



**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST**

Case: S ECI 2020 04761
S ECI 2020 04761
Filed on: 19/08/2022 11:52 AM

BETWEEN

DANIELLE BOPPING

First Plaintiff

and

MICHELLE LOUISE PEDERSEN

Second Plaintiff

and

MONASH IVF PTY LTD (ACN 006 942 990) AND ORS

Defendants

SEVENTH DEFENDANT'S DEFENCE

Date of document: 19 August 2022
Filed on behalf of: The seventh defendant

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Note: Headings and definitions from the plaintiffs' amended statement of claim dated
2 June 2022 are used in this defence, unless the context indicates otherwise.

To the amended statement of claim, the seventh defendant (**Compass**) says as follows:

A. PRELIMINARY

1. It admits paragraph 1.
2. It admits paragraph 2.
3. It does not know, and therefore does not admit paragraph 3.
4. It does not know, and therefore does not admit paragraph 4.
5. It does not know, and therefore does not admit paragraph 5.

The defendants

6. It admits paragraph 6 and says further that, during the relevant period:
 - (a) an employee of Monash IVF provided services to Compass as Scientific Director, which employee was Professor Michelle Lane until about 22 November 2018, and thereafter Dr Hassan Bakos;
 - (b) pursuant to a Share and Unit Holders Agreement, Monash IVF had the right to appoint a single director of Compass;
 - (c) pursuant to a Share and Unit Holders Agreement, Monash IVF owned 25% of the units in the unit trust of which Compass was trustee;
 - (d) Monash IVF owned 25% of the shares in Compass;
 - (e) pursuant to a Share and Unit Holders Agreement, Monash IVF was required to provide, inter alia, usage of the intellectual property of Monash IVF, an IT platform including the Monash IVF data base, Clinical and Laboratory Protocols and Procedures, assistance with accreditation to comply with regulatory bodies, inclusion of staff in ongoing in-service and education to maintain consistency and quality throughout the organisation, and training of nursing and scientific staff to comply with Monash IVF standards.

7. It admits paragraph 7.

8. As to paragraph 8, it:
 - (a) admits paragraph 8(a);
 - (b) does not admit paragraph 8(b);
 - (c) admits paragraph 8(c).

- 8A-8C. It does not know, and therefore does not admit paragraphs 8A to 8C.

- 8D. As to paragraph 8D, it:
- (a) admits paragraph 8D(a);
 - (b) admits that it operated a fertility treatment clinic and provided IVF treatment and related services to patients of Compass in the Australian Capital Territory, and otherwise denies paragraph 8D(b).
- 8E. It does not know, and therefore does not admit paragraph 8E.
9. [There is no paragraph 9].
10. It denies paragraph 10, and says further that:
- (a) Compass did not deliver the niPGT-A testing to any group members, whether patients of Compass or not;
 - (b) any niPGT-A testing upon embryos belonging to patients of Compass was not provided by Compass, but by Repromed;
 - (c) further, the plaintiffs were not patients of Compass;
 - (d) says further that it arranged for Repromed to perform niPGT-A testing for certain of its patients during the relevant period, and that it collected and arranged for the transport to Repromed of DNA samples from culture media for that purpose.
- 10A. As to paragraph 10A, to the extent the allegations relate to Compass, it:
- (a) does not admit paragraph 10A;
 - (b) refers to and repeats paragraphs 6 and 10 above;
 - (c) says further that the accounts of Compass were not consolidated into the accounts of Monash IVF Group, and Monash IVF Group did not hold any ownership interest in Compass.

IVF research and treatment

11. It admits paragraph 11.
12. As to paragraph 12, insofar as the allegations relate to Compass, it:
 - (a) refers to and repeats paragraph 10 above;
 - (b) says that from time to time it arranged for Repromed to perform embryo biopsy testing for certain of its patients, and that it collected the biopsy material and arranged for the transport to Repromed of such material for that purpose;
 - (c) otherwise does not admit paragraph 12.
13. As to paragraph 13, it:
 - (a) refers to and repeats paragraph 10;
 - (b) does not know, and therefore does not admit paragraph 13;
 - (c) says further that it reasonably relied upon some or all of Monash IVF, Monash IVF Group and Repromed and the information, research, advice and recommendations provided by them in respect of niPGT-A testing;
 - (d) it reasonably relied upon the NATA accreditation obtained by Repromed in respect of niPGT-A testing.
14. It refers to its non-admission of paragraph 13 above, and otherwise denies paragraph 14.
15. As to paragraph 15, insofar as the allegations relate to Compass, it:
 - (a) says that Repromed carried out a pilot study known as NEST4E;
 - (b) a clinical trial carried out by Repromed followed NEST4E and was given identification number ACTRN 12617000500358;
 - (c) otherwise denies paragraph 15.

16. It refers to and repeats paragraph 15 above, and as to paragraph 16, insofar as the allegations relate to Compass, it:

- (a) admits it did not publish the results of the clinical trial, as it did not conduct the clinical trial alleged;
- (b) refers to and repeats paragraph 13 above, and otherwise denies paragraph 16(b);
- (c) does not admit paragraph 16(c);
- (d) refers to and repeats paragraph 10 above, and otherwise denies paragraph 16(d);
- (e) says further that a testing validation period ran for approximately 3 months from around 1 August 2019 to 18 November 2019 during which Repromed performed embryo biopsy and niPGT-A testing in relation to each tested embryo for certain patients of Compass, in respect of which Compass was not made aware of any abnormalities or concerns.

17. As to paragraph 17, insofar as the allegations relate to Compass, it:

- (a) denies paragraph 17(a);
- (b) admits paragraph 17(b), and says further that it suspended the arrangement of niPGT-A testing by Repromed at the direction of the Scientific Director employed by Monash IVF;
- (c) says that it notified in October 2020 those patients of Compass who had an embryo that was aneuploid according to niPGT-A testing that niPGT-A testing had been suspended, and otherwise does not admit paragraph 17(c).

18. It does not admit paragraph 18, and otherwise refers to and repeats paragraph 12 herein.

19. It denies paragraph 19.

20. It denies paragraph 20.

Informed consent

21. As to paragraph 21, it:

(a) admits it did not communicate with the plaintiffs or those group members who were not patients of Compass;

(b) as to patients of Compass, any proper plea in response to such an allegation requires an assessment of the particular circumstances of each such patient and the information provided to them in writing and orally by Compass, its clinicians or third parties involved in the provision of IVF treatment to them.

22. It refers to and repeats paragraph 21 above, and otherwise denies paragraph 22.

B. CONTRACTS

The first plaintiff's treatment

23. It does not know, and therefore does not admit paragraph 23.

24. It does not know, and therefore does not admit paragraph 24.

25. It does not know, and therefore does not admit paragraph 25.

The second plaintiff's treatment

26. It does not know, and therefore does not admit paragraph 26.

27. It does not know, and therefore does not admit paragraph 27.

28. It does not know, and therefore does not admit paragraph 28.

28A. It admits that it entered into agreements with patients of Compass to provide them with IVF treatment or related services in the Australian Capital Territory, and otherwise denies paragraph 28A.

Testing and destruction of embryos

- 29. It does not know, and therefore does not admit paragraph 29.
- 30. It does not know, and therefore does not admit paragraph 30.
- 31. It does not know, and therefore does not admit paragraph 31.
- 32. It does not know, and therefore does not admit paragraph 32.
- 33. It does not know, and therefore does not admit paragraph 33.
- 34. It does not know, and therefore does not admit paragraph 34.

Terms of the agreements

- 35. It does not know, and therefore does not admit paragraph 35.

Breach of agreements

- 36. Insofar as the allegations relate to Compass, it denies paragraph 36 and says further that it was not a party to the agreements which allegedly contained the Due Care Term.

C. BREACH OF GUARANTEES UNDER THE AUSTRALIAN CONSUMER LAW

- 37. Insofar as the allegations relate to Compass, it refers to and repeats paragraph 8D and 10 above, and otherwise denies paragraph 37.
- 38. Insofar as the allegations relate to Compass, it refers to and repeats paragraph 10 above, and otherwise denies paragraph 38.
- 39. Insofar as the allegations relate to Compass, it refers to and repeats paragraph 10 above, specifically denies that it was engaged by the plaintiffs or group members to provide niPGT-A testing, and otherwise denies paragraph 39.
- 40. Insofar as the allegations relate to Compass, it refers to and repeats paragraph 10 above, and otherwise denies paragraph 40.
- 41. It denies paragraph 41.

42. Insofar as the allegations relate to Compass, it:
- (a) denies paragraph 42;
 - (b) refers to and repeats paragraphs 10 and 13 above;
 - (c) refers to its non-admission in paragraph 45;
 - (d) says that patients of Compass were informed, inter alia, that niPGT-A was not 100% accurate;
 - (e) says in the alternative that some or all of the loss alleged was not reasonably foreseeable as required by s 267(4) of the Australian Consumer Law;
 - (f) says further that, by reason of s 275 of the Australian Consumer Law, Parts 3.2, 4.1, 4.2, 4.3, 7.1 and 7.2 of the *Civil Liability (Wrongs) Act 2002* (ACT) apply to limit or preclude liability for any failure to comply with a guarantee.

D. NEGLIGENCE

Duty

43. As to paragraph 43, insofar as the allegations relate to Compass, it:
- (a) does not admit paragraphs 43(a)(i), (ii) and (iv) and denies paragraph 43(a)(iii);
 - (b) does not admit paragraph 43(b);
 - (c) denies paragraph 43(c);
 - (d) otherwise refers to and repeats paragraphs 10 and 13 above.

44. As to paragraph 44, it:
- (a) refers to the matters pleaded in paragraph 44 of the defence of Monash IVF dated 28 May 2021 to the plaintiffs' statement of claim dated 23 April 2021;
 - (b) otherwise denies paragraph 44.
45. It does not admit paragraph 45.
46. It does not admit paragraph 46.
47. It refers to and repeats paragraphs 10 and 13 above, and otherwise denies paragraph 47.
48. As to paragraph 48, it:
- (a) admits it did not communicate with the plaintiffs or those group members who were not patients of Compass;
 - (b) as to patients of Compass, any proper plea in response to such an allegation requires an assessment of the particular circumstances of each such patient and the information provided to them in writing and orally by Compass, its clinicians or third parties involved in the provision of IVF treatment to them.
49. It does not admit paragraph 49.
50. It refers to and repeats its denial of paragraph 10 above, and therefore denies paragraph 50.
51. It refers to and repeats its denial of paragraph 10 above, and therefore denies paragraph 51.
52. It denies paragraph 52.
53. It does not admit paragraph 53.

54. In respect of the plaintiffs and those group members who were not patients of Compass, it denies the allegations, and otherwise does not admit paragraph 54.
55. In respect of the plaintiffs and those group members who were not patients of Compass, it denies the allegations, and otherwise does not admit paragraph 55.
56. [There is no paragraph 56.]
57. It does not plead to paragraph 57 as it contains no allegations against it.

Precautions and Breach

58. Insofar as the allegations relate to Compass, it denies paragraph 58.
59. Insofar as the allegations relate to Compass, it denies paragraph 59.
60. It says that paragraph 60 is vague and embarrassing, and otherwise denies paragraph 60.
61. It refers to paragraphs 10 and 13 above, and otherwise denies paragraph 61.
62. Insofar as the allegations relate to Compass, it denies paragraph 62.

E. MISLEADING AND DECEPTIVE CONDUCT; MISREPRESENTATION

63. It cannot plead to paragraph 63 as it contains no allegations against it.
64. It cannot plead to paragraph 64 as it contains no allegations against it.
65. It does not know and therefore does not admit paragraph 65.
66. It does not know and therefore does not admit paragraph 66.
67. As to paragraph 67, it:
 - (a) says that paragraph 67 is vague and embarrassing;
 - (b) in any event, refers to and repeats paragraph 13 above;
 - (c) otherwise denies paragraph 67.
68. It cannot plead to paragraph 68 as it contains no allegations against it.

69. It cannot plead to paragraph 69 as it contains no allegations against it.
70. It cannot plead to paragraph 70 as it contains no allegations against it.
71. In respect of the plaintiffs and those group members who were not patients of Compass, it denies the allegations, and otherwise does not admit paragraph 71.

F. CAUSATION, LOSS AND DAMAGE

72. It says the plaintiffs were not patients of Compass, and otherwise denies paragraph 72 insofar as the allegations relate to Compass.
73. It says the plaintiffs were not patients of Compass, and otherwise denies paragraph 73 insofar as the allegations relate to Compass.
74. It says the plaintiffs were not patients of Compass, and otherwise denies paragraph 74 insofar as the allegations relate to Compass.
75. As to paragraph 75, it:
- (a) denies the allegations in respect of the plaintiffs and those group members who were not patients of Compass;
 - (b) as to patients of Compass, any proper plea in response to such an allegation requires an assessment of the particular facts and circumstances relevant to each individual patient;
 - (c) says further that, in respect of any claims by patients of Compass, it relies upon Parts 3.2, 4.1, 4.2, 4.3, 7.1 and 7.2 of the *Civil Liability (Wrongs) Act 2002 (ACT)*;
 - (d) in particular, as to causation, it relies upon the burden of proof placed upon each individual patient of Compass to prove any negligence by Compass was a necessary condition of the happening of the particular harm alleged, by reason of ss 45(1)(a) and 46 of the *Civil Liability (Wrongs) Act*,

- (e) it says that a loss of chance or loss of opportunity of the kind relied on in the particulars to paragraph 75 is not compensable damage;
- (f) in any event, it says that the majority of the patients of Compass who had an embryo that was aneuploid according to niPGT-A testing during the relevant period became pregnant thereafter.

G. COMMON QUESTIONS

- 76. It denies paragraph 76, and says, in the alternative, that if there are any common questions as concerns the allegations against Compass then appropriate common questions ought to be formulated prior to trial.

Dated: 19 August 2022

A N Murdoch

M J Hooper

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Avant Law

Solicitors for the Seventh Defendant