

SUPREME COURT OF VICTORIA



MONASH IVF CLASS ACTION

DANIELLE BOPPING

MICHELLE LOUISE PEDERSEN

V

MONASH IVF PTY LTD (ACN 006 942 990)

ADELAIDE FERTILITY CENTRE PTY LTD trading as Repromed (ACN 116 453 126)

MONASH IVF GROUP LIMITED (ACN 169 302 309)

MONASH IVF AUCHENFLOWER PTY LTD (ACN 111 370 891)

PALANTROU PTY LIMITED (ACN 111 795 692)

HOBART IVF PTY LTD (ACN 610 573 889)

COMPASS FERTILITY PTY LTD (ACN 130 793 583)

FERTILITY AUSTRALIA PTY LTD (ACN 117 504 766)

S ECI 2020 04761

## IMPORTANT NOTICE

### **ACTION REQUIRED BY 3 MARCH 2023**

On 23 December 2020, Ms Danielle Bopping (**the Plaintiff**) commenced this representative proceeding in the Supreme Court of Victoria. The proceeding is being pursued against Monash IVF Pty Ltd, Adelaide Fertility Centre Pty Ltd (trading as Repromed) and Monash IVF Group Limited (**Monash IVF Group**) (**the Defendants**). Michelle Louise Pedersen has since been joined as a second plaintiff, and Monash IVF Auchenflower Pty Ltd, Palantrou Pty Limited, Hobart IVF Pty Ltd, Compass Fertility Pty Ltd and Fertility Australia Pty Ltd have since been joined as further defendants.

This representative proceeding is brought by the plaintiffs on their own behalf, and on behalf of all persons who are alleged to have suffered harm as a result of the provision of the service of cell-free non-invasive pre-implantation genetic testing (“niPGT-A testing”) of their live embryos between May 2019 and October 2020.

The Supreme Court has ordered that this notice be published for the information of persons who might be group members in the proceeding and who may be affected by it.

**You should read this notice carefully. Any questions you have concerning the matters contained in this notice should not be directed to the Court.** If there is anything in it that you do not understand, you should seek legal advice.

## **1. What is a group proceeding?**

A group proceeding, also known as a class action, is a proceeding brought by the plaintiffs on their own behalf and on behalf of group members against the defendants, where the plaintiffs and the group members have similar claims against the defendants.

Group members are bound by any judgment in or settlement of the group proceeding unless they choose not to participate by “opting out” of the proceeding. This means that:

- (a) if the group proceeding is successful or settles through mediation or alternative dispute resolution, group members may be eligible for a share of any court awarded damages or settlement monies;
- (b) if the group proceeding is unsuccessful, group members are bound by that result; and
- (c) regardless of the outcome of the group proceeding, group members will not be able to pursue their claims against the defendants in separate legal proceedings unless they have opted out.

## **2. What is the Monash IVF class action about?**

The plaintiffs allege that the defendants should not have used niPGT-A testing, and did not warn them of certain alleged risks of the niPGT-A testing conducted or provided by the defendants.

In particular, the plaintiffs allege that the defendants did not warn them of the risk that the testing might yield false positive results and therefore a potentially erroneous determination that an embryo was aneuploidy and not suitable for transfer.

It is alleged that the failure by the defendants to give such a warning meant that the plaintiffs and group members did not give proper informed consent for the niPGT-A to occur.

It is alleged that niPGT-A was used as the sole basis for determining embryo viability, and that niPGT-A ought not to have been used as the sole basis for determining embryo viability.

The plaintiffs allege breach of contract, breach of Australian Consumer Law, negligence, misleading and deceptive conduct and misrepresentation.

The defendants deny that they are liable to group members. They defend the claims in breach of contract, breach of Australian Consumer Law, negligence and misrepresentation.

Copies of the amended statement of claim filed by the plaintiffs and the defences filed by the defendants are available for download from the website of the solicitors of the plaintiffs (see below).

### 3. Are you a group member?

Group members are those who:

- (a) were patients of any of the defendants between May 2019 and October 2020 (inclusive);  
and who
  - (i) received in vitro fertilisation (IVF) treatment provided by any of the defendants; and/or
  - (ii) were provided the service of cell-free non-invasive pre-implantation genetic testing of their live embryos (fertilized eggs) for aneuploidy (niPGT-A) undertaken by or on behalf of any of the defendants;  
and
  - (iii) had embryos classified by or on behalf of any of the defendants as abnormal (aneuploid) as a result of niPGT-A; and
  - (iv) had embryos destroyed or discarded, or did not proceed to embryo transfer (implanting into the uterus for the purpose of achieving live pregnancy) (transfer) as a result of the niPGT-A indicating embryos were positive for aneuploidy; and
  - (v) received written or oral notification from any of the defendants that the niPGT-A of embryos by or on behalf of any of the defendants has been suspended;
- (c) were a spouse, or domestic partner of persons in (a);
- (d) suffered loss and/or damage by way of:

- A. psychiatric injury (as defined below) or physical inconvenience as a result of:
- (i) receipt of the notification in (a)(v) above; and/or
  - (ii) the destruction of, and/or the failure to transfer, an embryo classified as aneuploidy as a result of the niPGT-A,

where "psychiatric injury" in this group means nervous shock or another psychiatric or psychological injury, disturbance, disorder or condition which has been diagnosed as such in a diagnosis given to the person by a medical practitioner prior to 31 December 2021, including, but not limited to, any psychiatric injury suffered as a result of an increase in the likelihood that an embryo was needlessly destroyed, or was not transferred, because it was incorrectly classified as aneuploidy as a result of the niPGT-A; and/or

- B. financial loss as a result of the niPGT-A;
- (e) are the legal personal representatives of the estates of any deceased persons who came within paragraphs (a) to (d) above.

If you are unsure whether or not you are a group member, you should contact Margalit Injury Lawyers on 03 9133 0288 or email [classaction@margalitlawyers.com.au](mailto:classaction@margalitlawyers.com.au) or seek your own legal advice without delay.

#### 4. What does 'opt out' mean?

The plaintiffs in a group proceeding do not need to seek the consent of group members to commence a group proceeding on their behalf. However, group members can cease to be group members by "opting out" of the group proceeding. If you do not want to continue to be a group member, you can opt out now (see below).

#### 5. Will you be liable for legal costs if you remain a group member?

You will **not become liable for any legal costs** simply by remaining as a group member. However:

- (a) if the preparation or finalisation of your personal claim requires work to be done in relation to issues that are specific to your claim, you can engage Margalit Injury Lawyers or other lawyers to do that work for you. A copy of the terms on which Margalit Injury Lawyers are acting in the group proceeding may be obtained from them (contact details below);
- (b) if any compensation becomes payable to you as a result of any order, judgment or settlement in the group proceeding, the Court may make an order that some of that compensation be used to help pay a share of the costs that are incurred by

the plaintiffs in running the group proceeding but which are not able to be recovered from the defendants; and

- (c) group proceedings are often settled out of court. If that occurs in this proceeding, you may be able to claim from the settlement amount without retaining a lawyer.

## 6. What are the next major steps in the class action?

The parties are continuing to prepare for a trial of the class action, although no date has yet been set for it.

However, the Court has ordered that before the trial occurs, the plaintiffs and defendants go to a mediation before 31 May 2023. It is possible that the parties may agree to settle the case at such a mediation or after such a mediation. Any settlement will only take effect if the Court approves it as fair and reasonable.

Any settlement reached between the parties may include releases of the kind that are commonly sought by defendants in relation to the settlement of class actions. These may include releases of the defendants and their related entities in respect of:

- (a) all claims made on behalf of group members against the defendants in the class action; and
- (b) any claims which may be made on behalf of group members against the defendants and/or their related entities which relate to the matters or issues that are the subject of the class action.

It is important that, if you want to benefit from any settlement which might be reached in or after a mediation that might then be approved by the Court, that you take the steps to register described below. If you do not do so and the parties settle the class action at or after the mediation (subject to Court approval), you may be ineligible to claim any money that might be paid as part of any settlement.

## 7. What should you do?

### Option 1

**Register by 3 March 2023 to participate in any settlement which the parties may reach (subject to Court approval) before the commencement of the trial of the proceeding.**

**If you wish to remain a group member** and claim a share of any money that might be paid under a settlement (subject to Court approval) which the parties may reach before the commencement of the trial of the proceeding, you must contact the plaintiffs' lawyers, Margalit Injury Lawyers, at <https://margalitlawyers.com.au/monash-ivf->

[class-action/](#) and complete the form for registration enclosed at Annexure B below.

Registration is for the purposes of identifying that you want to participate in the proceeds of such a settlement, and will not make your name public.

**If you do not register, and the parties agree to a settlement before the commencement of the trial of the proceeding which is approved by the Court, then subject to any further order of the Court you will be excluded from claiming any share of any money that might be paid in such a settlement. You will also be bound by any releases which may be given in the settlement, meaning that you may lose your rights which are subject of this class action against the defendants forever.**

If you do register but the parties do not agree to settle before the commencement of the trial of the proceeding, the class action will proceed as usual. You will be entitled to participate in any subsequent settlement or judgment.

You must send the completed registration form to **Margalit Injury Lawyers** by **no later than 4pm (AEST) on 3 March 2023**.

### **Option 2**

**Opt out of the class action by 3 March 2023.**

**If you do not wish to remain a group member**, you must opt out of the class action by completing the “Notice of Opting Out by Group Member” form below and returning it to the Supreme Court of Victoria at the address on the form.

If you opt out, you will not be bound by any order, judgment or settlement in the class action and you will be able to bring your own claim against the defendants within any applicable time limits that apply to bringing such a claim. However, if you opt out, you will not be entitled to any share in the benefit of a successful outcome in the class action, whether that is achieved by settlement or judgment.

If you wish to bring your own claim against the defendants, you should seek your own legal advice about your claim and the applicable time limits that apply to bringing a claim before opting out.

**If you wish to opt out, you must send your “Notice of Opting Out by Group Member” form to the Supreme Court so that it arrives BEFORE 4:00pm on 3 March 2023** otherwise it may not be effective.

### **Option 3**

**Do nothing—meaning that you will not take part in any settlement that may be reached (subject to Court approval, and subject to any further order of the Court) before the commencement of the trial.**

**If you neither register nor opt out** in accordance with Options 1 or 2 above, you will remain a group member but not be entitled to claim a share of any money that might be paid under a settlement (subject to Court approval, and subject to any further order of the Court) which the parties may reach before the commencement of the trial.

This means if the parties reach a settlement before the commencement of the trial which is approved by the Court, you will be excluded from claiming any share of any money that might be paid in that settlement (subject to any further order of the Court). You will also be bound by any releases, meaning that you may lose your rights which are subject of this class action against the defendants forever.

If however the parties do not reach a settlement before the commencement of the trial which is approved by the Court, then you will remain entitled to participate in any subsequent settlement or judgment.

If you consider that you have claims against any of the defendants which are based on your individual circumstances, or otherwise additional to the claims described in the class action, it is important that you seek independent legal advice about whether you should remain a group member **before** the deadline for registration and opting out.

#### 8. **Where can you obtain copies of relevant documents?**

Copies of relevant documents, including the statement of claim filed by the plaintiffs and the defences filed by the defendants, can be obtained by:

- (a) downloading them from <https://margalitlawyers.com.au/monash-ivf-class-action/>;
- (b) telephoning Margalit Injury Lawyers on (03) 9133 0288 and requesting that a copy be posted or emailed;
- (c) inspecting them by visiting the Registry of the Supreme Court of Victoria in Melbourne at Ground Floor, 450 Little Bourke Street, Melbourne; or
- (d) locating them on the Supreme Court website at:  
<https://www.supremecourt.vic.gov.au/areas/group-proceedings/monash-ivf>

Please consider the above matters carefully. If you are not sure whether you are a group member or want further information, you should contact **Margalit Injury Lawyers** on (03) 9133 0288 or email [classaction@margalitlawyers.com.au](mailto:classaction@margalitlawyers.com.au), or seek your own legal advice.

You should not delay in making your decision, as the deadline for the opt out and registration is **3 March 2023**.

This notice is published pursuant to Orders made by the Supreme Court on 20 December 2022.

**Annexure A**

**NOTICE OF OPTING OUT BY A GROUP MEMBER**

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

No. S ECI 2020 04761

BETWEEN:

**DANIELLE BOPPING and anor**

**Plaintiffs**

and

**MONASH IVF PTY LTD (ACN 006 942 990) and ors**

**Defendants**

To: The Prothonotary, Supreme Court of Victoria Registry,  
 210 William Street, Victoria 3000

I, [*print name*], .....  
 a group member in the above group proceeding, give notice under section 33J(2) of  
 the **Supreme Court Act 1986** that I am opting out of this proceeding.

Date:	
Signature of group member or the group member's solicitor:	
Address of group member:	

**Please return this notice by 3 March 2023 to:**

The Group Proceedings Coordinator

**By email:**

[cldgroupproceedings@supcourt.vic.gov.au](mailto:cldgroupproceedings@supcourt.vic.gov.au)

**Or by mail:**

Supreme Court of Victoria Registry,  
 Level 2, 436 Lonsdale Street,  
 Melbourne VIC 3000



**Annexure B**

**REGISTRATION FORM  
MONASH IVF CLASS ACTION (PROCEEDING NO: S ECI 2020 04761)**

**To register for the Monash IVF Class Action, please provide the information requested below.**

**Details of the group member**

1. Name of Group Member (print): .....
2. Address of Group Member: .....
3. Email address of Group Member: .....
4. Mobile number of Group Member: .....
5. Date of birth of Group Member: .....
6. Please indicate the type of Group Member:
  - A patient who satisfies the definition set out at [3] of the Notice above **(Patient)**; or
  - A person who is or was the spouse or domestic partner of a Patient **(Partner)**.
7. If the Group Member is or was the Partner of a Patient, please provide the name of the Patient: .....

**Details of claim**

8. Please specify the clinic at which the Group Member, or in the case of Partners, the spouse or domestic partner of the Group Member, received IVF treatment (name and address of clinic):  
.....  
.....
9. Please specify when, and from whom the Group Member, or in the case of Partners, the spouse or domestic partner of the Group Member, received information about niPGT-A?  
.....  
.....  
.....
10. Please specify if the Group Member, or in the case of Partners, their spouse or domestic partner, had a successful pregnancy and birth prior to treatment with the one of the defendants and if so, when:
  - Yes, and date of birth(s).....
  - No
11. Please specify the following information, if known:
  - a. Number of cycles in which niPGT-A was used: .....

- b. Number of embryos obtained: .....
- c. Number of embryos deemed aneuploid as a result of niPGT-A :  
.....

12. Please specify whether additional IVF cycles were undertaken as a result of having embryos deemed aneuploid as a result of niPGT-A:

- Yes
- No

13. If yes to question 12:

- a. Number of additional cycle(s) .....
- b. Which clinic did you have these additional cycles performed at?.....
- c. Number of embryos created in subsequent cycles.....
- d. Did you have any embryos tested in this/these additional cycles?
  - Yes. If yes, how many embryos were marked as no abnormality detected (euploid)?.....
  - No

14. Please specify whether the Group Member or, in the case of Partners, their spouse or domestic partner, has gone on to have a successful pregnancy and birth:

- Yes
- No

15. If yes to question 14, was pregnancy and birth achieved following: further IVF cycles or only frozen embryo transfer(s) (FET):

- by FET only (but no further cycles), please specify the number of FET before pregnancy and birth achieved?.....
- further IVF cycles and embryo transfers, please specify the number of further cycles undertaken and further embryo transfers before pregnancy and birth achieved?.....

16. Please specify whether the Group Member suffered any of the following as a result of embryos being deemed aneuploid by niPGT-A and finding out about the suspension of niPGT-A (please tick all that apply):

- Psychiatric or psychological injury  
(Date of onset of symptoms and please specify diagnosis (if a diagnosis has been obtained))  
.....  
.....
- Nervous shock  
(Date of onset of symptoms and please specify diagnosis(if a diagnosis

has been obtained))

.....  
.....

- Pain and suffering
- Emotional or mental harm
- Medical and like expenses
- Financial loss, for example wage loss

(Please specify what financial loss was suffered and if wage loss, how many hours/days lost and hourly rate/annual salary?)

.....  
.....

- Other (please specify):

.....  
.....

17. Did the Group Member seek any of the following as a consequence of the niPGT-A deeming embryo/s aneuploid:

- Donor eggs, sperm or embryos
- Surrogacy
- Adoption

18. Please provide any further details or supporting documents you have in relation to the alleged loss and damage identified in response to question 12. This can be included as a separate document if you need more space.

.....  
.....  
.....  
.....

**Please return this Registration Form to Margalit Injury Lawyers by either:**

- i. Emailing the form to: [classification@margalitlawyers.com.au](mailto:classification@margalitlawyers.com.au)
- ii. Mailing this form to

Margalit Injury Lawyers at:  
Suite 4  
107-111 High Street  
Prahran VIC 3181

**IMPORTANT: Please ensure that you return this Registration Form to Margalit Injury Lawyers by no later than 4pm (AEST) on 3 March 2023**