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

Not Restricted

S ECI 2022 00739

BETWEEN:

TINA LOMBARDO & ORS
(according to the attached Schedule)

Plaintiffs

-and-

DERMATOLOGY AND COSMETIC SURGERY SERVICES PTY LTD
(ACN 055 927 618) & ORS
(according to the attached Schedule)

Defendants

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	28 July 2023
DATE OF JUDGMENT:	10 August 2023
CASE MAY BE CITED AS:	Lombardo v Dermatology and Cosmetic Surgery Services Pty Ltd
MEDIUM NEUTRAL CITATION:	[2023] VSC 463

PRACTICE AND PROCEDURE – Group proceeding – Pleadings – Leave to amend statement of claim – More precise pleading required – No point of principle.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Georgina Costello KC, Anastasia Smietanka and Declan Murphy	Maddens Lawyers
For the First Defendant	Patrick Over	L A Warren Lawyers
For the Second Defendant	Angus Christophersen	Kennedys (Australasia)
For the Third - Sixth Defendants	Mary-Anne Hartley KC and Morgan McLay	Gilchrist Connell

For the Seventh Defendant	Fiona McLeod KC and Lindy Barrett	Colin Biggers & Paisley Lawyers
For the Eighth Defendant	Daniel Bongiorno	Colin Biggers & Paisley Lawyers

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HIS HONOUR:

The application

1 Four plaintiffs applied for leave to file an amended statement of claim in the form of the proposed pleading (**FPSOC**) included in the court book for the application. By the amendment, the plaintiffs proposed amending the group definition.

2 The background to this application is that more than 1000 persons have now registered with the plaintiffs' solicitors. Although the plaintiffs' initial general indorsement of claim was distinctly uninformative as a first attempt at a statement of claim, the pleading currently before the court has followed on the plaintiffs' responses to exchanges between the legal teams through several drafts.

3 The defendants remain opposed to leave being granted.

4 The plaintiffs submitted the FPSOC was adequate to allow the proceeding to move forward and that the plaintiffs should have leave to file it. That said, the plaintiffs stated they would respond to some issues by further amendment before doing so. I accept the plaintiffs' submissions that the pleading has been considerably refined and that the case to be met is 'tolerably clear', and will become clearer through requests for particulars and other interlocutory processes. However, I am also persuaded that the defendants' search for a more perfect pleading of the claims against them is not simple pedantry and more precise pleading is likely to save time and cost in the long run. I consider that some of the 'fixes' suggested by the plaintiffs may not address the root cause of particular issues raised and that the pleaders may benefit from a little more time for a closer review.

5 I propose to refuse the plaintiffs leave to file the FPSOC, with a direction that they submit a second FPSOC within 28 days and, to assist the parties in that process, I will address the principal submissions put on this application.

6 The four plaintiffs bring the proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic), on behalf of themselves and all persons who have

claims for loss or damage based on negligence, breach of contract or consumer law breaches in the context of cosmetic surgery being performed on them by Drs Lanzer, Aronov, Darbyshire, Wells, Fallahi or Wong (the second to seventh defendants). Drs Aronov, Darbyshire, Wells, Fallahi or Wong are collectively referred to as the **Other Cosmetic Doctor Defendants**. The plaintiffs, who were patients who underwent cosmetic surgery procedures carried out by either Dr Lanzer or the other cosmetic surgery doctors, rely on four causes of action, being:

(a) misleading or deceptive conduct under the *Australian Consumer Law* (***ACL***);

(b) negligence;

(c) non-compliance with the guarantees in ss 60 and 61 of the *ACL*; and

(d) breach of contract.

7 The substance of the defendants' application was that the FPSOC, were leave granted, would be liable to be struck out because it did not comply with Order 13 of the *Supreme Court (General Civil Procedure)* ***Rules*** *2015* (Vic), s 33C of the *Supreme Court Act*, and the court's practice note.[1] The defendants contended that the FPSOC failed to articulate the basics of each cause of action made for the group members, let alone identify claims arising from the same, similar or related circumstances. Case management difficulties would arise down the track as the court would be unable to assess what claim each group member has against each defendant, and whether the claims give rise to substantial common questions of law or fact. Accordingly leave ought to be refused.

8 The defendants' objections focussed on the misleading or deceptive conduct and the negligence claims.

Principles

9 The applicable principles were not disputed by the parties. They are stated in *Uber*

1 SC Gen 10, para 4.4.

Australia Pty Ltd v Andrianakis.[2] I do not propose to dwell on either a statement, or analysis, of those principles as I am well familiar with them[3] and will apply them on this application. That said, I think it important to stress on this particular application the further comment of Hargrave JA,[4] approved in *Uber*, suggesting a wholistic approach to a pleading, with a partial case management approach, should be preferred when the true nature of the case to be met is clear from reading the pleading as a whole and there is no embarrassment to filing a responsive pleading.

10 Adopting that approach, and by way of preliminary comment, it is tolerably clear what claim each plaintiff has against each defendant and in general terms what claim each group member has against each defendant and that these claims arise out of 'similar or related circumstances' as s 33C(1)(b) of the *Supreme Court Act* requires. That is so not withstanding that the language of the pleading is, on occasions, collective in its expression, in reference to parties or events (such as representations) when not every plaintiff or group member's particular claim draws on every single material fact pleaded. This can give rise to technical objection where the true nature of the case is clear overall. This is so because other parts of the pleading constrain or delimit the application of particular circumstances to particular parties, and it is clear that the individual doctor defendants performed procedures on individual plaintiffs and group members. However, as I will explain, there would nevertheless be embarrassment in pleading to it and I have looked at the various objections and responses, principally to enable the plaintiffs to settle a further proposed pleading.

11 Further, under the guise of insufficient particulars, some of the defendants' submissions challenged, on case management considerations, the pleading of material allegations of fact capable of being responded to by a defence. It is not necessarily a proper case management consideration, to discount the possibility of more sharply defined issues emerging from the pleadings if leave is refused, until such time as the pleading is fulsomely particularised, when the defendants can respond by denial of

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2 [2020] VSCA 11.

3 *Wheelahan v City of Casey (No 12)* [2013] VSC 316.

4 See *Babcock & Brown DIF III Global Co-Investment Fund, LP v Babcock & Brown International Pty Ltd (No 2)* [2017] VSC 556, [17].

the allegation. There are issues in dispute that cannot always be fully particularised at the initial pleading stage. There are more effective case management techniques available to courts than requests for particulars, but, that said, the plaintiffs ought to provide their best particulars when pleading.

Background

12 Briefly explaining these claims, the plaintiffs allege that the defendants made, or were involved in making, misleading or deceptive representations and that those representations were relied on in contracting with the first defendant (**DCSS**) for the provision of, and in undergoing, the cosmetic surgery services. It is alleged that DCSS operated a system for the purpose of selling cosmetic surgery services (**DCSS Sales System**).

13 The DCSS Sales System is alleged to be as follows. Availability of cosmetic surgery services was advertised on a website, through which potential patients made contact by completing a form. Such persons were contacted by email and then completed a web-form inquiry. This **Post-Inquiry Email** included statements alleged to constitute representations. One of the second to seventh defendants or an employee then consulted with the potential patient when oral representations were made. Following the **Pre-Engagement Consultation,** a potential patient received further documents, a Standard Advice, a We Care Form, a Consent form and a quote for the costs of the relevant procedure. These documents contained statements alleged to constitute representations and included a requirement that potential patients consult with Ms Wainstein (the eighth defendant), a psychologist. On payment of the sum quoted, potential patients received a further email, referred to as the Thank-You letter. The patient then attended immediately prior to the surgery on the doctor who would perform the procedure(s), for a pre-surgery consultation, immediately followed by the surgery. All of the doctor defendants performed surgery on patients who progressed through this system.

14 The representations are defined at paragraph 88 as the Pre-Eminence Representation, the Plastic Surgeon Representation, the Personal Line to Lanzer Representation, the

Independent Psychologist Representation and the Excellent Service Representation (together, the **Representations**). The Excellent Service Representation is alleged to be comprised of one or more of four statements about the services provided. I was not persuaded that there was any substance in the objections to the form in which the Excellent Service Representation is pleaded.

15 The defendants each economically put submissions on different issues and adopted the submissions put by others. I propose to consider the issues in the same way without always attributing the submissions to the party who developed them in oral submissions, but as applying, except where the contrary is indicated, to claims against each defendant.

Negligence

16 The plaintiffs pleaded, against DCSS, a direct liability in negligence and vicarious liability for the negligence of the other defendants (its 'employees'). Although the submission was developed by reference to the loss and damage claims of group members and the 'risk of harm' to group members, the common questions raised are:

> Whether, and which of, DCSS, Lanzer and the Other Cosmetic Doctor Defendants owed the Plaintiffs and the Group Members a common law duty of care;
>
> Whether the Other Cosmetic Doctor Defendants' participation in the DCSS Sales System was negligent.

17 The principal question raised at this point is whether there was a duty of care. I am satisfied that this is appropriately a common question. There are some issues with the expression of the pleading.

18 Looking first at the allegations against DCSS, paragraph 126 of the FPSOC alleges:

> At all relevant times DCSS owed a duty to the Plaintiffs and each Group Member:
>
> a. to exercise the degree of reasonable care and skill to be expected of a medical practice providing cosmetic surgery services in the provision of medical advice and treatment to any patient, and
>
> b. to exercise reasonable care and skill in the administration and management of the treatment by its servants or agents which included the Second to Seventh Defendants.

19 By paragraph 129, the plaintiffs allege that DCSS is vicariously liable for the negligence of its servants or agents the Other Cosmetic Doctor Defendants and for the negligence of Dr Lanzer, an employee of DCSS.

20 The pleading alleges the following against the individual doctors:

> at all relevant times the Other Cosmetic Doctor Defendants owed a duty to the Plaintiffs to whom they personally provided advice and treatment (as identified below at paragraphs 131 to 136) and each Group Member to whom they personally provided advice and treatment to exercise the degree of reasonable care and skill to be expected of a medical practitioner providing cosmetic surgery treatment and advice in the provision of medical advice and treatment.

21 A separate allegation against Ms Wainstein is dealt with later in these reasons.

22 First I note, although it was not raised by the second defendant, that the FPSOC only alleges that DCSS, the Other Cosmetic Doctor Defendants, and Ms Wainstein, but not Dr Lanzer, owed a duty of care. Although the pleading alleges that Dr Lanzer is an employee of DCSS, which is vicariously liable for his negligence, the absence of an allegation that Dr Lanzer owed a duty of care appears to be an oversight. Again, readily correctable, if that is what the plaintiffs intend to allege. I infer from both the common questions and the way negligence is pleaded against DCSS that the plaintiffs intend to allege that Dr Lanzer owed a duty of care.

23 Secondly, DCSS submitted the pleading failed to identify the material facts said to give rise to a duty toward every single plaintiff and group member when the procedure experienced by any individual plaintiff or group member could not have involved all doctor defendants. This submission lacked merit. It matters not that any individual plaintiff or group member was only provided with medical advice and treatment by one or some of the doctor defendants. Reading the FPSOC as a whole, it is not said that a doctor defendant owed a duty to a patient with whom he had no contact. Each of the four plaintiffs was seen, advised, or treated by one or more particular doctor defendants. I see no difficulty in making it clearer in the pleading that by implication from what is alleged it is not alleged that all doctor defendants engaged with all plaintiffs and group members, as the case may be.

24 Further, the issue of duty of care for each plaintiff/group member against each respective defendant are in respect of, or arise out of, similar or related circumstances and give rise to the substantial common question expressed in the pleading.

25 Thirdly, the duty alleged against the doctor defendants, as with the duty alleged against DCSS, is pleaded without any reference to the harm that it is alleged that the relevant defendant had a duty to avoid. As I noted in *5 Boroughs NY Pty Ltd v State of Victoria*,[5] the pleaded duty must identify the risk to the plaintiff and group members, usually stated as a risk of injury, or injury of a certain kind. However, that was a case of a complex and novel claim of a duty to avoid pure economic loss arising out of the COVID-19 pandemic response. In this case, on the one hand, it is difficult to conceive of a world in which the defendants' legal advisers do not understand from the pleading read as a whole what that risk of harm is and, on the other hand, the plaintiffs can readily add a few words of clarification to the end of the paragraphs pleading the duty that identify the nature of the risk of loss and should do so. Such a clarification ought to make clear the type of injury that a prudent medical practitioner or a prudent medical clinic would have avoided. Likewise, the words 'to be expected of a medical practice providing cosmetic surgery services' should not need to be read in to sub-paragraph 126(b).

26 Fourthly, another criticism that seems readily capable of rectification is the submission that the pleading rolls up the nature of cosmetic surgery and plastic surgery when alleging a standard of care. This is embarrassing. As the defendants submitted, it is unclear whether the plaintiffs claim that each of those defendants owed that same duty to all claimants, whatever the standard of that duty, or that some defendants may have owed the duty of care to be expected of a cosmetic surgeon and some of the defendants owed the duty of care to be expected of a plastic surgeon. Presumably, if the focus will be on the standard of care to be expected of a medical practitioner in respect of the particular procedure undergone by the patient, the pleading can say so, but it is a matter for the plaintiffs how the standard is to be framed.

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5 [2021] VSC 785, [23]

27 Fifthly, DCSS submitted that the duty alleged against it was a novel duty premised on a relationship between a medical practice providing cosmetic services and a patient of that medical practice. It submitted that a liability of a hospital for medical and advice and treatment at the hospital is normally on the basis of the principles of vicarious liability and that there is no general duty of care owed by a medical clinic to patients of a clinic. I do not accept this submission as baldly stated, but there are issues arising out of the pleading against DCSS that might benefit from further attention from the pleader.

28 I note that the plaintiffs allege against DCSS a direct liability by paragraph 126 and also vicarious liability by paragraph 129. Conceptually, the vicarious liability of the hospital/clinic where the medical practitioner negligently performs the subject procedure must be distinguished from the direct liability of the hospital/clinic for its own breach of duty, for example, in negligently providing sub-standard facilities for the subject procedure. The liability of the hospital/clinic may be based on principles of either vicarious liability[6] or the existence of a non-delegable duty where the duty extends beyond a duty to exercise reasonable care to avoid injury to a plaintiff, to a duty to ensure reasonable care was exercised to avoid injury to a plaintiff.[7] Depending on the circumstances, a clinic may be liable on both bases. It is a question of fact whether a clinic falls within the well-established liability of a hospital on the basis of a non-delegable duty or whether its contribution to events is such that those principles may be distinguished. There is considerable detail in the material facts alleged about the conduct of DCSS, particularly the DCSS Sales System. The Lanzer clinics alleged in paragraph 3(d) of the FPSOC are variously described as a 'clinic', or a 'day hospital'. Developments in the way that medicine is practised should be borne in mind when considering some of the older cases and the distinction between a medical clinic, in the sense of a local GP practice, and a large public hospital, as there are now many more points on this spectrum representing distinctive styles of medical practice with different levels of participation by the corporate service provider.

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6 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.

7 *Leichhardt Municipal Council v Montgomery* (2007) 233 ALR 200, 202-3 [6].

29 DCSS cited *C S v Anna* ***Biedrzycka,***[8] a proceeding in which contribution was sought from a corporate defendant that provided all relevant administrative services and facilities under a contractual arrangement with the doctor defendants for the operation of a medical clinic by a number of general practitioners. The corporate defendant denied that it owed a duty of care. The court ruled that the existence of a duty of care between the fourth defendant and the plaintiff, including the content of that duty, fell to be determined by 'a close analysis of the facts bearing on the relationship between the plaintiff and the [fourth defendant] by reference to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury', citing Allsop P in *Caltex Refineries (Qld) Pty Ltd v* ***Stavar.***[9] That exercise involved an evaluative judgment, including normative considerations.

30 The issue of negligence concerned the record keeping by the corporate defendant of patient details and of tests and the results. The court concluded, by a *Stavar* analysis, that the corporate defendant did owe a duty of care to maintain current and accurate records that ensure effective and timely contact with its patients when the need arises, particularly when a pathology sample has been taken.

31 However, *Biedrzycka* was appealed.[10] The Court of Appeal agreed that the trial judge was correct in finding that the corporate defendant owed a duty of care and in doing so by reference to *Stavar*. Hoeben JA reasoned to the like conclusion from the High Court's decision in ***Perre*** *v Apand Pty Ltd,*[11] adding that the force of the statements of principle [from *Perre*] was all the greater as that case involved pure economic loss, when in the subject appeal the damage was serious personal injury.

32 DCSS's point was that the duty of the corporate administrator was determined by reference to a 'salient features' analysis that has not been pleaded by the plaintiffs in

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8 [2011] NSWSC 1213.
9 (2009) 75 NSWLR 649, 676 [102].
10 *Idameneo (No 123) Pty Ltd v Gross* (2012) 83 NSWLR 643.
11 (1999) 198 CLR 180.

this case.[12]

33 ***Young*** *v Central Australian Aboriginal Congress Inc,*[13] also cited by DCSS, does not support that analysis. The first defendant (Congress) was found to owe a duty of care to the plaintiff, a patient. Congress conducted business as a publicly funded non-government organisation providing health-care services to Aboriginal and Torres Strait Islander residents in Central Australia. It was a multi-disciplinary medical institution which provided a wide range of medical and related services to its patient group. To carry out its role, Congress employed doctors to work in a general practice clinic, and Aboriginal health workers, nursing staff and administrative staff to support those medical practitioners. It employed counsellors and a psychologist. It had a dispensary or in-house pharmacy to supply medicines and drugs prescribed by Congress doctors. It conducted a regular diabetes clinic. It facilitated a weekly or fortnightly clinic attended by a visiting specialist physician. It had transport services for collection of patients. It did not have operating theatres or beds for in-patient accommodation, but it otherwise provided or attempted to provide a comprehensive medical service to its patients.

34 Thomas J concluded that Congress directly owed a duty of care owed to their patients and was vicariously liable in respect of a specialist general practitioner employed by Congress.

> I agree with the submission made by Mr Barr QC that Congress had a direct responsibility and duty to the deceased to exercise reasonable care and skill in the administration and management of the deceased's treatment and care by its employed general medical practitioners, nursing and administrative support staff (***Albrighton*** *v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 561-2 per Reynolds JA. See also ***Kondis*** *v State Transport Authority* [1984] HCA 61; (1984) 154 CLR 672 at 685-6 per Mason J).[14]

35 In ***KT*** *v PLG,*[15] Simpson J considered whether a company operating a birth control services clinic owed the plaintiff a duty of care in relation to the negligent performance of a pregnancy termination procedure at the clinic by a medical practitioner engaged

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12 See also *BT v Oei* [1999] NSWSC 1082, [63] - [65].

13 [2008] NTSC 47.

14 Ibid [204]. Thomas J also followed Kirby P in *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 566.

15 [2006] NSWSC 919 (***KT***).

by the clinic on a contract, on the basis that it was vicariously liable for the negligence of that medical practitioner. Simpson J noted that the issue of the extent to which a medical facility may be held vicariously liable for any breach of duty on the part of those engaged by it has been considered on a number of occasions, citing *Albrighton*[16] and *Ellis*.[17] Her Honour concluded:

> In my opinion it is clear that the third defendant is vicariously liable for any breach of duty by the first defendant. The evidence that the third defendant conducted the clinic from which the plaintiff sought the procedure; that the first defendant was engaged on a contractual basis, (although, it seems, not one of employment), by the third defendant; and that it was the third defendant who assigned her procedure to the first defendant, all point in that direction. Whether the conclusion is that the third defendant owed to the plaintiff a non-delegable duty of care, or whether it was liable to her for the breach of duty of the first defendant does not matter. The first defendant is liable to the plaintiff in damages. The third defendant is vicariously liable for the wrongs of the first defendant.[18]

36 Given that the practitioner was not an employee it is not entirely clear whether liability was imposed by way of a non-delegable duty or vicariously. Either way, the analysis, did not consider cases like *Perre*,[19] ***Crimmins** v Stevedoring Industry Finance Committee*,[20] and other cases.

37 The issue of a duty owed by a medical centre was also considered in ***Rooty Hill** Medical Centre Pty Limited v Michael Gunther*.[21] The plaintiff's claim arose out of the negligent treatment of a hand injury by a medical practitioner at a medical centre. In this case, Handley JA (with Mason P and Hodgson JA agreeing) applied *Kondis*.[22] The evidence was limited but the first defendant was found to have either employed the doctor, or undertook to provide medical services to persons attending at the Medical Centre. In the latter situation the company must have retained the doctor as its independent contractor to provide those medical services. If so, the company would owe a non-delegable duty to its patients and would be liable for any breach of duty

16 Above [34].
17 (n 14).
18 *KT*, [55] (n 15).
19 (n 11).
20 (1999) 200 CLR 1.
21 [2002] NSWCA 60.
22 (1984) 154 CLR 672, 679.

by the doctor.

38 Finally, on this issue, s 61 of the *Wrongs Act 1958* (Vic) must be borne in mind. The section, which has not received significant judicial consideration, states:

> **61 Liability based on non-delegable duty**
>
> (1) The extent of liability in tort of a person (the defendant) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the defendant were vicariously liable for the negligence of the person in connection with the performance of the work or task.
>
> (2) This section applies to a claim for damages in tort whether or not it is a claim for damages resulting from negligence, despite anything to the contrary in section 44.

39 That DCSS is alleged to be vicariously liable for the negligence of Dr Lanzer and the Other Cosmetic Doctor Defendants is clearly pleaded, as I have noted.

40 Much can be understood from the particulars of negligence pleaded against DCSS and the relationship between those particulars and the allegation of non-delegable duty. In this case, the allegations appear to more closely resemble the facts of *Rooty Hill, KT,* or *Young* such that it might be said that non-delegable duty in non-public hospital settings is not novel. This area of law is not marked by consistent and well-developed principle.[23] Often the key element supporting the imposition of the non-delegable duty for the work of contractors is the element of vulnerability, recognised in *Crimmins* as a significant salient feature.[24] Further, at an intermediate appellate court level, a 'salient features' approach appears to be favoured. The negligence pleading against DCSS requires further careful thought from the pleaders who could put the alleged basis for it beyond doubt by a salient features approach. As this is not an application for summary judgment and the plaintiffs are willing to further refine the pleading, it

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23 Compare *Kondis* (above [34]); *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313; *Leichhardt Municipal Council v Montgomery* (2007) 233 ALR 200; *Transfield Services (Australia) Pty Ltd v Hall* (2008) 75 NSWLR 12, 22 [54]-[57]; *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21, [48]ff (Edelman and Steward JJ).

24 (n 20).

is not necessary to finally decide some of these issues.

41 It may be that the pleader ought to focus on these distinctions in the way duty is alleged against the defendants when particularising the alleged breach of the duties. The particulars of the negligence of DCSS appear to encompass its direct liability, vicarious liability for the conduct of the doctors, and breach of a non-delegable duty. The defendants' complaint seems to be that they cannot distinguish which particulars are relevant to what duty and that issue might resolve with some further thought about the structure and layout of the pleading.

42 Sixthly, DCSS complained that the content of the duty and standard of care to be met to discharge the duty is unclear. This complaint appeared related to the point just made. Is the scope of the direct duty to be limited in some way that distinguishes it from the scope of the non-delegable duty/vicarious liability? The defendants complain that the scope 'in the provision of medical advice and treatment' is too wide to be meaningful and ought to be tied more specifically to the activities of the clinics/day hospitals. Likewise the distinction between cosmetic procedures and surgical procedures might be better aligned to the distinction that relevant experts will draw when opining about the standard to be expected of the practitioner when performing a particular procedure. The standard of care to be exercised by the medical defendants may inform the non-delegable duty/vicarious liability claim against DCSS, but the pleader ought to distinctly identify with some specificity the content of the duty and standard of care expected of a prudent clinic/day hospital in respect of its direct responsibility to the plaintiffs.

43 Seventhly, I agree with the defendants' submission that the pleader ought to re-think paragraph 142 that references s 48 of the *Wrongs Act*, and cognate provisions in other States. Pleading a duty of care stands outside of the terms of the *Wrongs Act*.[25] The submissions put by DCSS about the paragraph actually point to other aspects of the pleading that ought to be reconsidered. Although the section speaks of risk of harm, as I have already noted, the pleaders must ensure that the risk of harm is identified

25 Cf *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 432-3 [13].

and specifically pleaded, so as to inform the existence of, and content of a properly pleaded duty of care. This is not achieved by reciting the text of s 48.[26] The pleading of duty and its content or scope ought to identify the material acts, matters and circumstances that inform the foreseeable risk of not insignificant harm that reveal the precautions that a reasonable person ought to have taken. As Leeming JA stated about the cognate provisions of the *Civil Liability Act 2002* (NSW), 'the legislation makes liability dependent upon the identification of the risk of harm.'[27]

44 DCSS drew particular attention to the third element of s 48(1). Sub-paragraph (c) is directed to the conduct of a reasonable person. Consideration may need to be given as to whether some of the matters that the court is to consider under s 48(2) require material facts to be pleaded. This may not always be necessary and will depend on how the plaintiffs state their cause of action, having regard to the particular circumstances in which precautions are needed. The current pleading references back to the allegations of breach in paragraphs 130 – 137, but in doing so, the pleading falls into the deficiencies already discussed concerning risk of harm and the unclear way in which that is pleaded, which follows through into the uncategorised presentation of particulars of breach. These difficulties are highlighted by the distinctions, already discussed, that are needed between the risk of harm against which the doctors should have taken precautions and the risks against which DCSS should have taken precautions. In *PWJ1 v The State of New South Wales*,[28] Garling J discussed, in some detail, the form and content of a pleading that would meet the requirements of the *Civil Liability Act*.

45 Turning next to causation, the principal issue raised by the defendants was the lack of a counterfactual alleging what would have occurred had the duty of care been met, particularly in the case of omissions such as a failure to warn. The plaintiffs submitted

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26 The practical implications of s 48 (s 5B NSW) are discussed in *Menz v Wagga Wagga Show Society Ltd* [2020] NSWCA 65, [48]-[51].

27 See also *Collins v Clarence Valley Council* [2015] NSWCA 263, [126]-[135]; *Nominal Defendant v Buck Cooper* [2017] NSWCA 280, [89]; *Coles Supermarket Australia Pty Limited v Bridge* [2018] NSWCA 183, [17]-[22] .

28 [2020] NSWSC 1235, [57]-[83]

this was unnecessary, citing *Chappel v Hart,*[29] but in that case the counterfactual was clear.[30] I do not accept the proposition that it is unnecessary in medical negligence litigation to plead any form of counterfactual. Section 51 of the *Wrongs Act* now defines what must be pleaded. DCSS cited *Wodonga Regional Health Service v Hopgood,*[31] where Maxwell P observed:

> When — as here — a plaintiff alleges a negligent omission, the causal link between the breach of duty and the claimed damage can only be established by means of a counterfactual hypothesis. That is, the plaintiff must propound an alternative state of facts, premised upon the defendant's having exercised reasonable care and, specifically, upon there having been no such omission. The plaintiff's counterfactual hypothesis must identify:
>
> (a) what the defendant would have done had reasonable care been exercised; and
>
> (b) how the taking of that action would have averted the loss or damage which the plaintiff in fact suffered.[32]

46 More recently, in *Cotton On Group Services Pty Ltd v Golowka,*[33] T Forrest JA and J Forrest AJA (with McLeish JA concurring) added:

> Proposition (a) relates to breach and the need for a plaintiff to demonstrate a reasonably practicable alternative system of work which would reduce or alleviate the risk of injury. Proposition (b) relates to causation. It must be shown that the deployment of the hypothetical system would have avoided the injury sustained by the plaintiff.

47 Particularly in a group proceeding, it may be problematic to assert that there is an obvious inference that the plaintiffs and group members would not have undergone the procedure if prudently warned, or, as the plaintiffs put it, that it is subsumed into the pleading. At the least, the pleading must reveal whether the counterfactual in a failure to warn case will raise any common question. The defendants' submission is overstated when putting the contention that no counterfactual is pleaded. It is true that no material facts have been alleged and all that the plaintiffs can point to is that the particulars of loss and damage recite a counterfactual in respect of the

29 (1998) 195 CLR 232, 242 [23].
30 Ibid 242 [22].
31 [2012] VSCA 326, [31]
32 (Citations omitted). See also *Munday v St Vincent's Hospital Pty Ltd* [2021] VSCA 170, [22]–[23].
33 [2022] VSCA 279, [77].

representation claims, but not for any aspect of the negligence claims.

48 The objection was not that it was foreseeable that a doctor could cause injury because of negligent surgery, that is, in the case of negligently conducted procedures or patient assessment and management. The defendants noted that the plaintiffs allegations of breach are not confined to the procedure undergone and extended to what was described as pre-surgery events. Further, duty in respect of pre-surgery events is not alleged simply against the doctor defendants. I accept the proposition, as developed, that in respect of the plaintiffs' claims, in the case of omissions, the counterfactual situation and how that would have averted the loss suffered should be addressed. Whether a plaintiff would not have undergone the procedure may be a complex factual question and the pleader might consider expanding this aspect of the pleading by alleging material facts that must draw a response rather than incorporating the counterfactual into some particulars.

49 Bearing all these considerations and pitfalls in mind, I am satisfied that the plaintiffs ought to further consider the pleading of negligence and that leave to file the pleading in its present form should be refused, as the defendants have submitted. I bear in mind the defendants' submission that formally satisfying the requirements of s 33C may not avoid a s 33M application at a later point. Such an application, if thought appropriate, will best proceed where the extent of the common questions raised in the group proceeding is more fulsomely developed.

Misrepresentation claims

50 Turning next to the criticisms advanced of the pleading of the misleading or deceptive representation claims, the defendants' principal objection was to the rolled up definition of five separate pleaded representations as the 'Representations'. The pleading alleges (paragraph 88):

> a. Lanzer and the Other Cosmetic Doctor Defendants were pre-eminent and highly skilled in the performance of cosmetic surgery (Pre-Eminence Representation);
>
> b. Lanzer and the Other Cosmetic Doctor Defendants were plastic surgeons (Plastic Surgeon Representation);

c. Lanzer was personally contactable by each cosmetic surgery client of DCSS, Lanzer and the Other Cosmetic Doctor Defendants on his personal mobile phone (the Personal Line to Lanzer Representation);

d. Wainstein was a psychologist exercising independent judgement from each of DCSS, Lanzer and the Other Cosmetic Doctor Defendants (the Independent Psychologist Representation);

e. DCSS, Lanzer and the Other Cosmetic Doctor Defendants provided a service that was:

i. apt to achieve consistently excellent results;

ii. of a consistently excellent standard, grade or quality;

iii. pre-eminent; and/or

iv. apt to consistently achieve the purpose of significantly enhancing the appearance of their patients' body

(the Excellent Service Representation)

(together, the Representations).

51 When considering the defendants' criticisms, I begin with the common questions identified by the pleading. The first two questions ask whether DCSS and/or Lanzer and/or the Other Cosmetic Doctor Defendants made the Representations to the plaintiffs, group members and the public. Other questions are directed to findings about who was involved in making representations and whether there was conduct in breach of the *ACL*.

52 The plaintiffs allege that the Pre-Eminence representation, Plastic Surgeon representation and Excellent Service representation (consisting of four sub-representations, although it is not clear whether that representation is alleged to be constituted by all, or one, of some of them) were made in two ways with combined particulars. First, the Pre-Eminence representation and the Excellent Service representation were conveyed by DCSS and Dr Lanzer, as a matter of inference, from identified statements found on the Lanzer website, which presumably are written statements appearing on the website (identified in paragraph 86(a)) and second, each representation was made to the public through posts on Dr Lanzer's social media accounts/profiles that were linked to the Lanzer Website. The plaintiffs submitted that they had pleaded what media the plaintiffs accessed, but I think that submission

overstates what the pleading achieves. It is unclear whether the allegations about the social media accounts take the plaintiffs' allegations further than the written representations relied on and the plaintiffs may need to give strategic consideration to this aspect of the representation claims. At present, they are part of the FPSOC and must be pleaded to the requisite standard.

53 The social media accounts/profiles are not particularised in the usual way and the plaintiffs say they cannot particularise them prior to discovery as they have been taken down. Although the pleading is not explicit about this, I accept that the precise content of the social media accounts is now peculiarly within the knowledge of the defendants. The plaintiffs submitted that interrogatories may be the appropriate tool to employ in due course, and although I am not much attracted to that process, it can be considered on its merits as can a procedure for the exchange of outlines of evidence. At this point the plaintiffs have not identified, as they should, whether or when they read any statements on particular identifiable social media accounts that either constituted the representations or the material from which they may be inferred, with proper particulars of their best general allegations about their content, even if qualified by the common reservation of the right to give further particulars at a later point. Given the nature of presentation of content on social media accounts, it is difficult to identify the role of such accounts in communicating the representations to the plaintiffs, let alone group members and there may be real difficulties in now identifying the relevant social media without the best particulars the plaintiffs can presently provide.

54 This problem is compounded by the allegation that the Other Cosmetic Doctor Defendants acquiesced in and/or did not resile from these representations by DCSS and Dr Lanzer. Further, each of them were directly or indirectly knowingly concerned in or party to DCSS and Dr Lanzer making the Pre-Eminence and Excellent Service representations to the public through the Lanzer Website. Leaving aside the problems with the allegation about the 'content' of the social media accounts which are incorporated into this allegation, the plaintiffs provide extensive particulars of the

written statements by which the representations were otherwise communicated to each plaintiff. The Other Cosmetic Doctor Defendants can respond to those allegations to that extent.

55 The plaintiffs also allege unparticularised oral representations made during consultations.

56 The defendants accepted that a substantially identical representation may be pleaded in substance, despite having been made in different terms, provided that the words or matters conveying the representation are also pleaded with sufficient precision to show that the substance was truly the same. What was required was particulars of the statements made that are said to contain each oral (or written) representation, if the pleading does not particularise the precise words said to contain the representation to each group member. Their complaint was that the representation claims were 'airbrushed', precluding identification of the common fact or issue. More specifically, the plaintiffs have not particularised as precisely as possible the statements made during consultations that are said to contain each oral representation. In support of this submission, the defendants cited *Connell v Nevada Financial Group Pty Ltd.*[34] However, this was a proceeding seeking relief under s 33N that concerned 16 class members. There were three categories of written representations and numerous oral representations alleged and must be considered in that context.

57 The role of the representations in inducing the conduct sued on is unclear, as reliance is pleaded in a generic way for each plaintiff by the template form 'in reliance on the Representations [plaintiff] entered into the Surgery Contract with DCSS for the cosmetic surgery services to be provided and performed by DCSS, Lanzer or the Other Cosmetic Doctor Defendants, which contract would not have been entered into but for the Representations' and/or maintained or did not withdraw her consent to that surgery.

58 The defendants submitted that the form of pleading provided a façade of commonality

34 (1996) 139 ALR 723, 728.

to the substance of the alleged representations made. I do not accept that this is so. It is clear that substantially identical representations were made to all claimants in written form, while the problem with the oral representations is the lack of particulars of the substance of the statements heard by each of the plaintiffs, but that omission has, as the defendants have submitted, its own consequences.[35] The principal concern identified by the defendants is ambiguity – that the plaintiffs, having pleaded five distinct representations, with the last of those comprising four alternative possible meanings, using the 'and/or' formulation to allow any or all of those alternative meanings to constitute the alleged representation – then adopt a generic definition 'the Representations' when alleging the consequences of the representations.

59 As with the social media accounts, the plaintiffs should consider providing their best particulars of the oral representations made to each of them, having regard to the observations in the 'First & Second Defendants' Joint Contentions'.[36]

Other matters

60 The criticisms advanced by the defendants in respect of the rolled up claims against DCSS and/or Lanzer are embarrassing and appear to be the consequence of an incomplete review of an earlier draft.[37] These appear to be details that can readily be reviewed.

61 The defendants also noted that the allegations of loss and damage made by the plaintiff, Ms Morrison, provide particulars of aggravated damages and exemplary damages that were described as 'untethered'. The plaintiffs noted and accepted that this was an oversight that will, as it should, be corrected.

62 Dr Wong submitted that the PFSOC required further particularisation in the manner that was specified in his outline of contentions, but otherwise contended that he considered it reasonable to interpret the pleading, particularly in respect of the DCSS sales system, as not making allegations against him when he was not referenced in

35 See e.g. First & Second Defendants Joint Contentions, [12].
36 Ibid [20].
37 Ibid [35]-[39].

such allegations. Counsel submitted that, otherwise, the PFSOC could, because of the breadth of the language, be construed as alleging that Dr Wong is party to the representation claims in respect of plaintiffs he did not treat. If the plaintiffs consider Dr Wong's approach to be incorrect, clarification is necessary.

Ms Wainstein

63 The eighth defendant was in a different position to that of the other defendants, being a psychologist. Her concern was the pleading against her of the claim in negligence.

64 I note that the duty of care alleged at paragraph 128 against Ms Wainstein is in the same form as the duties discussed earlier. Many of the issues raised by Ms Wainstein can resolve if the risk of harm is specifically identified and then consequentially followed through in the pleading. Presumably, the words 'in the provision of a psychological assessment to evaluate a person's suitability to undergo cosmetic surgery', give some insight into the intended risk of harm, but they do not go far enough to be sufficiently specific. This is likely to lead to proper disclosure of the existence and scope of the duty. I do not accept that the pleading cannot be rectified. The pleading appears to be limited to the plaintiff Ms Bonnici, with whom she consulted on 7 June 2021.

65 Ms Wainstein has, in solicitor's correspondence, stated that she conferred with each of Ms Morrison and Ms Russell, but was on maternity leave during the time of Ms Lombardo's pre-engagement contact with DCSS and subsequent consultations.

66 It is desirable that the material facts be pleaded that show how each plaintiff consulted with Ms Wainstein, what occurred, and what advice or treatment she received. The pleading does not reveal any aspect of this consultation. The reader is left to speculate from the particulars of negligence set out in paragraph 137; the assessment was, in some undefined way inadequate, cursory, and limited to whether Ms Wainstein considered Ms Bonnici understood that the surgery had risks and had realistic expectations as to the surgery. The earlier observations I made about the application of s 48 by paragraph 142 are also apposite.

67 Ms Wainstein's second objection was that causation was not properly pleaded and a chain of causation cannot be discerned. Again, the reader of the pleading is left to speculate from the particulars to paragraph 139 – that paragraph alleging that Ms Bonnici suffered loss and damage as a consequence of the negligence of Ms Wainstein, although rolled up in the paragraph is the same allegation in respect of the negligence of DCSS, Dr Wells and Dr Fallahi. This paragraph does not assert a counterfactual, the closest it comes to hinting at the possibility, is a particular that reads:

> Undergoing surgery in circumstances where she had unrealistic expectations of said surgery and was psychologically an unsuitable candidate

Although the loss suffered clearly includes psychological injury due to the trauma of and associated with the treatment.

68 Ms Wainstein is correct when she asserts that the pleading does not show how the alleged negligence was a necessary condition of the occurrence of the harm. The hint, found in the allegation that Ms Bonnici was unsuited to undergo plastic and/or cosmetic surgery, falls well short of articulating the claim in a proper fashion.

69 Of all of the claims made in the FPSOC, the claim against Wainstein is insufficiently articulated to admit of the possibility that there may not be a viable claim capable of being pleaded against her. However, given what is alleged about her role in the context of the claims against DCSS and in the operation of the DCSS Sales System, I would not accept that any claim against her must be untenable. As I propose to permit the plaintiffs to file a another PFSOC, I will not presently address that issue.

Conclusion

70 I will refuse the plaintiffs leave to file the FPSOC and I will direct that the application for leave to file an amended statement of claim be adjourned to 18 September 2023 at 9:30am. The plaintiffs should serve their second FPSOC by 6 September 2023 and the defendants, by 13 September 2023, should either state that they will not oppose leave being granted or file and serve an outline of their contentions against leave being granted. The plaintiffs should file any outline in support of their application by 15 September 2023.

CERTIFICATE

I certify that this and the 22 preceding pages are a true copy of the reasons for judgment of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 10 August 2023.

DATED this 10th day of August 2023.

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Associate

SCHEDULE OF PARTIES

S ECI 2022 00739

BETWEEN:

TINA LOMBARDO	First Plaintiff
TINA BONNICI	Second Plaintiff
SIMONE RUSSELL	Third Plaintiff
JULIE ROSE MORRISON	Fourth Plaintiff
-and-	
DERMATOLOGY AND COSMETIC SURGERY SERVICES PTY LTD (ACN 055 927 618)	First Defendant
DANIEL LANZER	Second Defendant
DANIEL ARONOV	Third Defendant
DANIEL DARBYSHIRE	Fourth Defendant
RYAN WELLS	Fifth Defendant
ALIREZA FALLAHI	Sixth Defendant
DR GEORGE SHU-KHIM WONG	Seventh Defendant
CANDICE WAINSTEIN	Eighth Defendant