In the Supreme Court of St. Helena

Citation: SHSC 542/2020

Civil

Judgment on Residuary Liability and Damages

Plaintiff

MR GEORGE NATHANIEL MOYCE

(through his litigation friends CHERYL TINGLER and WILLIAM TINGLER)

-v-

Defendant

ATTORNEY GENERAL OF ST HELENA

(for and on behalf of the Health Directorate of the St Helena Government)

Judgment dated 30th October 2022

The Chief Justice Rupert Jones

Introduction

1. The background to this claim (or plaint as it is more properly known) is well known but I shall summarise it very briefly. It is a clinical negligence claim relating to cataract day-surgery performed on the Plaintiff, Mr George Moyce, on 13 December 2017 at Jamestown General Hospital in St Helena. The wrong strength intraocular lens (IOL) was implanted in his right eye by a doctor, Dr Tavcar, employed the St Helena Health Directorate. This was because the Plaintiff was misidentified and he received the IOL meant for another patient of the same surname.

2. The following day, 14 December 2017, the mistake was identified. The Plaintiff subsequently underwent ex-plantation of the IOL and its correct replacement in day-surgery (corrective surgery or exchange surgery) some six days after the original surgery, on 19 December 2017. The Plaintiff complains of the ongoing effects of the surgery and permanent injury to his right eye including increased sensitivity to light.

3. The full background to the claim is set out in the summary judgment of HHJ Wall dated 1 October 2021[1]. The Judge entered liability Judgement in favour of the Plaintiff, with damages to be assessed, on the first pleaded particular of negligence in the Claim contained at paragraph 4a of the Plaintiff's particulars of claim. This was on the basis of one breach

[1] Order of HHJ Carmel Wall dated 1 October 2021

of duty accepted by the Defendant as set out at paragraph 1 above – the Defendant negligently failed to take reasonable care and failed to identify the correct patient and thus implanted the incorrect IOL into the Plaintiff on 13 December 2017. Therefore, the procedure carried out on 13 December 2017 of cataract removal and implantation of intraocular lens was performed in breach of duty. The Judge found that the breach caused damage to the Plaintiff was more than minimal but the extent of the injury and damage caused by the breach was to be determined at trial.

4. The Judge refused to enter summary judgment in respect of the remaining particulars of negligence – residuary liability – which are now also to be determined at trial. Therefore, the extent of damage caused to the Plaintiff by the negligence proved and the assessment of damages in relation to all particulars of negligence which are established, fall to be determined as part of the trial.

5. The trial of the remaining issues of residuary liability and damages took place before me using video technology (Skype) on 24 October 2022. This is my judgment on residuary liability and damages following that hearing.

6. Before turning to determination of the remaining matters in dispute, I should address the hearing itself.

The hearing of the claim – proceeding in the Plaintiff's and Litigation Friends' absence

7. Neither the Plaintiff, nor his litigation friends, Mr and Mrs Tingler, attended nor participated in the hearing. I am satisfied that they were each properly and repeatedly notified in writing of the time, date and form of the hearing. I am satisfied that their non-attendance and non-participation was voluntary and deliberate. The background to their decision not to attend nor participate in the hearing and my decision to continue to hold an oral hearing of the trial is set out at length in some of my previous rulings – see those of 22 January 2022, 19 April 2022, and 2 October 2022.

8. Essentially, the Tinglers, on behalf of the Plaintiff, have decided that the St Helena justice system is unjust, corrupt even, and that it cannot give them satisfactory justice (neither a fair trial nor a fair remedy in respect of the claim). Therefore, they have not cooperated with any of the prior directions nor timetable for trial – for example, in addition to their non-attendance they have failed to serve evidence or complete disclosure etc. They (the litigation friends) even disavow the participation of the expert witness, Dr Lefkowitz, previously instructed on the Plaintiff's behalf.

9. The litigation friends have previously sought to withdraw the Plaintiff's claim, which application I refused in light of the Plaintiff having already obtained summary judgment on liability. I decided that it was in the Plaintiff's best interests for the full extent of the Defendant's liability to be established and for him to receive the appropriate recompense by

way of damages. The litigation friends have also sought to stay proceedings pending an investigation by the United Nations ('UN') into the St Helena justice system which Mr Tingler has sought. I have previously refused this stay request on the basis there has been no investigation launched by the UN and there is no further outcome to await.

10. Further, I am satisfied there has been no injustice perpetrated by the St Helena justice system. That much is obvious from the fact that the Plaintiff has already been awarded summary judgment in part in his favour. Furthermore, I have not sought to strike out the remainder of the claim but to determine it on its merits despite the lack of cooperation from the Plaintiff's litigation friends. I am satisfied that this was in the best interests of the Plaintiff notwithstanding the stance of his litigation friends.

11. In light of all this, I was satisfied that it was in the interests of justice to proceed with the hearing on 24 October 2022 in the absence of the Plaintiff and litigation friends absence for these reasons and those set out in my earlier rulings.

12. I was satisfied that I could fairly try the matter in their absence and postponing the trial would only lead to delay without any prospect of progressing it – there is no reasonable prospect of them changing their mind and cooperating - for example, Mr Tingler previously suggested that any receipt of damages awarded would constitute 'blood money'. I have previously indicated that I would take into account all written evidence and submissions already served on the Plaintiff's behalf and critically assess and test the Defendant's evidence called orally at the hearing. I have done so.

13. At the hearing, the Defendant was represented by Mr Cridland of counsel, to whom I am extremely grateful, who made written and oral submissions. The only live witnesses called for the Defendant were its two witness of fact – medical doctors who examined the Plaintiff at various times: Mr Clare, Consultant Ophthalmologist and, Dr Milian, Consultant Gynaecologist (and general practitioner on St Helena). They each provided a witness statement dated 30 May 2022, gave oral evidence at the hearing and answered questions from myself and Mr Cridland.

14. The remaining written evidence and submissions considered by me were contained in the trial bundle – these included the Plaintiff's medical notes and records, the Plaintiff's Expert Report from Dr Lefkowitz, Consultant Ophthalmologist dated 23 March 2021 and the report of the Defendant's Expert, Mr Quah, Consultant Ophthalmologist dated 3 June 2022.

15. As above, the Plaintiff and litigation friends did not engage nor cooperate, nor provide any witness statements nor any other type of documentary evidence beyond the Plaintiff's expert report, particulars of claim and schedule of loss. Nonetheless, I carefully considered all the documentary and oral evidence in deciding what matters of liability and damages were proved on the balance of probabilities.

Rulings at the outset of the hearing

16. I ruled at the outset of the hearing that I would admit the original Plaintiff's expert report from Dr Lefkowitz of March 2021 – but not his recent written evidence of October 2022. Dr Lefkowitz had contributed to a joint expert's report, 'a joint statement', authored by him and Mr Quah, the expert for the Defendant, dated 11 October 2022.

17. I decided that I would not admit Dr Lefkowitz's contribution to the recent joint report as representing his evidence. This was because, despite the St Helena Government generously agreeing to fund his contribution, Mr Tingler made clear in email correspondence last week that Dr Lefkowitz had not had authority / instructions from the litigation friends to further participate or act on the Plaintiff's behalf. In addition, to the extent the recent report could have been said to represent Dr Lefkowitz's expert opinion, it was at variance with his original report, tending now to agree with the Defendant's expert. For all these reasons, I was satisfied that I should not admit the joint report as containing any evidence from Dr Lefkowitz. I am satisfied it would have been unfair to admit it for those purposes.

18. All the same, I am satisfied that the St Helena Government had acted properly and fairly in seeking to fund the Plaintiff's expert in circumstances where the Plaintiff and litigation friends had ceased to fund their expert to do any work on the Plaintiff's behalf and where the Government was seeking fairly to assist the Plaintiff to advance his case and prepare for trial. I was satisfied that the Government had not attempted to induce the Plaintiff to settle with the Defendant nor to corrupt the evidence served on the Plaintiff's behalf. It was doing its best from honourable motives.

19. Nonetheless, I did admit and consider Dr Lefkowitz's original report as above. As with all evidence that was only given in writing, which was not given orally nor subject to cross examination, I have to decide what weight to give it.

20. At the outset of the hearing I explained my reasons why I would admit the joint statement dated 11 October 2022 as containing only evidence on behalf of Mr Quah (the Defendant's expert) and would then consider its reliability, as I have done below, together with that of the original expert report from Mr Quah dated 3 June 2022.

21. Essentially, Mr Quah's evidence was highly relevant to the issues in the case and from a qualified expert. Both his reports were filed and served in accordance with directions and the evidence was given in writing only. Mr Quah did not give any live oral evidence at the hearing because he was unavailable due to a recent family bereavement for which I express my condolences. However, the Defendant had intended to make Mr Quah available for cross examination if it was needed and would have applied for an adjournment had there been any question of his report not being admitted without his giving oral evidence.

22. I ruled that I would admit Mr Quah's evidence for the reasons set out above. However, I ruled that I would have to consider its reliability - what weight to give it in light of fact he was not available for cross examination. The fact that written evidence has not been tested may decrease the weight to be attached to it.

23. In those circumstances, Mr Cridland did not seek a postponement or adjournment of the hearing but was prepared to proceed with Mr Quah's evidence being admitted on that basis.

The remaining issues to be determined – residuary liability and damages

24. There are five remaining specific allegations of breach of duty which remain to be determined - these are contained at paragraph 4.b-f of the Particulars of Claim, that the Defendant:

a. …[judgment entered as above]
b. Negligently and wrongly performed an invasive procedure;
c. Failed to take appropriate steps to reduce the risk of injury to the Plaintiff arising out of undertaking the operation set out above to the lowest practicable level;
d. Failed to put in place or enforce any or adequate training or risk prevention measures;
e. Negligently failed to provide aftercare, resulting in damage;
f. Negligently failed to medevac the Plaintiff, resulting in damage.

25. Causation is dealt with in paragraph 5 of the Particulars as follows: "…but for the negligence of the Defendant the Plaintiff would not have had to undergo a second surgery and the damage would not have been caused."

26. By virtue of the undated Schedule of Loss the Plaintiff seeks General Damages. The allegations of personal injury are dealt with in paragraph 6(a) of the pleaded case in the Particulars. Reference is made to the avoidable second corrective surgery and it is alleged that the Plaintiff "is now left with permanent damage to his eye …". This is not specified in the Particulars. The damages are quantified in the Particulars as being within the Judicial College Guidelines, Chapter 5(f) but in the Schedule of Loss as being within either of paragraphs 5(f) or 5 (g):

General Damages
Judicial College Guidelines, Chapter 5 Injuries affecting the senses
(A) Injuries affecting sight
(f) cases of serious but incomplete loss of vision in one eye without significant risk of loss or reduction of vision in the remaining eye, or where there is constant double vision. As case of constant blurred vision and sensitivity to light in both eyes requiring constant wearing of dark glasses would be at the top of the bracket
£23,680 to £39,340

…

(g) minor but permanent impairment of vision in one of both eyes, including cases where there is some double vision, which may not be constant and cases of permanent sensitivity to bright light but not sufficient to require constant wearing of dark glasses. **£9,110 to £20,980**

27. The general damages are claimed to be in excess of £20,000 in the Particulars of Claim.

28. In the Schedule of Loss, special damages are claimed in the sum of over £10,000 as set out in a table. These are essentially the Plaintiff's costs associated with travel, accommodation and private medical ophthalmic care in South Africa both in January-February 2018 and in July 2019.

The facts

29. I make the following findings of fact on the balance of probabilities. They do not appear to be in dispute and are derived from the original expert report for the Defendant, from Mr Say Aun Quah BCH BAO PGDIP CRS FRCOphth dated 3 June 2022. The original report usefully summarises facts which are undisputed and drawn from the variety of sources including the statements and medical notes.

30. The Plaintiff, George Moyce, was aged 80 years and 1 month old he was diagnosed to have cataracts and referred for surgery opinion on 6th July 2017. His recorded vision at that time was 6/9 in his right eye and 6/9 in the left eye.

31. On 7th November 2017, George Moyce saw Dr Igor Tavcar who recorded George Moyce's vision to be 6/18 in the right eye and 6/9 in the left eye. There were presence of significant cataracts and arrangement was made for George Moyce to have right cataract surgery. An intra-ocular lens with +25.0D was selected.

32. On 13th December 2017, George Moyce underwent an uneventful cataract surgery performed by Dr Igor Tavcar with implantation of +25.0D Rayner intraocular lens. George Moyce was sent home with a prescription for topical steroid and antibiotic eye drops to be use 4 times daily in his right eye.

33. On 14th December 2017, George Moyce visual acuity was found to be CF (counting fingers) that improved with pin hole. The right eye was otherwise normal post operatively but the wrong powered lens implant had been inserted into George Moyce's eye (+25.0D instead of +19.5D or +20.0D). Right intraocular lens exchange was arranged by Dr Igor Tavcar to be performed on 19th December 2017.

34. On 18th December 2017, George Moyce's right vision was CF improving to 6/12 via pin hole. It was commented that the right eye was "setting (sic) structures, normal post op inflammation, IOL stable in bag, no sign of inflammation."

35. On 19th December 2017, George Moyce underwent a right intraocular lens procedure performed by Dr Igor Tavcar.

36. On 20th December 2017, George Moyce saw Dr Igor Tavcar. George Moyce's right vision was 6/60. He had "corneal oedema, stable and centred iol, ++ post op inflammation, pupil round, stable and settling structures". George Moyce was prescribed topical steroid and antibiotic drops to be used 4 times daily in his right eye.

37. On 21st December 2017, George Moyce saw Dr Igor Tavcar. George Moyce had complained of significant light sensitivity "photophobia ++" and his right vision was 6/60 that improved to 6/12+ with pin hole. The right eye appeared more inflammed "inflammaton (sic) ++(+), pupil inferior synechiae, iris pigment dispersed on IOL". George Moyce was advised to continue with the use of steroid drops 4 times daily and taper down the treatment in 4 days. A follow up appointment was given for George Moyce to be seen on 28th December 2017.

38. On 26th December 2017, George Moyce saw Dr Igor Tavcar. George Moyce reported throbbing pain and photophobia. His right vision was 6/24 improving to 6/18 with pin hole. His cornea was clear, no oedema, pupil mid dilated with resolved synechiae, iris pigment, inflammation and clear view of the fundus. George Moyce was reassured and advised to expect further improvement of his vision.

39. On 29th December 2017, George Moyce saw Dr Igor Tavcar. George Moyce's right vision was 6/18 improving to 6/7.5 with pin hole. Examination revealed a fixed pupil but was otherwise unremarkable. A follow up was planned for 2018 with optometry refraction and for consideration of YAG capsulotomy.

40. On 8th January 2018, George Moyce saw Dr Igor Tavcar. George Moyce's right vision was 6/24 improving to 6/12 with pin hole. George Moyce complained of a persistent foreign body sensation when blinking. Examination of George Moyce's right eye was unremarkable. He was reassured to expect complete resolution of the ocular discomfort over next weeks. A review appointment was arranged for mid-2018 with refraction and prescription of new glasses.

41. On 23rd January 2018, George Moyce saw Dr Michael Mesham. George Moyce's right visual acuity was 6/18. He was noted to have mild inflammation and a distorted pupil. OCT scan suggested presence of macular oedema. George Moyce was treated with a further course of topical steroid and no steroidal anti-inflammatory drops.

42. On 6 August 2018, George Moyce saw Ms Priscilla Brown, the visiting optometrist to the island. George Moyce's recorded vision of the right eye was 6/36 and his left eye was 6/9 corrected. George Moyce had expressed he was not keen for further surgical intervention.

43. On 14 September 2018, George Moyce saw Mrs Patronella Mittens-Henry. George Moyce's right visual acuity was recorded as 6/18 and his left visual acuity was recorded as 6/9.

44. On 14 September 2018 Dr Milian (the second live witness of the Defendant) having reviewed the records, concluded that Mr Moyce was fit to drive. He reviewed the entries by Ms Priscilla Brown, was aware that while Mr Moyce complained of ocular irritation, but decided that there were no concerns regarding his vision which would impact on his ability to drive. As such, he approved Mr Moyce's driving licence fitness report.

45. On 19th March 2019, George Moyce saw Dr Gerry Clare (the first live witness of the Defendant, Mr Clare). George Moyce's right visual acuity was 6/24 with pin hole. Clinical examination revealed that he had right endothelial guttae, posterior synechiae, capsular opacification with no retinopathy. Dr Gerry Clare carried out right YAG capsulotomy for George Moyce.

46. On 29th March 2019, George Moyce saw Dr Gerry Clare (Mr Clare). George Moyce's right visual acuity was 6/12 improving the 6/9 with pin hole. George Moyce was pleased with the improvement in his vision. Clinical examination confirmed that there was no sign of inflammation or vitritis in the right eye. Fundal examination appeared normal. A follow up appointment was arranged for George Moyce to be reviewed in 12 months for consideration of left cataract surgery.

47. On 21st August 2019, George saw Mrs Bridget Henry at the diabetic eye clinic. His right visual acuity was recorded as 6/7.5.

48. On 2nd September 2019, George Moyce saw Mrs Patronella Mittens-Henry for medical for driving. His right visual acuity was recorded as 6/6.

49. On 23rd September 2019, George Moyce saw Dr Jiten Mistry. He complained of blurry vision and light sensitivity. George Moyce right vision was recorded as 0.4 unaided correcting to 0.7 with his glasses. He was noted to have a decentred pupil and evidence of an early epiretinal membrane at the back of the right eye. No further treatment was offered to George Moyce.

Dr Lefkowitz's evidence

50. At this point I should note the key evidence filed and served on behalf of the Plaintiff which I have admitted - the original expert report dated 23 March 2021 from Dr Lefkowitz.

His expert opinion evidence was as follows.

'DISCUSSION:

An attempt to place the correct implant in the capsular bag should be made. This would be the ideal position. In some cases, the new IOL cannot be placed within the capsular bag, necessitating another fixation technique. Research showed similar outcomes among iris sutured, scleral sutured, and anterior chamber IOL techniques. If the bag cannot be saved with a capsular tension ring or ring segments, fixation technique will depend on the degree of capsule support. Gluing or external fixation methods will ensure stable fixation of the implant.

If a sulcus implantation is employed, it must be done properly to avoid IOL dislocation or Inflammation.

The inflammation was noted after the surgeon had left the island. The patient was in severe pain and showed signs of iritis. Care by an Ophthalmologist should have been arranged through Airevac to a suitable location which would have allowed the inflammation to be diagnosed and treated lead to several problems, such as macular edema, which can result in permanent vision loss.

CONCLUSIONS:

Placement of an incorrect IOL power can be due to clerical errors pre-operatively, incorrect IOL position in capsular bag among other reasons. Quick diagnosis of the problem is essential for proper remediation. As soon as possible, the patient should be brought back to OR and have the wrong IOL removed and replaced with the correct one.

In most cases, the IOL can be removed atraumatically removed and a new IOL placed into the capsular bag. In rare cases, if that cannot be safely done, a sutured sulcus lens or a glued IOL can be used. An anterior chamber lens is also an acceptable alternative. Dr Tavcar's replacement surgery was poorly done, and this resulted in severe intraocular inflammation, ultimately requiring Airevac to South Africa.

Not allowing the inflammation to be diagnosed and treated, led to glare, poor vision, ghosting of images and ultimately macular edema

In a National Health scenario, absence of appropriate care in the remote location mandates immediate transport to the nearest appropriate facility. This failure is a definite departure from the standard of care, and is regrettable. Patient's children had to pay for his transfer to South Africa, on the same ship that Dr Tavcar left St Helena on.'

51. I address the weight I propose to give the report below. Suffice to say at this stage that the report does not address any of the key questions of the six pleaded particulars of negligence nor attempt to address causation nor the precise damage that is said to have been caused to the Plaintiff by the Defendant's negligence. It is a very short report and the reasoning in support of the opinions which are expressed is brief and generalised. It makes

no specific reference to the medical notes nor to any instructions nor witness statement from the Plaintiff.

52. For these reasons alone, to the extent it conflicts with the expert opinion of Mr Quah, I prefer Mr Quah's evidence and propose to give Dr Lefkowitz's opinion less weight.

The residuary allegations of breach of duty

53. I now turn to the residuary allegations of breach of duty to be resolved by the Court. As noted above – Dr Lefkowitz does give any opinion on these specific Particulars but Mr Quah does address them in detail in his original report dated 3 June 2022. Save for where I indicate otherwise, I accept Mr Quah's expert evidence and opinions in his original report as being established on the balance of probabilities in making my determinations. I take into account the specificity, length and detail of Mr Quah's original report and the fact that it is fully referenced and reasoned. For reasons set out below I do not find some of Mr Quah's more recent opinion evidence set out in the joint statement dated 11 October 2022 to be established on the balance of probabilities.

The particulars of negligence[2] at paragraph 4 of the Particulars of Claim

Negligently failed to identify the correct patient.

54. This was admitted at paragraph 21.1 of the Defendant's defence[3], and summary judgment entered on the basis of the admission on 21 October 2021 as above.

Negligently and wrongly performed an invasive procedure

55. This particular of negligence is not proved, and it is not supported by the evidence. I accept the expert opinion set out in Mr Quah's original report and his further report (the joint statement at answer 1, which is still admissible as to Mr Quah's opinion). The Plaintiff presented with a right cataract and vision that was no longer correctable with glasses. The opinion is that the offer of surgery was reasonable *"and Dr Igor Tavcar did not perform an invasive procedure."*

56. The Plaintiff presented with symptomatic right cataract. His poor vision was not correctable with glasses. To improve his vision, he would have to undergo cataract surgery in any event. I accept Mr Quah's opinion that Dr Igor Tavcar was not negligent in offering George Moyce cataract surgery.

57. When George Moyce was found to have an incorrect powered intraocular lens, a lens exchange procedure was offered by Dr Igor Tavcar. It was not documented that other options were discussed, for example, conservative treatment with subsequent contact lens

[2] [6].
[3] [13].

correction of the residual refractive error or implantation of secondary sulcoflex lens to correct the residual refractive error.

58. I accept Mr Quah's opinion that as the identification of the wrong lens implanted was found immediately after the cataract surgery, on 14 December 2017, an intraocular lens exchange procedure would have been the most appropriate option for George Moyce.

59. In relation to the replacement, exchange or corrective surgery which took place on 19 December 2017, Dr Lefkowitz does not suggest that inserting the replacement IOL in the sulcus rather than the capsular bag would be automatically negligent.

60. Further Mr Clare, when giving oral evidence, accepted that while it may be sub-optimal to do so, it would not constitute a failure to take reasonable care or any breach of the standard of a reasonably competent doctor (breach of duty or negligence) to insert the IOL in the sulcus rather than the capsular bag. In any event, it is not said to be the cause of any damage in the Plaintiff's case.

61. I am therefore satisfied that Dr Igor Tavcar did not negligently or wrongly carry out the intraocular lens exchange or replacement surgery on 19 December 2017.

62. In conclusion, save for inserting the wrong intraocular lens in the original surgery on 13 December 2017 (already accepted above and for which judgment has already been entered), there was no other evidence in the medical records to support the Plaintiff's case that Dr Tavcar performed an invasive procedure wrongly. This particular is not proven and dismissed.

63. Further and in any event, this particular of negligence would add nothing to that already established – no further damage is said to have been caused to the Plaintiff by the second corrective surgery than that established under the admitted particular for which judgment has been entered. The damage from having second corrective surgery is already accepted to have caused the Plaintiff pain, suffering and loss of amenity because of the stress of having to undergo a second procedure and the extended length of inflammation and recovery time it produced. However, this flows from the negligent conduct of the first surgery and not from the corrective surgery which has not been found to have been conducted negligently.

Failed to take appropriate steps to reduce the risks of injury to the Plaintiff arising out of undertaking the operation set out above to the lowest practicable level

64. It is accepted that Dr Igor Tavcar negligently failed to identify the correct patient on the biometry he used to perform George Moyce's right cataract surgery (for which Judgment has been entered), as above. However, I accept Mr Quah's opinion that other aspects of the standard of care provided by Dr Igor Tavcar in the day-surgery on 13 and 19 December 2017 did not fall below that expected of an ordinary and competent medical practitioner.

65. For the avoidance of doubt, save for the incorrect patient being identified, and therefore incorrect lens being implanted, I am satisfied that Dr Tavcar performed the other aspects of the procedures on 13 and 19 December 2017 to the lowest practicable level as pleaded by the Plaintiff.

66. Further and in any event, and as above, at answer 2 of Mr Quah's evidence in the joint statement, he comments that there was a failure by Dr Tavcar *"to identify the correct patient on the biometry he used to select the intraocular lens implant…"* as such this particular of negligence adds nothing (in terms of causing damage to the Plaintiff) to particular of negligence 4(a) which has been admitted and judgment entered in respect of.

67. Therefore, again I am satisfied that this particular should be found not proven and be dismissed.

Failed to put in place or enforce any or adequate training or risk prevention measures

68. Mr Quah states that he is not able to comment in respect of this allegation as he is not familiar with healthcare arrangements in St Helena – see answer 3 of his opinion as recorded in the joint statement of 11 October 2022. However, given there is therefore no evidence to support this allegation, the Court finds it not proven and it is dismissed. Again, there is no further nor additional damage that would be caused by this particular in any event.

Negligently failed to provide aftercare, resulting in damage

69. There is inconsistent evidence on this particular of negligence. In his original expert report dated 3 June 2022, Mr Quah stated as follows:

> "George Moyce was given the appropriate after care following his initial cataract surgery. Dr Igor Tavcar identified the use of an incorrect lens implant on the first day post operative review. George Moyce developed significant inflammation of the right eye following the intraocular lens exchange but Dr Igor Tavcar did not increase the frequency of use of the topical steroid drops. In my opinion, the standard of care provided by Dr Igor Tavcar had fallen below that expected of an ordinary and competent medical practitioner. The use of increased topical steroid drops would have shortened the duration of the period of recovery and avoided the damage to the right pupil. George Moyce has achieved good correctable vision of his right eye but he suffers from light sensitivity due to the damage to his pupil."

70. He is therefore of the opinion that there was negligence in the aftercare following the second corrective surgery which caused extended recovery and damage to the pupil.

71. At answers 4 and 5 of the joint report dated 11 October 2022f Mr Quah does not address this issue and expresses no further relevant opinion when he states:

> 4. Following surgery for intraocular lens exchange, what aftercare should be provided?

> … following an intraocular lens exchange procedure, the patient should be reviewed at the hospital for a check-up after being discharged from surgery. Assessment at the clinic should include history taking, assessment of visual acuity, slit lamp examination, intraocular pressure measurement and fundal examination.
> 5. Following your answer to question 4 above, what aftercare did the Plaintiff receive?
> …. the immediate after care consisted of history taking, assessment of visual acuity, measurement of intraocular pressure and fundal examination were provided to George Moyce.

72. However, at answer 7, Mr Quah changes his mind from his original report and states: *"that [the Plaintiff] received all the appropriate aftercare following his discharge after an intraocular lens exchange."*

73. I reject this latter evidence on the balance of probabilities as Mr Quah gives no good reason for changing his mind from his original report. The later opinion (in the joint report) is shorter and less considered analysis than that of his original report – simply consisting of questions and a one sentence answer. The joint report also evidences a lack of same care and attention than that of the report. For example, in answer to question 1 it states:

> Dr Igor Tavcar was no[t] negligent in offering George Moyce cataract surgery and Dr Igor Tavcar did not perform an invasive procedure wrongly other than <u>miscalculating</u> the power of the implant. [<u>emphasis added</u>]

74. There is no suggestion Dr Tavcar miscalculated the power of the implant – he misidentified the patient. This opinion is simply incorrect.

75. In his oral evidence during the hearing Mr Clare, whose expertise entitled him to give an opinion on this matter, opined that he agreed that the failure to increase the frequency of eyedrops was 'sub-optimal' and it would have reduced the inflammation and recovery time by a measure of 2-4 weeks. However, he opined that it did not fall below the standard of a reasonably competent medical practitioner.

76. While respecting Mr Clare's opinion, and that his opinion was given in good faith in questioning by me asking him to comment on Mr Quah's report, on balance I prefer Mr Quah's original evidence. Mr Clare was not called as an expert but on matters of fact and had not provided an original and considered written report on the issue, unlike Mr Quah. Therefore, on balance, I prefer the more considered written evidence. Further and in any event, it seems to me to be unfair for me to rely on supplementary expert opinion evidence given orally and without notice to the Plaintiff, against the Plaintiff in this matter.

77. Mr Cridland submits that the evidence does not support this particular of negligence based on Mr Quah's recent report of 11 October 2022 and Mr Clare's oral evidence. Nonetheless, for the reasons set out above, the Court is satisfied that it is proven on the balance of probabilities that there was a negligent failure to increase the frequency of eye drops recommended to the patient as part of the aftercare following second corrective

surgery. This caused some damage in the sense that it extended the length of the Plaintiff's inflammation and recovery time, during which time he would have suffered discomfort, and caused damage to the pupil which resulted in the Plaintiff's sensitivity to light.

78. As I find when I address Special Damages, in light of this breach, I am satisfied that the Plaintiff was reasonably entitled to make a journey to South Africa to seek further medical consultation and treatment as a non urgent trip in January 2018 not requiring a medical evacuation. I am satisfied that in light of the failure in aftercare the Plaintiff was entitled to take the boat to South Africa in January 2018 and receive a second medical opinion, consultation and further treatment (an increase in the eye drops). This was due to the absence of further care on island from the visiting ophthalmologist, Dr Tavcar, and loss of confidence in him in any event. However, I reject the need for any urgent medivac or Airevac as set out below.

Negligently failed to Medevac [the] Plaintiff resulting in damage

79. I accept the evidence and opinion given in the original report of Mr Quah who states:
"As I do not have a good knowledge with the medical care arrangements in Saint Helena, I am limited in my ability to comment on the failure to medevac George Moyce from the island. However, I am on the view that the outcome of George Moyce's right eye would not have been different even if he was transferred to the care of another practitioner. George Moyce developed significant inflammation of the eye following the intraocular lens exchange procedure, a common occurrence following consecutive surgeries performed in an eye over a short period of time."

80. In his original report Dr Lefkowitz suggests that Airevac to South Africa was required. I do not accept that any urgent evacuation by airplane was required – the opinion is given as part of a short and less considered report than that of Mr Quah as I have explained above. It is apparent that even though I have found that the quality of aftercare which was provided to the Plaintiff fell short, it did not reasonably require or necessitate any emergency evacuation off island, particularly any further additional or corrective surgery. I am satisfied that the Governor and Defendant as a whole was reasonably entitled to refuse the request for any urgent or medical evacuation by air.

81. At answer 6 of the recent joint statement, Mr Quah states *"[the Plaintiff] would not have benefitted from being medevac as he had received the appropriate care following his intraocular lens surgery."* I do not accept this statement in so far as it suggests that all aftercare was appropriate. This is for the reasons set out above. However, I accept it in so far as it means it was reasonable for the doctors, Health Directorate and Governor to decided there was no need for an urgent air evacuation of the Plaintiff from the island. As set out above, I do however accept that it was reasonable for the Plaintiff to travel of his own accord by boat to South Africa in January 2018 to seek further consultation and treatment.

82. Mr Clare stated in his oral evidence that a medical evacuation was unnecessary and there was no failure to take reasonable care in not offering it to the Plaintiff. Given the

weight of the evidence from the experts, this particular of negligence is not proven and is dismissed.

83. Further and in any event, there is no further damage caused by the failure to perform a medical evacuation to that occasioned by the failure to increase the frequency of eye drops recommended and the failure in aftercare. To the extent that there was any damage caused by the failure in aftercare, this was an extended recovery period and light sensitivity as set out above. To the extent that general or special damages are recoverable, I have already accounted for that damage caused in my findings above and any failure to medevac caused no further damage.

Conclusion on residuary liability

84. In addition to that particular of negligence for which judgment has already been entered, paragraph 4a of the particulars of claim, I also find paragraph 4e proven – there was negligent aftercare in the failure to increase the frequency of dosage of the Plaintiff's eye drops in the manner described Mr Quah.

85. All other remaining particulars of negligence are dismissed. Further or alternatively none of the other breaches, even if established, would have caused any additional damage to that already caused by the two particulars which are proved and for which damages will be awarded.

Causation

86. I accept the evidence of Mr Quah on the issue of causation, comprehensively set out in his original report as follows:

> 3.8.1 George Moyce was unfortunate in that a wrong powered intraocular lens implant was selected and inserted into his right eye during an otherwise seemingly uncomplicated cataract surgery performed by Dr Igor Tavcar on 13th December 2017. Had the correct implant been inserted, George Moyce right eye would probably have settled within 4-6 weeks of the surgery. Furthermore, George Moyce would not have suffered from the symptom of light sensitivity from the pupillary damage.
>
> 3.8.2. George Moyce experienced a prolonged recovery period as he developed significant inflammation of the right eye following the intraocular lens exchange procedure, which then took over 2 months to settle with an extended duration of use of topical steroid drops and non-steroid anti-inflammatory drops in the eye. It is therefore my opinion that as a result of the admitted breach of duty, the Plaintiff's recovery period was extended by 2 weeks. In the non-negligent scenario, I believe the Plaintiff would have recovered within 6 weeks. In the event, he required 8 weeks to recover.
>
> 3.8.3. George Moyce achieved a visual acuity of 6/6 in his right eye recorded on 2nd September 2019 when he attended the clinic for driving fitness check.

3.8.4. During the examination of George Moyce's right eye by Dr Jiten Mistry, he was noted to have a decentred pupil and evidence of an early epiretinal membrane at the back of the right eye. As there was no documentation of this retinal finding prior to the surgery, the development of the epiretinal membrane may be related to one of the following: (a) the cataract surgery on 13th of December 2017, (b) the intraocular lens exchange procedure on 19th December 2017, (c) YAG capsulotomy treatment or (d) be completely idiopathic. On the balance of probabilities, I believe the formation of epiretinal membrane is most likely to be related to the significant post-operative inflammation following the intraocular lens exchange procedure. This is because the most apparent risk that the Plaintiff had was the significant inflammation in the eye following the lens exchange surgery. Epiretinal membrane is very uncommon following a routine cataract surgery or YAG capsulotomy. The lack of epiretinal membrane in the fellow eye would also support that it was unlikely to be idiopathic.

3.8.5 George Moyce had suffered from prolonged rehabilitation of his right eye but he has not lost vision as a result of the incorrect lens implant inserted during the cataract surgery. I believe that the Plaintiff's rehabilitation was extended by 2 weeks as a result of the insertion of the wrong intraocular lens.

3.8.6. The damage to the pupil from the intraocular lens exchange procedure and the significant post-operative inflammation has resulted in George Moyce's symptom of light sensitivity. The symptom of light sensitivity in George Moyce's right eye is permanent as it is a result of damage to his pupil which cannot be repaired.

4.1 George Moyce underwent an intraocular exchange procedure as a result a wrong lens implant being inserted into his eye during his right cataract surgery.

4.2. George Moyce developed significant post-operative inflammation of his right eye following the intraocular lens exchange procedure.

4.3. George Moyce has achieved a good standard of vision in his right eye following the prolonged course of visual rehabilitation.

4.4. George Moyce suffers from symptom of light sensitivity due to damage to his pupil.

4.5. George Moyce has an epiretinal membrane in the right eye that will need long term monitoring.

4.6. As a result of the index incident, I believe the Plaintiff's otherwise avoidable injury/injuries include:

4.6.1. An extended recovery period (of 2 weeks);

4.6.2. Sensitivity to light; &

4.6.3. development of an Epiretinal membrane.

Quantification of Damages

General Damages

87. As is set out above, the Plaintiff seeks general damages for pain, suffering and loss of amenity based on the judicial college guidelines at paragraphs 5f and 5g. It is not clear which paragraph the Plaintiff relies upon and why it should fall within paragraph 5f given the absence of evidence of him suffering more serious injury to the right eye. The Defendant, in my view rightly interprets the Plaintiff as claiming the intervening sum between to the two backets – around £22,000.

88. In the counter schedule of loss, the Defendants asserts a sum of £12,500 of general damages should be awarded to the Plaintiff. Mr Cridland submits that the appropriate quantification is in the lower mid-range in paragraph 5g – '(g) minor but permanent impairment of vision in one of both eyes, including cases where there is some double vision, which may not be constant and cases of permanent sensitivity to bright light but not sufficient to require constant wearing of dark glasses.'

89. I am satisfied that damages bracket 5g is the appropriate. The range for this bracket is **£9,110 to £20,980.**

90. The creation of the Epriretinal membrane does not appear to have given rise to any deterioration or any other injury or symptom. However, the symptom of light sensitivity in the Plaintiff's right eye is permanent and I have found it to have been caused on balance by the Defendant's negligence in the aftercare, the prolonged inflammation and damage to the pupil. It is a result of damage to the Plaintiff's pupil which cannot be repaired.

91. I accept Mr Quah's evidence that the prognosis of his right eye is good but that the Plaintiff may benefit from tinted glasses to reduce his symptom of light sensitivity in the right eye. The right epiretinal membrane will need to be monitored regularly.

92. Despite, Mr Cridland's submissions I am satisfied that general damages fall towards the top of the bracket because there are a number of aggravating features to this case which should be recognised in the award of general damages – in addition to the permanent injury, light sensitivity and the effect of the recommendation that the Plaintiff may benefit from wearing tinted glasses. Further aggravating features include: a) the need to have a second corrective surgical procedure (albeit day-surgery) some six days later – this would cause some pain, distress and stress, particularly in an elderly patient; b) the extension of the recovery time due to having to have the second corrective surgery; c) the extension of the recovery time due to the increased length of inflammation as a result of not being prescribed more frequent eye drops.

93. Mr Cridland submits that the Plaintiff's case is less serious than *G*:
(1) *G v, Optimax* (Lawtel 24 February 2010)

> The claimant underwent laser eye refractive surgery. Following the surgery he complained of blurred vision. 2 months later he underwent further treatment, but over the next 9 months attended complaining of blurred vision and dry gritty eyes. The claimant underwent "epiLASIK" treatment almost 1 year later which he found excruciatingly painful and required strong painkillers. The claimant developed a refractive error from the surgery, he also suffered from corneal haze and scarring. He returned to a relatively normal life and did not require assistance. He was able to drive. He needed to use artificial tears more frequently. He was able to return to university, the case was settled for £12,000. General damages were estimated at £10,000 (£18,898 updated for RPI).

94. I do not accept the Plaintiff's case is less serious than *G* given the aggravating factors I have identified above and the fact there is a degree of permanent damage which means that the Plaintiff may benefit from wearing tinted glasses. While there may have been a longer period of extreme discomfort in *G*, the Plaintiff is at an advanced stage of life and has suffered some permanent damage and the wearing of tinted glasses will remain a continued recommendation for the rest of his life. In any event, I cannot decide the level of damages simply by reference to one comparator alone. Taking the case in the round, and looking at the categorisation of paragraph 5g broadly, I am satisfied that it is comparable.

95. I therefore award the Plaintiff the sum of £18,000 in general damages.

96. Further I add the further interest of £673.20[4]. General damages therefore total £18,673.20 inclusive of interest.

97. I am satisfied that the injuries caused are not such as to fall within bracket 5f – 'f) cases of serious but incomplete loss of vision in one eye without significant risk of loss or reduction of vision in the remaining eye, or where there is constant double vision. As case of constant blurred vision and sensitivity to light in both eyes requiring constant wearing of dark glasses would be at the top of the bracket.'

98. While not wishing to be insensitive to the injury caused to the Plaintiff, there is no loss of vision, let alone serious but incomplete loss of vision, and no significant risk of further deterioration - there is also no double vision or blurred vision. While tinted glasses are recommended, there is no recommendation that they must be constantly worn – eg. indoors, and Mr Clare, while accepting the Plaintiff complains of this symptom, was sceptical as to the severity of photophobia (light sensitivity) given the Plaintiff's lack of adverse reaction to the slit lamp test.

[4] 3.74% aggregate rate at 2% per annum to run from 11 December 2020 – the date of the plaint.

Special Damages

99. I am somewhat hampered in assessing special damages due to the lack of witness statement and documentary evidence (such a invoices or receipts) served on behalf of the Plaintiff. Nonetheless I shall do my best to do justice to the claim in light of the material before me and applying the standard of proof – that of the balance of probabilities.

100. I have found that particular 4e of negligence has been proved – the negligent aftercare in relation to the eyedrops has been proved. I have also dealt with the damage caused by this above.

101. I should add that in such circumstances, Mr Cridland accepted that it would have been reasonable for the Plaintiff to travel to South Africa in January 2018 by boat to seek further medical attention – consultation and treatment such as an increase in the frequency of eye drops recommended. But for the failure to increase the frequency of the dose of eyedrops, the Plaintiff's inflammation and irritation would have reduced more quickly (pupil damage and light sensitivity may have been avoided) and it would not have necessitated further medical consultation and treatment at this time.

102. However, I do not accept all the expenses in the Plaintiff's schedule of loss as being reasonably incurred as a result only of travelling to South Africa to seek medical attention. I am satisfied that all the medical bills incurred by the Plaintiff between 23 January 2018 and 29 January 2018, as set out in the Schedule of Loss, were reasonably and properly incurred in consultation and treatment. These total: £1,001.44.

103. I also accept that the Plaintiff's reasonable travel expenses of a return trip from South Africa to St Helena were reasonably and properly incurred: These total £2,286 in invoices from AW Ship Management Ltd, Passage on RMS and Solomon & Company (St Helena plc) payment of passage. The invoices are not provided so it is not clear how many passengers travelled on these passages and it must be assumed (although not expressly stated, that these were from St Helena to South Africa).

104. Dr Lefkowitz has stated that the Plaintiff's children (the litigation friends) had to pay for the Plaintiff's transfer to South Africa on the same ship that Dr Tavcar left St Helena on and I accept this hearsay evidence. I also allow what appears to be a return flight on 13 February 2018 described as a South African Airways Flight from Johannesburg to St Helena in the sum of £458.70.

105. The total special damages awarded are therefore: £3,745.11.

106. I do not accept that the further expenses for 2 passenger Economy flights on 14 January 2018 on Emirates were reasonably and properly incurred. The Plaintiff claims for the costs of carers, presumably Mr and Mrs Tingler, whom the schedule of loss asserts were required to travel to assist in the Plaintiff's medical treatment. There has been no evidence filed or

served (no expert medical evidence nor evidence directly from the Plaintiff nor carers) to provide support for the suggestion that the Plaintiff required one carer, let alone two carers, to fly to St Helena or South Africa to accompany him and supervise him due to his trip. Even though he was elderly at the time, the extent of the Plaintiff's existing medical conditions for which evidence has been provided, including that of his eye, do not prove that he was so infirm or in such pain that he could not reasonably conduct the visit alone. The absence of any evidence served by the Plaintiff and the Tinglers in respect of this claim is critical.

107. In any event, as above, I have allowed the two separate claims for two passages which appear to be from St Helena on 16 January 2018 which may account for the Plaintiff and one person as carer.

108. I reject the claim in the schedule of loss dated 30 January 2018 for accommodation at the Cape Panorama Lodge in the sum of £667.46. No invoice is provided and there is no other evidence provided on the issue of hotel expenses – such of who stayed at the accommodation, for how long and the purpose of the stay. In any event the entry on the table is dated 30 January 2018 – a time after the medical treatment and consultation had been given to the Plaintiff. As Mr Cridland suggested, there may also have been part of the trip which was not necessitated or occasioned by the need for medical treatment – it is simply not known and the Plaintiff has not proved his case that this accommodation expense was reasonably incurred. In principle I accept that a longer stay in South Africa (such as two weeks) may have been required due to the infrequency of return flights or boats to St Helena.

109. I also reject the claim for any expenses relating to the July 2019 trip to South Africa – there is no evidence that this was reasonably or medically necessary by virtue of the Plaintiff's eye condition which was being cared for reasonably and competently on island at the time. There is no finding of negligence in relation to the Defendant's treatment of the Plaintiff at the time nor any finding that he suffered any symptom that could not and was not being treated on island. Further, the inflammation in the eye had reduced by this time and no further injury had been caused nor was additional treatment reasonably necessary to that being given.

110. Likewise, neither of the statements of Dr Mesham or Dr Lefkowitz are claimable as damages – they may constitute costs (as in legal costs) of the claim but do not constitute heads of damage.

Conclusion on damages

111. General damages are awarded in the total sum of £18,673.20. Special damages are awarded in the sum of £3,745.11. The total award is £22,418.31.

Postscript

112. As has been set out above, the conduct of the Plaintiff's litigation friends has not assisted the determination of this case. It has not engendered cooperation nor the easy determination of the claim. At times, the language used and sentiment directed to the court by Mr Tingler has been abusive. Nonetheless, I have put all of this to one side and not considered any formal action against him which might be within my powers. It is clear that Mr Tingler is acutely mentally distressed and there was substance to the Plaintiff's claim. Ultimately fairness and justice requires me to focus upon ithe Plaintiff's position. I have found that he has suffered damage resulting from a negligent medical procedure and aftercare.

113. It is also apparent that Mr Tingler has genuinely believed he has been acting in the Plaintiff's best interest and he genuinely believes there has been misconduct, corruption and injustice on the part of the Government and Supreme Court of St Helena. This is a mistaken belief and regrettable for the reasons I have already set out.

114. I hope it is clear from my earlier rulings in this case, the public hearing and from this judgment that the Court has put aside the litigation friends' conduct and provocative behaviour, their applications to withdraw the claim or seek a stay pending UN investigation and has instead done everything it could to provide a fair procedure and outcome. The Court has held a fair, open and public hearing to demonstrate to public that the allegations of misconduct, corruption and miscarriage of justice in St Helena justice system are without any rational foundation.

115. Justice has not only been seen to be done but has been done. The objective test of this is that the Court has found the claim to have been substantially proved. The damages awarded are somewhere in the middle between those claimed by the Plaintiff (over £30,000) and those conceded by the Defendant (£12,500). The Plaintiff has been substantially successful in his claim - he has been awarded over £22,000. Whether or not the Plaintiff is prepared to accept receipt of these damages is a matter for him and his litigation friends.

116. I remain grateful to the Defendant for its preparation, conduct and representation in defence of this claim and for the assistance provided throughout by the Attorney General's Chambers.

Order

I Order as follows:

a) I enter judgment in favour of the Plaintiff against the Defendant as being liable in negligence for the breach of duty set out in paragraph 4e. of the particulars of claim (in addition to paragraph 4a for which summary judgment has already been given).
b) I dismiss all other particulars of negligence pleaded on behalf of the Plaintiff as not being proved.

c) General damages are awarded in the total sum of £18,673.20 including interest. Special damages are awarded in the sum of £3,745.11. The total award is £22,418.31.

Rupert Jones, The Chief Justice
30th October 2022