

NOTICE OF FILING

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Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: NSD1968/2013
File Title: Paul Leslie McAlister by his Litigation Representative the NSW Trustee & Guardian v State of New South Wales & Ors
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 18/03/2016 11:56:28 AM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 33

Rule 16.32

Defence to Further Amended Statement of Claim

No: NSD1968 of 2013

Federal Court of Australia

District Registry: NSW

Division: General

PAUL LESLIE McALISTER by his litigation representative THE NSW TRUSTEE AND GUARDIAN

Applicant

STATE OF NEW SOUTH WALES & ORS

Respondents

The Second and Third Respondents deny that the Applicant is entitled to the relief claimed in the amended originating application and rely on the following facts and assertions:

1. As to paragraph 1 of the Further Amended Statement of Claim ("FASC"), the Second Respondent and the Third Respondent ("**the Respondents**");
 - 1.1 admit that the Applicant resided at Grand Western Lodge, Millthorpe, New South Wales ("**GWL**") during the Relevant Period;
 - 1.2 admit that the group members resided at GWL during the Relevant Period;

Filed on behalf of (name & role of party)	Avibin Pty Limited, Second Respondent and Adrian Alan Powell, Third Respondent		
Prepared by (name of person/lawyer)	Samantha Kelly	Ref	SJD/SJD/343005/29/AUM/1212402996.1
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[Form approved 01/08/2011]

- 1.3 deny that the Applicant or any of the group members suffered loss or damage as a consequence of some or all of the conduct alleged in paragraph 111 of the FASC (which conduct is denied); and
- 1.4 otherwise deny the allegations made in the paragraph.
2. The Respondents deny paragraph 2 of the FASC.
3. The Respondents admit paragraph 3 of the FASC.
4. The Respondents admit paragraph 4 of the FASC.
5. The Respondents admit paragraph 5 of the FASC.
6. The Respondents do not plead to paragraphs 6, 7 and 8 of the FASC as they makes no allegations against them.
7. As to paragraph 9 of the FASC, the Respondents:
 - 7.1 say that:
 - 7.1.1 licence number R 84/039/58 for premises situated at 27 Victoria Street, Millthorpe, was initially granted sometime in 1984, and was re-issued on 15 December 1987;
 - 7.1.2 licence number R 88/016/494 for premises at 5 Kingham Street, Millthorpe, was granted on 27 May 1988;
 - 7.1.3 licence number R 84/039/58 for premises situated at 27 Victoria Street, Millthorpe, was replaced by licence number A-2330-1115 on 23 December 1999;
 - 7.1.4 licence number R 88/016/494 for premises at 5 Kingham Street, Millthorpe, was replaced by licence number A-2330-1114 on 23 December 1999; and

- 7.2 otherwise admits the allegations made in the paragraph.
8. The Respondents admit paragraph 10 of the FASC.
9. The Respondents admit paragraphs 11 and 11A of the FASC.
10. The Respondents do not plead to paragraphs 12, 12A, 12B, 12C, 12D, 13, 13A and 14 of the FASC as those paragraphs do not contain any allegations against them.
11. As to paragraph 15 of the FASC, the Respondents:
- 11.1 rely on the Licence conditions for their full meaning and effect as if they were fully set out herein; and
- 11.2 otherwise admit the allegations made in the paragraph.
12. The Respondents deny paragraph 16 of the FASC.
13. The Respondents deny paragraph 17 of the FASC.
14. As to paragraph 18 of the FASC, the Respondents:
- 14.1 to the extent that the paragraph merely asserts the content of media articles says that the pleading is embarrassing and ought to be struck out;
- 14.2 to the extent that it contains allegations against them, denies the paragraph; and
- 14.3 otherwise does not plead to the paragraph as it contains no specific and direct allegations against them.
15. ~~As to paragraph 19 of the ASC,~~ The Respondents admit paragraph 19 of the FASC.:
- 15.1 ~~deny that GWL was a licensed boarding house;~~
- 15.2 ~~say that GWL was a "residential centre for handicapped persons" within the meaning of the YACS Act;~~

- ~~15.3~~ ~~otherwise admits the allegations made in the paragraph.~~
16. The Respondents deny paragraph 20 of the FASC.
17. The Respondents do not plead to paragraphs 21, 22, 23, 24, 25, 26, 27, 27A, 27B, 27C, 27D, 27E, 27F, 28 and 29 of the FASC as those paragraphs do not plead any allegations against them.
18. As to paragraph 30 of the FASC, the Respondents:
- 18.1 deny the paragraph insofar as it repeats the allegations made in paragraphs 16, ~~and 17~~ and 20 of the FASC; and
- 18.2 otherwise do not plead to the paragraph as it contains no allegations against them.
- 18A As to paragraphs 30A, 30B, 30C and 30D of the FASC, the Respondents:
- 18A.1 deny the applicant and Group Members in the individual circumstances of each case suffered loss or damage as alleged, or at all;
- 18A.2 deny the paragraph insofar as it makes allegations against them; and
- 18A.3 say they do not know and cannot plead to the paragraph insofar as it makes allegations against the First Respondent.
19. The Respondents deny paragraph 31 of the FASC.
20. As to paragraph 32 of the FASC, the Respondents:
- 20.1 deny the paragraph insofar as it makes allegations against them; and
- 20.2 say that they do not know and cannot plead to the paragraph insofar as it makes allegations against the First Respondent.
21. The Respondents deny paragraph 33 of the FASC.

22. The Respondents deny paragraph 34 of the FASC.
23. As to paragraph 35 of the FASC, the Respondents:
- 23.1 deny the paragraph insofar as it makes allegations against them; and
- 23.2 say that they do not know and cannot plead to the paragraph insofar as it makes allegations against the First Respondent.
24. The Respondents deny paragraph 36 of the FASC.
25. As to paragraph 37 of the FASC, the Respondents:
- 25.1 admit that the Applicant fell from the first floor balcony of the Victoria Street Premises on or about 2 February 2000;
- 25.2 do not know and cannot admit the balance of the allegations contained in the paragraph.
- ~~26. As to paragraph 38 of the FASC, the Respondents:~~
- ~~26.1 deny the applicant and Group Members in the individual circumstances of each case suffered loss or damage as alleged in paragraph 30A, or at all;~~
- ~~26.2 deny the paragraph insofar as it makes allegations against them; and~~
- ~~26.3 say they do not know and cannot plead to the paragraph insofar as it makes allegations against the First Respondent.~~
- ~~26.0 do not plead to paragraph 38 of the ASC as it does not contain any allegations against them.~~
27. The Respondents do not admit paragraph 39 of the FASC.
28. The Respondents deny paragraph 40 of the FASC.
29. As to paragraph 41 of the FASC, the Respondents:

- 29.1 deny the paragraph insofar as it makes allegations against them; and
- 29.2 say that they do not know and cannot plead to the paragraph insofar as it makes allegations against the First Respondent.
- 30. As to paragraph 42 of the FASC, the Respondents:
 - 30.1 deny that the Applicant was neglected as alleged;
 - 30.2 otherwise do not admit the allegations contained in the paragraph.
- 30A The Respondents deny paragraph 42A of the FASC.
- 30B The Respondents do not admit paragraph 42B of the FASC.
- 30C The Respondents deny paragraph 42C of the FASC.
- 30D The Respondents deny paragraph 42D of the FASC.
- 31. The Respondents deny paragraph 43 of the FASC.
- 32. As to paragraph 44 of the FASC, the Respondents:
 - 32.1 deny the paragraph insofar as it makes allegations against them; and
 - 32.2 say that they do not know and cannot plead to the paragraph insofar as it makes allegations against the First Respondent.
- 33. The Respondents deny paragraph 45 of the FASC.
- 34. The Respondents do not admit paragraph 46 of the FASC.
- 35. As to paragraph 47 of the FASC, the Respondents:
 - 35.1 do not admit the Second Respondent could control the conduct of the residents of GWL;
 - 35.2 otherwise admit the balance of the allegations contained in the paragraph.
- 36. The Respondents admit paragraph 48 of the FASC.

36A As to paragraph 48A of the FASC, the Respondents:

36A.1 do not admit sub-paragraph 48A.1; and

36A.2 deny sub-paragraphs 48A.2, 48A.3 and 48A.4.

36B The Respondents deny paragraph 48B of the FASC.

36C The Respondents deny paragraph 48C of the FASC.

36D The Respondents do not admit paragraph 48D of the FASC.

36E The Respondents deny paragraph 48E of the FASC.

37. The Respondents deny paragraph 49 of the FASC.

37A The Respondents deny paragraphs 49A, 49B and 49C of the FASC.

38. As to paragraph 50 of the FASC, the Respondents:

38.1 admit that the Applicant fell from the first floor balcony of the Victoria Street Premises on or about 2 February 2000;

38.2 do not know and cannot admit the balance of the allegations contained in the paragraph.

39. The Respondents deny paragraph 51 of the FASC.

40. The Respondents do not admit paragraph 52 of the FASC.

41. The Respondents deny paragraph 53 of the FASC.

42. The Respondents deny paragraph 54 of the FASC.

42A The Respondents deny paragraphs 54A, 54B, 54C and 54D of the FASC.

43. As to paragraph 55 of the FASC, the Respondents:

43.1 admit that the Second Respondent is vicariously liable for the conduct of the Third Respondent;

- 43.2 deny that the Third Respondent engaged in tortious conduct as pleaded in paragraphs 80 to 101 of the FASC; and
- 43.3 otherwise deny the allegations contained in the paragraph.
44. As to paragraph 56 of the FASC, the Respondents:
- 44.1 admit that during the Relevant Period the Applicant received Centrelink pension payments;
- 44.2 ~~deny~~ does not admit the payments were made to a bank account in the Applicant's name.
45. The Respondents do not admit paragraph 57 of the FASC.
46. As to paragraph 58 of the FASC, the Respondents:
- 46.1 repeat paragraph 44 of this Defence;
- 46.2 otherwise deny the allegations made in the paragraph.
47. As to paragraph 59 of the FASC, the Respondents:
- 47.1 repeat paragraphs 44 and 46 of this Defence;
- 47.2 admit that the Applicant's pension income was used for, among other things, the purposes set out in paragraphs 59.1, 59.2 and 59.3 of the FASC;
- 47.3 deny that the Applicant's pension income was used for podiatry services provided to the Applicant as alleged in sub-paragraph 59.4 of the FASC;
- 47.4 say that podiatry services were provided free of charge by state medical services;
- 47.5 otherwise do not admit the allegations made in the paragraph.
48. As to paragraph 60 of the FASC, the Respondents:

- 48.1 say that the Applicant never requested any invoices or receipts for any expenditures on his behalf;
- 48.2 say that the Applicant never requested any invoices or receipts for any board paid on his behalf;
- 48.3 otherwise do not admit the allegations contained in the paragraph.
49. The Respondents deny paragraph 61 of the FASC.
50. The Respondents deny paragraph 62 of the FASC.
51. The Respondents deny paragraph 63 of the FASC.
52. The Respondents deny paragraph 64 of the FASC.
53. As to paragraph 65 of the FASC, the Respondents:
- 53.1 deny that the Third Respondent engaged in the conduct alleged in paragraphs 80, 82, 84 and 86 of the FASC;
- 53.2 otherwise do not admit the allegations contained in the balance of the paragraph.
- 53A The Respondents do not admit paragraph 65A of the FASC.
54. As to paragraph 66 of the FASC, the Respondents:
- 54.1 repeat paragraphs 44, 46, 47, 48 and 49 of this Amended Defence; and
- 54.2 otherwise deny the allegations made in the paragraph.
- 54A As to paragraph 66A of the FASC, the Respondents:
- 54A.1 repeat paragraphs 44, 46, 47, 48 and 49 of this Defence; and
- 54A.2 otherwise deny the allegations made in the paragraph.
55. As to paragraph 67 of the FASC, the Respondents:

- 55.1 repeat paragraph 54 of this Defence;
 - 55.2 admit that if the conduct alleged took place, it would be unconscionable;
 - 55.3 otherwise deny the allegations contained in the paragraph.
56. The Respondents deny paragraph 68 of the FASC.
57. The Respondents deny paragraph 69 of the FASC.
58. As to paragraph 70 of the FASC, the Respondents:
- 58.1 deny that the Third Respondent engaged in the conduct alleged in paragraphs 80, 82, 84 and 86 of the FASC;
 - 58.2 otherwise do not admit the allegations contained in the paragraph.
59. The Respondents deny paragraph 71 of the FASC.
60. As to paragraph 72 of the FASC, the Respondents:
- 60.1 repeat paragraph 54 of this Defence;
 - 60.2 otherwise deny the allegations contained in the paragraph.
- 60A The Respondents deny paragraph 72A of the FASC.
61. As to paragraph 73 of the FASC, the Respondents:
- 61.1 repeat paragraph 54 of this Defence;
 - 61.2 admit that if the conduct alleged took place, it would be unconscionable;
 - 61.3 otherwise deny the balance of the allegations contained in the paragraph.
62. As to paragraph 74 of the FASC, the Respondents:
- 62.1 repeat paragraph 58 of this Defence;
 - 62.2 admit there was a material inequality of bargaining position between the Second Respondent and the Applicant; and

- 62.3 otherwise deny the allegations contained in the paragraph.
63. The Respondents deny paragraph 75 of the FASC.
64. The Respondents deny paragraph 76 of the FASC.
65. The Respondents deny paragraph 77 of the FASC.
66. The Respondents deny paragraph 78 of the FASC.
67. As to paragraph 79 of the FASC, the Respondents deny the Applicant has suffered loss or damage as alleged or at all.
68. The Respondents deny paragraph 80 of the FASC.
69. The Respondents deny paragraph 81 of the FASC.
70. The Respondents deny paragraph 82 of the FASC.
71. The Respondents deny paragraph 83 of the FASC.
72. The Respondents deny paragraph 84 of the FASC.
73. The Respondents deny paragraph 85 of the FASC.
74. The Respondents deny paragraph 86 of the FASC.
75. The Respondents deny paragraph 87 of the FASC.
76. The Respondents deny the Applicant is entitled to aggravated damages as alleged in paragraph 88 of the FASC.
77. The Respondents deny the Applicant is entitled to exemplary damages as alleged in paragraph 89 of the FASC.
78. The Respondents do not admit paragraph 90 of the FASC.
79. The Respondents deny paragraph 91 of the FASC.
80. As to paragraph 92 of the FASC, the Respondents:

- 80.1 admit that the Applicant fell from the first floor balcony of the Victoria Street Premises on or about 2 February 2000; and
- 80.2 do not know and cannot admit the balance of the allegations contained in the paragraph.
81. The Respondents deny paragraph 93 of the FASC.
82. The Respondents do not admit paragraph 94 of the FASC.
83. The Respondents deny paragraph 95 of the FASC.
84. The Respondents deny paragraph 96 of the FASC.
85. As to paragraph 97 of the FASC, the Respondents:
- 85.1 admit that during the Relevant Period the Applicant received Centrelink pension payments; and
- 85.2 ~~deny~~ do not admit the payments were made to a bank account in the Applicant's name.
86. The Respondents do not admit paragraph 98 of the FASC.
87. As to paragraph 99 of the FASC, the Respondents:
- 87.1 admit that during the Relevant Period, the Third Respondent was the agent of the Applicant for the purposes of making payments on behalf of the Applicant:
- 87.1.1 to the Second Respondent for board and lodging; and
- 87.1.2 for goods and/or services provided to the Applicant by third parties;
- 87.2 denies that the Third Respondent was the agent of the Applicant for the purposes of making withdrawals from the Applicant's bank account; and

- 87.3 otherwise does not admit the allegations contained in the paragraph.
88. As to paragraph 100 of the FASC, the Respondents:
- 88.1 admit the Third Respondent was the Applicant's agent as set out in paragraph 87 of this Defence;
- 88.2 denies that the Third Respondent owed to the Applicant the duty set out in sub-paragraph 100.1 of the FASC;
- 88.3 admits that the Third Respondent owed to the Applicant the duties set out in sub-paragraphs 100.2, 100.3 and 100.4 of the FASC;
- 88.4 otherwise do not admit the allegations contained in the paragraph.
89. The Respondents deny the allegations in paragraph 101 of the FASC.
90. The Respondents deny the allegations in paragraph 102 of the FASC.
91. As to paragraph 103 of the FASC, the Respondents:
- 91.1 deny that the Third Respondent engaged in the conduct alleged in paragraphs 80, 82, 84 and 86 of the FASC; and
- 91.2 otherwise do not admit the allegations contained in the balance of the paragraph.
- 91A As to paragraph 103A of the FASC, the Respondents:
- 91A.1 deny that the Third Respondent engaged in the conduct alleged in paragraphs 80, 82, 84 and 86 of the FASC; and
- 91A.2 otherwise do not admit the allegations contained in the balance of the paragraph.
92. As to paragraph 104 of the FASC, the Respondents:
- 92.1 repeat paragraphs 44, 46, 47, 48 and 49 of this Defence; and

- 92.2 otherwise deny the allegations made in the paragraph.
93. As to paragraph 105 of the FASC, the Respondents:
- 93.1 repeat paragraph 54 of this Defence;
- 93.2 admit that if the conduct alleged took place, it would be unconscionable; and
- 93.3 otherwise deny the allegations contained in the paragraph.
94. As to paragraph 106 of the FASC, the Respondents:
- 94.1 deny that the Third Respondent engaged in the conduct alleged in paragraphs 80, 82, 84 and 86 of the FASC; and
- 94.2 otherwise do not admit the allegations contained in the balance of the paragraph.
95. The Respondents deny paragraph 107 of the FASC.
96. As to paragraph 108 of the FASC, the Respondents:
- 96.1 repeat paragraph 54 of this Defence; and
- 96.2 otherwise deny the allegations contained in the paragraph.
- 96A The Respondents deny paragraph 108A of the FASC.
97. The Respondents deny paragraph 109 of the FASC.
98. The Respondents deny paragraph 110 of the FASC.
99. The Respondents deny paragraph 111 of the FASC.
100. As to paragraph 112 of the FASC, the Respondents:
- 100.1 admit that the Second Respondent is vicariously liable for the conduct of the Third Respondent;

100.2 deny that the Third Respondent engaged in tortious conduct as pleaded in the paragraph; and

100.3 otherwise deny the allegations contained in the paragraph.

101. The Respondents admit paragraph 113 of the FASC.

102. The Respondents admit paragraph 114 of the FASC.

103. The Respondents admit paragraph 115 of the FASC.

104. The Respondents deny paragraph 116 of the FASC.

105. The Respondents do not admit paragraph 117 of the FASC.

106. As to paragraph 118 of the FASC, the Respondents:

106.1 admit John Harragon was not assaulted by the Third Respondent or any person acting at the direction of or with the consent of the Third Respondent during the period of his residence at GWL; and

106.2 otherwise deny the allegations contained in the paragraph.

107. The Respondents deny paragraph 119 of the FASC.

108. The Respondents do not admit paragraph 120 of the FASC.

109. As to paragraph 121 of the FASC, the Respondents:

109.1 admit John Harragon worked in a lawn mowing team of residents of GWL; and

109.2 otherwise does not admit paragraph 121.

110. The Respondents deny paragraph 122 of the FASC.

111. The Respondents deny paragraph 123 of the FASC.

112. The Respondents do not admit paragraph 124 of the FASC.

113. The Respondents deny paragraph 125 of the FASC.

114. The Respondents deny paragraph 126 of the FASC.

115. The Respondents deny paragraph 127 of the FASC.

116. The Respondents deny paragraph 128 of the FASC.

117. The Respondents deny paragraph 129 of the FASC.

118. The Respondents deny paragraph 130 of the FASC.

119. The Respondents deny paragraph 131 of the FASC.

120. The Respondents deny paragraph 132 of the FASC.

121. The Respondents deny paragraph 133 of the FASC.

122. The Respondents deny paragraph 134 of the FASC.

123. The Respondents deny paragraph 135 of the FASC.

124. The Respondents deny paragraph 136 of the FASC.

125. The Respondents deny paragraph 137 of the FASC.

126. As to paragraph 138 of the FASC, the Respondents:

126.1 admit the Second Respondent is vicariously liable for the lawful conduct of the Third Respondent;

126.2 deny the Third Respondent engaged in the conduct and caused the injuries to John Harragon as pleaded in paragraphs 131 to 137 of the FASC; and

126.3 otherwise deny the allegations contained in the paragraph.

~~101.~~127. In response to the whole of the FASC, the Respondents:

~~101.~~127.1 say that the loss and damage alleged by the Applicant was not reasonably foreseeable to the Respondents and the Respondents were not negligent in

failing to take precautions against a risk of harm pursuant to section 5B of the *Civil Liability Act 2002* ("~~the Act~~CLA");

~~101.2~~127.2 admit they owed a duty of care to the Applicant but deny that duty of care extended to the circumstances pleaded by the Applicant, pursuant to section 32 of the CLA;

Particulars

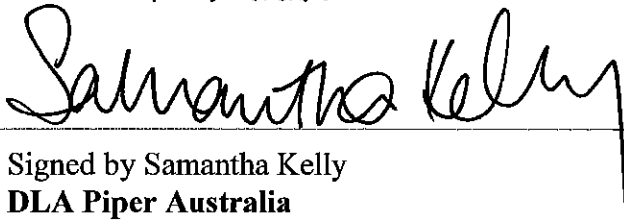
a) the harm would not have eventuated to a person of normal fortitude.

~~101.3~~127.3 say they have no liability to pay damages for pure mental harm because the harm the Applicant allegedly suffered does not consist of a psychiatric illness resultant from or caused by the circumstances pleaded in the FASC.

~~102.1~~28. In response to the whole of the FASC, the Respondents say that the loss or injury allegedly suffered, or part of it, occurred after the expiration of the applicable limitation periods, pursuant to sections 14 and 18A, of the *Limitation Act 1969* (NSW), section 82(2) of the *Trade Practices Act 1974* (Cth) and sections 236(2) and 237(3) of the *Australian Consumer Law*.

~~103.1~~29. The Respondents reserve their rights to amend this Defence upon provision of proper particulars, discovery and evidence by the Applicant.

Date: 17 ~~February~~ March 2016



Signed by Samantha Kelly
DLA Piper Australia
Lawyer for the Respondent


This pleading was prepared by Samantha Kelly, lawyer

Certificate of lawyer

I Samantha Kelly certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 17 March 2016

A handwritten signature in cursive script that reads "Samantha Kelly". The signature is written in black ink and is positioned above a horizontal line.

Signed by Samantha Kelly
DLA Piper Australia
Lawyer for the Respondent