either civil or criminal legal action in mind. In my view, the potential corroborative and probative value of the SARO report is overwhelmingly outweighed by the self-serving nature and litigious context of the document.

### **Correspondence from the treating psychologist**

1003 The evidence comprising the correspondence from the plaintiff's treating psychologist concerned the disclosure the plaintiff made to the psychologist on



1 November 2019. It was received by the psychologist in her professional capacity in a clinical setting. It is summarised at paragraphs [200] to [208] above.

1004 Although the disclosure took place in a professional setting, the very limited detail of the factual circumstances of the offending conduct alleged against the defendant within that disclosure necessarily limits its probative value, except as to the record of the age as then disclosed by the plaintiff in relation to the alleged abuse, namely that the alleged offending conduct occurred when she was aged at around 8 years.

### **Evidence of the plaintiff's mother**

1005 The plaintiff's mother claimed to have a relevant recollection of alleged conversations and activity that took place in the bedroom on the night in question. She claims to have heard the plaintiff making extremely distressed sounds and she claims that she heard the defendant and the plaintiff exchange words. She also claims to have spoken to the plaintiff after the alleged events. The defendant denies the occurrence of each element of the mother's claimed recollections.

1006 In view of my findings (at paragraphs [937] to [966] above), concerning the credit of the plaintiff's mother as a witness, where I record my assessment that she was an unsatisfactory witness, I find myself unable to accept any aspect of her evidence on factual matters in contention unless her evidence is supported by independent corroboration.

1007 This is because of those credit findings and also because she is so closely aligned, committed, and partisan to the plaintiff's case, and because she is so maligned and consumed with antipathy and disdain towards the defendant. This was to the extent of her claiming, with contemptuous sarcasm, that she did not know who he was: T343.11. I consider that it would be unsafe to rely on her evidence as proof of any matter of fact in contention in this case.

- 1008 In looking at the objective evidence, a relevant contextual aspect of the evidence of the plaintiff's mother is that she used to take prescribed medication to help her to sleep. This is evident from her pharmacist's dispensing records: Exhibit "D".
- 1009 I do not accept the evidence of the plaintiff's mother where she attempted to embellish her evidence as to her sleep issues whereby she claimed that it was only sometimes that she had difficulty getting back to sleep once woken: T343.24 – T343.34.
- 1010 I accept the observation-based evidence of the defendant, in light of his experience of living with the plaintiff's mother over a significant period of time, to the effect, in his observation, that if she had been woken from her sleep after taking sleeping medication, which she claimed as a possibility, then once woken, it was unlikely that she would have quickly resumed her sleep, as she claims to have done in this instance.
- 1011 When the evidence of the plaintiff's mother was challenged as to any opportunity she may have had for having relevant recollections of the alleged events, she speculated that she could have taken part of a Stilnox tablet on the night in question: T344.43.
- 1012 I do not accept that evidence. It involves unproven speculation, and there are other difficulties with that evidence.
- 1013 First, her pharmaceutical dispensing records do not support the suggestion she had Stilnox tablets available for her to take in the relevant time frame: Exhibit "D".
- 1014 Secondly, accepting that those dispensing records provide some evidence she had access to sleeping tablets other than Stilnox, absent specific medical or pharmaceutical evidence as to the dosages, actions and therapeutic properties of the medications that were available to her, I am not prepared to accept as feasible, the effect of her evidence in which she described a convenient

temporary or transient period of wakefulness that would have enabled her to reliably make and retain her claimed observations and recollections concerning the plaintiff's loud "*keening*" sounds of extreme distress, and the words she said she heard the defendant say on the night in question. The evidence of the defendant as to his experienced observation of the effects that sleeping tablets had on the plaintiff's mother suggests otherwise. I accept his evidence in that regard.

1015 Thirdly, given that the plaintiff's mother was vigilantly if not hypervigilantly attentive to the plaintiff's background of adverse conditions of health, I consider it most improbable that on seeing and hearing the plaintiff in a state of extreme emotional distress, where the plaintiff was unable to speak, as the mother described in her evidence, that she would simply comfort and cuddle the plaintiff in bed and then go back to sleep without investigating the cause of such distress once she was awake.

1016 Consequently, I do not accept the evidence of the plaintiff's mother to the effect that she heard loud "*keening*" or crying sounds of extreme emotional distress coming from the plaintiff's mouth as she has claimed. I do not accept that she saw the plaintiff move around her the bed followed by the defendant who then moved to another room as she has claimed. I do not accept that she had or heard a conversation with the defendant which gave her to understand the plaintiff had a "*tummy ache*" as claimed. I do not accept that she heard the defendant say the plaintiff had a "*tummy ache*" and then beckon the plaintiff to enter his side of the bed.

1017 In my view, in the circumstances described by the plaintiff's mother, if that claimed conversation between the plaintiff and the defendant had taken place, and if the subsequent claimed conversation between the defendant and the plaintiff's mother had taken place, such circumstances most probably would have resulted in the mother staying awake and making a follow-up inquiry out of concern for the plaintiff's well-being, especially given her vigilant commitment to managing the plaintiff's extensive history of adverse health issues, some of which could quickly develop into emergency situations.

1018 For the above reasons, I conclude that the evidence of the plaintiff's mother does not form a reliable basis for proving any fact in contention in this case.

1019 In view of my adverse findings as to the plaintiff's credit recorded at paragraphs [899] to [936] above, I find myself unable to accept the plaintiff's evidence concerning the alleged occurrence of any of the events she described, referring to the night in question.

1020 I accept the defendant's denials to the effect that none of those events occurred.

### **Varied evidence concerning plaintiff's entry into the bedroom**

1021 It is informative to review the plaintiff's evidence concerning her past history of entering into the bedroom in comparison to her particulars of claim and in comparison to the evidence of the plaintiff's mother.

1022 The plaintiff's particulars dated 4 May 2022 specifically stated that historically, prior to the alleged offending, the plaintiff would have entered the parental bedroom approximately once or twice per month, depending on if she was ill or could not sleep: Exhibit "47", p 1, paragraph 2. The plaintiff was the obvious source of those particulars which framed the detail of the case that defendant was required to meet: *Dare v Pulham* (1982) 1948 CLR 658; [1982] HCA 70, at [6].

1023 In her oral evidence the plaintiff retreated somewhat from the positive assertion of entry into the bedroom once or twice per month as stated in her particulars. She did so by saying that whilst it was possible she had entered the parental bedroom on many occasions both prior and subsequent to the alleged events (T136.12), she was unsure as to whether this occurred once or twice per month: T136.16 – T136.19.

1024 In my view that evidence by the plaintiff was an equivocal disavowal of the precisely framed particulars she had provided to her solicitors, where it must be assumed those particulars were provided based on her instructions. In my

assessment, her cited testimony was a significantly avoidant stance that was tailored to flexibly suit her case.

1025 It is noteworthy that the plaintiff's mother could not recall the plaintiff having previously come into the bedroom once or twice per month: T258.9 – T258.20. On the contrary, the plaintiff's mother said the plaintiff was a clear thinking, independent, self-possessed young person, who according to her own memory "*didn't often ask for comfort [and was not] in need of help*": T258.30.

1026 Having considered in detail the evidence of the plaintiff's mother on the issue of the plaintiff's entry into the bedroom, I am persuaded that she has most probably invented her evidence of her recollections of seeing and hearing the plaintiff in the bedroom on the night of the alleged offending conduct.

1027 I consider that she did so in pursuit of a partisan effort to seek an advantage for the plaintiff, and to disadvantage the defendant in the outcome of this case. I reject that evidence as being improbable in the described circumstances.

1028 The evidence of the plaintiff's mother concerning the content of the plaintiff's disclosure to her on or about 23 July 2020 is summarised at paragraphs [214] to [221] above. In view of my findings as to the credibility and reliability of the testimony of her evidence, I conclude that her evidence of the plaintiff's disclosure to her should be limited to the fact that a claim of sexual abuse involving alleged sexual touching was made, but that complaint does not reliably serve to prove the underlying facts in that disclosure as alleged by the plaintiff.

1029 The interpolation of the mother's "*I think*" inferences embedded within her description cited at paragraph [219] above, necessarily obscures and outweighs the probative value of her evidence regarding the plaintiff's disclosure to her.

1030 The plaintiff's mother had been present in court during the opening addresses by counsel, and would have heard counsel for the defendant provide his

opening remarks to the effect that the plaintiff's account of the alleged conduct of the defendant was improbable.

1031 When the plaintiff's mother gave her evidence she made gratuitous reference to a claimed movement absorbent property of the mattress that was on the bed. In my view, that evidence was proffered forensically, which suggested it was advocacy on her part, aimed at assisting the plaintiff's case on a crucial issue rather than simply providing direct answers to questions when asked. That evidence was gratuitous to the question that was asked.

1032 In my view, that evidence by the plaintiff's mother should be seen to be in the nature of advocacy aimed at seeking to assist the plaintiff's case rather than just recounting the material facts as she knew them.

1033 It was clear that element of advocacy had several objectives aimed at bolstering the plaintiff's version of the events in the face of the criticism anticipated to come from the defendant's side of the record regarding the occurrence being improbable, as was flagged by defence counsel's opening remarks.

1034 The objective of the plaintiff's mother was clear, namely, to seek to explain why she had, on the plaintiff's version, slept through the likely commotion that the defendant's alleged movements and actions would most probably have caused on the bed, whilst also providing a basis for her claimed fragments of recollection that assisted the plaintiff's case by seeking to explain, through speculation, that her claimed partial recall may have been due to having taken Stilnox medication to help her sleep.

1035 I do not accept that evidence.

### **Inherent improbability of abuse at around age 8 years**

1036 The ultimate theory of the plaintiff's case was that the alleged abuse occurred when she was aged 12 years, thereby exposing a glaring inconsistency within the plaintiff's historical accounts of the events. In my view, this is a pivotally determinative matter.

- 1037 The plaintiff's treating psychologist took a history from the plaintiff on 1 November 2019. That history included the significant disclosure by the plaintiff of an allegedly traumatic event comprising sexual abuse by the defendant. The psychologist had an obvious professional interest in making an accurate record of that sentinel disclosure. The accuracy of that record was not disputed.
- 1038 The plaintiff's treating psychologist recorded the plaintiff's age at the time of the alleged sexual touching as being at "*around 8 years*": Exhibit "A", p 29. The plaintiff confirmed to Dr Brown that she gave that history to her psychologist according to her belief at the time before she had "*pieced [her story] together*": T214.13 – T214.18. The plaintiff did not claim that the history of alleged abuse at around 8 years of age was an erroneous statement made by her as a result of any psychological condition which was affecting her at the time of that consultation.
- 1039 The defendant has confirmed that the plaintiff would have been aged 8 years in 2006: T470.32. He also confirmed that he moved to live with the plaintiff's mother (and the plaintiff and her sister) in mid-2007 (T370.23), at which time the plaintiff would have been aged almost 2 months past her 9<sup>th</sup> birthday.
- 1040 In this context, given the requirements for satisfactory proof of the serious allegations made by the plaintiff in this case, I do not take the loose expression of age of "*around 8 years*" to mean 9 years: *Briginshaw v Briginshaw (ibid)*. The plaintiff obviously gave a lot of thought to this most important disclosure before she made that disclosure to her psychologist on 1 November 2019. On her account, it had been on her mind for some time, including some months following a similar disclosure she had made to her then boyfriend, in mid-2019.
- 1041 In my view, the plaintiff's disclosure to her psychologist that she was allegedly abused at around 8 years of age identifies a focal point of inconsistency which compels the conclusion of an inherent improbability within her account of the alleged abusive event.

1042 In my view that evidence should be seen as being an historical admission by the plaintiff against her interests.

1043 That identified element of inherent improbability remained extant when the plaintiff later expanded upon that stated age of around 8 years to change it to a claimed range of between 8 and 13 years when this was explored by Dr Brown. This occurred after the passage of several years during her adulthood and it occurred as a result of her described process of piecing together her story: T214.13 - T214.18.

1044 I am mindful that the consideration of this starkly apparent age inconsistency must obviously be approached with caution in relation to credit related findings based on historical inconsistencies: *Mason v Demasi* [2009] NSWCA 227. In that case, at [2]-[4], the need for caution in relation to the reliance on records suggesting historical inconsistencies was explained as follows:

"[2] First, the trial judge was invited to discount the appellant's oral testimony on the basis of accounts given to various health professionals, which appeared inconsistent either with each other, or with her oral testimony, or both. The difficulties attending this kind of exercise should be well-understood; as explained in the *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 at [8], such apparent inconsistencies may, and often should, be approached with caution for the following reasons, amongst others:

(a) the health professional who took the history has not been cross-examined about:

- (i) the circumstances of the consultation;
- (ii) the manner in which the history was obtained;
- (iii) the period of time devoted to that exercise, and
- (iv) the accuracy of the recording;

(b) the fact that the history was probably taken in furtherance of a purpose which differed from the forensic exercise in the course of which it was being deployed in the proceedings;

(c) the record did not identify any questions which may have elucidated replies;

(d) the record is likely to be a summary prepared by the health professional, rather than a verbatim recording, and



(e) a range of factors, including fluency in English, the professional's knowledge of the background circumstances of the incident and the patient's understanding of the purpose of the questioning, which will each affect the content of the history.

[3] The fact that, in the present case, none of the health professionals was called to give oral evidence as to the matters in issue may not itself be a point of significance. It is unlikely that cross-examination would have advanced any issue in dispute; the witness being likely to have no relevant recollection of taking the history, the oral testimony would be largely limited to an assertion of usual practice.

[4] Thirdly, and more significantly, it was quite possible that the elements of florid expression and exaggeration in the applicant's oral testimony (and in some of the recorded histories) may have been a function of her psychological state. This was not something that the trial judge could readily assess without expert assistance, but it was a possibility that should not have been ignored.  
..."

1045 Applying the considerations of caution identified in *Mason v Demasi (ibid)* to the evidence in this case, the factors identified at paragraphs [2] - [4] in that case are addressed as follows:

- (1) Factor [2](a), the absence of a facility for cross-examining the record maker, factor [2](c), being the inability to identify the questions asked that led to the information recorded, and the language factor [2](e), do not apply in this case because the plaintiff has confirmed that she initially told her psychologist that the alleged abuse occurred when she was aged around 8 years. Therefore, the psychologist's record may safely be assumed to be accurate;
- (2) Factor [2](b) is engaged in favour of a reliance on the record because plainly, the psychologist had a professional interest in the sentinel matter of identifying the age at which the alleged abuse occurred. That is a factor in common with the forensic focus of these proceedings. Similarly, factor [2](d) is not an impediment to reliance on the content of the record made by the psychologist even though it is in the form of an *aide memoire* and not a transcript. This is because there is no dispute as to the accuracy of the content of the record. The psychologist obviously placed some historical importance on the description given by the plaintiff;

(3) Factor [4], the possibility of an infelicity of expression or a florid or exaggerated expression, does not arise in this context. There is no evidence to suggest such factors applied at the time the plaintiff was interviewed by the psychologist on 1 November 2019. It would therefore be speculative to assume otherwise. The psychologist's correspondence did not suggest that such considerations applied. Dr Brown's report described the apparently spontaneous and normal manner of the plaintiff at her mental state examination of her in her interviews: Exhibit "A", p 7. Furthermore, the plaintiff confessed that she disclosed the age of around 8 years to her psychologist.

1046 Accordingly, in my view, the psychologist's record of the plaintiff's age of "*around 8 years*" at the time of the alleged abuse is a reliable and legitimate reference point for the assessment of what appears to me to be a significantly relevant inconsistency within the evidence relied upon by the plaintiff.

1047 The plaintiff's account of alleged sexual abuse was given to her psychologist at her fourth consultation. This occurred after much deliberation on her part. This was in circumstances where it was her stated intention to make that disclosure to the psychologist at the outset, and, according to her account, it took her some weeks to feel sufficiently comfortable to discuss the matter which she was intending to disclose. Plainly, she had given the question a great deal of thought, which suggests that on 1 November 2019, and for some undefined time beforehand, she truly believed she was abused by the defendant at around 8 years of age.

1048 It is noteworthy that the description of the alleged abuse having occurred at around the age of 8 years is broadly consistent with the plaintiff's statement to her sister that something happened to her when she was "*a kid*" (T186.40 - T187.48), which was the same expression that was recounted by her godmother (T240.27), which was also consistent with the disclosure she made to her mother, in which she described the alleged event as having occurred when she "*was little*": T247.14.

1049 In my assessment, having regard to Dr Brown's explanatory evidence at (at T214.25 – T214.34), as to the process by which memory is laid down and retrieved, the plaintiff's evidence of the process of having "*pieced together*" the history of the claimed event strongly suggests that a process of unreliable construction has occurred in the evolution of the plaintiff's version of the alleged events: *Watson v Foxman (ibid)*, *Helton v Allen (ibid)*.

1050 Those accounts persuade me that the plaintiff's best belief was that the alleged abuse occurred when she was around 8 years of age. However, the veracity of that account must necessarily be seen to be inherently improbable as the defendant and the plaintiff's mother were not in a relationship at that time. This represents an insurmountable obstacle to the success of the plaintiff's claim.

#### **Apparent unlikelihood that sexual abuse occurred**

1051 On the alternative revised assumption that the alleged abuse occurred when the plaintiff was aged 12 years, possibly going towards 13 years, as she told Dr Brown in 2023 (Exhibit "A", p 17), an examination of the sequence of events is instructive.

1052 According to the objective content of the medical records kept by the plaintiff's treating general practitioner, the plaintiff would have weighed approximately 40kg, as is identified in the source referenced tabulation appearing at paragraph [632] above.

1053 Having regard to the plaintiff's description of the claimed events, it would appear that whilst she was laying inertly on the bed, she would have been an uncooperative dead weight if attempts had been made by the defendant to move her in the manner she has described. On her description, she would have had to have been manipulated into a position up onto her knees and then kept in that position by considerable physical effort on the part of the defendant, if in fact that occurred.

1054 In my view, in that described sequence, the combination of the inevitable movements and probable forces involved in the described activity would most

likely have caused quite a commotion on the bed which the defendant shared with the plaintiff's mother. I consider that if those claimed events had truly occurred as described by the plaintiff, this would most likely have disturbed the otherwise quiet tranquillity of the bedroom, and would most likely have caused the mother to wake from her sleep.

1055 In my assessment, if those events had occurred as the plaintiff claims, it would have been highly unlikely for the plaintiff's mother to have remained asleep throughout the duration of those 15 to 20 minutes of probable commotion on the bed.

1056 Without corroborative evidence, I do not accept the evidence of the plaintiff's mother that the bed in question had the described movement absorbent properties which would have muffled or prevented her from becoming aware of the commotion that the claimed movements would have most likely produced on the bed.

1057 Consequently, I find that the factual description of the events alleged by the plaintiff did not occur. I reject the plaintiff's evidence and the evidence of her mother on those matters as improbable and untrue.

1058 Instead, I accept the not otherwise improbable evidence of the defendant, in which he said that none of those described events had ever happened.

### **Why would the plaintiff have given evidence that was untrue?**

1059 The submissions made on behalf of the defendant, echoing a comment made in correspondence by the mother of the plaintiff, commenced with the question of why would the plaintiff have lied?

1060 A submission to that effect was correctly identified as being one which was impermissible in a criminal trial involving an alleged sexual assault. This is because, as is explained in the cases cited at paragraphs [22] to [23] above, human motivation for telling lies can involve covert complexity that may not be readily discernible for an array of unfathomable reasons. It is therefore not

necessary to engage in speculation to identify a precise reason for mendacity in a case such as this one.

1061 That said, the defendant is able to point to several non-speculative factors which might have led the plaintiff to an inclination to give untrue evidence about the events she has claimed. One such factor is the plaintiff's longstanding resentment which she has harboured against the defendant, as has been identified at paragraphs [211] and [213] above.

1062 Another such factor is the prospect of the plaintiff obtaining secondary gain by an award of damages. That factor seems credible given that there was a background of financial hardship in the family, the plaintiff's mother was in financial distress, and the plaintiff had a long term need for expensive medical surveillance and treatment.

1063 In my view, both of those factors are arguable in the defendant's favour on the evidence adduced in this case.

1064 As to the factor of the plaintiff's resentment of the defendant, in cross-examination, the defendant was asked to address the nature of his relationship with the plaintiff. In summary, he described the initial relationship as being "*up and down*", which he took to be a "*kind of jealousy on behalf of her father*" (T482.2), which he thought explained the "*ebb and flow*" of the plaintiff being "*alternatively affectionate and not affectionate, or rude*" to him (T396.15; T482.43), which he took to be an inconsistency between what she was saying she felt towards him and what she was indicating to him (T486.11), which gave him the impression that she was resentful of him "*from day one*": T489.49. That evidence was not challenged or contradicted. The plaintiff acknowledged her hostility towards the defendant in her disclosure to her godmother, as cited at paragraph [211] above.

1065 The notion of the existence of a resentment factor also gains some support from the "*resentment*" note made by the plaintiff's treating psychologist: Exhibit "B". In that regard, the defendant said, in retrospect, looking back on "*a multitude of*

*texts*" that had passed between them, the circumstances as revealed, led him to the view the plaintiff's affectionate behaviour towards him as "*fake*": T490.4. His view in that regard was open on the content of those messages.

1066 A different interpretation is also open on the evidence, namely, that the plaintiff's affectionate messages were genuine up until the time of her disclosure of alleged sexual abuse, and fake thereafter.

1067 As to the factor of the plaintiff potentially deriving secondary gain from the litigation, whilst Dr Brown initially concluded (at T209.50 – T210.2), that although she had considered it, she could find no evidence that the plaintiff was actuated by considerations of secondary gain, it appears that she ultimately considered that a conclusion of potential secondary gain was open to material revision because at the time she had formed the view that secondary gain was not a relevant consideration, she was unaware that there were financial stresses in the family: T210.30.

1068 Another potential factor to be considered is that the plaintiff has been influenced by her mother to pursue this litigation. The plaintiff's mother felt animosity towards the defendant. She sought compensation from him as is evidenced by her email to the defendant dated 23 August 2020 which is replicated at paragraph [333] above. She has been invested in the proceedings from the outset, as is evident from her illegitimate action in providing the plaintiff's solicitor with confidential material obtained in the Family Court proceedings, and her related advocacy on the plaintiff's behalf in this case. That advocacy extended to her attempt in these proceedings to gratuitously diminish the defendant's standing in his profession: T249.46 – T250.3.

1069 The defendant also pointed to the blackmailing effect of the emails sent by the plaintiff's mother and the plaintiff, and the attempts to involve third parties in pressuring the defendant to engage in financial discussions to avoid potential police involvement and potential adverse press coverage that would obviously have an adverse effect on his reputation.

1070 Against that background, the defendant submitted that the plaintiff's claim against him is actuated by either furtive dishonesty on her part, in conspiracy with her mother, or alternatively, as a consequence of a false memory of alleged events which in fact did not actually occur.

1071 On the evidence adduced in this case it is difficult to confidently conclude that the plaintiff has deliberately lied. In my assessment, the evidence must be seen to fall short of being comfortably persuasive of such a serious finding of dishonesty: *Briginshaw v Briginshaw* (*ibid*).

1072 In arriving at that conclusion I have not overlooked the attempts by the plaintiff's mother to involve third parties in placing pressure on the defendant to engage in financial discussions with her and her family. In my view, whilst indicating a measure of desperation on the part of the plaintiff's mother, those matters are not necessarily indicative of a level of mendacity or conspiratorial criminality that amounts to blackmail.

### **False belief of sexual abuse**

1073 Instead, I consider there is a compelling case for the alternative conclusion that the plaintiff gave untrue evidence in the false belief that what she was saying was true.

1074 In my view that conclusion arises because the plaintiff had become convinced of the truth of her "*pieced together*" account of the alleged events. Dr Brown has persuasively described the process whereby, through repeated recall and repeated recounting, false detail can become imperfectly placed into memory even though it has not come from an actual event: T215.35.

1075 The proposition of the plaintiff having a false memory gained some general support from within the evidence of Dr Brown. Whilst Dr Brown expressed the initial but qualified view (at T215.50 – T216.2), that there was no major evidence of the plaintiff having a false memory of the alleged events, she said that in such cases this is always a matter to be considered: T215.26 – T215.46. That

evidence implies that in her view there was some evidence to support a false evidence theory.

1076 This is the very point made in *M v M (ibid)* and *Longman v R (ibid)* cited at paragraphs [20] and [22] above, where it was stated that such claims, which can be erroneously influenced by imagination, emotion and prejudice, are easy to make, but difficult to refute.

1077 The evidence in this case certainly establishes a threshold basis for considering the proposition that the plaintiff has developed and has continued to harbour a false memory as the basis for her claim, despite her denial of that proposition: T180.35.

1078 In my assessment, Dr Brown's evidence in which she said she found no major evidence of false memory, was significantly qualified in an adjectival sense by the juxtaposition of her choice of the word "*major*", which implies there was some evidence supportive of the notion that the plaintiff might have a false memory, which may have caused her, over time, to become falsely convinced of the truth of the account she has conveyed by reason of the process of repetition, rumination, reinforcement, construction, and whatever other inponderable factors were driving her thought processes.

1079 As explained at paragraph [720] above, Dr Brown acknowledged in multiple instances, when materials she had not previously considered were brought to her attention, that she would have liked the opportunity to discuss the detail of such newly emergent material with the plaintiff. To my mind this suggests that the initial views she has expressed must now be seen to be tentative and inconclusive in many important respects, as has been identified in detail elsewhere in these reasons.

1080 In my view, those instances when Dr Brown indicated that she would have liked to have discussed the newly emergent materials with the plaintiff, necessarily leads to the conclusion that her views, particularly as to the absence of major



evidence of false memory, remain incomplete and therefore represent an unreliable guide to determining that issue.

1081 Notwithstanding that I consider Dr Brown's reports and opinions must be seen to be tentative in light of the new material, I am nevertheless persuaded of the aptness to this case of her general commentary concerning the fallible processes by which the detail of memory may evolve and change over time and can result in a false memory, consistent with the explanation noted at paragraph [23] above: *Watson v Foxman (ibid)*; *Helton v Allen (ibid)*; *Longman v R (ibid)*.

1082 In this case, it is not possible, or indeed necessary, to seek a pin-point precise explanation to base a finding that the plaintiff's claim is founded upon a false memory. The process by which a false memory may arise is complex, and the reasons are largely imponderably intrinsic to the individual and their particular background of trauma.

1083 In this case, the plaintiff has been aptly described as being a complex person with complex medical needs. She has also had a significant range of traumas in her life, both in her childhood and as an adult, as has been summarised at earlier places in these reasons. A significant number of the traumas and factors which have been identified in these reasons were not fully exposed to Dr Brown for her consideration when she made her assessments.

1084 Aspects of those traumas could in all likelihood have played a determinative part in the formation of the plaintiff's beliefs.

1085 In this case, one of those factors is the phenomenon of the plaintiff's vivid dreams, which I take to include nightmares, which have a real impact on her: T180.31. Another factor is the unexplored subject of her juxtaposed use, as an adult, of a variety of illicit mind-altering substances, which she candidly disclosed to Dr Brown: Exhibit "A", p 3. Those items of detail taken from the evidence are not intended to be an exhaustive exposition.

1086 Having considered the evidence as a whole, for the above reasons, whilst I remain unpersuaded of the truth of the plaintiff's account in which she asserts she was allegedly abused by the defendant, I am persuaded that her belief that such an abusive event occurred is based on a false memory which she holds and has perpetuated, perhaps fuelled by the encouragement of her mother, and perhaps subconsciously influenced by the possibility of obtaining a secondary monetary gain from these proceedings.

1087 A basis for the view that secondary gain could have operated as a factor in this case is the plaintiff's recurringly expressed hyperbole by which she asserts that her life has been destroyed as a result of the claimed sexual abuse. In my view, her evidence in that regard should be seen to involve considerable overstatement.

1088 The plaintiff's self-view that her life has been destroyed seems extreme and exaggerated in view of the glimpses of her life that have emerged in the evidence.

1089 These include the observations of her former boyfriend, where he agreed that she had an outgoing and effervescent personality, and the more recent developments, which reveal that she is currently availing herself of the opportunity to further her acting career by accepting an engagement to appear in a significant role in a forthcoming feature film that is at present in the making.

#### **Does the plaintiff have PTSD?**

1090 The question of whether the plaintiff has PTSD, and if so, the question of what might have caused that condition, remains to be addressed.

1091 The plaintiff was in no doubt that she has PTSD and she has no doubt as to the cause. She unhesitatingly attributed the cause to the defendant's alleged offending conduct: T40.7 – T40.36; T41.15. That view was necessarily based on her false belief that such conduct in fact occurred.

- 1092 Whilst I have concluded that Dr Brown's opinions do not represent a reliable guide to the causation question because of the limited material she had for her consideration, her clinical acumen and diagnostic abilities nevertheless remain undoubted.
- 1093 Clearly, as was open to Dr Brown, absent any affirmative evidence of malingering on the plaintiff's part, she formed the clinical impression, based on the plaintiff's multiple presentations in consultations, that the plaintiff had PTSD. She then proceeded to make that formal diagnosis according to the applicable DSM criteria for the purpose of these proceedings.
- 1094 Accordingly, on the evidence, Dr Brown's diagnosis that the plaintiff has PTSD is not open to doubt. However, in my view, the acceptance of that diagnosis by Dr Brown does not extend to an acceptance of Dr Brown's view as to the underlying cause of that PTSD being the alleged sexual abuse.
- 1095 As identified at paragraphs [111] to [157], [188] to [191], and [849] above, to date, the plaintiff has had many traumatic experiences and stresses in her complex life, some of which may also have had the real potential to cause her to suffer PTSD. That said, a Court is constrained from making positive diagnostic conclusions on those matters in the absence of explanatory expert medical evidence: *Strinic v Singh* [2009] NSWCA 15, at [58].
- 1096 However, that limitation does not preclude a Court identifying a range of other potential traumatic causes. In that regard, when Dr Brown formed her opinions in this case she did not have available for her consideration a significant array of other traumatic and potentially traumatic events in the plaintiff's life. That array is not put forward as diagnosed causes for the plaintiff's PTSD, but rather, as factual scenarios that appear to merit expert consideration in the process of seeking to ascribe a cause for the plaintiff's PTSD diagnosis.
- 1097 One such factor involved a consideration of the detail of the plaintiff's intimate life which was not put before Dr Brown for her consideration. This involved the plaintiff having a history of a prolonged period of gynaecological and related

difficulties that she was coincidentally experiencing as an adult, and which were contemporaneous with the period in which she made her disclosures of alleged sexual abuse by the defendant.

1098 The plaintiff's mid-2019 disclosure to her boyfriend of the defendant's alleged offending conduct culminated in the disclosure the plaintiff made to her mother on or about 23 July 2020. Those disclosures took place over the course of an overall period of about 12 months.

1099 As identified at paragraphs [403] to [404] above, preceding the commencement of that time frame by about 9 months, that is, from about September 2018, the objective clinical records show that the plaintiff was having dyspareunic and supra-pubic pain, and related problems. Those gynaecological problems were unresponsive to antibiotic treatment. These problems seemed to have continued, and spanned a long period, until 9 December 2020. Consequently the plaintiff was being tested and screened for sexually transmitted infections, including chlamydia, syphilis, gonorrhoea, and HIV, at the Sydney Hospital Sexual Health Clinic: Exhibit "1", Vol 1, p 49 and p 52.

1100 In distilling that time frame, it is apparent that the plaintiff was experiencing those problems over the course of some 27 months. It would have been unusual for this not to have been something of a traumatic time for her even taking into account the childhood equanimity ascribed to her by her treating general practitioner as cited at paragraph [150] above, where the contrasting factor was her sensitivity to adverse findings of a medical nature, as cited at paragraph [151] above.

1101 Given the plaintiff's complaint to Dr Brown (at Exhibit "A", p 6), of experiencing periodic difficulties with personal intimacy, for example, where if her hair is touched by her boyfriend, this caused triggering, it would seem that the plaintiff's sexual health issues identified in the preceding paragraphs would have been a relevant matter for a forensic psychiatrist to explore when considering the likely causes of the plaintiff's PTSD diagnosis.

- 1102 It is not clear as to whether pages 49 and 52 of Exhibit "1", which identify the plaintiff's history of sexual health issues, were provided to Dr Brown for the purpose of her evaluation of the plaintiff's history. It seems unlikely that Dr Brown would have overlooked such matters of significance if they had been provided to her. Undoubtedly, this topic raises a relevant matter that Dr Brown would most probably have wanted to explore with the plaintiff if she had the opportunity to have done so.
- 1103 Furthermore, there is a confluence of other relevant factors of apparent inconsistency which have emerged in the evidence which raise questionable gaps in the claimed causal chain. In my view, individually and in combination, those circumstances preclude the findings the plaintiff seeks in this case.
- 1104 The defendant raised a series of inconsistencies in the plaintiff's history which suggest the plaintiff does not have PTSD resulting from any conduct or misconduct on his part. Ultimately, two of those matters appear to be of relevance to evaluating the plaintiff's thesis of sexual abuse related PTSD.
- 1105 The first such inconsistency of significance was that on 25 April 2016, when the plaintiff was aged almost 18 years, uneventfully, she undertook a four-hour car journey with the defendant to an interstate location to attend and celebrate the 18th birthday of the defendant's son from a previous relationship. On that occasion she stayed overnight with the defendant in a twin bed caravan park cabin. Dr Brown said there was an issue concerning that event in terms of her understanding of the way PTSD becomes manifest: T204.50. Dr Brown agreed, variously, that those circumstances were not entirely consistent with, or were relatively inconsistent with, someone who was developing a PTSD, and had an awareness of this: T204.26 – T204.35. Dr Brown was obviously referring to the potential for triggering to occur in such circumstances.
- 1106 The second such inconsistency of significance concerned the events of 17 May 2017, when the plaintiff and her family attended a court hearing for the sentencing hearing of someone convicted of sexually abusing a minor, where the victim's impact statement was read whilst the plaintiff and her family sat in

the public gallery. The victim was known to the plaintiff's mother who was there to support the victim. Dr Brown's attention was drawn to the factual circumstances where the plaintiff had on that occasion, without apparent signs of triggering, not only sent the defendant a text message to tell him to hurry into the courtroom after parking the car, but she sat next to him whilst the victim impact statement was presented to the Court, following which and submissions were made to the sentencing Judge. Dr Brown agreed that she would have expected the plaintiff to have triggering of symptoms in those circumstances, and it was somewhat unexpected that such a response was absent. The effect of Dr Brown's evidence on this point is that it was unlikely that triggering had not occurred in such a setting, in the presence of potential triggering stimuli: T205.36 - T206.50; T208.19. My interpretation of that cited evidence is that the non-triggering of the plaintiff in the described circumstances was inconsistent with a diagnosis of sexual abuse-related PTSD.

1107 Although Dr Brown properly qualified her answers regarding those matters with the caveat that she did not have an opportunity to discuss those matters with the plaintiff (T206.38), in my assessment, the concessions Dr Brown acknowledged within those answers, necessarily undermine and remove a significant sub-stratum of supportive expert opinion the plaintiff was relying upon to prove the causation case she was seeking to make, namely that her PTSD was caused by the alleged sexual abuse of her by the defendant.

1108 In coming to the those conclusions I have not overlooked the suggestions raised in the evidence that the plaintiff's lack of triggering or reactive behaviour, and the evidence of her many affectionate communications she had sent to the defendant over the course of time, which in themselves raised inconsistencies, could have been influenced by the defendant's overshadowing parental presence in her life, and possible reticence on the plaintiff's part not to cause disruption to the family dynamic so as to cause financial stress for her mother, suggesting a possible process of appeasement of the defendant in those circumstances.

- 1109 In my view, those possible explanations involve unwarranted speculation. There is no reliable evidence to support such conclusions. Those propositions are dependent upon an acceptance of the veracity and the reliability of the testimony of the plaintiff. Given my adverse assessment of the credit of the plaintiff as a witness, I am not prepared to give determinative weight to those considerations in the absence of reliable supporting evidence. Consequently, I am not persuaded by the plaintiff's evidence that such factors could have applied at those times: *Briginshaw v Briginshaw (ibid)*.
- 1110 Having carefully considered Dr Brown's opinion evidence in light of the objective factual material which emerged in evidence in this case, the bulk of which she did not have the opportunity of considering in the course of her clinical discussions with the plaintiff, I am not persuaded that the plaintiff's PTSD was caused by the alleged sexual abuse which she claims.
- 1111 The plaintiff bears the onus of proof of the proposition that her PTSD was either caused by, or was materially contributed to, by the sexual abuse she has alleged. In view of my finding that the alleged abuse did not occur, and considering the evidence of so many emergent factors which Dr Brown would have liked to have taken up with the plaintiff but did not have the opportunity of doing so, in my view it would be unsafe to rely upon Dr Brown's analysis. It has been shown to be tentative. I do not accept that evidence as proof of the cause for her PTSD.
- 1112 I remain unpersuaded that the claimed sexual abuse occurred, especially given the confounding factors which have been identified in these reasons but not fully considered by Dr Brown. The plaintiff has not discharged the onus of proof she carried on that matter of contention: *Larson v Commissioner of Police* [2004] NSWCA 126, at [48]. Dr Brown's conclusions to the contrary are not based on evidence sufficiently like, or similar to, or which corresponds to, the evidence adduced in evidence in the case: *Paric v John Holland Constructions Pty Ltd (ibid)*, at [9].

## **Conclusion**

1113 I accept the defendant's evidence and find that the alleged sexual assault claimed by the plaintiff never happened. The plaintiff's claim to the contrary is based on a false memory. The plaintiff's claim against the defendant has therefore failed to achieve success, both on the issue of primary liability, and on the issue of causation of damage.

## **PART J – CONTINGENT DAMAGES ASSESSMENT**

1114 The plaintiff presented a damages schedule in the amount of \$762,810: MFI "5".

1115 Ordinarily, in unsuccessful claims for damages for personal injury, the convention is that there be an assessment of damages to allow for the counterfactual possibility that the primary findings which determine the claim might be set aside on appeal.

1116 However, in this case, in view of the nature of my credit findings which have led to the plaintiff's case being unsuccessful, it would be invidious to proceed to assess damages on a counterfactual basis. I therefore decline to assess damages on that basis.

## **PART K – DISPOSITION, COSTS, ORDERS**

1117 The plaintiff has failed to prove the case she has sought to make against the defendant. Consequentially, I find that she is liable for the costs the defendant has incurred in defending the proceedings. I therefore make the following orders:

- (1) Verdict and judgment for the defendant;
- (2) The plaintiff is to pay the defendant's costs on the ordinary basis unless a party can show an entitlement to some other costs order;
- (3) The exhibits may be returned;



- (4) The non-publication order made on 18 September 2023 is to remain in place until the further order of the Court;
- (5) Liberty to apply for further or other orders if required.

I CERTIFY THAT THIS AND THE 256 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT HEREIN OF HIS HONOUR ACTING JUDGE LEONARD LEVY SC

Associate  
Date: 14 December 2023

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