This document was eFiled on 10 Mar 2021 . Final acceptance has been given.

Principal Registrar &
Chief Executive Officer

Form 7A (version 5)
UCPR 14.3

AMENDED DEFENCE TO SECOND FURTHER AMENDED STATEMENT OF CLAIM FILED ~~19 JUNE~~ 10 DECEMBER 2020

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Professional Negligence
Registry	Sydney
Case number	2017/279308

TITLE OF PROCEEDINGS

First plaintiff	**AMY RICKHUSS**
Number of plaintiffs	12
First defendant	**THE COSMETIC INSTITUTE PTY LTD (IN LIQUIDATION) (ACN 153 061155)**
Number of defendants	~~16~~20

FILING DETAILS

Filed for	**Sri Balakrishnan Darshn,** sixteenth defendant
Filed in relation to	Plaintiffs' claim
Legal representative	Robert Ishak, William Roberts Lawyers
Legal representative reference	702000416
Contact name and telephone	Effie Dimos (02) 9552 2111
Contact email	effie.dimos@williamroberts.com.au

HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at

PLEADINGS AND PARTICULARS

In respect of, and in answer to, the paragraphs set out in the plaintiffs' further amended statement of claim (**FASOC**), the sixteenth defendant:

1 In response to paragraph 1:

a. denies:

i. that the claims of the plaintiffs and group members:

1. are in respect of, or arise out of, the same, similar or related circumstances; or

2. give rise to a substantial common question of law or fact;

for the purposes of s 157 of the *Civil Procedure Act 2005* (NSW) (**CPA**);

b. in the premises of (a), denies that the proceeding is a validly commenced representative proceeding;

c. further and in the alternative, denies:

i. that the claims of the twelfth plaintiff and the Darshn Sub-Group against him;

1. are in respect of, or arise out of, the same, similar or related circumstances; or

2. give rise to a substantial common question of law or fact,

for the purposes of s 157 of the CPA; and

ii. in the premises of (c)(i), denies:

1. that the twelfth plaintiff has standing to commence Part 10 representative proceedings against him on behalf of the Darshn Sub-Group; and

2. in the premises, that the proceedings as against him are a validly commenced Part 10 representative proceeding; and

Particulars

The twelfth plaintiff's BAS was [redacted] which is denied.

d. otherwise does not admit the allegations in the paragraph.

2 In respect of paragraphs 2 and 2A:

a. denies that he utilised the One Size Fits All Approach (as defined) on any of his patients at The Cosmetic Institute;

b. repeats *mutatis mutandis* the matters particularised in 1(c) above and says that the One Size Fits All Approach was not utilised in relation to the twelfth plaintiff;

c. otherwise does not know and cannot admit the allegations.

3 Does not admit the allegations in paragraph 3.

4 Does not plead in response to paragraph 4 as it does not contain any allegations against him.

5 Does not plead in response to paragraph 5 as it does not contain any allegations against him.

6 Does not plead in response to paragraph 6 as it does not contain any allegations against him.

7 Does not plead in response to paragraph 7 as it does not contain any allegations against him.

8 Does not plead in response to paragraph 8 as it does not contain any allegations against him.

8A Does not know and cannot admit the allegations in paragraph 8A.

8B Does not know and cannot admit the allegations in paragraph 8B.

8C Does not know and cannot admit the allegations in paragraph 8C.

8D Does not know and cannot admit the allegations in paragraph 8D.

8E Does not know and cannot admit the allegations in paragraph 8E.

8F Does not know and cannot admit the allegations in paragraph 8F.

8G Does not know and cannot admit the allegations in paragraph 8G.

9 In response to paragraph 9:

a. does not plead to sub-paragraphs (a)-(d) as they do not contain any allegations against him;

b. in response to sub-paragraph (e);

i. repeats *mutatis mutandis* paragraph [81L] below;

ii. denies that, after 2 February 2015, he was directed and controlled in the manner in which he was to perform BAS services; and

iii. does not otherwise admit the allegations in the subparagraph;

c. in response to sub-paragraph (f):

i. repeats *mutatis mutandis* paragraphs 14(b) and 21-22 below; and

ii. denies that he was directed or required to apply the One Size Fits All Approach to any procedures performed at TCI Premises; and

iii. does not otherwise admit the allegations in the sub-paragraph.

10 In response to paragraph 10:

a. does not plead to sub-paragraphs (a)-(g), as they do not contain any allegations against him;

b. in response to sub-paragraph (h):

i. repeats *mutatis mutandis* paragraphs 14 (c) and 21-22 below; and

ii. does not otherwise admit the allegations in the sub-paragraph.

11 Does not plead in response to paragraph 11 as it does not contain any allegations against him.

12 In response to paragraph 12:

a. does not plead to sub-paragraphs (a)-(g), as they do not contain any allegations against him;

b. In response to sub-paragraph (h):

i. repeats *mutatis mutandis* paragraphs 14 (c) and 21-22 below; and

ii. does not otherwise admit the allegations in the sub-paragraph.

13 In response to paragraph 13:

a. does not plead to sub-paragraphs (a)-(g), as they do not contain any allegations against him;

b. In response to sub-paragraph (h):

i. repeats *mutatis mutandis* paragraphs 14 (c) and 21-22 below; and

ii. does not otherwise admit the allegations in the sub-paragraph.

14 In response to paragraph 14:

a. does not plead to sub-paragraphs (a)-(d) and (f) as they do not contain any allegations against or concerning him;

b. does not admit sub-paragraphs (e), and (h)-(p), and in further answer:

i. denies that he performed pre-operative consultations or surgery in accordance with the alleged "One Size Fits All Approach", or any other standardised approach;

ii. denies that the fifth defendant supervised and/or trained him in the performance of the alleged "One Size Fits All Approach", or any other standardised approach;

iii. says that he performed BAS procedures and/or declined to perform BAS procedures by reference to the specific physical features, surgical

and psychological needs and/or aesthetic preferences of each individual patient.

14A-14J Does not plead to paragraphs 14A-14J as they do not contain any allegations against him.

14K In response to paragraph 14K:

a. does not admit sub-paragraphs (a) and (b);

b. admits sub-paragraph (c), save for sub-sub-paragraph (v), and in further answer repeats *mutatis mutandis* paragraph 14(b) above;

c. admits sub-paragraph (d), save for sub-sub-paragraph (v), and in further answer repeats *mutatis mutandis* paragraph 14(b) above;

d. in response to sub-paragraph (e):

i. admits that he performed BAS on Ms Sanchez; and

ii. does not otherwise admit the allegations in the subparagraph.

14L Does not plead in response to paragraph 14L as it does not contain any allegations against him.

14M Does not plead in response to paragraph 14M as it does not contain any allegations against him.

14N Does not plead in response to paragraph 14N as it does not contain any allegations against him.

15 Admits paragraph 15.

16 In response to paragraph 16:

a. in so far as it relates to BAS performed by the other defendants, does not know and cannot admit the paragraph:

b. in so far as it relates to BAS performed by the sixteenth defendant:

i. admits that he performed BAS at the TCI Facilities, but further says that the surgery performed at Southport was performed at Southport Day Hospital, which was an accredited day hospital;

ii. denies sub-paragraphs (a);

iii. does not admit sub-paragraph (b);

iv. does not know and cannot admit sub-paragraphs (c)-(d).

17 In response to paragraph 17:

a. repeats *mutatis mutandis* paragraph 9 above;

b. does not otherwise plead to paragraph 17 as it does not contain any allegations against him.

18 In response to paragraph 18:

a. admits that, from in or about January 2015 to ~~to~~ in or about January 2018 he was engaged to perform BAS at TCI Parramatta Premises, TCI Bondi Premises, TCI Southport Premises, Concord Private Hospital and Holroyd Private Hospital; and

b. does not otherwise admit the allegations in the paragraph.

19 In response to paragraph 19:

a. in so far as it relates to the other defendants, does not know and cannot admit the paragraph:

b. in so far as it relates to the sixteenth defendant:

i. admits sub-paragraphs (a)-(f);

ii. admits sub-paragraph (g), but further says that this was for the limited purposes specified in cl 4.4 of the accreditation deed;

iii. admits sub-sub-paragraphs (i)-(ii)

iv. does not admit sub-sub-paragraphs (iii); and

v. in respect of sub-sub-paragraph (iv), relies on cl 5.4 of the accreditation deed and otherwise does not admit the sub-sub-paragraph.

20 Admits paragraph 20 in so far as it relates to the sixteenth defendant.

21 In response to paragraph 21 in so far as it relates to the sixteenth defendant:

a. denies sub-paragraph (a);

b. admits sub-paragraphs (b)-(d);

c. in response to sub-paragraph (e), denies that implants were uniformly inserted into subpectoral pockets and/or using a dual plane approach and says further that:

i. the only other recognised technique for insertion of the implants was the sub-glandular approach;

ii. in appropriate cases, a sub-glandular approach was employed;

d. denies the allegations in sub-paragraph (f), and in further answer:

i. repeats *mutatis mutandis* paragraph 14(b) above and paragraph 77LF and 81L below;

ii. says that the surgical approach taken by him for each patient was determined by reference to the surgical needs and physical features of the patient;

iii. denies that the same surgical technique was used for each patient;

iv. otherwise does not admit the sub-paragraph;

e. in response to sub-paragraph (g):

i. repeats *mutatis mutandis* paragraph 21(d) above;

ii. admits sub-sub-paragraphs (i)-(ii);

iii. denies that the same surgical technique was used for each patient;

iv. otherwise does not admit the sub-paragraph.

22 In response to paragraph 22:

a. repeats *mutatis mutandis* paragraphs 14(b) and 21(e) above and denies that he used a One Size Fits All Approach as alleged; and

b. does not otherwise admit the allegations contained in the paragraph.

23 Does not admit paragraph 23.

23A Does not know and cannot admit paragraph 23A.

24 In response to paragraph 24 insofar as it relates to the sixteenth defendant:

a. admits that his patients attended a pre-surgery consultation;

b. otherwise does not know and cannot admit the paragraph.

24A In response to paragraph 24A insofar as it relates to the sixteenth defendant:

a. admits that his patients attended a post-surgery consultation;

b. otherwise does not know and cannot admit the paragraph.

24B In response to paragraph 24B:

c. admits that, from time to time, he consulted the fifth defendant about BAS complications associated with his performance of BAS on his patients; and

d. otherwise does not admit the allegations in the paragraph.

24C In response to paragraph 24C:

a. admits that, from time to time, the fifth defendant assisted in the treatment of his BAS patients; and

b. otherwise does not admit the allegations in the paragraph.

25 Does not admit paragraph 25.

26-~~77KI~~77HA Does not plead to paragraphs 26-~~77KI~~77HA as they do not contain any allegations against him.

77HB In response to paragraph 77HC:

a. admits that he had a consultation with Ms Zahr on or about 11 April 2015; and

b. otherwise does not admit the allegations in the paragraph.

77HC Admits paragraph 77HC.

77HD Admits paragraph 77HD.

77HE Admits paragraph 77HE.

77HF-77KI Does not plead to paragraphs 77HF-77KI as they do not contain any allegations against him.

77LA Does not know and cannot admit paragraph 77LA.

77LB Does not know and cannot admit paragraph 77LB.

77LC Does not know and cannot admit paragraph 77LC.

77LD Does not know and cannot admit paragraph 77LD.

77LE In response to paragraph 77LE:

c. admits that he had a consultation with Ms Sanchez on or about 11 January 2017;and

d. otherwise does not admit the allegations in the paragraph.

77LF In response to paragraph 77LF:

a. admits that it was agreed that Ms Sanchez would receive [redacted]

b. admits that it was [redacted]

c. admits that it was [redacted]

d. admits that it was [redacted]

e. further says that Ms Sanchez [redacted]

f. otherwise does not admit the allegations in the paragraph.

77LG In response to paragraph 77LG:

a. admits that he performed BAS on Ms Sanchez and was assisted by James Kenny;

b. says that the surgery was performed at Southport Day Hospital, which was an accredited day hospital.

77LH Does not admit paragraphs 77LH to 77LL.

78 Admits paragraph 78.

79 Does not admit paragraph 79.

80 In response to paragraph 80:

a. denies the allegations in so far as they relate to him;

b. otherwise does not know and cannot admit the allegations in the paragraph.

81 Does not plead to paragraphs 81 to 81K as they do not contain any allegations against him.

81L In response to paragraph 81L:

a. in so far as it relates to the twelfth plaintiff:

i. denies sub-paragraphs 81L(a) to 81L(r);

ii. further says in response to sub-paragraph 81L(f) [redacted] and repeats *mutatis mutandis* paragraph 71LF;

iii. in response to sub-paragraphs 81L(c), 81L(d), 81L(k) and 81L(l) says further that the twelfth plaintiff received detailed information confirming the risks involved in her BAS procedure, including pain in the breasts, malposition/displacement, and "double bubble", and that he explained that information to her;

Particulars

Patient Evaluation and Operative Plan for Ms Sanchez dated 11 January 2017

Patient Consent Form for Ms Sanchez dated 11 January 2017

Surgery Discussion Points for Ms Sanchez dated 11 January 2017

Operative Report for Ms Sanchez dated 14 January 2017

iv. further says in response to sub-paragraph 81L(k) that the BAS was performed under general anaesthetic at a properly accredited day hospital, and repeats *mutatis mutandis* paragraph 77LG(b);

v. does not otherwise admit the allegations in the paragraph;

b. in so far as it relates to the claims of group members:

i. in response to sub-paragraph 81L(b), 81L(m), 81L(n), 81L (o), 81L (p) and 81L(q):

1. repeats *mutatis mutandis* paragraphs 9, 14(b) and 21(e) above; and

2. denies ever performing, or assisting in the performance of BAS in accordance with the alleged One Size Fits All Approach on any patient;

ii. in response to sub-paragraphs 81L(c), 81L(d), 81L(k) and 81L(l) says that all of his patients received detailed information confirming the risks involved in her BAS procedure, including pain in the breasts, malposition/displacement, and "double bubble", and that he explained that information to them;

Particulars

TCI Standard Patient Evaluation and Operative Plan Form

TCI Standard Patient Consent Form

TCI Standard Surgery Discussion Points

iii. denies sub-paragraph 81L(m) and says that, at all material times, he was fit to carry out the duties or activities referred to in that sub-paragraph (other than the One Size Fits all Approach to BAS which he denies performing); and

iv. does not otherwise admit the allegations in the paragraph.

~~86~~82 Admits paragraph ~~86~~82.

~~87~~83 Admits paragraph ~~87~~83.

~~88~~84 Admits paragraph ~~88~~84.

~~89~~85 In response to paragraph ~~89~~85:

a. admits that BAS was performed for purposes which may include one or more of the purposes identified in sub-paragraphs (a)-(d); and

b. does not otherwise admit the allegations in the paragraph.

~~90~~86 In response to paragraph ~~90~~86:

a. admits that the twelfth plaintiff informed him that she wanted BAS in order to improve self-esteem and because of weight loss changes;

b. admits that it was his standard practice to ascertain the BAS purpose of each of his patients;

c. does not otherwise admit the allegations in the sub-paragraph.

~~91~~87 In response to paragraph ~~91~~87:

a. admits that the twelfth plaintiff had a reasonable expectation that her BAS surgery would result in:

i. enlargement of her breasts;

ii. improvement in the aesthetic appearance of her breasts; and

iii. increased self-esteem and confidence;

b. repeats paragraph 81Labove and says that the twelfth plaintiff, and all of the sixteenth defendant's patients, were warned of potential complications with BAS, including pain and tightness in the breasts, breast asymmetry and "double bubble".

~~92~~88 In response to paragraph ~~92~~88:

a. admits that he knew that the twelfth plaintiff had the expectations identified in paragraph ~~91~~87(a), and had informed him of the matters identified in paragraph ~~89~~85(a); and

b. does not know and cannot otherwise admit the allegations in the sub-paragraph.

~~93~~89 In response to paragraph ~~93~~89:

a. denies the allegations in so far as they concern the twelfth plaintiff;

b. repeats *mutatis mutandis* the matters pleaded and particularised in paragraphs 9, 14, 14K, 21, 22 and 81Labove;

c. does not otherwise admit the allegations in the paragraph.

~~94~~90 In response to paragraph ~~94~~90:

a. denies the allegations in so far as they concern the twelfth plaintiff;

b. does not otherwise admit the allegations in the paragraph.

~~95~~91 In response to paragraph ~~95~~91:

a. repeats *mutatis mutandis* paragraphs ~~93~~89 and ~~94~~90 above; and

b. does not otherwise admit the allegations in the paragraph.

~~96~~92 In response to paragraph ~~96~~92:

a. repeats *mutatis mutandis* paragraphs ~~93~~89 and ~~94~~90 above; and

b. does not otherwise admit the allegations in the paragraph.

~~97~~93 In response to paragraph ~~97~~93:

a. repeats *mutatis mutandis* the matters pleaded in paragraph 23 above; and

b. does not otherwise admit the allegations in the paragraph.

~~98~~94 In response to paragraph ~~98~~94:

a. repeats *mutatis mutandis* paragraphs ~~93~~89 and ~~94~~90 above; and

b. does not otherwise admit the allegations in the paragraph.

~~99~~95 Does not admit paragraph ~~99~~95.

~~100~~96 In response to paragraph ~~100~~96:

a. denies the allegations in so far as they concern the twelfth plaintiff; ~~and~~

b. in respect of the twelfth plaintiff, says further that:

i. the twelfth plaintiff's action in negligence against him is statute barred by reason of s 11 of the *Limitation of Actions Act 1974* (Qld);

ii. in the alternative, any failure by him to take precautions against the risk of harm in respect of the twelfth plaintiff (such failure being denied) was not negligent;

Particulars

Civil Liability Act 2003 (Qld) ss 9 and 10

Judiciary Act 1903 (Cth) ss 79 and 80

iii. if the twelfth plaintiff suffered harm as a result of BAS performed by the sixteenth defendant:

1. any such harm was a result of the materialisation of an "inherent risk" of the surgery within the meaning of s ~~5I(2) of the *Civil Liability Act 2002* (NSW)~~s 16 of the *Civil Liability Act 2003* (Qld); and

2. in the premises, the sixteenth defendant is not liable for any harm suffered by the twelfth plaintiff as a result of her BAS;

iv. any entitlement to damages on the part of the twelfth plaintiff against Dr Darshn (such entitlement being denied) falls to be assessed in accordance with Chapter 3 of the *Civil Liability Act 2003* (Qld);

c. does not otherwise admit the allegations in the paragraph;

d. in relation to the other Darshn sub-group members says further that:

i. the action in negligence against Dr Darshn of any Darshn sub-group member (and any other group member on whom the sixteenth defendant performed BAS) whose claim was discoverable three or more years before 19 June 2020, is statute barred by reason of s 50C of the *Limitation Act 1969* (NSW) or, where applicable, s 11 of the *Limitation of Actions Act 1974* (Qld);

ii. in the alternative, any failure to take precautions against the risk of harm suffered by any Darshn sub-group member (and any other group member on whom the sixteenth defendant performed BAS) and any liability on the part of Dr Darshn (such failure, harm and liability being denied) will need to be assessed by reference to Part 1A of the *Civil Liability Act 2002* (NSW) or, where applicable, Chapter 2 of the *Civil Liability Act 2003* (Qld);

iii. if any of the Darshn sub-group members suffered harm as a result of BAS performed by the sixteenth defendant:

1. any such harm was a result of the materialisation of an "inherent risk" of the surgery within the meaning of s 5I(2) of the *Civil Liability Act 2002* (NSW) or, where applicable, s 16 of the *Civil Liability Act 2003* (Qld); and

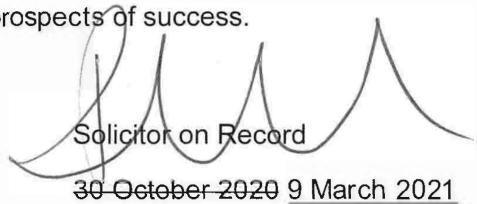
2. in the premises, the sixteenth defendant is not liable for any harm suffered by any of the Darshn sub-group members; and

iv. any entitlement to damages on the part of any Darshn sub-group member against Dr Darshn (such entitlement being denied) falls to be assessed in accordance with Part 2 of the *Civil Liability Act 2002* (NSW) or, where applicable, Chapter 3 of the *Civil Liability Act 2003* (Qld).

97-131 Does not plead to paragraphs 97-131 as they do not contain any allegations against him.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature 

Capacity Solicitor on Record

Date of signature ~~30 October 2020~~ 9 March 2021