



Principal Registrar &
Chief Executive Officer



Form 7B (version 4)

UCPR 14.3

DEFENCE TO THE SECOND FURTHER AMENDED STATEMENT OF CLAIM FILED 10 DECEMBER 2020

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Professional Negligence
Registry	Supreme Court Sydney
Case number	2017/00279308

TITLE OF PROCEEDINGS

First plaintiff	Amy Rickhuss
Second plaintiff	Kylie Pollock
Number of plaintiffs	12
First defendant	The Cosmetic Institute Pty Ltd ACN 153061155
Second defendant	The Cosmetic Institute Parramatta Pty Limited (in liquidation)
Number of defendants	16 <u>19</u>

FILING DETAILS

Filed for	Niroshan Sivathasan, the Sixth Defendant
Filed in relation to	Plaintiffs' <u>Second</u> Further Amended Statement of Claim filed 16 June 2020 <u>10 December 2020</u>
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HEARING DETAILS

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

PLEADINGS AND PARTICULARS

The sixth defendant, Niroshan Sivathasan, pleads to the corresponding paragraphs of the Second Further Amended Statement of Claim filed ~~19 June 2020~~ 10 December 2020 (2nd FASC), adopting the acronyms there used, as follows:

1. In answer to paragraph 1 of the 2nd FASC, the sixth defendant:
 - a. denies that there are, in respect of him, any persons falling within the group members (as defined in paragraph 2A of the 2nd FASC); and
 - b. otherwise does not admit the paragraph.
2. The sixth defendant does not admit paragraph 2 of the 2nd FASC and says further:
 - a. in relation to subparagraphs (a), (b) and (c), he:
 - i. admits he performed BAS on the first plaintiff, Amy Rickhuss on 30 January 2015 at the TCI Parramatta Premises;
 - ii. admits he performed BAS on other patients at TCI Parramatta Premises and the TCI Bondi Premises;
 - iii. denies performing BAS at any other TCI premises; and
 - iv. otherwise does not admit the balance of those subparagraphs.
 - b. in relation to subparagraph (d), he:
 - i. repeats and relies upon subparagraph 2a. above;
 - ii. denies he performed BAS using the “One Size Fits All” Approach on any patient he operated on at either the TCI Parramatta Premises and the TCI Bondi Premises; and
 - iii. otherwise does not admit the balance of the subparagraph.
 - c. in relation to subparagraph (dd), he:
 - i. admits Amy Rickhuss, the first plaintiff and any patient he operated on at either the TCI Parramatta Premises and the TCI Bondi Premises consulted with him following BAS; and
 - ii. otherwise does not admit the balance of the subparagraph.
 - d. in relation to subparagraph (e), he:
 - i. admits Amy Rickhuss, the first plaintiff and any patient he performed BAS on at either the TCI Parramatta Premises and the TCI Bondi Premises had BAS performed under anaesthesia administered by a specialist anaesthetist appointed by TCI (TCI specialist anaesthetist); and

- ii. otherwise does not admit the balance of the subparagraph.
 - e. in relation to subparagraph (f), he:
 - i. denies the first plaintiff and any patient he performed BAS on at either the TCI Parramatta Premises and the TCI Bondi Premises has suffered injury, loss and damage as a result of undergoing BAS; and
 - ii. otherwise does not admit the balance of the paragraph.
- 2A. In answer to paragraph 2A of the 2nd FASC, the sixth defendant:
- a. denies that there exists a sub-group of members who suffered injury, loss and damage in consequence of undergoing BAS performed by him; and
 - b. otherwise does not admit the paragraph.
3. In answer to paragraph 3 of the 2nd FASC, the sixth defendant:
- a. repeats paragraph 1a. above;
 - b. says that he is not aware of any patient who underwent BAS performed by him as a TCI Surgeon who is currently dissatisfied with any aspect of his management, with the exception of Ms Rickhuss, the first plaintiff;
 - c. says that despite request, the plaintiffs' solicitors have not identified the persons said to comprise the Sivathanan Sub-Group and he is unaware of the persons said to comprise the Sivathanan Sub-Group or that such a Sub-Group exists;
 - d. says that so far as he is aware, only Ms Rickhuss, the first plaintiff, brings a claim against him;
 - e. does not admit that there are seven or more persons who are group members and who have claims against him;
 - f. says that, in the circumstances, he does not admit that s157 of the *Civil Procedure Act 2005* (NSW) (the **CPA**) is satisfied or that it is appropriate that he be a party to a representative proceeding within the meaning of Part 10 of the CPA;
 - g. and otherwise denies the paragraph.
4. In answer to paragraph 4 of the 2nd FASC, the sixth defendant:
- a. admits the first plaintiff is named as the lead plaintiff; and
 - b. otherwise does not admit the paragraph.
5. In answer to paragraph 5 of the 2nd FASC, the sixth defendant:
- a. does not plead a response, as no material allegation of fact is pleaded against him; and

- b. Ms Pollock, the second plaintiff is not involved in or related to the “Sivathasan Sub-Group”.
6. In answer to paragraph 6 of the 2nd FASC, the sixth defendant:
 - a. does not plead a response, as no material allegation of fact is pleaded against him; and
 - b. Ms Bruen, the third plaintiff is not involved in or related to the “Sivathasan Sub-Group”.
7. In answer to paragraph 7 of the 2nd FASC, the sixth defendant:
 - a. does not plead a response, as no material allegation of fact is pleaded against him; and
 - b. Ms Rowlands, the fourth plaintiff is not involved in or related to the “Sivathasan Sub-Group”.
8. In answer to paragraph 8 of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead to the paragraph, because:
 - a. no material allegation of fact is pleaded against him; and
 - b. Ms Knowland, the fifth plaintiff, is not involved in or related to the “Sivathasan Sub-Group”.
- 8A. In answer to paragraph 8A of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead to the paragraph, because:
 - a. no material allegation of fact is pleaded against him; and
 - b. Ms Rutherford, the sixth plaintiff, is not involved in or related to the “Sivathasan Sub-Group”.
- 8B. In answer to paragraph 8B of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead to the paragraph, because:
 - a. no material allegation of fact is pleaded against him; and
 - b. Ms Axen, the seventh plaintiff, is not involved in or related to the “Sivathasan Sub-Group”.
- 8C. In answer to paragraph 8C of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead to the paragraph, because:
 - a. no material allegation of fact is pleaded against him; and
 - b. Ms Zahr, the eighth plaintiff, is not involved in or related to the “Sivathasan Sub-Group”.

- 8D. In answer to paragraph 8D of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead to the paragraph, because:
- a. no material allegation of fact is pleaded against him; and
 - b. Ms Love, the ninth plaintiff, is not involved in or related to the “Sivathasan Sub-Group”.
- 8E. In answer to paragraph 8E of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead to the paragraph, because:
- a. no material allegation of fact is pleaded against him; and
 - b. Ms Gielisse, the tenth plaintiff, is not involved in or related to the “Sivathasan Sub-Group”.
- 8F. In answer to paragraph 8F of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead to the paragraph, because:
- a. no material allegation of fact is pleaded against him; and
 - b. Ms Turner, the eleventh plaintiff, is not involved in or related to the “Sivathasan Sub-Group”.
- 8G. In answer to paragraph 8G of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead to the paragraph, because:
- a. no material allegation of fact is pleaded against him; and
 - b. Ms Sanchez, the twelfth plaintiff, is not involved in or related to the “Sivathasan Sub-Group”.
9. In answer to paragraph 9 of the 2nd FASC, the sixth defendant:
- a. admits subparagraphs (a), (b) and (c);
 - b. does not admit subparagraphs (d), (e) and (f); and
 - c. repeats and relies upon the matters pleaded in paragraph 2 above.
10. In answer to paragraph 10 of the 2nd FASC, the sixth defendant:
- a. admits subparagraphs (a), (b), (c) and (d);
 - b. does not admit subparagraphs (e), (f), (g) and (h); and
 - c. repeats and relies upon the matters pleaded in paragraph 2 above.
11. The sixth defendant does not admit paragraph 11 of the 2nd FASC.
12. In answer to paragraph 12 of the 2nd FASC, the sixth defendant:
- a. admits subparagraphs (a), (b), (c) and (d); and

- b. does not admit subparagraphs (e), (f), (g) and (h).
13. The sixth defendant does not admit paragraph 13 of the 2nd FASC.
14. In answer to paragraph 14 of the 2nd FASC, the sixth defendant:
- a. admits subparagraph (a) and (b);
 - b. does not admit subparagraphs (c), (d), (f), (i), (k) and (n);
 - c. says in relation to subparagraph (p), that:
 - i. Eddy Dona supervised nursing staff, cosmetic consultants, administrative staff and management at the TCI Clinics in the provision of BAS services, but otherwise does not admit the balance of the paragraph;
 - d. says in relation to subparagraph (e), that:
 - i. he denies the fifth defendant, Eddy Dona, trained him and supervised him in relation to the matters recorded in (i) to (viii) of the subparagraph; and
 - ii. otherwise does not admit the balance of the subparagraph.
 - e. says in relation to subparagraph (h), that:
 - i. he denies the fifth defendant, Eddy Dona supervised and assisted him in the performance of the One Size Fits All Approach to BAS at the TCI Premises; and
 - ii. otherwise does not admit the balance of the subparagraph.
 - f. says in relation to subparagraph (j), that:
 - i. he repeats and relies upon the matters pleaded at paragraph 14(c)(i) and 14(d)(i) above; and
 - ii. otherwise does not admit the balance of the subparagraph.
 - g. says in relation to subparagraph (l), that:
 - i. Eddy Dona was available to the sixth defendant in relation to complications arising from BAS, but the sixth defendant did not require his assistance during any BAS operation performed by him; and
 - ii. he repeats and relies upon paragraph 22 (a) of this defence.
 - h. Denies subparagraph (m) and (o).
- 14A. In answer to paragraph 14A of the 2nd FASC, the sixth defendant:
- a. denies subparagraph (a), and says further that:
 - i. he has the following qualifications

1. Bachelor's degree in science, medicine, and surgery, and post-graduate qualifications as follows:
 1. Graduate Diploma in Aesthetic Medicine from University of Greenwich [Grad.Dip.Aesth.Med.]
 2. Board Certified in Aesthetic Medicine by A.A.A.M. [Aesth.Med. Board Cert. (A.A.A.M.)]
 3. Affiliate Fellow of Australasian College of Phlebology [A.F.A.C.P.]
 4. Member of The Royal College of Surgeons of England [M.R.C.S. (Eng)]
 5. University Diploma in Plastic Surgery from University of Paris [D.U. (Paris)]
 6. Fellow of Cosmetic Physicians College of Australasia [F.C.P.C.A.]
 7. Fellow of Faculty of Medicine of Australasian College of Cosmetic Surgeons [F.F.M.A.C.C.S.]
 8. Fellow of Australasian College of Cosmetic Surgeons [F.A.C.C.S.]
 9. Fellow of American Society of Cosmetic Breast Surgery [F.A.S.C.B.S.]
 10. Fellow of American Academy of Cosmetic Surgeons [F.A.A.C.S.]
- ii. by January 2015, he had the following relevant experience:
 1. approximately 11 years as a medical doctor;
 2. approximately 6 years working solely in surgical disciplines, the bulk being in plastic and reconstructive surgery in Great Britain;
 3. completion of focal fellowship terms in cosmetic breast surgery with Australasian College of Cosmetic Surgeons
- b. denies subparagraph (b), and says further that he was engaged as a contractor;
- c. denies subparagraph (c), and says further that training, supervision and assistance by the fifth defendant was not necessary and not provided;

Particulars

The Accreditation Deed between The Cosmetic Institute Parramatta Pty Ltd and Dr. Niroshan Sivathasan executed on 03 July 2014.

- d. says in answer to subparagraph (d), insofar as the allegation relates to him performing BAS as a TCI Surgeon at the TCI Parramatta Premises and the TCI Bondi Premises, he:
 - i. admits subparagraphs (i), (ii), (iv), (vi), (vii) and (viii);
 - ii. denies subparagraphs of (iii) and (v); and
 - iii. otherwise does not admit the balance of the paragraph.
- e. says in answer to subparagraph (e), that:

- i. he admits performing BAS on Amy Rickhuss, the first plaintiff, but does not admit performing BAS on other members said to comprise the Sivathasan Sub-Group as their identities have not been revealed; and
- ii. denies Amy Rickhuss, the first plaintiff and any member said to comprise the Sivathasan Sub-Group suffered injury, loss and damage as a consequence of him performing BAS.

14B. In answer to paragraph 14B of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14C. In answer to paragraph 14C of the 2nd FASC, the sixth defendant the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14D. In answer to paragraph 14D of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14E. In answer to paragraph 14E of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14F. In answer to paragraph 14F of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14G. In answer to paragraph 14G of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14H. In answer to paragraph 14H of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14I. In answer to paragraph 14I of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him

14J. In answer to paragraph 14J of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14K. In answer to paragraph 14K of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14L. In answer to paragraph 14L of the 2nd FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14M. In answer to paragraph 14M of the 2FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

14N. In answer to paragraph 14N of the 2FASC, the sixth defendant makes no admission, and otherwise does not plead a response, as no material allegation of fact is pleaded against him.

15. The sixth defendant admits paragraph 15 of the 2nd FASC.
16. In answer to paragraph 16 of the 2nd FASC, the sixth defendant:
- a. admits that BAS was performed at the TCI Parramatta and the TCI Bondi Premises, but does not admit BAS was performed at any other TCI Facilities;
 - b. to the extent the allegation relates to the TCI Parramatta and the TCI Bondi Premises, denies subparagraph (a);
 - c. to the extent the allegation relates to the TCI Parramatta and the TCI Bondi Premises, denies subparagraph (b);
 - d. does not admit subparagraph (c), and says further that during procedures conducted by the sixth defendant, he was accompanied at all times by a specialist anaesthetist;
 - e. in answer to subparagraph (d):
 - i. does not admit that the TCI Parramatta Premises and the TCI Bondi Premises were unlicensed premises;
 - ii. admits subparagraph (d)(i) to the extent it relates to the TCI Parramatta Premises and the TCI Bondi Premises; and
 - iii. does not admit subparagraph (d)(ii).
17. Insofar as it relates to the TCI Parramatta Premises and the TCI Bondi Premises, the sixth defendant admits paragraph 17 of the 2nd FASC, but does not admit it in relation to the other TCI Facilities.
18. Insofar as it relates to the TCI Parramatta Premises and the TCI Bondi Premises, the sixth defendant admits he was engaged as alleged in paragraph 18 of the 2nd FASC, but does not admit the paragraph in relation to the other TCI Facilities and the other TCI Surgeons.
19. Insofar as paragraph 19 of the 2nd FASC relates to him performing BAS as a TCI Surgeon at the TCI Parramatta Premises and the TCI Bondi Premises, the sixth defendant:
- a. admits he was engaged to perform BAS pursuant to a training agreement (**Training Agreement**);
 - b. admits he was engaged to perform BAS pursuant to an accreditation deed (**Accreditation Deed**);

Particulars

- (i) Deed for the Provision of training executed between the sixth defendant and The Cosmetic Institute Parramatta Pty Limited in about July 2014

(ii) Accreditation Deed executed between sixth defendant and The Cosmetic Institute Parramatta Pty Limited on 3 July 2014

- c. in relation to subparagraph (a):
 - i. says that the Training Agreement was modified such that the sixth defendant was not required to undertake any training by Eddy Dona or by anyone representing the interests of The Cosmetic Institute;
 - ii. admits that the sixth defendant was accredited under the control and supervision of Eddy Dona.
- d. admits subparagraph (b);
- e. admits subparagraph (c);
- f. admits subparagraph (d);
- g. admits subparagraph (e);
- h. denies subparagraph (f), and says further that the sixth defendant invoiced The Cosmetic Institute Parramatta Pty Ltd, the second defendant;
- i. does not admit subparagraph (g); and
- j. otherwise does not admit the paragraph.

20. In answer to paragraph 20 of the 2nd FASC, the sixth defendant:

- a. admits the paragraph to the extent the allegation is made in relation to the TCI Parramatta Premises and the TCI Bondi Premises; and
- b. otherwise does not admit the paragraph.

21. Insofar as paragraph 21 of the 2nd FASC relates to him performing BAS as a TCI Surgeon at the TCI Parramatta Premises and the TCI Bondi Premises, the sixth defendant denies that there was an “approach”, or that he followed a practice, of the type described in the paragraph as the “One Size Fits All Approach”, and:

- a. denies subparagraph (a);
- b. admits subparagraph (b);
- c. denies subparagraph (c), and says further that he was not limited to performing BAS via an infra-mammary incision approach;
- d. admits subparagraph (d);
- e. denies subparagraph (e), and says further that the sixth defendant was not limited to inserting implants into subpectoral pockets and/or using a dual plane approach;

- f. denies subparagraph (f);
- g. says, in answer to subparagraph (g)(i):
 - (i) to the extent the paragraph relates to him, he admits that he administered local anaesthesia and did so in the presence of and with the authorisation of an appointed TCI specialist anaesthetist when performing BAS;
 - (ii) denies twilight sedation was provided by TCI Anaesthetists, but says further that depending on each individual anaesthetist and the circumstances of each patient a different combination of anaesthetic drugs was administered by the appointed anaesthetist to effect (a) a state of comfort, (b) a less responsive state for the patient (c) a degree of amnesia, in order to allow BAS to be performed; and
 - (iii) says further that he had no control or responsibility over anaesthetic drug dosages.
- h. says, in answer to subparagraph (g)(ii), the TCI anaesthetists managed the state of anaesthesia and otherwise does not admit the subparagraph; and
- i. denies subparagraph (g)(iii).

22. In answer to paragraph 22 of the 2nd FASC, the sixth defendant:

- a. denies that there was an “approach”, or that he followed a practice, of the type described in the paragraph as the “One Size Fits All Approach”;
- b. denies the paragraph;
- c. says further that the procedures applied by him in performing the BAS did not increase the risk of the patients suffering any of the BAS Complications; and
- d. says any form of BAS surgery could encounter complications described in subparagraphs (a) to ~~(k)~~ (l).

23. Insofar as the allegations in paragraph 23 of the 2nd FASC are made in respect of his interactions with the first plaintiff, Ms Rickhuss, the sixth defendant denies the Representations were made by him and otherwise does not admit the paragraph.

23A. The sixth defendant does not admit paragraph 23A of the 2nd FASC.

24. Insofar as the allegations in paragraph 24 of the 2nd FASC are made against him in respect of his performing BAS as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff, the sixth defendant admits he attended a pre-surgery consultation with Ms Rickhuss on his own, and says subsequent to that consult, Ms Rickhuss consulted with a cosmetic consultant, but otherwise, does not admit it.

- 24A. Insofar as the allegations in paragraph 24A of the 2nd FASC are made against him in respect of his performing BAS as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff, the sixth defendant:
- a. admits the material facts alleged in the paragraph, but otherwise, does not admit it;
 - b. says that the matters set out in the particulars should be pleaded as material facts; and
 - c. for the avoidance of doubt, denies the matters set out in the particulars insofar as they are made in respect of his post-operative interactions with the first plaintiff, Ms Rickhuss
- 24B. Insofar as the allegations in paragraph 24B of the 2nd FASC are made against him in respect of his performing BAS as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff, the sixth defendant denies the paragraph, and otherwise, does not admit it.
- 24C. Insofar as the allegations in paragraph 24C of the 2nd FASC are made against him in respect of his performing BAS as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff, the sixth defendant denies the paragraph, and otherwise, does not admit it.
25. In answer to paragraph 25 of the 2nd FASC, the sixth defendant:
- a. repeats paragraph 3 above;
 - b. says that having regard to the matters there pleaded, he denies that the questions identified in paragraph 25 of the 2nd FASC arise in respect of BAS performed by him as a TCI Surgeon; and
 - c. says the pleading is embarrassing in that it propounds common questions different to 54 common questions set out in a document entitled "List of Common Questions", served by the plaintiffs on 13 November 2020, and which, the sixth defendant understands, the plaintiffs contend are the common questions; and
 - ~~d.e.~~ says that the questions identified in the paragraph are not questions of law or fact common to all group members, because:
 - (i) as to subparagraph (a), the sixth defendant admits that in performing BAS on Ms Rickhuss, the first plaintiff, as a TCI Surgeon at the TCI Parramatta Premises, he owed Ms Rickhuss a duty to exercise reasonable care and skill, and insofar as subparagraph (a) conflicts with that admission, it propounds a question on a matter that is not in issue;
 - ~~(i)}~~(ii) as to subparagraph (~~a~~b), the question identified in that subparagraph requires separate enquiries into the contractual relationship between each of the TCI Surgeons and each of the first, second, third or fourth defendants;

- (ii) ~~as to subparagraph (b), the question identified in that subparagraph requires separate enquiries into whether any of the TCI Surgeons made the representations alleged to any of the plaintiffs and other individual group members, on separate occasions;~~
- (iii) as to subparagraph (c), the question identified in that subparagraph requires separate enquiries into whether any of the defendants made the representations alleged to any of the plaintiffs and other individual group members, on separate occasions;
- (iv) as to subparagraph (d), the question identified in that subparagraph requires separate enquiries into whether any of the TCI Surgeons performed BAS negligently in respect of any of the plaintiffs and other individual group members;
- (v) as to subparagraph (e), and on the assumption that it is directed to the issue whether in implementing “the first to fifth defendants’ System of BAS”, the defendants were in breach of a relevant duty of care, the question identified in that subparagraph requires separate enquiries into whether the implementation of any “System of BAS” was negligent in respect of each plaintiff and individual group member;
- (vi) as to subparagraph (f), the question identified in that subparagraph requires separate enquiries whether the participation by the TCI Surgeons in any “System of BAS” was negligent in respect of each plaintiff and individual group member;
- ~~(vii)~~ (vii) as to subparagraph (eg), the question identified in that subparagraph requires separate enquiries into whether any of the defendants, in respect of any of the plaintiffs and other individual group members:
- A. failed to comply with the statutory guarantee under s 60 of the ACL;
 - B. ~~breached a common law relevant duty to exercise due of care and skill in~~ breached a common law relevant duty to exercise due of care and skill in informing the plaintiffs and group members about BAS, assessing them for BAS, performing BAS, and in managing them after they had undergone BAS;
 - ~~C. breached any implied warranty that BAS would be performed with due care and skill; and~~
 - ~~D.C. failed to comply with contravened any guarantee implied into the agreement by under s61(1)(2) of the ACL that BAS would be reasonably fit for the BAS Purpose; and~~

D. contravened any guarantee under s61(2) of the ACL that BAS would be of a nature, quality, state or condition that might reasonably be expected to achieve the BAS Results.

~~(vi)~~(viii) as to subparagraph (~~fh~~), the question identified in that subparagraph requires separate enquiries into whether any representations made by one or more of the defendants to one or more of the plaintiffs or other group members were misleading representations with respect to future matters for the purposes of s 4 of the ACL;

~~(vii)~~(ix) as to subparagraph (~~gi~~), the question identified in that subparagraph requires separate enquiries into whether any representations made by one or more of the defendants to one or more of the plaintiffs or other group members were false, misleading or deceptive and in contravention of ss 18, 29(1)(b), ~~and~~ 29(1)(m) and 34 of the ACL;

~~(viii)~~(x) as to subparagraph (~~hj~~), the question identified in that subparagraph requires separate enquiries into whether any representations made by one or more of the defendants to one or more of the plaintiffs or other group members where negligent misrepresentations;

~~(ix)~~(xi) as to subparagraph (~~ik~~), the question identified in that subparagraph requires separate enquiries into whether the fifth defendant devised, designed, implemented, supervised and conducted the training of each of the TCI Surgeons;

~~(x)~~(xii) as to subparagraph (~~jl~~), the question identified in that subparagraph requires separate enquiries into whether the fifth defendant recommended to any of the first, second, third or fourth defendants, in respect of each of the TCI Surgeons, that the relevant surgeons be accredited to perform BAS;

~~(xi)~~(xiii) as to subparagraph (~~km~~), the question identified in that subparagraph requires separate enquiries into whether the fifth defendant authorised accreditation, in respect of each of the TCI Surgeons, for the relevant surgeon to perform BAS;

~~(xii)~~(xiv) as to subparagraph (~~ln~~), the question identified in that subparagraph:

- A. assumes the exercise of the One Size Fits All approach without addressing the anterior question of whether such an approach existed; and

B. requires separate enquiries into whether, for each BAS performed, that BAS was performed in accordance with the alleged One Size Fits All approach;

~~(xiii)~~(xv) as to subparagraph ~~(m)~~, the question identified in that subparagraph requires separate enquiries into whether the BAS services provided to each of the group members were, in each case, provided under the control and direction of the first defendant;

~~(xiv)~~(xvi) as to subparagraph ~~(n)~~, the question identified in that subparagraph:

A. assumes the exercise of the One Size Fits All approach without addressing the anterior question of whether such an approach existed; and

B. requires separate enquiries into:

(i) whether a One Size Fits All Approach was adopted in respect of each group member; and

(ii) whether, in each case, the adoption of the alleged approach was negligent; and

(xvii) as to subparagraph (q), the question identified in that subparagraph requires separate enquiries whether, in each case, the alleged application of the One Size Fits All approach increased the risk of a given group member suffering from the BAS Complications; and

(xviii) as to subparagraph (r), the question identified in that subparagraph requires separate enquiries whether, firstly, a given defendant is liable to the plaintiffs, and if so, the basis thereof, and secondly, whether, in each case, the insurers are liable to indemnify that defendant.

~~(xv) does not admit that these proceedings otherwise raise questions of law or fact common to the claims of group members~~

(xix) says in further answer to paragraph 25 of the 2nd FASC that there may be questions of law or fact that are common to the claims of group members, but they are not the questions propounded in that paragraph.

Particulars

The sixth defendant will circulate to the parties questions that, he contends, may be common to the claims of group members, with a view to the parties agreeing thereon.

26. The sixth defendant does not admit paragraph 26 of the 2nd FASC.

27. In answer to paragraph 27 of the 2nd FASC, the sixth defendant:
- a. admits the material facts alleged in the paragraph;
 - b. says that the matters set out in the particulars should be pleaded as material facts; and
 - c. for the avoidance of doubt, denies the matters set out in the particulars.
28. The sixth defendant admits paragraph 28 of the 2nd FASC.
29. In answer to paragraph 29 of the 2nd FASC, the sixth defendant:
- a. denies the paragraph; but
 - b. says further that, in conjunction with a TCI specialist anaesthetist, he commenced BAS at the TCI Parramatta Premises on 30 January 2015 and was subsequently joined by another TCI specialist anaesthetist and surgeon to complete the BAS upon the first plaintiff.
30. In answer to paragraph 30 of the 2nd FASC, the sixth defendant:
- a. denies the paragraph; and
 - b. [REDACTED]
31. The sixth defendant admits paragraph 31 of the 2nd FASC.
32. The sixth defendant does not admit paragraph 32 of the 2nd FASC.
33. In answer to paragraph 33 of the 2nd FASC, the sixth defendant:
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
34. The sixth defendant admits paragraph 34 of the 2nd FASC.
35. The sixth defendant does not admit paragraph 35 of the 2nd FASC.
36. The sixth defendant does not admit paragraph 36 of the 2nd FASC.
37. In answer to paragraphs 37 – 77 inclusive of the 2nd FASC, the sixth defendant makes no admission, but does not otherwise plead a response, as no material allegation of fact is pleaded against him.

38. In answer to paragraphs 77FA – 77LL inclusive, the sixth defendant makes no admission, but does not otherwise plead a response, as no material allegation of fact is pleaded against him.

39.-77. NOT USED

78. In answer to paragraph 78 of the 2nd FASC, the sixth defendant:

- a. admits that in performing BAS on Ms Rickhuss, the first plaintiff, as a TCI Surgeon at the TCI Parramatta Premises, he owed Ms Rickhuss a duty to exercise reasonable care and skill;
- b. admits that he provided Ms Rickhuss advice about BAS; and
- c. otherwise does not admit the paragraph.

79. The sixth defendant admits paragraph 79 of the 2nd FASC insofar as it relates to the BAS he performed as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff, and otherwise does not admit the paragraph.

80. The sixth defendant denies paragraph 80 of the 2nd FASC insofar as it relates to the BAS he performed as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff, and otherwise does not admit the paragraph.

81. In answer to paragraph 81 of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.

81A. In answer to paragraph 81A of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.

81B. The sixth defendant denies paragraph 81B of the 2nd FASC.

81C. In answer to paragraph 81C of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.

81D. In answer to paragraph 81D of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.

81E. In answer to paragraph 81E of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.

81F. In answer to paragraph 81F of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.

81G. In answer to paragraph 81G of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.

81H. In answer to paragraph 81H of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.

- 81I. In answer to paragraph 81I of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.
- 81J. In answer to paragraph 81J of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.
- 81K. In answer to paragraph 81K of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.
- 81L. In answer to paragraph 81L of the 2nd FASC, the sixth defendant makes no admission and otherwise does not plead a response as no material allegation of fact is pleaded against him.

~~82-85. NOT USED~~

- ~~86-82.~~ The sixth defendant admits paragraph ~~8682~~ of the 2nd FASC insofar as it relates to the BAS he performed as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff, but otherwise does not admit the paragraph.
- ~~87-83.~~ The sixth defendant admits paragraph ~~8783~~ of the 2nd FASC insofar as it relates to the BAS he performed as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff, but otherwise does not admit the paragraph.
- ~~88-84.~~ The sixth defendant admits paragraph ~~8884~~ of the 2nd FASC insofar as it relates to the BAS he performed as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff, but otherwise does not admit the paragraph.
- ~~89-85.~~ The sixth defendant admits paragraph ~~8985~~ of the 2nd FASC.;
- ~~90-86.~~ In answer to paragraph ~~9086~~ of the 2nd FASC, the sixth defendant admits that when he performed BAS as a TCI Surgeon, he was aware that patients undergoing BAS could do so for purposes that included one or more of the matters defined as the BAS Purpose, and otherwise does not admit the paragraph.

~~91-87.~~ In answer to paragraph ~~9187~~ of the 2nd FASC, the sixth defendant:

- a. says that whether a given patient held the expectation that the result would include one or more of the matters there pleaded depended upon the patient and the proposition is expressed too generally;
- b. says that one's judgment about a given surgical outcome and whether it achieves the BAS Results may differ according to the subjective perception of the person exercising that judgment; and
- c. otherwise does not admit the paragraph.

~~92-88.~~ In answer to paragraph ~~9288~~ of the 2nd FASC, the sixth defendant admits that when he performed BAS as a TCI Surgeon, he was aware that some patients undergoing BAS had the

reasonable expectation that one or more of the matters said, in paragraph 9187 of the 2FASC, to comprise the BAS Results, would be the result, and otherwise does not admit the paragraph.

93.89. The sixth defendant denies paragraph 9389 of the 2nd FASC insofar as it relates to the BAS he performed as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff him, and otherwise does not admit the paragraph.

94.90. The sixth defendant denies paragraph 9490 of the 2nd FASC insofar as it relates to the BAS he performed as a TCI Surgeon at the TCI Parramatta Premises on Ms Rickhuss, the first plaintiff him, and otherwise does not admit the paragraph.

95.91. The sixth defendant does not admit paragraph 9591 of the 2nd FASC.

96.92. The sixth defendant does not admit paragraph 9692 of the 2nd FASC.

97.93. In answer to paragraph 9793 of the 2nd FASC, the sixth defendant repeats paragraph 23 above and otherwise does not admit the paragraph.

98.94. In answer to paragraph 9894 of the 2nd FASC, the sixth defendant repeats paragraph 23 above and otherwise denies the paragraph.

99.95. In answer to paragraph 9995 of the 2nd FASC, the sixth defendant:

- a. does not admit the paragraph;
- b. says that if Ms Rickhuss, the first plaintiff, relied upon and was induced by the Representations as alleged, such reliance was unreasonable because, on 29 January 2015, prior to performing BAS on her:
 - (i) he told Ms Rickhuss:
 - A. cosmetic breast augmentation is performed for aesthetic reasons;
 - B. revisionary surgery will be likely in the future because:
 - (1) breasts change in shape and size throughout the course of a woman's life, especially if she were to get pregnant and/or experience significant changes in body mass;
 - (2) the outcome from breast implants should 'not' be viewed as 'fixed for a lifetime';
 - (3) with age, tissues get weaker and breasts typically become saggier, and this frequently results in women wanting additional procedures
 - C. that complications can arise:
 - (1) from BAS immediately during surgery;
 - (2) from BAS within 48 hours after surgery;

- (3) from BAS within four weeks after surgery;
 - (4) from BAS after implants settle approximately 6 weeks onwards;
 - (5) from the administration of anaesthesia (short term and long term);
 - (6) due to implants; and
 - (7) due to patients factors which include non-compliance.
- (ii) Ms Rickhuss told him:
- A. that she was in a casual relationship with a male, but considered herself to be officially single;
 - B. she had no immediate plans to get married;
 - C. she had no immediate plans to have a baby in the near future because she was working in a canteen in the mines and worked on a fly-in-fly-out basis.

~~100-96~~. In answer to paragraph ~~10096~~ of the 2nd FASC, insofar as it contains allegations against him, the sixth defendant:

- a. denies the paragraph;
- b. says further in relation to Ms Rickhuss, the first plaintiff:
 - (i) if, which is not admitted, she suffered harm of the kind alleged in the 'particulars of injuries', she did so as the result of the materialisation of an inherent risk within the meaning of s 51 of the *Civil Liability Act 2005* (NSW);
 - (ii) her action on her cause of action in negligence is not maintainable because it was brought after the expiration of the 3 year post discoverability limitation period within the meaning of s 50C of the *Limitation Act 1969* (NSW);
- c. says further as to subparagraph (c):
 - (i) he repeats paragraph ~~9893~~ above; and
 - (ii) by reason of ss 137C(1) and 137E(1) of the *Competition and Consumer Act 2010* (Cth), the group members are not entitled to recover the damages claimed.

97. In answer to paragraphs 97 – 131 of the 2nd FASC, the sixth defendant makes no admission, but does not otherwise plead a response, as no material allegation of fact is pleaded against him.

98 – 99. NOT USED

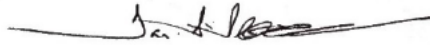
~~101-100~~. Further, in answer to the whole of the 2nd FASC, the sixth defendant says:

- a. the claim made against him in the 2FASC is a claim for damages for harm resulting from negligence, within the meaning of section 5A of the *Civil Liability Act 2002* (NSW) (the CLA);
- b. accordingly, Part 1A of the CLA applies to the claim;
- c. at all material times, including when he performed BAS as a TCI Surgeon:
 - i. he was a person practising a profession within the meaning of section 50 of the CLA;
 - ii. in his care and management of patients undergoing BAS, including Ms Rickhuss, the first plaintiff, he acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice; and
 - iii. accordingly, and pursuant to section 50 of the CLA, he does not incur a liability as alleged.

~~102,101~~. Further, if, which he denies, section 50 of the CLA requires that the sixth defendant establish that he acted in accordance with, or pursuant to, a practice that was in existence at the relevant time, then the sixth defendant says that the manner in which he acted accorded with, or was pursuant to, a practice in existence at that time.

SIGNATURE

Signature



Capacity Solicitor

Date of signature 24 March 2021

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