IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 153

Suit No 854 of 2013

Between

Rathanamalah d/o Shunmugam

… *Plaintiff*

And

Chia Kok Hoong

… *Defendant*

GROUNDS OF DECISION

[Tort] — [Negligence] — [Breach of duty]
[Tort] — [Negligence] — [Res ipsa loquitur]
[Tort] — [Negligence] — [Damages]

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v
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Aedit Abdullah JC:

Introduction

1 The Plaintiff here suffered injuries after undergoing an operation conducted by the Defendant on both her legs. Having considered the evidence and submissions, I concluded that she had failed to show on the balance of probabilities that the Defendant had acted in breach of the standard of care expected of him as a medical practitioner. Furthermore, while the evidence showed that the Plaintiff did suffer some injuries, these were not to the extent that she had claimed. Thus, even if causative breach had been shown, I would have awarded less than what she claimed as damages.

Background

2 The Plaintiff was in the insurance business and was at the time of the trial a Financial Services Director with the Prudential Assurance Company ("Prudential").

3 The Defendant is a Senior Consultant in vascular surgery practising at Chia KH Surgery, Vein Vascular & General Surgery Centre at Mount Elizabeth Medical Centre.

4 In March 2010, after being referred onwards by another surgeon, Dr Ravintharan s/o Tharmalingam ("Dr Ravintharan"), a senior consultant surgeon practising at Ravi Surgery Pte Ltd at Mount Elizabeth Medical Centre, the Plaintiff consulted the Defendant at his clinic. The scope of the consultation was in dispute. The Plaintiff claimed it was for hyperpigmentation on both her shins. The Defendant said it was for treatment of her lower limb varicose veins. What the Plaintiff agreed to at this consultation, if anything, was disputed.

5 Two further visits were made by the Plaintiff to the Defendant's clinic on 11 June 2010 and 1 July 2010 respectively. There was a dispute as to what had transpired at these visits. In particular, as regards the visit on 1 July 2010, the Plaintiff denied meeting the Defendant in person and claimed to have met only the clinic's staff. Further, the Plaintiff also denied signing a consent form acknowledging that she had been explained, and understood, the risks involved in the operation ("the Consent Form").

6 On 3 July 2010, the Plaintiff attended at Mount Elizabeth Hospital and the Defendant carried out certain medical procedures on her. It was disputed whether the Plaintiff had confirmed her signature on the Consent Form just before the operation.

7 It was not disputed that three distinct procedures were carried out on each of the Plaintiff's legs (collectively, "the Procedures"). They include:

(a) Endovenous Laser Therapy ("EVLT"), which involves: (i) the insertion of a laser fibre, guided by a sheath, into the patient's long saphenous vein, (ii) the concurrent injection of tumescent anaesthesia into the surrounding tissue to protect the saphenous nerve, and (iii) the firing of laser at calibrated energy levels, while the laser fibre is slowly withdrawn, to treat the vein;

(b) Foam Sclerotherapy ("FS"), which involves the injection of FS to close the vein, after the entire laser fibre from the EVLT procedure is withdrawn but before the sheath is removed; and

(c) Phlebectomy (also known as Multiple Stab Avulsions), which involves the physical removal of veins.

8 General anaesthesia was administered by an anaesthetist. A number of other procedures were involved in the operation, including ligations, but those were not in issue.

9 In November 2010, the Plaintiff was told that she suffered injuries to both of her saphenous nerves, which are the longest nerves in a human body and which run from the groin to the foot. The Plaintiff's nerve injuries were said to be permanent. The Plaintiff claimed that these nerve injuries and various other disabilities were causally related to the operation carried out negligently by the Defendant.

The Plaintiff's case

10 The Plaintiff's factual account of what had transpired at the consultations leading up to the Procedures varied significantly from that of the Defendant's.

11 The Plaintiff first consulted the Defendant on 4 March 2010 on the advice of Dr Ravintharan. The Plaintiff's version of the material facts that transpired that day was as follows:

(a) She had consulted the Defendant for small patches of pigmentation on both her shins. She denied the Defendant's claim that she had sought treatment for varicose veins, heaviness of legs, and unsightly veins.

(b) The Defendant advised her that she would require EVLT on both her legs, and assured her that her pigmentation would resolve itself after the surgery. She raised concerns about the appropriateness of performing the treatment on both her legs at the same time, and her desire to return to work as soon as possible. The Defendant assured her that the operation would be simple and safe, and that she would be able to return to work the following day. She asked him if there were alternatives to EVLT, to which he replied in the negative.

(c) Contrary to the Defendant's assertions, she did not immediately agree to EVLT but rather said that she would consider whether to undergo the operation.

(d) She was not informed that she would be undergoing the additional procedures of FS and phlebectomy.

(e) The Defendant had neither discussed the type of anaesthesia that would be used nor informed her that EVLT could be carried out under local anaesthesia.

(f) She also did not express a desire to be admitted for an overnight stay at the hospital instead of undergoing the operation as a day surgery; that would have been unlikely because, *inter alia*, she wanted to get back to work as soon as possible.

12 Evidentially, the Plaintiff submitted that her factual accounts were corroborated by the testimony of her son, Kumaran s/o Ramachandra ("Kumaran"). Kumaran testified that the Defendant had not discussed the risks and complications of EVLT with the Plaintiff on 4 March 2010. Nor did the Defendant mention the other aspects of the Procedures or the use of general anaesthesia at any time. He further testified that the Plaintiff did not agree to proceed with EVLT on the first consultation.

13 In contrast, the Defendant's evidence as to the events on 4 March 2010 was said to be lacking, inconsistent, and/or untruthful. In this regard, there was an unusual lack of documentation by the Defendant on the details of the Plaintiff's visits, which was not explained. This was contrary to the note-taking practice recommended by the Singapore Medical Council ("SMC"). Where medical notes were in fact adduced by the Defendant, the Plaintiff submitted that these were unreliable. The medical notes adduced also did not mention any discussion of the risks and complications of the treatment or of tumescent anaesthesia, thus suggesting that there had in fact been no such discussion. It was clear that the Defendant had no personal recollection of the events on 4 March 2010 and could only give testimony as to his usual practice: this was said to be insufficient. In particular, the Plaintiff submitted based on the testimony

at trial that the Defendant had a tendency to exaggerate. The Defendant also did not call any clinic staff to refute the Plaintiff's claim even though he could easily have done so. All these suggested that the Defendant's version of events on 4 March 2010 could not be believed. Further, the Plaintiff pointed to a report authored by the Defendant on 13 May 2011 which suggested that the Plaintiff was undecided during the first consultation as to whether to undergo the operation as she was concerned that her venous reflex may result in poor circulation in lower limbs if not addressed. The Plaintiff submitted that this was consistent with her version of events, and gave the lie to the Defendant's claim that she had agreed to the operation on 4 March 2010.

14 Subsequently, the Plaintiff made further visits to the Defendant's clinic on 11 June and 1 July 2010 respectively.

15 For the visit on 11 June 2010, she met the Defendant in person for a brief consultation because she thought that her pigmentation patch had grown slightly larger in size and had become itchy. The Defendant reiterated that she should undergo EVLT to resolve the pigmentation and that, if left untreated, the condition may develop into ulcers. She raised concerns with the operation interfering with her ability to return to work and to go on an annual pilgrimage in early August. The Defendant reassured her that this was a simple and safe surgery and that she would be able to return to work the very next day. At no point did the Defendant explain to her the risk and complications associated with EVLT. Nor were other aspects of the operation and anaesthesia discussed. The second consultation ended with the Defendant asking the Plaintiff to inform his staff if she would like to undergo treatment.

16 A few days after 11 June 2010, the Plaintiff called the Defendant's clinic and suggested 3 July 2010 for the EVLT treatment. The date was confirmed and

a pre-operation visit was scheduled for 1 July 2010. The Plaintiff stated that she agreed to undergo the operation on the Defendant's assurance that this was a simple surgery and that she would be able to resume work the following day.

17 For the visit on 1 July 2010, the Plaintiff denied meeting the Defendant in person and claimed that she had met only with the clinic's staff. She had her blood drawn for testing, underwent some scans, and was given certain registration documents to be filled and brought back to the clinic on 3 July 2010. She left without meeting the Defendant. Thus, until the day of the operation, she had only met the Defendant in person twice. The Plaintiff alternatively submitted that even if she had met the Defendant personally on 1 July 2010, their meeting would just have been for a few minutes and the Defendant could not have sufficiently explained the risks of the Procedures.

18 The Plaintiff also denied signing the Consent Form in the Defendant's presence on 1 July 2010. Although the Consent Form stated that the nature, purpose, risks, and alternatives to EVLT had been explained by the Defendant to the Plaintiff, the Plaintiff vehemently denied that any such explanation had in fact been provided. She also suggested that the signature on the Consent Form might not have been hers.

19 The Procedures were carried out by the Defendant on 3 July 2010. According to the Plaintiff, she arrived at the hospital at around 8.00 am and was asked to sign certain admission forms. Anaesthesia was dispensed and the Plaintiff passed out without being informed beforehand that she would be placed under general anaesthesia. The entire operation took more than three hours.

20 In the days following the operation, the Plaintiff's legs became swollen and numb. She suffered intense pain in her lower limbs. She was unable to

ambulate and needed painkillers. She returned to the Defendant's clinic on 5 July 2010, assisted by her son, Kumaran, and was assured by the Defendant that her pain, numbness, and pigmentation would resolve in a few days. She told the Defendant that she was upset that she would not be able to return to work as planned. She disputed the Defendant's consultation notes which recorded that the Plaintiff merely complained of "some pain and itchiness".

21 She continued to consult the Defendant from July to November 2010 even as her condition worsened. In August, she visited an Ayurvedic centre for treatment. In September 2010, she requested to be referred by the Defendant to a dermatologist for a second opinion. That led her to Dr Lee Chiu Toh ("Dr Lee"), a consultant dermatologist at CT Lee Skin and Laser Clinic Pte Ltd, whose prescribed medication did not assist her condition. Around this time, the Defendant purportedly told her that his initial diagnosis of venous eczema was wrong, and that she suffered from discoid eczema instead. Nevertheless, the Defendant continued to assuage her that her condition will turn for the better. In or around October 2010, she consulted other doctors who informed her, *inter alia*, that she may be suffering from nerve injuries and diagnosed her condition as discoid eczema.

22 In November 2010, the Plaintiff learnt that the saphenous nerves in both her limbs had been permanently damaged during the operation and that she was suffering from a severe varicose vein condition. The Plaintiff claimed that once she was told of her injuries, she confronted the Defendant on 19 November 2010 about his failure to explain the surgical risks to her. She submitted that her immediate upset reaction supported her claim that the Defendant had at no point discussed the risks of nerve injuries with her. She denied the Defendant's assertion that the confrontation took place on 6 December 2010, which she claimed was inconsistent with his own report to Dr Ravintharan dated 19

November 2010 acknowledging the confrontation, and was merely the Defendant's untruthful bid to paint the Plaintiff's claim as an afterthought.

23 As a result of the Defendant's purported negligence, the Plaintiff suffered and continued to suffer from (a) bilateral saphenous nerve injury, (b) Complex Regional Pain Syndrome ("CRPS") Type 2 in both lower limbs, (c) major depressive disorder with anxious distress, (d) aggravated discoid eczema, and (e) subsisting venous insufficiencies. The medication she had to take also caused her to suffer adverse side effects. Her inability to devote to her career caused her loss of income. Further surgeries and treatment were also necessitated by her condition.

24 The Plaintiff claimed that the injuries and losses she suffered were caused by the Defendant's failure to exercise reasonable care in performing and monitoring the Procedures. Further, the Defendant had not properly advised her in advance about the risks and complications of the Procedures and the anaesthesia dispensed during the operation. If the Defendant had properly done so, the Plaintiff would not have undergone the operation. The Defendant also, as a matter of fact, had not obtained consent from her for some aspects of the Procedures.

25 Consequently, the Plaintiff sued the Defendant for negligence in tort and/or breach of his contractual duty of care. The Plaintiff sought general damages for pain and suffering, loss of amenities, loss of future earnings (and/or loss of earning capacity), and future medical expenses. She also sought special damages for medical expenses incurred and pre-trial loss of earnings.

The Defendant's case

26 The Defendant claimed that on 4 March 2010, the day of their first consultation, the Plaintiff had sought treatment for lower limb varicose veins, and complained of heaviness of the legs and of her unsightly spider veins. She also informed him that she had hyperpigmentation over both shins which had recently become itchy.

27 On physical examination, he diagnosed her to be suffering from bilateral lower limbs superficial reflux disease. This gave rise to venous eczema, a secondary condition which manifested in hyperpigmented patches on her lower limbs. He thus advised the Plaintiff to undergo EVLT to treat her condition, as failure to do so could lead to poor circulation of her lower limbs. He also purportedly explained to the Plaintiff the nature, process, and risks of the Procedures. Further, he explained the need for her to be put under general anaesthesia and the attendant risks of doing so. The Plaintiff asked him if there was a risk of amputation of the lower limbs, to which he replied in the negative. She did not raise any other queries.

28 On this same day, 4 March 2010, the Plaintiff indicated her wish to have the operation carried out within two weeks and for it to be done as a day surgery. For the interim period before the operation, the Defendant offered a pair of compression stockings to the Plaintiff to alleviate her varicosity.

29 After the first consultation, the Defendant's clinic staff contacted the Plaintiff to finalise the date of the operation, but the Plaintiff postponed it. The clinic thereafter contacted the Plaintiff to determine if she still intended to proceed with the operation.

30 According to the Defendant, he did not meet the Plaintiff between 4 March 2010 and 11 June 2010. On 11 June 2010, the Plaintiff returned to the clinic and informed him in person that she remained keen to undergo the procedure. At this consultation, the Plaintiff asked if the operation was simple and if she could resume her duties and travel to India. The Defendant did not say that the surgery was simple but told her that it was minimally invasive. A day surgery was thereafter arranged.

31 On 1 July 2010, the Plaintiff went to the clinic and underwent some pre-operation tests. The Defendant personally attended to her. The Plaintiff then signed Part A of the Consent Form, which was countersigned by the Defendant. By doing so, she indicated her consent to the Procedures and her understanding of the nature, purpose, risks and alternatives to the Procedures. Her allegation that the signature on the Consent Form was not hers was vague and raised belatedly in the pre-trial stage of the proceedings, in her Affidavit of Evidence-In-Chief ("AEIC") affirmed on 13 July 2015. It was thus a clear afterthought. No handwriting expert was called or report adduced. Further, as the hospital would not have allowed the operation without a signed consent form, it was inconceivable that someone would have forged the Plaintiff's signatures before the operation on 3 July 2010.

32 Staff Nurse Boopathy Kavitha ("Ms Kavitha"), who was a senior nurse employed by Mount Elizabeth Hospital and was assigned as one of the scrub nurses for this operation, also testified that as part of her role, she had approached the Plaintiff before the operation on 3 July 2010 and confirmed (a) her identity by verifying her name and NRIC number, (b) her signature at Part A of the Consent Form, and (c) that the risks and procedures had been explained.

33 As for Part B of the Consent Form, that would have been signed by the Plaintiff when Dr Chin Kin Wuu ("Dr Chin"), a senior consultant anaesthetist who was the anaesthetist for the operation, explained the risks and alternatives to the Plaintiff while they were in the waiting area outside the operating theatre immediately prior to the operation on 3 July 2010. Dr Chin countersigned Part B. His evidence was unchallenged and corroborated by the anaesthetic record.

34 On 3 July 2010, the Procedures were carried out on the Plaintiff as a day surgery. The operation went smoothly. Based on the Defendant's operation notes, the operation started at 9.35am and ended at about 11.35am. General anaesthesia was administered by Dr Chin. The Defendant first proceeded with the Procedures on the Plaintiff's right leg, and then on the left. His account of the treatment process was detailed in his AEIC. In summary, he claimed to have acted with all due care and diligence, including taking precautions to protect the saphenous nerve from being affected by endovenous laser energy. EVLT was first performed, followed by FS to close the vein. Phlebectomy was then carried out on the bigger bulging veins which were visible to the naked eye.

35 After the operation, the Defendant reviewed the Plaintiff at about 1.05 pm on the same day. She was well and did not complain of discomfort. She was thus discharged with instructions to return for a review on the following Monday.

36 Subsequently, the Plaintiff's condition was observed to improve, with the ulcers drying and eczema improving with no more active inflammation. However, at several post-operation consultations, the Plaintiff complained of pain and numbness. In response, the Defendant assured her that the symptoms would settle down. On 6 August 2010, the Plaintiff went on her scheduled pilgrimage to India. As the Plaintiff had complained of both pain and numbness

in her right ankle, the Defendant advised her to walk less during her pilgrimage. By the next consultation on 18 September 2010, the Plaintiff's eczema on both shins became nodular. The Defendant observed symptoms suggestive of discoid eczema, and thus referred the Plaintiff to Dr Lee. After a few sessions with Dr Lee, the Plaintiff did not follow up and instead sought Ayurvedic treatment.

37 On 29 October 2010, the Plaintiff attended at the Defendant's clinic and he informed her that his original diagnosis of venous eczema might have been incorrect. He then advised her to seek specialist dermatologist advice. Consequently, the Plaintiff consulted Dr Wong Su-Ni ("Dr Wong"), a consultant dermatologist, who confirmed the diagnosis of discoid eczema. AS the Plaintiff's numbness did not improve, the Defendant also advised her to seek opinions from various other specialists, who confirmed that she had sustained bilateral saphenous nerve injury. The Defendant bore the costs of these consultations because he felt sorry for the Plaintiff, and not because of guilt.

38 In the circumstances, the Defendant submitted that he had properly discharged his duty of care as regards all aspects of the medical care provided by him to the Plaintiff. Negligence, whether in tort or in contract, had therefore not been made out. Alternatively, even if the court was not with him on the issue of liability, as regards the quantum of damages, the Plaintiff's requested sums should not be sanctioned because she had exaggerated the extent of her pain and discomfort in order to boost her claim as to general and special damages.

The decision

39 I found in favour of the Defendant based primarily on factual findings as to the advice given, consent obtained, the conduct of the operation, and the post-operative care provided. While there were some shortcomings in the

Defendant's evidence, especially on some aspects of the documentation, the Plaintiff failed to establish her claim of either contractual or tortious breach of duty of care on the balance of probabilities. Further, the Plaintiff could not rely on the *res ipsa loquitur* principle as the operation carried an inherent risk of nerve injuries that was not shown to be statistically insignificant or inapplicable to our facts.

40 For completeness, I also found that various claims by the Plaintiff as to the quantum of damages were not made out. The evidence pointed against the Plaintiff suffering pain and disability to the degree that she alleged. Additionally, there were shortcomings in her evidence as to the losses that she claimed to have incurred.

The analysis

The claims of negligence

41 The law was not in dispute in the present case. Generally, in determining whether a doctor has breached the duty of care owed to his patient, the court will not find him negligent as long as there is a respectable body of medical opinion, logically held, that supports his actions; in other words, a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion, even if other doctors adopt a different practice (see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 ("*Bolam*")). However, in assessing whether a body of opinion is responsible, reasonable or respectable, the court will need to be satisfied that the experts have, in forming their views, directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter (see *Bolitho v City and Hackney Health Authority* [1998] AC 232 ("*Bolitho*")). This is collectively known as the *Bolam-Bolitho* approach, and for

present purposes, it applies consistently across all aspects of the doctor's interaction with the patient, including the doctor's provision of advice, conduct of an operation, and his facilitation of post-operative treatment and care (see *Khoo James and another v Gunapathy d/o Muniandy and another appeal* [2002] 1 SLR(R) 1024, citing *Bolam* and *Bolitho* with approval).

42 The three broad aspects to the Plaintiff's claim in contractual and/or tortious negligence against the Defendant may be stated as follows:

(a) the Defendant breached his duty of care in the provision of advice and the obtaining of consent in respect of the Procedures;

(b) the Defendant breached his duty of care in the conduct of the operation in respect of each aspect of the Procedures:

(i) EVLT;

(ii) FS;

(iii) phlebectomy; and

(c) the Defendant breached his duty of care in the post-operative treatment and care of the Plaintiff.

43 As the existence of a duty of care owed by the Defendant as a medical practitioner to the Plaintiff as his patient was not in dispute between the parties, my grounds will not analyse that issue either in contract or tort. The focus of the dispute between the parties was whether the Defendant had, in any respect, breached the standard of care expected of him as a medical practitioner.

Issue 1: Diagnosis and advice

The Plaintiff's arguments

44 There were several aspects to the Plaintiff's case that the Defendant had not properly obtained her consent *vis-à-vis* some of the Procedures and/or had not advised her on the nature and risks of the Procedures and anaesthesia. They were as follows:

(a) As regards EVLT, the Plaintiff agreed that she had been informed by the Defendant that EVLT would be carried out on both her legs. However, the Defendant had omitted to advise her about the possibility of complications associated with EVLT, whether transient or permanent, including the possibility of nerve injuries. The Defendant also failed to advise her on the increased risk of nerve injuries posed when EVLT and phlebectomy are performed in a single sitting on both legs of a patient. Further, other complications such as bruising, pain, and swelling should have been disclosed to the patient, but this had not been done. Alternative treatment methods were also not explained by the Defendant. For these reasons, the Defendant failed to provide sufficient information about the EVLT treatment for the Plaintiff to make an informed decision. Had the Defendant done so, she would not have agreed to EVLT as she had not been keen to undergo operations for cosmetic purposes in the first place. All the more, she would not have agreed to undergo EVLT on both legs at the same time.

(b) The Plaintiff was not informed that she would be undergoing the additional procedures of FS and phlebectomy, which were performed without her consent. Hyperpigmentation being the only reason why she sought advice from the Defendant, EVLT would have been sufficient

and there was no need for additional cosmetic procedures. The Defendant himself did not mention, in his letters to other specialists while facilitating the Plaintiff's desire to obtain a second opinion, any procedure other than EVLT that had been performed on the Plaintiff. This was all the more suspicious given that phlebectomy entailed its own risks, including the possibility of nerve injury. The Defendant also practised his own innovations on FS on the Plaintiff during the operation but had not explained this to her. Since there was no discussion about FS or phlebectomy at all, the issue of whether the Defendant had provided adequate advice on these procedures did not arise.

(c) Advice should have been given on the use of anaesthesia. The Defendant did not discuss the type of anaesthesia that would be used, nor did he inform her that EVLT could be carried out under local and not general anaesthesia. He also did not tell her of the impact of general anaesthesia in relation to phlebectomy, which was particularly important since the patient would not be able to react to pain stimuli from the nerves whilst under general anaesthesia.

45 The Plaintiff also alleged that the Defendant failed to properly diagnose the Plaintiff, erroneously finding her to suffer from venous eczema. The Plaintiff's condition was later found by Dr Lee, from whom she had sought a second opinion post-operation, to be discoid eczema. The Defendant had at no point explained to her that her pigmentation could have been caused by conditions other than venous eczema. The Plaintiff did not plead that this misdiagnosis constituted negligence *per se*, but submitted that the misdiagnosis resulted in the Defendant's subsequent erroneous advice and treatment.

The Defendant's arguments

46 The Defendant submitted that he had provided adequate advice and obtained the informed consent of the Plaintiff *vis-à-vis* the Procedures. In particular, he claimed as follows:

(a) The nature, purpose, risks and complications of the Procedures were explained to the Plaintiff on 4 March 2010. The possibility of nerve injuries was also explained. The fact that the Plaintiff had asked about the risk of amputations, the degree of painfulness, and her ability to ambulate the following day from the surgery rendered it unbelievable that she had not asked any questions about the risks and complications of the Procedures. Further, the Defendant was well aware of the possibility of nerve injuries as he had researched and published on this precise issue. In explaining the risks of the Procedures, the Defendant did not make any express reference to the term "saphenous nerves" because the Plaintiff was a lay person, but he did explain that there was a risk of numbness, which is the effect of an injury to those nerves. The Defendant also explained to the Plaintiff his novel technique of plugging the end of the saphenous vein with sclerosants.

(b) According to the Plaintiff's own expert, Prof Hamilton, EVLT, FS, and phlebectomy were perfectly complementary procedures.

(c) He had also discussed the type of anaesthesia he would need during the operation and explained the attendant risks of general anaesthesia.

(d) His usual practice would be to highlight the risks of bleeding, swelling, bruising, and numbness from nerve injuries. Prof Hamilton

agreed that there was no need for the Plaintiff to be told of the risk of CRPS.

(e) The Plaintiff signed the Consent Form and, by so doing, indicated her consent to the Procedures and her understanding of the nature, purpose, risks of and alternatives to the Procedures. Prior to the operation, Ms Kavitha had confirmed with the Plaintiff (i) her signature at Part A of the Consent Form, (ii) that the procedure and risks had been explained to her, and (iii) that she understood those procedures and risks. Dr Chin did the same as regards Part B of the Consent Form on the use of anaesthesia before countersigning it. There was no evidence of forgery. The hospital would not have allowed the operation without a signed consent form; in this context, it would have been incredible for there to have been premeditated forgery even before the operation.

47 As such, all necessary advice about the Procedures had been provided by the Defendant to the Plaintiff before the operation. In fact, during the first consultation on 4 March 2010, the Plaintiff had made a decision to undergo the Procedures and initially wanted the operation to be scheduled within two weeks. The inconsistencies in the Defendant's records and evidence were not significant and could be explained on innocent grounds.

48 As regards the issue of misdiagnosis, the Defendant argued that the initial diagnosis made of venous eczema could not be impeached. First, he was a vascular specialist and there was no reason for the Plaintiff to seek treatment from him for skin problems. Dr Ravintharan had referred the Plaintiff to him because Dr Ravintharan did not perform varicose vein surgeries. Indeed, the Plaintiff had sought advice and treatment from the Defendant expressly for varicose veins. Secondly, all the experts, including the Plaintiff's own, agreed

that the pigmentation on the Plaintiff's shins in its pre-operation state was consistent with venous eczema. Discoid eczema could also be caused by trauma to the skin, which would include the operation: the Plaintiff may thus have developed discoid eczema only *after* the Procedures.

The Court's findings

49 In the present case, the issues of advice and consent were taken together by the parties. The question was whether the Defendant had acted in breach of his duty as a medical practitioner to give due advice to the Plaintiff, and to obtain informed consent from her, *vis-à-vis* each aspect of the Procedures (*Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] AC 1430 ("*Montgomery*")). In *Montgomery*, the leading opinion jointly handed down by Lord Kerr of Tonaghmore and Lord Reed JJSC, with whom four other Law Lords agreed, stated as follows:

> 82 In the law of negligence, this approach entails a duty on the part of the doctors to take reasonable care to ensure that a patient is aware of material risks of injury that are inherent in treatment. This can be understood, within the traditional framework of negligence, as a duty of care to avoid exposing a person to a risk of injury which she would otherwise have avoided…
>
> …
>
> 87 … The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.

50 It is important to note that in *Montgomery*, the complaint was that the doctor had erred by failing to advise the patient of a risk of complication of shoulder dystocia, which is the inability of the baby's shoulders to pass through the mother's pelvis during vaginal delivery, given the particular patient's small stature and diabetic condition. The main issue was thus whether the law required

the doctor to provide such advice. The patient argued that she was entitled to be told of the risk in order to be able to make an informed decision whether to incur them; the doctor argued that she should not be obliged to disclose or advise on the risk because she had assessed the risk of that complication to be small.

51 In contrast, in the present case, it was common ground that the principles in *Montgomery* were irrelevant because the requirements of the law were not in dispute. Rather, the case fell to be decided on factual grounds.[1] In respect of EVLT, there was a denial of proper advice being given as a matter of fact, and as for FS and phlebectomy, the Plaintiff's complaint was that she had not been informed of these procedures at all and thus could not have given her consent. Accordingly, it was appropriately framed in the Plaintiff's closing submissions that the crux of the dispute was "whether the Defendant actually warned the Plaintiff of the possible risks and whether he obtained consent … before he carried out the three surgical procedures".[2]

52 It should be noted that failure to obtain consent for medical procedures would properly speaking form the basis of a claim for some form of trespass to the person (such as assault or battery), rather than for negligence whether contractual or tortious (see Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) ("*The Law of Torts in Singapore*") at para 02.054). Indeed, it is "well established that, as a general rule, the performance of a medical operation upon a person without his or her consent is unlawful, as constituting both the crime of battery and the tort of trespass to the person" (*In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at

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1 Plaintiff's Closing Submissions at para 44; Defendant's Closing Submissions at para 14.

2 Plaintiff's Closing Submissions at para 11.

71, *per* Lord Goff). No claim was, however, formulated and pleaded for assault, battery or trespass.

(1) Purpose of the first consultation

53 A preliminary issue should first be dealt with. The Plaintiff submitted extensively on the purpose for which she had initially consulted the Defendant, in an apparent bid to buttress her claim relating to the absence of consent and advice, and improper treatment. In particular, the Plaintiff argued that since she had only complained of hyperpigmentation at the first consultation and not of varicose veins, EVLT would reasonably have been the treatment of choice and there would have been no need for additional procedures like FS or phlebectomy to be discussed on 4 March 2010. On this premise, issues of consent and advice *vis-à-vis* FS and phlebectomy did not even arise. In response, the Defendant submitted that discussions about FS and phlebectomy, in addition to that on EVLT, would reasonably have been expected from the very first consultation since the Plaintiff had approached him for her varicose vein condition and not merely hyperpigmentation. The Defendant also argued that the expert evidence was unanimous in affirming the view that FS and phlebectomy are perfectly complementary procedures to EVLT.

54 I preferred the Defendant's argument that the primary purpose of the Plaintiff's consultation with him had been for the treatment of varicose veins and not merely hyperpigmentation. This was the evidence of Dr Ravintharan, the doctor that the Plaintiff had originally consulted and who referred her to the Defendant. Dr Ravintharan testified that the Plaintiff first saw him regarding her varicose veins, and that EVLT was a treatment proposed for that condition. His independence and objectivity were not challenged. Indeed, as the Defendant submitted, a referral to a vascular surgeon such as himself by Dr Ravintharan

would not be sensible at all if the purpose of the consultation had merely been to treat hyperpigmentation.

55 I also had concerns about the Plaintiff's own evidence. As she conceded in cross-examination, Dr Ravintharan had told her that it would be best for her to see the Defendant as Dr Ravintharan did not himself treat varicose veins.[3] Dr Ravintharan also informed her that the Defendant was a "vascular surgeon".[4] In the circumstances, the Plaintiff's consultation with Dr Ravintharan was clearly focused on the issue of varicose veins and not merely hyperpigmentation. The referral of the Plaintiff to the Defendant was also for the better management of her varicose veins, and this, even if not explicated, would have been known to both the Plaintiff and Defendant by the time of their first consultation. Although the Plaintiff sought support from the testimony of her son, Kumaran, about what had transpired in her consultation with Dr Ravintharan, that could not assist her as Kumaran was not present at that consultation.[5]

56 Accordingly, on the evidence, I found that the primary purpose of the Plaintiff's first consultation to the Defendant had been to seek treatment for her varicose veins. Thus, contrary to the Plaintiff's submission, it could not be accepted as unnecessary or incredible that the procedures of FS and phlebectomy were discussed at the first consultation between the Plaintiff and Defendant.[6]

57 I noted that in her closing submissions, the Plaintiff appeared to adopt a more nuanced stance: she conceded that the Defendant could have concluded

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3 NE Day 1 at p 13; NE Day 2 at p 125.

4 NE Day 2 at p 126.

5 NE Day 11 at pp 36-37.

6 See Plaintiff's Closing Submissions at para 71.

that her pigmentation arose as a result of varicose veins, but maintained that her complaint had in the first instance been of pigmentation patches.[7] This could not assist her. Whatever her initial complaint might have been, the primary purpose and focus of the consultation on 4 March 2010 had been the treatment of varicose veins; a discussion about FS and phlebectomy cannot thus be said to be unnecessary or implausible.

(2) Misdiagnosis of the Plaintiff's condition

58 As for the issue of diagnosis, the dispute between the parties was whether the Defendant had misdiagnosed the Plaintiff as suffering from venous eczema rather than discoid eczema. As explained above (at [45]), the Plaintiff sought to argue that the Defendant had misdiagnosed her and consequently provided her with erroneous advice and treatment options. She highlighted the evidential missteps of the Defendant who had, according to her, tendered inaccurate medical notes, given inconsistent testimony, and failed to call material clinic staff as witnesses. In response, the Defendant submitted that his initial diagnosis of venous eczema could not be impeached as it was consistent with the manifested symptoms at that time.

59 I did not consider, as a matter of fact, that the Defendant had made a misdiagnosis at the time of the first consultation in March 2010. First, as the Defendant highlighted, the expert witnesses – including both Prof Hamilton[8] and Associate Prof Tan Seck Guan ("Prof Tan"), who is a senior consultant in the Department of Vascular Surgery at the Singapore General Hospital ("SGH") [9] – were largely in agreement that the pigmentation on the Plaintiff's shins was

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7 Plaintiff's Closing Submissions at para 68.

8 NE Day 3 at p 66.

9 TSG's AEIC at p 7, para 15.

consistent with the condition of venous eczema at the time of initial diagnosis in March 2010. Importantly, Prof Tan gave evidence that "[i]t may be difficult to distinguish discoid eczema from venous eczema at the outset but in the presence of varicose veins and if the eczema is confined to the lower leg where most signs of venous disease present, it is reasonable to offer surgery to treat the condition."[10] Further, the fact that the Plaintiff was diagnosed post-operation with discoid eczema could not assist her claim. As noted by Prof Tan, this could be explained on the basis that discoid eczema arose due to the trauma caused to the skin during the operation. In light of these, there was no evidence that the Defendant's diagnosis was incorrect at the time it was made.

60 For completeness, although no allegation was made that the Defendant had breached his duty of care in the diagnosis of the Plaintiff's condition, even if that had been raised, it would not have been established on the evidence since the diagnosis was correct at the time it was made. In any case, based on the evidence before me, there was nothing to suggest that the diagnosis fell out of the limits of the *Bolam-Bolitho* approach. In this regard, the standard of care in medical negligence is judged in light of the knowledge available at the time of the event, and not at the time of trial (*Roe v Minister of Health and Another* [1954] 2 QB 66 at 84, *per* Denning LJ).

(3) Consent for the Procedures

61 Having ascertained the correctness of the Defendant's diagnosis and the primary purpose of the Plaintiff's consultation at his clinic, the next issue was whether the Defendant had in fact obtained consent from the Plaintiff for the procedures of FS and phlebectomy.

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10 TSG's AEIC at p 7, para 15.

62 In the context of a negligence claim in tort or in contract where the allegation is that there was no proper advice given, and the existence of consent forms the basis on which such allegation is founded, the legal burden to prove the lack of proper advice as the basis of the claim in negligence lies on the plaintiff (*The Law of Torts in Singapore* at para 03.006). The evidential burden to prove the existence of consent as a question of fact would, however, shift onto the defendant. Accordingly, in the present case, the Plaintiff bore the legal burden to prove the absence of proper advice, but the Defendant would have to raise sufficient evidence to prove that consent had been obtained as a matter of fact in the first instance.

63 The case turned on the factual findings that should be reached. In this regard, I preferred the Defendant's account of the facts. While the Defendant's evidence had shortcomings, I accepted his evidence as to his normal practice that the nature and risks of the operation would be discussed with his patients. This, coupled with the signed Consent Form, as well as the evidence of the senior nurse, Ms Kavitha, and the anaesthetist, Dr Chin, amply demonstrated that consent had been duly given by the Plaintiff for all aspects of the Procedures and for the general anaesthesia. Indeed, on the evidence, even if the legal burden to prove the existence of consent rested on the Defendant, I would have found that the fact of consent was proven on the balance of probabilities.

64 In the present case, the Consent Form was a part-template part-filled-in document issued by ParkwayHealth. Part A of the Consent Form, titled "Consent for Operation or Procedure", read as follows:

> 1. I, the undersigned, consent to undergo the operation / procedure of BILATERAL LOWER LIMB ENDOVENOUS LASER THERAPY AND SAPHENO POPUTEAL JUNCTION LIGATIONS AND MULTIPLE STAB PHLEBECTOMY having understood the nature, purpose, risks and alternatives which were explained to me by Dr CHIA KOK KOONG.

> 2. I also consent to:
>
> > 2.1 The transfusion of blood and other blood derived products as may be found necessary by my attending doctor(s) and confirm that the nature, purpose, risks and alternatives of such transfusion have been explained to me.
> >
> > 2.2 Such further or alternative operative measures or procedures as may be found necessary by my attending doctor during the course of the operation / procedure.
> >
> > 2.3 My attending doctor seeking consultation or assistance from other relevant specialist if the need arises during the course of the operation / procedure.
>
> …
>
> [the passages in block capital letters filled in by handwriting; the rest pre-printed as part of the template form]

65 At the end of this part of the Consent Form, a signature was appended next to the name of the Plaintiff and her NRIC number. Below this was the Defendant's name and counter-signature. Both signatures were dated 1 July 2010. Part B of the Consent Form followed, stating that the undersigned consented to the administration of general anaesthesia and further alternative anaesthesia or sedation as may be found necessary during the operation by the attending anaesthetist. The undersigned further confirmed that the "nature, purpose, risks and alternatives of such anaesthesia or sedation ha[d] been explained to me by my attending [a]naesthetist". The Plaintiff's signature dated 3 July 2010 was appended, alongside with the counter-signature of Dr Chin dated the same.

66 On its face, Part A of the Consent Form covered the EVLT and phlebectomy procedures, though not expressly the FS. However, this did not necessarily mean that consent had not been obtained from the Plaintiff as regards the FS procedure. The omission must be taken in context. The undisputed expert evidence was that FS (as well as phlebectomy) was well

regarded as complementary to EVLT. This point was accepted by the Plaintiff's own expert, Prof Hamilton, who relied on a medical text stating that "[a]mbulatory phlebectomy and ultrasound-guided [FS] are perfect complements to [ELVT] of the saphenous veins" [emphasis added].[11] Indeed, as the Plaintiff himself had only sought to argue a factual distinction between phlebectomy and EVLT,[12] it would appear that as compared to phlebectomy, FS is even more so a part of the EVLT procedure. This could to my mind explain the omission of reference to FS in the Consent Form.

67 In this regard, there was no proven allegation that challenged the authenticity or validity of the signatures on the Consent Form. The Plaintiff did, belatedly, raise an argument that the signatures might not have been hers. But that could not be accepted. As the Defendant pointed out, no handwriting expert or report was adduced that would have put the question of the authenticity or validity of the signatures into play. Nor was any issue raised by the Plaintiff as to her signatures when she received a copy of the Consent Form in November 2014. There was only, therefore, a bare denial that the signatures were not hers.

68 The Plaintiff further disputed that she had met with the Defendant in person during her visit to the clinic on 1 July 2010. This was the day the Consent Form was supposedly signed by the Plaintiff. The Plaintiff pointed to an admission by the Defendant that his clinic assistant had been the one communicating with the Plaintiff. She thus submitted that the Defendant's account that the Consent Form had been signed in his presence could not be believed. However, even if the Defendant had not personally met the Plaintiff on 1 July 2010, that could not explain away the existence of the signed Consent

11 NE Day 3 at pp 37, 66-67.

12 See Plaintiff's Closing Submissions at para 72.

Form. Further, even assuming that there had been an error as to the date of signatures, it could not be inferred that the Consent Form was not in fact signed by the Plaintiff. Nor could it be concluded that the form was a forgery or nullity.

69 Against the Plaintiff's arguments, two of the Defendant's witnesses supported the validity of the signatures on the Consent Form. Ms Kavitha gave evidence that as part of her role as a senior scrub nurse of the operating theatre in which the operation was conducted on 3 July 2010, she had verified the Plaintiff's identity and her signature under Part A of the Consent Form prior to the operation, and confirmed that the procedures and risks had been explained to her. Dr Chin, the anaesthetist, also gave evidence that, on the day of the operation, following his explanation of the nature and risk of general anaesthesia and the possibility of using regional anaesthesia, he had obtained the Plaintiff's signature and then counter-signed at Part B of the form. The Plaintiff would be brought into the operating theatre only after both parts of the Consent Form had been signed.

70 In the circumstances, the Plaintiff's allegations about the lack of consent provided by her to the Procedures and/or to the anaesthesia ran up against the fact that the Consent Form had been signed by her. It also stood against the weight of the testimonies of the Defendant, Ms Kavitha, and Dr Chin.

71 The Plaintiff made various arguments that the Defendant's evidence could not be believed, pointing out a number of discrepancies and omissions. In particular, she pointed to a lack of contemporaneous written records by the Defendant. The absence of any mention of consent or advice in the Defendant's records, it was said, indicated that there had in fact been no such consent

obtained for, or discussion of the risks and complications arising from, the Procedures and the anaesthesia.

72 Certainly, the absence of any record of consent or advice would have been strong evidence in the Plaintiff's favour. However, in the present case, the Plaintiff's pleaded case was that consent had not been obtained as a matter of fact. It was not the Plaintiff's case that that consent, albeit given, was attenuated in any way. Thus, her line of argument ran up against the objective fact that the Consent Form had been signed by her. It might have been different if her case had been, for instance, that even though she signed the Consent Form her consent was obtained on the basis of insufficient information, or that she was somehow misled into signing it. But her evidence and her pleadings did not go in that direction. Confronted with the signed Consent Form, the absence of or discrepancies in the earlier medical records could not assist the Plaintiff very much in her argument about the factual absence of consent, at least not without evidence that her signature had been wrongly appended or obtained.

73 In any case, even taking the Plaintiff's case at the highest, the discrepancies and omissions in the medical notes were not of that scale and extent that would allow the court to reject entirely the Defendant's evidence. These discrepancies and omissions related primarily to dates and the particulars of what had been done during the consultations. While it may be that the Defendant should have taken better records, it did not necessarily follow from his failure to do so that his evidence should be rejected entirely.

74 Further, even if the Defendant's testimony was not to be believed, there was sufficient basis to find the fact of consent in other objective evidence (*ie*, the Consent Form) and the testimony of other witnesses (*ie*, Ms Kavitha and Dr Chin). The Plaintiff's challenges did not go to the critical issue of whether the

Plaintiff had in fact signed that Consent Form. The Plaintiff also sought to challenge the credibility of both Ms Kavitha and Dr Chin, but there was nothing amounting to more than mere allegations.

75 In the circumstances, the fact that there might have been discrepancies in the Defendant's recording of the medical notes, or a difference in testimony as to what happened (including who had seen whom on what day), could not, even taken together, lead to the conclusion that the Defendant had not obtained the Plaintiff's consent to the Procedures.

(4) Proper advice on the Procedures

76 As for the issue of advice, the primary factual dispute was whether the Defendant had in fact given advice to the Plaintiff as regards each aspect of the Procedures and the anaesthesia that was to be provided, prior to the conduct of the operation. No issue was taken here of the joint responsibilities of the anaesthetist (see *Tong Seok May Joanne v Yau Hok Man Gordon* [2013] 2 SLR 18 ("*Joanne Tong*") at [69]–[74]).

77 On the balance of evidence, I preferred the Defendant's testimony that he had explained to the Defendant the nature and risks of each aspect of the Procedures, including the risks of nerve injury attributable in particular to EVLT and phlebectomy, prior to the operation if not on the day of the first consultation. I also found that the Defendant had discussed the type of anaesthesia that would be needed during the operation and the general risks involved, including that of oxygen suppression and the necessity for a qualified anaesthetist to be present.[13]

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13 NE Day 8 at pp 46-47.

78 This finding was supported by the signed Consent Form. As mentioned, the Plaintiff had acknowledged in her signed Consent Form the provision of advice by the Defendant as to the nature, purpose, risks and alternatives of the Procedures and anaesthesia. There was no suggestion that the Plaintiff did not appreciate the significance of her signature. Nor was there any question that the Plaintiff could understand the nature and content of the Consent Form: she was a sophisticated financial services director and had testified that "had that [Consent Form] been shown to me … and my signature had been obtained … I would definitely have noticed in the document matters reflected as … phlebectomy and … litigations in addition to [EVLT]".[14] Further, the authenticity of the Plaintiff's signature on the Consent Form had not been impeached. Nor was it the Plaintiff's case that she had appended the signature mistakenly or for other vitiating cause. Taken with the evidence of the other witnesses of the Defendant that both parts of the Consent Form had been properly signed, this was strong evidence that advice had in fact been given by the Defendant to the Plaintiff as regards the Procedures and anaesthesia by the time of the operation.

79 Further, the finding that advice had in fact been given was also consistent with the Plaintiff's own account that she had played an active role in consulting the Defendant about the nature, risks, and alternatives at least *vis-à-vis* EVLT. The Plaintiff agreed that the Defendant had advised her to undergo EVLT for her varicose vein condition at the first consultation. According to her, the Defendant had explained that EVLT was a laser therapy which would "kill" the varicose veins that result in pigmentation.[15] In turn, she questioned the Defendant, *inter alia*, about the possibility of alternative treatments to EVLT,[16]

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14 Plaintiff's AEIC at para 54.

15 NE Day 1 at p 61.

how painful the operation would be,[17] and how long the operation would impact her mobility because she was concerned about her ability to return to work the following day.[18] The Defendant responded accordingly. He might not have used the technical terms of "saphenous nerves" in his advice, but that detracted from neither the quality of the advice nor the fact that it had been given.

80 The issue of whether advice had in fact been given of the Procedures, in particular of FS and phlebectomy, must also be taken in the context of the initial diagnosis by the Defendant and the primary purpose of the Plaintiff's consultation at the Defendant's clinic, which I have found to be for varicose veins and not just hyperpigmentation (see [53]–[56] above). It could not thus be argued that since EVLT was the procedure of choice, there was no reason for the Defendant to explain the nature and risks of FS and phlebectomy. Nor could it be argued that FS and phlebectomy could not have been discussed because the Plaintiff did not want treatment for cosmetic purposes. As earlier discussed (at [66] above), the Plaintiff's own expert, Prof Hamilton, testified that EVLT, FS, and phlebectomy were perfectly complementary procedures. In any event, the Plaintiff had agreed on the stand that the Defendant did not offer her purely cosmetic procedures.[19]

81 I noted that the Defendant did not maintain a full contemporaneous record of the advice that he had given the Plaintiff at her consultations, and that there were some discrepancies about his recollection of events. This was something that required consideration. Indeed, it would have been ideal, and perhaps easier for both parties, if there had been comprehensive documentation.

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16 NE Day 1 at p 54.

17 NE Day 1 at p 63.

18 NE Day 1 at p 54.

19 NE Day 1 at p 66.

However, the countervailing concern militating against the court drawing too readily an adverse inference from the absence of comprehensive documentation is that the doctor should be allowed to focus on giving the appropriate advice and communicating with his patient; the greater the paperwork required, the harder it is to achieve this. An additional concern is that the court should not scrutinise any omission and discrepancy in the medical notes through the lens of hindsight. For the benefit of both their patients, their colleagues and themselves, doctors should strive to be as comprehensive as practically possible in their notes, but what is practical will depend considerably on the circumstances. Beyond this, I did not think the law can stipulate more.

82 The Plaintiff sought to impress on me the importance of records as to the patient's informed consent. She cited the SMC Ethical Code and Ethical Guidelines ("the SMC Guidelines"), which provided (at para 4.1.2) that "[a]ll clinical details, investigation results, discussion of treatment options, informed consents and treatments by drugs or procedures should be documented". However, the SMC Guidelines relate to ethical proceedings; they may be helpful but cannot necessarily dictate the evidential burdens in civil suits.

83 Even if the omission to comply with the SMC Guidelines were to lead to an adverse inference against the medical practitioner, that inference need not necessarily be a sweeping one of immediate liability. As the Defendant pointed out, the absence of a record of advice did not logically mean the absence of advice as such. Indeed, despite the shortcomings in the Defendant's documentation and records, what was missing did not entail any defect in credit or credibility as to require the whole of his evidence to be rejected. The absence or omission of such evidence could plausibly be explained on the grounds of the Defendant being subject to time constraints, or the Defendant's desire to focus on communicating with the patient.

84 Thus, when weighed against the evidence, the Plaintiff's claim that she had not been advised of the nature, risks, and alternatives to the Procedures could not be sustained based on the mere absence of documentation or records.

85 In her closing submissions, the Plaintiff pointed out that the Defendant failed to advise her on the increased risk of nerve injuries when EVLT is combined with phlebectomy, the increased risks when EVLT is performed on both legs of the patient in the same sitting, and the lesser chance of avoiding nerve injuries when phlebectomy is conducted under general anaesthesia. The Defendant submitted that these allegations, not having been pleaded in the Plaintiff's statement of claim, should not be considered as that would be unfair to him.[20] I agreed that these allegations, while perhaps alluded to in the course of cross-examination, had not properly been pleaded. In any case, the expert evidence did not make out the existence of these increased risks or the obligation to disclose the same. As pointed out earlier, the unchallenged expert evidence was that phlebectomy and FS are "perfect complements" to the use of EVLT (see [66] above) and that the use of FS in conjunction with EVLT may, rather than create increased risks, provide an additional safeguard for the patient (see [80] above). Prof Tan also testified that the use of FS as an adjunct to EVLT would serve as an additional safeguard for the patient.[21] Further, Prof Hamilton confirmed that it would be possible to operate on both legs at the same time and that this would not increase the chance of complications.[22] Accordingly, I could not agree that the Plaintiff had made out any breach in this regard.

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20 Defendant's Reply Submissions at paras 32-34.

21 NE Day 10 at p 39.

22 NE Day 3 at pp 74-75.

Conclusion on diagnosis and advice

86 My finding on the signing of the Consent Form meant that even if some of the Plaintiff's arguments were accepted, the Plaintiff still had to explain how the Consent Form came to be signed and how that did not accurately reflect the state of affairs. As it was, I did not find that the Plaintiff's various assertions were made out, including her claim that her signatures had been allegedly forged. The Plaintiff's allegations of breach of duty of care in obtaining consent or providing advice were difficult to make out because even though her signature on the Consent Form might not have been conclusive that the risks of the Procedures were fully explained to her, her pleaded case and her evidence primarily concerned a factual dispute: that no consent had been obtained, no real advice or explanation had been given, and that she had not signed the Consent Form. In that context, the discrepancies and omissions in the Defendant's medical notes, on which the Plaintiff chiefly relied, went up against the objective evidence of the signed Consent Form. Further, while it was true that the signed Consent Form did not rule out the possibility that advice might have been wanting in specific aspects, the test was not whether the Plaintiff's case was more probable than the Defendant's but rather whether it was more true than not on a balance of probabilities (see *Surender Singh s/o Jagdish Singh and another (administrators of the estate of Narindar Kaur d/o Sarwan Singh, deceased) v Li Man Kay and others* [2010] 1 SLR 428 at [121], citing *Clarke Beryl Claire (personal representative of the estate of Eugene Francis Clarke, deceased) and others v SilkAir (Singapore) Pte Ltd* [2002] 1 SLR(R) 1136 at [58]).

87 In the circumstances, I found that the Defendant had in fact obtained the consent of the Plaintiff to all aspects of the Procedures, including FS and phlebectomy, and the anaesthesia that was administered. Further, I found that

the Defendant had advised the Plaintiff on the nature, purpose, risks, and alternatives to the Procedures and general anaesthesia. Relatedly, I found that the Plaintiff had consulted the Defendant on 4 March 2010 for varicose veins, and that the Defendant could not be said to have misdiagnosed the Plaintiff's condition as varicose veins based on what was known at their first consultation.

88 In the end, taking a holistic view of the evidence, the Plaintiff did not discharge its burden to prove on a balance of probabilities that the Defendant had breached his duty of care, whether tortious or contractual, as regards the issue of consent and advice. Several other arguments raised by the Plaintiff, such as whether she had expressed a desire for day surgery or overnight admission for the operation, or how and when she had expressed shocked upon being told of the permanent nerve injuries that she suffered, were to my mind not material to the issues at hand. Given these findings, the issue of causation was not at the forefront and was indeed not fully argued.

Issue 2: Operation and treatment

The Plaintiff's arguments

89 The Plaintiff claimed that the Defendant had been negligent in his conduct of the operation which caused the Plaintiff to suffer nerve damage in both her legs.

90 Two specific aspects of the operation were alleged to have been conducted negligently. First, the Plaintiff submitted that the Defendant had failed to use tumescent anaesthesia appropriately and to monitor the adequacy of these fluids during the EVLT process. In this regard, it was not disputed that the nerve injuries sustained by the Plaintiff might be attributable to thermal injuries caused by lack of preventative measures implemented during EVLT.

Second, the Plaintiff contended that mechanical injuries could have been inflicted upon her nerves during the phlebectomy procedure. On this point, the Defendant was said to be negligent in conducting the procedure while labouring under an erroneous assumption that a patient could react to pain stimuli during the phlebectomy even if he or she was under general anaesthesia.

91 As evidential support for her claims, the Plaintiff highlighted that it could not have been a mere coincidence that the Plaintiff suffered similar injuries on both her lower extremities in respect of the extent, intensity, and permanency of the injuries. The Plaintiff's expert, Prof Hamilton, testified that he had not seen any patient with such serious nerve injuries to both legs as a result of EVLT. Thus, it was submitted that common sense would lead to the inescapable conclusion that the Defendant had breached his duty of care in carrying out the operation.[23]

92 Further, the Plaintiff pointed out that the Defendant had made inadequate records about the use and adequacy of tumescent anaesthesia, the level of energy used in the lasers for EVLT, and the number of bulging veins removed by phlebectomies. No explanation was provided for these omissions. The Plaintiff thus urged the court to draw an adverse inference against the Defendant.

93 During the trial, other arguments were made that the Defendant should not have used his unusual self-designed FS technique, and should not have performed EVLT on both legs of the Plaintiff in the same sitting. The circumstantial evidence and undisputed causal link between the Procedures and the Plaintiff's injuries were said to lead inexorably to the inference that there had been negligence on the Defendant's part.

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[23] Plaintiff's Reply Submissions at para 84.

The Defendant's arguments

94 On a preliminary note, the Defendant pointed out that its expert, Prof Tan, was a senior consultant at the Department of Vascular Surgery at SGH who has been practising as a vascular surgeon since 1981 and has conducted over 500 EVLT procedures. His expert opinion was thus said to represent that of a body of medical men skilled in the execution of EVLT procedures. The Plaintiff's expert, Prof Hamilton, had no equivalent experience and in any case, expressed views that were largely in line with that of Prof Tan.

95 The Defendant submitted that he had exercised due care and skill in the management and care of the Plaintiff during the Procedures. The following points were made:

(a) Saphenous nerve injury was a known risk for EVLT, and typically presents with numbness over the lower leg and foot. It could arise even if due care and skill were exercised. The mere occurrence of nerve injuries *per se* was thus not indicative of negligence.

(b) As was his usual practice, the Defendant had properly administered tumescent fluid in the Plaintiff's lower limbs during EVLT to protect the relevant nerves. The Defendant did so with the guidance of an ultrasound scan. If tumescent fluid had not been used, EVLT could not physically be carried out. The operation invoice also documented items that had been used during the administration of the tumescent fluid. Ms Kavitha testified that the invoiced saline solution and pump were indeed used during the procedure. Further, based on medical literature, there is no specific amount of tumescent fluid that should be used on the patient; the adequacy of it is a matter for the surgeon to determine.

(c) There was no evidence that the delivery of laser energy during EVLT had fallen below reasonable standards.

(d) As for the phlebectomy, nerve injury was also a known risk. Prof Hamilton alleged that the Defendant had erroneously performed phlebectomies to the main trunk of the saphenous vein when he should have done so to the branches. The Defendant countered that he extracted only the branches of the vein on both legs, but it was hard to be absolutely sure when the branch veins were equally tortured and thick. In any case, Prof Hamilton accepted that it was reasonable to perform phlebectomies on main trunk veins in some circumstances, and that it was acceptable to perform the procedure on both legs of the patient.

(e) The FS was used with EVLT as an innovation introduced by the Defendant, based on an article he had read in a medical journal in 2008. Prof Hamilton accepted the potential of this innovation to reduce the risk of thermal injury. Prof Tan went further and opined that using FS as an adjunct to EVLT provided an additional safeguard for the patient.

96 The Defendant made two further submissions:

(a) The principle of *res ipsa loquitur* did not apply because, as the experts of both parties agreed, the Plaintiff could have suffered the alleged nerve injuries even if the Defendant had not been negligent.

(b) There was also a possibility that the Ayurvedic treatment taken up by the Plaintiff post-operation had worsened her condition. Indeed, Kumaran had admitted that the Plaintiff's condition became worse after she went for such treatment, and after her pilgrimage in August 2010.

The Court's findings

97 The burden of proof lay on the Plaintiff to show that the Defendant's conduct of the operation had fallen below the requisite standard expected of him.

(1) Expert competencies

98 On a preliminary note, the expertise of the Plaintiff's expert was not really questioned, save only as to the number of EVLT procedures that he had conducted. The primary focus of the arguments was on the risk of nerve injury from the inappropriate use of tumescent anaesthesia, and the energy level of the laser used. In that context, I did not consider that much could be made out of the difference in qualification between Prof Hamilton and Prof Tan.

(2) Inherent risks of nerve injury

99 In the present case, there was uncontroverted evidence that there was some chance of nerve injury from an EVLT procedure that could not be excluded even with due diligence and care. This inherent risk was expressed in various percentages in the medical texts cited by the parties. Based on a medical text cited by the Defendant, the risk ranged from as high as 36.5% to as low as 7%.[24] On the other hand, based on the medical report relied on by the Plaintiff's expert, Prof Hamilton, the risk of nerve injury was between 1% and 10%.[25] The questions of cause and duration of the injury and whether there was recovery at some later time were not clearly addressed in the texts.

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24 NE Day 3 at pp 58–59.

25 George Hamilton's AEIC at p 198; NE Day 3 at p 55.

100 When confronted with the numbers presented by the Defendant, Prof Hamilton highlighted that the percentages did not accord with his personal and international experience. However, that could not assist when taken against the medical texts cited by the Defendant postulating a contrary statistic. In any case, even by Prof Hamilton's own account, there was a risk of nerve injury inherent in the EVLT procedure that is independent of the negligence of the surgeon. As he testified, nerve injuries may be minimised but could still arise, for instance, from the penetration of the saphenous vein during EVLT, even if the whole process had been guided by ultrasound and the proper methodology had been strictly adhered to.[26] Therefore, even taking the most conservative estimate of 1% as cited in the text relied on by Prof Hamilton, the inherent risk of nerve injury was not one that could be ignored in determining whether the Plaintiff had made out her case on the balance of probabilities. Evidence had to be led to show that the 1% risk could be addressed or ignored, but that was not done. Notably, no evidence had been adduced to distinguish the present case from the general dataset forming the basis of the statistics cited.

101 In respect of phlebectomy, it was common ground that the procedure carried inherently a known risk of nerve injury.[27] No issue was taken by the Plaintiff in this regard.

102 Taking these together, it was clear that nerve injuries might have occurred even if the Defendant had exercised due care in the conduct of the Procedures. This was conceded by the Plaintiff's expert, Prof Hamilton, in cross-examination:[28]

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26 NE Day 3 at p 58.

27 NE Day 10 at p 27; NE Day 10 at pp 38-39.

28 NE Day 3 at p 68.

> Q: And even if Dr Chia had exercised all due care in carrying out the procedures on this patient, based on the literature that we have, it is still possible for the nerve injuries to occur?
>
> A: Yes.

103 The fact that there was *bilateral* nerve injury (*ie*, nerve damage on both legs) could not add much to the Plaintiff's case. The Plaintiff asserted that given the rarity of bilateral saphenous nerve injuries, common sense would lead inexorably to the conclusion that the Defendant must have been negligent. But this argument could not be accepted. First, the Plaintiff did not adduce evidence on whether the risk of nerve injury on one leg is dependent or independent of the risk of nerve injury on the other leg. This relational question was the premise of the Plaintiff's argument, without which that "common sense" conclusion could not follow. It may be, for instance, that if unilateral nerve injury eventuates, bilateral nerve injuries necessarily follow. If so, the risk of a bilateral nerve injury would simply be the risk of a unilateral nerve injury. Second, while Prof Hamilton testified that he had never seen any patient with such serious nerve injuries to both legs as a result of EVLT, that was premised on his personal experiences and unsupported by the medical texts and articles cited by him.[29] Therefore, the Plaintiff could not rely on the presumed greater rarity of bilateral nerve injuries to discharge his burden of proof.

(3) Applicability of the principle of *res ipsa loquitur*

104 The Plaintiff appeared to rely on the principle of *res ipsa loquitur*, *ie*, that the injury or damage speaks for itself. That principle or any analogous method of reasoning, however, could not apply in our present context because of the risks of nerve injury inherent in the operation, which was not shown to be statistically insignificant or inapplicable to our facts.

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[29] NE Day 3 at p 50.

105 Generally, the *res ipsa loquitur* principle is resorted to where a plaintiff facing difficulties adducing direct evidence of negligent conduct seeks to rely on circumstantial or indirect evidence to prove his case (*The Law of Torts in Singapore* at paras 06.083–06.084). Thus, the principle is a practical tool of evidence, allowing the ready inference of breach or negligence where direct evidence may not be ready at hand, and not a rule or doctrine of law. In the words of Megaw LJ, it applies as "an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances" (*Lloyde v West Midlands Gas Board* [1971] 1 WLR 749 at 755, cited in *Joanne Tong* at [217]).

106 It is generally accepted that the principle of *res ipsa loquitur* would apply where three conditions are satisfied (*Scott v The London and St Katherine Docks Company* (1865) 3 H & C 596, *per* Erle CJ, cited in *Joanne Tong* at [219] and *BNJ (suing by her lawful father and litigation representative, B) v SMRT Trains Ltd and another* [2014] 2 SLR 7 ("*BNJ*") at [137]):

(a) the occurrence is such that it would not have happened without negligence;

(b) the thing which inflicted the damage was under the sole management and control of the defendant; and

(c) there must be no evidence as to why or how the occurrence took place.

107 Once the three conditions are satisfied, the plaintiff would establish a *prima facie* case of negligence by the defendant. This is because the accident may then itself be taken as evidence of the defendant's failure to take reasonable care on the balance of probabilities (*BNJ* at [138]). However, it remains open to

the party against whom it is invoked to try to bring in evidence to show that some other conclusion should be reached. Thus, as the learned editors of C T Walton MA, *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 13th Ed, 2013) ("*Charlesworth*") observed in the context of medical negligence claims (at para 5-27):

> … [The principle of *res ipsa loquitur*] does not raise any presumption but is merely a guide to help to identify when a prima facie case is being made out. If the position reached at the end of a case is that the evidence admits of an inference of negligence, but the defendant has provided a plausible explanation of what happened, consistent with the exercise of due care, then the claim will fail. Likewise, the claim will fail where the defendant's evidence satisfies the judge that proper care was taken, even though the outcome itself cannot be explained in the current state of medical knowledge.

108 In the present case, none of the conditions were satisfied. In respect of condition (a), the inherent risk of nerve injury, as earlier discussed, negated the necessary causal nexus between the Defendant's purported negligence and the nerve injuries suffered by the Plaintiff. In respect of condition (b), the "thing which inflicted the damage" must be taken to include the inherent risk of nerve injury, and that was not within the control of the Defendant.

109 Condition (c) operated as a negative requirement: "[w]here there are facts relating to the known cause of the accident, they should be applied to determine the issue of the defendant's breach of duty, instead of relying on indirect evidence under the [principle] of *res ipsa loquitur*" (*The Law of Torts in Singapore* at para 06.087). In the present case, there was extensive expert evidence on both sides and the court should decide, on a balance of probabilities, whether the Plaintiff had proven negligence on that basis. This was not a case where the Plaintiff relied solely on the "*res*" itself. In this regard, the dictum of Hobhouse LJ in *Ratcliffe v Plymouth and Torbay Health Authority and another* [1998] PIQR P 170 was relevant (at [84]):

> Medical negligence cases are unlikely to give rise to the stark problems encountered in road traffic accident cases where there may be a total dearth of evidence or where one or other side may choose, no doubt for tactical reasons, not to present evidence … Where expert and factual evidence has been called on both sides at a trial [the] usefulness [of the principle] will normally have long since been exhausted.

110 Apart from principle, the disapplication of the *res ipsa loquitur* principle in the present case was also consistent with case law in Singapore.

111 In *F v Chan Tanny* [2003] 4 SLR(R) 231, the issue was whether the defendant-gynaecologist had been negligent in monitoring the mother's pregnancy and the eventual delivery of the plaintiff-baby, thereby causing the plaintiff to suffer various neurological defects on birth. The court held that the principle of *res ipsa loquitur* did not apply (at [116]):

> Being born is dangerous for the baby … In law, when a baby is still-born or dies soon after birth or is born damaged or deformed, the fact in and by itself is no evidence of negligence on the part of the doctors or nurses attending the birth. It does not speak [for] itself. The maxim *res ipsa loquitur* does not apply.

112 Similarly, in *Denis Matthew Harte v Dr Tan Hun Hoe and another* [2000] SGHC 248, the plaintiff-patient sued the defendant-gynaecologist for negligence in performing a surgery which caused the atrophy of the plaintiff's testicles, a consequence that such operations were not known to produce. The defendant, however, claimed that the testicular atrophy had been caused by the plaintiff's fall in the hospital toilet soon after the operation. The court rejected the applicability of the principle of *res ipsa loquitur* on the basis that, apart from the negligence of the doctor during the operation, the subsequent fall of the plaintiff could itself have been a cause of his testicular atrophy (at [246]):

> I do not think that the above maxim has any application here. The plaintiff's fall in the toilet unfortunately has crept into the equation and is capable *per se* of causing bilateral atrophy … So long [as] he shows that there are other probable causes

> (other than his surgery) for the atrophy, without proving which is in fact responsible for the damage, the principle of *res ipsa loquitur* can no longer help the plaintiff, who always has the legal burden to prove that [the doctor] had breached his duty of care towards him.

113 In the present case, where an inherent risk of injury existed, the principle of *res ipsa loquitur* should not apply. Notably, there was no evidence that this inherent risk was statistically insignificant or inapplicable to our facts. This inherent risk, therefore, stood as an obstacle to both the issues of breach and causation in the Plaintiff's claim of negligence. Insofar as the Plaintiff sought to rely on a broader notion of common sense and intuition, it should be reiterated that the test of liability is not whether the Plaintiff's case is more probable than the Defendant's, but rather, whether the Plaintiff had proven that case on a balance of probabilities (see above at [86]). It thus behoved the Plaintiff to show, by direct or expert evidence, that an action or omission of the Defendant had been in breach of his duty of care and had led to the injuries claimed for.

(4) The administration of tumescent fluids

114 The Plaintiff, relying on the evidence of Prof Hamilton, submitted that the Defendant had been negligent in his conduct of the EVLT procedure as he did not adequately administer or monitor the use of tumescent anaesthesia while delivering laser energy to the tissue surrounding her saphenous veins. The evidence did not bear this out.

115 On a preliminary note, it should be noted that Prof Hamilton had made a critical concession that there is no medical standard as to the specific amount of tumescent anaesthesia that should be used in EVLT procedures, and that the adequacy of such fluids is a matter for the surgeon to adjudge based on his or her situational assessment of the surgical demands.[30] This meant that it would

be difficult, in the absence of strong evidence, to hold against the Defendant based on the adequacy (or otherwise) of his use of tumescent anaesthesia. Indeed, the primary dispute was on the narrower issue of whether tumescent anaesthesia had in fact been used.[31]

116 In that regard, I found that such tumescent anaesthesia had in fact been used during the operation. This was confirmed by Ms Kavitha, the senior scrub nurse, based on the cardex – which was a document maintained by an operating theatre setting out the surgeon's required items for the operation – that she had prepared. She also testified that although she was not certain of the composition and adequacy of the fluids used, she was certain of the fact that tumescent fluids had been used in the operation.[32] Further, even though there was no express documentation of the use of tumescent anaesthesia, the hospital's tax invoices were satisfactory evidence that necessary components of tumescent anaesthesia and tools for the administration of such fluids had in fact been ordered and billed for. This meant that the Plaintiff's allegation that the Defendant had not used tumescent anaesthesia could not be established.

117 Even if issue had been taken with the adequacy of tumescent anaesthesia used, the Plaintiff could not establish a case of breach. The Defendant had given evidence of the detailed procedures that would be taken prior to the firing of the laser in EVLT, including the proper administration of tumescent fluids as a heat sink. There was nothing in the circumstances that would suggest that no surgeon exercising proper care and skill could have reached the same decision as he did (*Charlesworth* at para 9-129). As discussed earlier, the mere fact of the nerve injury being suffered could not itself justify the conclusion that the Defendant

30 NE Day 3 at pp 36-37.

31 Defendant's Closing Submissions at para 80.

32 Ms Kavitha's AEIC at paras 10-11.

had not properly dispensed tumescent fluids: there might also have been other causes, including the risk inherent in such a procedure. Prof Hamilton's opinion that he had not seen such injuries also could not assist the Plaintiff.

118 In the end, the Plaintiff could only rely on the adverse inference that she argued should be drawn against the Defendant for not recording the amount of tumescent anaesthesia used in the operation notes. However, while comprehensive documentation would have been ideal and perhaps more prudent, its absence could not in itself lead to the conclusion that the Defendant had acted in breach by failing to use sufficient tumescent fluids during EVLT. An ultimate inference of liability based on the absence of record was particularly inappropriate in this case given that, as Prof Hamilton accepted, from a practical perspective, if the doctor had observed during EVLT that there was insufficient tumescent fluid, he would simply not have fired the laser and made the necessary adjustments; there was no reason (apart from liability concerns) to record the insufficiency and adjustment down.

119 For these reasons, I found that the Plaintiff did not establish, on a balance of probabilities, that the Defendant had acted in breach of his duty of care by failure to properly administer and monitor the usage of tumescent anaesthesia during the EVLT procedure.

(5) Erroneous assumption as to pain reception

120 In respect of the phlebectomy procedure, the Plaintiff submitted that the Defendant was negligent in conducting the procedure on the assumption that a patient could react to pain stimuli during the phlebectomy even if he or she was under general anaesthesia. The Plaintiff claimed that this assumption was erroneous as it was contradicted by Dr Chin's evidence.

121 This could not assist the Plaintiff much. Under the *Bolam-Bolitho* approach, it might be that liability in negligence would attach to a doctor who performs a treatment procedure while labouring under an erroneous belief regarding a practice that no reasonable body of medical practitioners would similarly have held, or to a doctor who, as a consequence of his erroneous belief, conducted the treatment in a manner that departs from the practice accepted as proper by a responsible body of similarly qualified doctors. However, neither was established on the evidence at present. In any event, it was not clear how causation would be made out between the Defendant's erroneous assumption and the injuries suffered by the Plaintiff.

(6) Other allegations

122 Three final allegations of negligence in treatment should be addressed.

123 First, the Plaintiff raised an issue about the operation being carried out on both legs at the same time. This was a non-starter as the Plaintiff's expert, Prof Hamilton, had unequivocally testified that it was common for similar operations to be conducted on both legs at the same sitting.[33]

124 Second, Prof Hamilton appeared to cast doubt on whether proper heat settings had been used by the Defendant during EVLT. In support of that, the Plaintiff pointed to the absence of medical records on the energy levels used, and questioned the Defendant's allegedly suspicious omission to call as a witness the specialist technician who had assisted him with the use of the laser machines during the operation.[34]

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33 NE Day 3 at pp 74-75.

34 Plaintiff's Closing Submissions at para 185.

125 With respect, without any underlying evidence or fact, the doubts raised as regards the heat settings were nothing more than speculation. As Prof Hamilton himself testified, there was no particular strength setting for the laser that could reduce the risk of nerve damage; despite a great deal of research done on this issue, the results were as yet inconclusive.[35] Further, the fact that the Plaintiff suffered bilateral saphenous nerve injuries could not itself justify a finding that the heat settings had been improper, as this was not a case where no alternative explanation existed for the injuries suffered. No adverse inference could also be drawn from the Defendant's omission to call the assisting technician as witness – the evidential burden of proof rested on the Plaintiff to adduce at least some evidence of impropriety of the settings before the Defendant would be compelled to adduce evidence to show otherwise. This the Plaintiff did not do. In fact, the Defendant had given evidence of his use of a safer method of dispensing laser energy, which had been taught to him by the laser machine's vendor.[36] In the circumstances, s 116 of the Evidence Act (Cap 97, 1997 Rev Ed), and in particular Illustration (*g*) thereto, was not triggered. No adverse inference should be drawn against the Defendant.

126 Third, the Plaintiff highlighted that the Defendant's combination of EVLT with FS was unusual, and alluded to the possibility that the use of such a novel combination might have been negligent. In turn, the Defendant explained that the use of FS during EVLT was an innovation he had introduced based on an article that he had read in a medical journal in 2008.

127 In my judgment, the fact that a novel technique is employed or that an accepted technique is used in a novel way does not, without more, give rise to a breach of duty. In our case, the fact of novelty aside, there was no evidence that

35 NE Day 3 at p 76.

36 NE Day 8 at p 10.

the Defendant's method of use of FS was one which no respectable body of medical opinion, logically held, would support. Indeed, to the contrary, the expert evidence was unanimous in identifying a potential benefit to the Defendant's innovative use of FS. Prof Hamilton accepted that such use of FS, while perhaps unorthodox, was complementary to EVLT and had the potential to reduce the risk of thermal injury around the knee area (see [66] above).[37] Prof Tan went further to testify that the use of FS as an adjunct to EVLT posed minimal risks and, in fact, provided an additional safeguard for the patient.[38] In itself, the use of FS would also have posed a minimal risk of nerve injury as it does not entail a release of heat but rather aids the clotting of the vein.[39] With all of this in mind, therefore, the fact that an unusual combination of techniques was employed did not assist the Plaintiff in making out his claim.

Conclusion on the Operation

128 On the evidence, I concluded that no breach was shown in respect of the requisite duty of care imposed on the Defendant in the conduct of the operation. The *res ipsa loquitur* principle was not applicable in the present situation: there being an inherent risk of nerve injuries in EVLT and phlebectomy, the mere fact that bilateral nerve injuries occurred did not lead inexorably to the conclusion that there must have been something wanting in the Defendant's conduct. Further, the discrepancies and omissions of medical records could not in themselves justify a finding of breach. The fact that the Defendant incorporated novel elements into his surgical process also did not mean that he was therefore negligent. Consequently, there was nothing to show on the evidence that the Defendant had, on a balance of probabilities, fallen below the standards required

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37 NE Day 3 at pp 35, 67.

38 NE Day 10 at p 39.

39 NE Day 3 at p 13.

of him. Further, given the risks of nerve injuries inherent in the Procedures, there was, in the end, nothing to show that anything done or not done by the Defendant had causally led to the injuries suffered by the Plaintiff. No evidence had been adduced to distinguish the present case from the general dataset forming the basis of the statistics cited.

Issue 3: Post-operation

The Plaintiff's arguments

129 The Plaintiff alleged that the Defendant had breached his duty of care in respect of his provision of post-operative treatment and care as he did not inform her that she suffered from nerve injuries until sometime in November 2010, despite several consultations between July and November 2010.

The Defendant's arguments

130 The Defendant denied all allegations of breach in this regard. He submitted that there was no delay in his management of her injuries, his re-diagnosis of her condition, or his referral of her to other specialists. Within around two weeks of the operation, he had informed the Plaintiff of the likelihood that the pain she felt was caused by nerve injuries. Complaints of pain and numbness were also fairly common post-EVLT, and that explained why he had taken some time to assess the Plaintiff's condition and had initially reassured her that her condition would improve. In fact, it was the Plaintiff who was not consistent in returning to the Defendant for consultation. She also did not punctually attend her sessions scheduled with the other specialists recommended by the Defendant.

The Court's findings

131 At the outset, it should be noted that while there were some allegations which seemed to imply insufficient post-operative care, the particulars of these were not clearly laid out in the pleadings. Further, there was a lack of expert evidence from the Plaintiff showing that the Defendant's conduct in this respect fell afoul of the standard expected of him.

132 In any event, the Plaintiff's allegations were not made out on the facts. As argued by the Defendant, there was nothing to show that there had been a failure or undue delay in his re-diagnosing of the Plaintiff's condition. The context was important in this regard: pain and numbness, albeit varying in degree and duration, were usual consequences of the type of operation that the Plaintiff had undergone, and therefore some time would reasonably be needed to verify the actual state of the Plaintiff. Indeed, the Defendant's evidence was that up to a year would usually be taken for recovery from numbness resulting from similar operations, and there was no contrary evidence from the Plaintiff. For this reason, the Defendant's initial assessment that the Plaintiff's condition would improve, and his referral of the Plaintiff to a neurologist or dermatologist about three months after the operation, could also not be impeached.

Conclusion on liability

133 For the foregoing reasons, even considering all the shortcomings and discrepancies of the Defendant's evidence, it could not be said that there was sufficient evidence to establish the Defendant's breach of his duty of care as a medical practitioner towards the Plaintiff on the balance of probabilities.

Issue 4: Damages

134 The issue of damages was not canvassed before the court in detail. Nevertheless, I indicated my general findings for completeness.

The Plaintiff's arguments

(1) Amenities, pain and suffering

135 In this case, the claim for pain and suffering was taken together with the claim for loss of amenities. The Plaintiff sought compensation for her pain, suffering, and loss of amenities arising from the Defendant's alleged negligence. She relied on several medical expert reports, which she claimed remained unchallenged by the Defendant.

136 The Defendant adduced a surveillance video recorded by Tan Tien Hwee ("Tan TH"), a private investigator who had been hired to conduct video surveillance on the Plaintiff to give evidence of her pain and disability. The surveillance video suggested that the Plaintiff had exaggerated her condition. In response, the Plaintiff vehemently denied that to be the case. She pointed to various portions of the footage which showed her impaired mobility, and highlighted that there were several breaks in the footage. She also argued that she had even been hospitalised in March 2015 for intravenous infusion of pain-relief anaesthetic drugs: there was no reason for the Plaintiff to expose herself to the risks of pain treatment if she had not in fact suffered great pain. Finally, in respect of the Private Investigator Report ("PI Report") adduced in conjunction with the surveillance video prepared by Tan TH, the Plaintiff submitted that, save for the section titled "Surveillance", the rest of the report ought to be inadmissible as hearsay, as they had been prepared by another investigator who was not present in court.

137 In respect of the quantum, the Plaintiff submitted on separate awards for each of her four medical conditions:

(a) First, in respect of her bilateral saphenous nerve injury and CRPS, the Plaintiff sought an award of $70,000, based on an analogy to the case of *Mei Yue Lan Margaret v Raffles City (Pte) Ltd* [2005] 4 SLR(R) 740 and a reference to the *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Academy Publishing, 2010) ("*Guidelines*") under which between $25,000 and $50,000 was recommended for severe reflex sympathetic dystrophy (another name for CRPS). In this regard, she relied on the evidence of Dr Tan Tee Yong ("Dr Tan TY"), who is a consultant pain specialist at the Integrative Pain Centre, Mount Elizabeth Medical Centre, that her nerve injuries were likely to be permanent and would demand regular medication for alleviation.

(b) Second, for the major depressive disorder with anxious distress ("MDD"), the Plaintiff submitted that this had been amply proven by the testimony of Dr Lim Boon Leng ("Dr Lim BL"), who is a private psychiatrist. By analogy with case precedents in which damages between $4,000 and $40,000 had been ordered for varying forms of depression and the *Guidelines*, which provided for an award of between $8,000 and $25,000 for moderately severe psychiatric disorders, the Plaintiff sought compensation of $30,000. The Plaintiff further highlighted that her prognosis remained guarded and that Dr Lim BL had suggested that she be re-assessed in two years.

(c) Third, for the aggravated discoid eczema, by analogy with moderate dermatitis under the *Guidelines*, which provided for damages

between $2,000 and $5,000, the Plaintiff sought $5,000. According to the Plaintiff, the Defendant's negligent operation had rendered her condition ulcerous.

(d) Fourth, in respect of the venous insufficiency, the Plaintiff claimed $10,000 on the basis that, under the *Guidelines*, up to $6,000 would be awarded for a soft tissue injury with residual disabilities being at most of a minor nature that will resolve in time. She noted that while her varicose veins had not caused any problems prior to the operation, post-operation, she suffered mild oedema in both her legs.

(2) Medical expenses

138 In respect of pre-trial medical expenses, the Plaintiff claimed a total of $68,563.11 for expenses incurred up to July 2015. These were evidenced by invoices from Mount Elizabeth Hospital, National University Hospital ("NUH"), and other private clinics.

139 In respect of future medical expenses, the Plaintiff claimed projected expenses for the following two categories:

(a) First, she sought costs for future psychiatric treatment, amounting to $14,430 in total per annum (composed of consultation fees of $2,400, medication expenses at $5,400, and psychotherapy costs at $6,630). Relying on Dr Lim BL's evidence, the Plaintiff submitted that such psychiatric treatment would be necessary because of her current poor prognosis.

(b) Secondly, she sought up to $92,812 in total per annum as costs of future pain management (composed of up to four Ketamine infusion treatment sessions per annum at $20,803 per admission, and

consultation and medication at $800 per month). A provision for ketamine infusion was reasonable based on Dr Tan TY's testimony that the Plaintiff's pain could flare up from time to time. The Plaintiff also gave evidence as to the plethora of medication she had been taking on a daily basis to help her manage pain and restore her mobility.

140 As to the multiplier, the Plaintiff submitted that medical expenses for psychiatric treatment costs should be assessed for four years, while that for pain management should be assessed for 16 years. This was based on the expected life expectancy of a female in Singapore at the age of 65: the Plaintiff could expect to live for another 31 years.

(3) Income losses

141 At the outset, the Plaintiff painted a rosy picture of her employment prospects prior to the Defendant's acts of alleged negligence. By virtue of her hard work and aptitude, she rose through the ranks after joining the company in 1987 to become a Financial Services Director with Prudential. The Defendant's negligence, however, caused the Plaintiff to suffer various pains and symptoms since 2010 which adversely and significantly affected her work. Consequently, a declining trend could be observed of the Plaintiff's agency staff, sales numbers, and sales remuneration.

142 In the circumstances, the Plaintiff pegged her pre-trial income at $267,680 per annum. This was an averaged projected figure which Mr Delon Choo ("Mr Choo"), a representative from Prudential, testified that she could potentially have earned in the period from 2010 to 2014 based on her performance in 2007 and 2008. The Plaintiff submitted that performance in the year of 2009 was not a good gauge because she was faced with the passing of

her father and her son's serious bout of pancreatitis. Although there might have been later adjustments to her actual income, there would be no clawback of the excess paid out by Prudential once earned.

143 On that basis, the Plaintiff's pre-trial loss of earnings for the years 2010 through 2014 amounted to around $432,429.30. Her post-trial income loss was between $150,000 and $180,000 per annum. There being no fixed retirement age for persons in financial services, the Plaintiff, who was around 56 years old, should be able to rely on a 10-year multiplier. This was argued to be reasonable because the Plaintiff would likely suffer a lifetime of persisting and debilitating pain in both her legs. In the alternative, the Plaintiff sought damages for her loss of earning capacity.

The Defendant's arguments

(1) Amenities, pain and suffering

144 The Defendant accepted that the Plaintiff suffered pain, but maintained that she had exaggerated her condition. To this end, he raised two general arguments. First, as seen in the surveillance video, the Plaintiff could walk and stand unaffected, and showed little signs of pain or hyper-sensation. At most, mild allodynia was suffered. The Plaintiff should not be entitled to allege impropriety in the breaks in the footage as these issues had not been put to Mr Tan TH. Second, he pointed out that the Plaintiff had apparently not needed any medical treatment for a substantial period of time from 2012 until early 2013, in line with developments in the present legal proceedings.

145 More specific contentions were raised in respect of each of the four conditions relied on by the Plaintiff:

(a) First, in respect of nerve injuries and CRPS, the Defendant sought to cast doubt on Dr Tan TY's diagnosis of CRPS on both of the Plaintiff's lower limbs. It was noted that while CRPS symptoms usually surface within one month of the injury, his diagnosis of CRPS here came around three years after the operation. The Plaintiff had also not been truthful in her complaints to Dr Tan TY, who was surprised in court by the Plaintiff's demonstrated mobility captured in the video surveillance which was played to him. Even if the Plaintiff suffered CRPS, it was not to a serious extent given her mobility and ability to conduct her daily activities. The Plaintiff had even gone on overseas trips and attended social functions. Taking all these circumstances into account, the maximum award in this regard should be $5,000.

(b) In response to the Plaintiff's claim to suffer from MDD, the Defendant highlighted that: (a) the Plaintiff's psychiatrist conceded that the diagnosis was dependent on what the patient had reported, which may not be verifiable, (b) the condition manifested only in the few months prior to the first tranche of trial and could be attributed to stress from the ongoing lawsuit, which would soon no longer be operative, (c) some of the Plaintiff's complaints may be attributed to the medication she was taking and not the Defendant's purported negligence, and (d) after viewing the surveillance video, Dr Tan TY concluded that the Plaintiff may not need to engage in as many consultations. As such, the Plaintiff's claim should be viewed with caution and a reasonable sum for the pain and suffering arising from MDD would be $2,000.

(c) The Defendant also submitted that the conditions of aggravated discoid eczema and venous insufficiencies should not be compensated

at all as these were simply afterthoughts and the Plaintiff had not shown the requisite causal nexus.

(2) Medical expenses

146 In respect of the Plaintiff's pre-trial medical expenses, these were special damages which the Plaintiff must, but failed to, strictly prove.

147 In this regard, some of the expenses incurred by the Plaintiff had been paid for on her behalf by her insurer. Where there was no obligation to repay, the same was not recoverable. This would exclude all of the Plaintiff's expenses incurred in respect of her hospital admissions into Mount Elizabeth Hospital, and the invoices incurred between 14 February 2015 and 23 August 2015 falling within the post-hospitalization coverage period of the Plaintiff's policy.

148 In respect of the invoices with Dr Tan TY, these sums should be discounted as the Plaintiff was also consulting him for back injuries suffered as a result of a separate fall, which was unrelated to the Defendant's purported negligence. In this regard, only $3,300 should be allowed.

149 As for the other invoices, the Defendant took no issue with them, save as to highlight that some consultations would have been due regardless of the Defendant's negligence. Of these invoices, the position was as follows:[40]

(a) Vascular and general surgery invoices: agreed sum of $2,946.70;

(b) Dr Lee Kim En of Neurology Pte Ltd invoices: agreed sum of $2,847.20;

(c) NUH invoices: agreed sum of $2,542.96;

[40] Defendant's Closing Submissions at para 148.

(d) Dr Lim BL invoices: agreed sum of $6,419.85;

(e) Anaesthesia and analgesia consultant invoices: $192.60 not agreed as the purpose of these consultations and their causal relation to the Procedures were not clear; and

(f) Adrian Tan of Neurology Practice Pte Ltd invoices: $531.30 not agreed as the purpose of these consultations was unclear.

150 Invoices contained in Schedule B of the Plaintiff's amended Statement of Claims, but which were not itemised in her AEIC, were no longer sought as damages by the Plaintiff.[41]

151 As for future medical expenses, there were two aspects:

(a) First, in relation to future psychiatric treatment, the Defendant argued that the Plaintiff's provision was excessive. Given her lack of credibility, she must have exaggerated her account of her condition to Dr Lim BL to seek as much damages as possible. Indeed, even though the Plaintiff sought compensation for psychotherapy sessions twice a month, she had never thus far attended such sessions on a twice-monthly basis; in fact, she had at best attended previous sessions on a monthly basis with several months in which she did not attend the sessions at all.[42] The number of consultations with Dr Lim BL would also likely decrease after the conclusion of these proceedings and the alleviation of litigation stress. As such, a sum of $3,500 for two years was sufficient.

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41 NE Day 1 at p 78; Defendant's Closing Submissions at para 149.

42 NE Day 5 at p 66.

(b) Second, in relation to pain management, the Defendant noted that the Plaintiff had not sought pain management treatment for almost one and a half years before she consulted Dr Tan TY. It was also not clear if the Defendant was artificially boosting her claim against the Defendant by consulting Dr Tan TY at the same time for a serious back injury that she had suffered after a fall. Further, after viewing the surveillance video, Dr Tan TY appeared to accept that the Plaintiff would not require as many consultations or ketamine infusions. In terms of pain-relief medication, a lignopad application was also the most likely and most cost-effective method. In the circumstances, monthly damages in the sum of $350 for lignopad application and $400 for consultation and medication would suffice.

152 As to the multiplier, there was no basis for the Plaintiff's proposed multipliers of four years and 16 years for psychiatric treatment costs and pain management costs respectively. Instead, a multiplier of two years would be appropriate for pain management costs, and for psychiatric treatment, the proposed quantum of $3,500 was for two years.

153 The Plaintiff's claims for the costs of consultations with other doctors not brought as witnesses to court, and for costs of a domestic helper, should be rejected. No award should also be made for future transport expenses, as she had not proven any difficulty in mobility and her use of public transport.

(3) Income losses

154 As for the pre-trial loss of earnings, the Defendant raised four main objections as follows:

(a) The Plaintiff's claim should be confined to her earnings in 2010 and 2011 as pleaded by the Defendant in her Statement of Claim – which she could but did not amend – and not the years 2010 through 2014.

(b) There was no reliable proof of the Plaintiff's loss of earnings from 2010 to 2014. Some of the numbers relied on by the Plaintiff were not personally prepared by her witness, Mr Choo, and were thus inadmissible hearsay evidence. They were also unreliable projected hypotheticals which contradicted other documents issued by Prudential, and for which the source documents and numbers had not been produced.

(c) The Plaintiff's claim for pre-trial loss of earnings contradicted evidence that her sales performance in fact improved in 2012 and 2013, which was after the operation, compared to in 2008 and 2009. Her income tax statements for the period from 2007 to 2014 showed that there had been no pre-trial loss of earnings. This was confirmed by Mr Choo, who testified as to the Plaintiff's continued competence at work and the fact that she had not been the subject of any complaints. The number of financial consultants under her also doubled in 2012 and she retained them all in the following year.

(d) Vicissitudes of sales needed to be taken into account.

155 In respect of loss of future earnings or earning capacity, the Defendant submitted that none should be paid as the Plaintiff had not proved the possibility of any such loss. Indeed, her sales performance in 2012 and 2013 exceeded her performance prior to the operation. Rather than rely on Mr Choo's hypothetical and unreliable tabulations, the Plaintiff's tax statements should be the objective benchmark based on which future losses were assessed. On that premise, there

were no continuing financial losses suffered by the Plaintiff. There was, on the facts, also no risk that the Plaintiff would lose her present job and thus no loss of earning capacity claim should be allowed.

The Court's findings

(1) Amenities, pain and suffering

156 In respect of the pain suffered by the Plaintiff, I had general concerns about the extent of the injuries and disabilities that continued to affect her. Based on the surveillance video adduced by the Defendant, although the Plaintiff would have been aided by pain management medication, her mobility and ability to conduct her daily activities seemed to show that the extent of her injury was not as serious as she had claimed. Although the Plaintiff took issue with the admissibility of parts of the PI Report, that did not detract from the strength and probative value of the video evidence, on which the PI Report was primarily founded.

157 Based on the video footage, it was evident that the Plaintiff was able to walk significant distances, from her home to the MRT station, into the MRT station, and on to the hospital. While she did not perhaps walk totally fluidly, there was no indication that there had been significant pain suffered, or that she was struggling. She was able to navigate and make her way through crowds and onto the escalators, and it appeared that she did not require much support. Indeed, when the video was shown to the Plaintiff's own pain specialist, Dr Tan TY, he accepted that she looked comfortable and did not appear to suffer from any discomfort or difficulty.

158 In respect of the Plaintiff's diagnosed CRPS, I agreed with the Defendant that there were serious questions about her condition and the extent

of her disability. While it is true that courts will ordinarily accept an uncontradicted expert opinion, the concern here related not to the propriety of the diagnosis, but to the factual premises upon which that diagnosis was based. Looking thus at the facts, which comprised the video evidence adduced and the fact that the Plaintiff had even gone on overseas trips, I was of the view that the Plaintiff's condition might not have been as serious as she had conveyed to the doctor who made the diagnosis, Dr Tan TY. Indeed, it was telling that Dr Tan TY was himself surprised in court by the Plaintiff's demonstrated mobility in the surveillance video. Further, the possibility that the Plaintiff might on occasion have needed an intravenous infusion of anaesthetic drugs in early 2015[43] could not detract from the general mobility and ability of the Plaintiff, particularly when she conceded that she had been suffering from pain in the lower back since July 2013 as a result of an unrelated fall and had been consulting at the Integrative Pain Centre for the same.[44]

159 Even assuming that the Plaintiff had been labouring under the condition of CRPS arising as a result of the Defendant's negligence, it was clearly not of such severity as to be analogous to the precedents cited by the Plaintiff. The *Guidelines* suggested a sum between $25,000 and $50,000 for CRPS, which it described as involving a situation where "[m]oving or touching the limb (or affected area) often results in *intolerable* pain" [emphasis added]. While the Plaintiff might have suffered discomfort and some degree of pain, it clearly did not reach this level of severity.

160 The Plaintiff's condition also did not reach the level of disability observed in *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 ("*Mykytowych*") and *Khek Ching v SBS Transit Ltd* [2010] SGDC 220, for

43 Plaintiff's Closing Submissions at para 235(d).

44 Agreed Bundle Vol 1 at pp 69-70; NE Day 1 at pp 79-80.

which sums of $30,000 were ordered as compensation. Unlike the present case, the claimants in both of those cases lost the ability to continue working and appeared to have to rely on walking aids (*eg*, walking sticks or wheelchairs). In *Mykytowych*, the Court of Appeal considered the claimant to suffer from "moderate" CRPS (at [110]). In the present case, the Plaintiff's situation would more appropriately fall within the mild range of the CPRS, for which the *Guidelines* prescribe compensation between $5,000 and $12,000. The Plaintiff's claim for $70,000 for this condition alone was thus clearly excessive.

161 In respect of the MDD suffered by the Plaintiff, it was also not shown to be of the scale or impact claimed by her. Indeed, Dr Lim BL had accepted that her diagnosis was dependent on facts provided by the Plaintiff, which might not be verifiable. Further, the evidence suggested that some of the symptoms of MDD could have arisen, at least in part, from the medication that she had been taking or the stresses of the trial process, rather than the Defendant's purported negligence.

162 In respect of the Plaintiff's conditions of aggravated discoid eczema and venous insufficiency, I agreed with the Defendant that no compensation should be made as there were questions as regards the causal nexus between these conditions and the Defendant's purported negligence in conducting the operation. As discussed earlier (at [59] above), discoid eczema could be caused by trauma to the skin, which would mean that the surgery contained an inherent risk of giving rise to this condition. As for venous insufficiency, there was no evidence before me that it was caused by the Defendant's negligent conduct of the operation.

163 In the circumstances, I would have found an award of $10,000 in total for the Plaintiff's loss of amenities and pain and suffering to be appropriate.

(2) Incurred medical expenses

164 In relation to the pre-trial medical expenses, I would have accepted the Defendant's submissions. A number of the invoices were not disputed by him, and the Plaintiff dropped her claim in relation to some of the others. Accordingly, a sum of $18,057 would have been awarded.

165 In particular, I noted that the sums reimbursed by the Plaintiff's insurer did not have to be compensated by the Defendant (see, *eg*, *Quek Yen Fei Kenneth v Yeo Chye Huat* [2016] 3 SLR 1106 at [95]). Any loss suffered by the Plaintiff would thus have to be correspondingly reduced. While there might conceivably be a claim for increased future premium costs, there was no allegation or evidence of such an increase before the court.

166 Further, there was a concern about the causal reason for some of the expenses incurred, as the Plaintiff had suffered from lower back pain as a result of a fall at least since July 2013, and she had been arranging for consultations and treatments serving the purpose of ameliorating both the pain from the fall and the operation. Thus, at least as regards Dr Tan TY's invoices, some discount would have been warranted.

167 I would also disallow the Plaintiff's claim for costs of a domestic helper and private transport expenses, as these had not been shown to be necessary in light of the severity of her condition.

(3) Future medical expenses

168 The Plaintiff sought $14,430 per annum multiplied by four years for psychiatric treatment costs and $92,812 per annum multiplied by 16 years for costs of her pain management treatment. This was not shown to be required given the severity of her condition. On the other hand, the Defendant's provisions were too conservative given that the Plaintiff would, on this hypothesis, have suffered bilateral nerve injuries that were of a permanent nature. Thus, in respect of pain management, I found that a sum of $10,000 per annum for five years would be appropriate. The accompanying psychiatric treatment should be for four years as claimed, and I assessed the amount required to be at $2,400 per annum, leaving out the costs of the medication and psychotherapy sessions.

(4) Pre-trial loss of earnings

169 The Plaintiff sought to claim pre-trial loss of earnings of $432,429.30 for the period from 2010 to 2014. However, she did not adduce sufficient evidence to support her claim. As the Defendant noted, the loss of earnings claimed in her amended Statement of Claim was only for the period from 2010 to 2011, and no application to amend had been made. Although the Plaintiff's reply submissions argued that such an amendment should be allowed, this was neither formal nor procedurally proper, and appeared to be only an attempt to stave off the argument made by the Defendant.

170 Even if the amendment application was taken as granted, there remained significant issues with the evidence relied upon by the Plaintiff to justify the quantum of her pre-trial loss of earnings. In the circumstances, I agreed with the Defendant that what should be relied upon were the Plaintiff's income tax statements, rather than Mr Choo's hypotheses and speculations, of which he did

not appear entirely familiar with himself, and for which he did not provide the base numbers and primary documents. Accordingly, these tax statements showed an increase in the Plaintiff's income after the operation in 2010. This would be consistent with Mr Choo's evidence that the Plaintiff had been able to carry out her work competently.

171 For these reasons, I could not find that the Plaintiff's claim for pre-trial loss of earnings was made out.

(5) Loss of future earnings or earning capacity

172 For similar reasons as explained above, the Plaintiff did not establish a viable claim that she would likely suffer any loss of future earnings. Indeed, her prospects at Prudential remained promising. There was also no proven loss in earning capacity.

Summary of putative awards

173 Based on the above, the award that would be made to the Plaintiff in the event that the liability issue was decided in her favour was as follows:

(a) General damages

(i) Pain, suffering, and loss of amenities

Some amount would be awarded, as I accepted that the Plaintiff had suffered some degree of pain. If this was indeed caused by the Defendant's negligence, an amount of $10,000 would appear to be appropriate, given my assessment that she was able to function to a significant extent as shown by the surveillance video.

(ii) Future medical expenses

I would award a sum of $50,000 for the costs of pain management treatment, and $9,600 for her psychiatric treatment.

(iii) Loss of future earnings or earning capacity

No compensation would be ordered as the losses in respect of her future salary and commission were not made out.

(b) Special damages

(i) Pre-trial medical expenses

Of the invoices that could be claimed, I would award the amount as submitted by the Defendant, *ie*, $18,057.

(ii) Pre-trial loss of earnings

No compensation would be ordered as the claims were not made out.

Postscript

174 Subsequent to the delivery of my judgment in this case, the Court of Appeal issued its landmark decision in *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38, in which a modified *Montgomery* test was adopted, in place of the traditional *Bolam-Bolitho* approach, to determine the standard of care required of doctors in their provision of advice to the patients. That case, however, would likely not affect any part of my analysis due to the nature of the disputes concerned here, which were primarily factual (see [51] above).

Conclusion

175 While the Plaintiff's condition deserves sympathy and commiseration, it did not follow that the Defendant should be liable, unless it was shown on the balance of probabilities that the Defendant had fallen below the requisite standard of care expected of him as a medical practitioner. This the Plaintiff did not do. Furthermore, even if liability were found in her favour, I would have awarded less than what she claimed as damages. Costs were ordered to be paid to the Defendant.

Aedit Abdullah
Judicial Commissioner

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