SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2026] SC GLA 43

GLW-PD318-15

JUDGMENT OF SHERIFF D N TAYLOR

in the cause

JOANNA COX

Pursuer

against

OPTIMAX CLINICS LIMITED

First Defender

DR ADRIAN ROLAND BERRY

Second Defender

DR ASIF ANWAR

Third Defender

Pursuer: Allardice, advocate
First Defender: Paterson KC advocate
Second Defender: Absent
Third Defender: Clair, advocate

GLASGOW, 29 January 2026

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:

(1) The pursuer is as designed in the instance.

(2) At all material times the first defender operated from premises at 18 Charing Cross Mansions, St George's Road, Glasgow, G3 6UJ (the Glasgow clinic) from where it carried out LASIK eye surgery for patients.

(3) The third defender is the executor nominate of Dr Mohammad Anwar Ul-Haq who was formerly employed by the first defender as an ophthalmologist.

(4) Keratoconus is a disorder of the eye that results in progressive thinning of the cornea. This may result in blurry vision, double vision, nearsightedness, irregular astigmatism, and light sensitivity leading to poor quality-of-life. Usually, both eyes are affected. In more severe cases a scarring or a circle may be seen within the cornea.

(5) While the cause is unknown, it is believed to occur due to a combination of genetic, environmental, and hormonal factors. Patients with a parent, sibling, or child who has keratoconus have 15 to 67 times higher risk in developing corneal ectasia compared to patients with no affected relatives. Proposed environmental factors include rubbing the eyes and allergies. The underlying mechanism involves changes of the cornea to a cone shape. Diagnosis is most often by topography. Topography measures the curvature of the cornea and creates a colored "map" of the cornea. Keratoconus causes very distinctive changes in the appearance of these maps, which allows doctors to make the diagnosis.

(6) Corneal ectatic disorders or corneal ectasia are a group of uncommon, noninflammatory, eye disorders characterised by bilateral thinning of the central, paracentral, or peripheral cornea. Types of corneal ectatic disorder or corneal ectasia are as follows:

(i) Keratoconus, a progressive, non-inflammatory, bilateral, asymmetric disease, characterized by paraxial stromal thinning and weakening that leads to corneal surface distortion.

(ii) Keratoglobus, a rare non inflammatory corneal thinning disorder, characterized by generalized thinning and globular protrusion of the cornea.

(iii) Pellucid marginal degeneration, a bilateral, non-inflammatory disorder, characterized by a peripheral band of thinning of the inferior cornea.

(iv) Posterior keratoconus, a rare condition, usually congenital, which causes a nonprogressive thinning of the inner surface of the cornea, while the curvature of the anterior surface remains normal. Usually only a single eye is affected.

(v) Post-LASIK ectasia, a complication of LASIK eye surgery.

(vi) Terrien's marginal degeneration, a painless, noninflammatory, unilateral or asymmetrically bilateral, slowly progressive thinning of the peripheral corneal stroma.

(7) Nos 5/1 and 5/2 of process are true and accurate copies of records from the Glasgow clinic pertaining to the pursuer.

(8) No 5/3 of process are true and accurate copies of the pursuer's records from the BMI Carrick Glen Hospital.

(9) No 5/4 of process are true and accurate copies of the pursuer's general practitioner records from Viewpark Health Centre, 119 Burnhead Street, Glasgow G71 5SU.

(10) The pursuer suffered from myopia in or about August 2002. As a result of her condition, she underwent LASIK eye surgery on both of her eyes at the Glasgow clinic on 7 August 2002. This surgery was carried out by the second defender.

(11) The pursuer had enhancement LASIK eye surgery on both of her eyes carried out at the Glasgow clinic on 5 November 2003. This surgery was carried out by the second defender.

(12) On 20 August 2004 the pursuer had further LASIK eye surgery to her right eye carried out at the first defender's Glasgow clinic. This surgery was carried out by Dr Mohammad Anwar Ul-Haq.

(13) On or about 16 June 2009 the pursuer attended an appointment with Dr Nabili, Locum Consultant Ophthalmologist at Hairmyres Hospital, East Kilbride G75 8RG.

(14) At some point prior to attending the appointment with Dr Nabili the pursuer required to wear glasses.

(15) No 5/3/56 of process is a true and accurate copy of a letter sent by Dr Nabili to the pursuer dated 16 June 2009.

(16) Dr Nabili and the pursuer discussed a problem with constant watering of the pursuer's right eye which was unlikely to be related to her previous LASIK laser eye surgery.

(17) Dr Nabili also discussed the pursuer's disappointment that despite previous LASIK laser eye surgery she still required to wear glasses. He recommended that the pursuer discuss this issue with the first defender.

(18) The pursuer did not contact the first defender in relation to her disappointment that she still required to wear glasses despite previous surgery. Contacting the first defender was a reasonably practicable step which the pursuer could have taken to investigate the position with her injuries further.

(19) Her eyesight continued to deteriorate between 2009 and 2012. In particular she suffered from ongoing blurring of her vision which was caused by progressive or worsening changes in the shape of the cornea. The progressive or worsening changes in the shape of the cornea were caused by the LASIK eye surgery.

(20) The pursuer started suffering from problems with double vision on 17 April 2012. She was very concerned at this development.

(21) At some point between 17 April 2012 and 16 May 2012 the pursuer attended an appointment with an optician in Main Street, Uddingston who recommended that she use

glasses with prism lenses. She obtained glasses with prism lenses but this did not cure her double vision.

(22) On 16 May 2012 the pursuer attended an appointment with her usual optician, Mr Hughes. Mr Hughes advised the pursuer that she had double vision or ghosting and an intermittent squint or lazy eye. He recommended that the pursuer see a consultant ophthalmologist about these problems.

(23) On 17 May 2012 the pursuer was privately referred to Dr Alan Mulvihill consultant ophthalmic surgeon. She was anxious to be privately referred so she did not have to wait for NHS treatment.

(24) On 23 May 2012 the pursuer attended an appointment with Dr Mulvihill at the Spire Hospital in Edinburgh. The pursuer's mother attended with her as the pursuer was worried and upset about her condition.

(25) No 6/1 of process is a true and accurate copy of a letter dated 23 May 2012 sent by Dr Mulvihill to the pursuer's GP and copied to the pursuer.

(26) The pursuer read the letter from Dr Mulvihill No 6/1 of process when she received it on or about 23 May 2012.

(27) At the appointment on 23 May 2012 Dr Mulvihill told the pursuer that her visual difficulties with her right eye could have occurred as a result of her LASIK eye surgery.

(28) On 23 May 2012 Dr Mulvihill advised the pursuer to return to the first defender for further investigation.

(29) On 23 May 2012 Dr Mulvihill advised the pursuer that he would recommend that her general practitioner initiate a referral to her local NHS eye department. He also recommended that the pursuer seek an opinion from the surgeons who carried out the previous LASIK eye surgeries.

(30) At or about 5.35pm on 23 May 2012 the pursuer called the first defender and spoke to one of their operators, Nicola Hurst.

(31) The entry dated 23 May 2012 and timed 17:35:03 in No 5/2/4 of process is a true and accurate record of the conversation which took place between the pursuer and Nicola Hurst.

(32) The pursuer advised Nicola Hurst that she had been to see her opticians and her eye doctor who had told her that she had developed Kerataconus as a result of eye surgery. Ms Hurst arranged an aftercare appointment for the pursuer at the Glasgow clinic.

(33) On 30 May 2012 the pursuer attended an appointment with Malissa McWilliams optometrist at the Glasgow clinic with her mother. She advised Malissa McWilliams that she had been advised by an ophthalmologist that she had Kerataconus as a result of her laser treatment.

(34) No 5/1/9 is a true and accurate record of the matters discussed, the investigations carried out and the advice given by Malissa McWilliams to the pursuer, in the course of the appointment on 30 May 2012.

(35) Malissa McWilliams advised the pursuer that she should be examined by Dr Samuels, one of the first defender's eye surgeons based in London, so that Dr Samuels could give her advice on treatment options.

(36) Because of the length of time that it would take to arrange an appointment with Dr Samuels the pursuer arranged a private referral with Mr Srinivasan consultant ophthalmologist.

(37) She saw Mr Srinivasan on 29 June 2012 who advised her that she had post-LASIK ectasia involving her right cornea and discussed treatment options with her.

(38) No 5/3/63 is a true and accurate copy of a letter sent by Mr Srinivasan to the pursuer's GP Dr Larkin.

(39) The pursuer attended an appointment with Mr Samuels, a consultant ophthalmologist with the first defender, on 17 July 2012. He confirmed Mr Srinivasan's diagnosis of post-LASIK ectasia.

(40) No 6/2 of process is a true and accurate copy of a letter sent by the pursuer to the first defender on or around 25 January 2015.

(41) The initial writ in these proceedings was served upon the defenders on 26 June 2015.

(42) The pursuer sustained injury as a result of the LASIK eye surgery more than 3 years prior to the commencement of the present action against the first and third defenders.

Finds in fact and in law

(1) That the pursuer has failed to aver and prove that she was not aware and that it was not reasonably practicable for her to have become aware, before a date less than 3 years prior to 26 June 2012:

(i) that any injuries she suffered as a result of the LASIK eye surgery carried out by the first and third defenders were sufficiently serious to justify her bringing an action of damages on the assumption that the first and third defenders did not dispute liability and were able to satisfy a decree;

(ii) that any injuries she suffered as a result of the LASIK eye surgery carried out by the first and third defenders were attributable in whole or in part to an act or omission; and

(iii) that the first and third defenders were persons to whose acts or omissions the injuries were attributable in whole or in part or the employer or principal of such a person.

(2) That, in any event, the pursuer was aware by 23 May 2012:

(i) that any injuries she suffered as a result of the LASIK eye surgery carried out by the first and third defenders were sufficiently serious to justify her bringing an action of damages on the assumption that the first and third defenders did not dispute liability and were able to satisfy a decree;

(ii) that any injuries she suffered as a result of the LASIK eye surgery carried out by the first and third defenders were attributable in whole or in part to an act or omission; and

(iii) that the first and third defenders were persons to whose acts or omissions the injuries were attributable in whole or in part or the employer or principal of such a person.

(3) That accordingly the pursuer's claim for damages against the first and third defenders is time barred in terms of section 17(2)(b) of the Prescription and Limitation (Scotland) Act 1973.

THEREFORE repels the pleas-in-law for the pursuer, sustains the first plea-in-law in law for the first defender and the first plea-in-law for the third defender and dismisses the action in so far as directed against the first and third defenders; assigns a hearing on all questions of expenses to take place on 23 February 2026 at 9.30am within Glasgow Sheriff Court, 1 Carlton Place, G5 9DA to call in open court.

NOTE

Background

[1] The pursuer suffers from longstanding problems with her vision. Between August 2002 and August 2004, she underwent three LASIK eye surgeries at the first defender's Glasgow clinic. The second defender carried out the first two operations; the original third defender in the action, Dr Mohammad Anwar Ul-Haq, carried out the last operation.

[2] The pursuer alleges that she has suffered loss, injury and damage as a result of the defenders' negligence in carrying out the LASIK eye surgery.

[3] These proceedings are defended by the first and third defenders. The second defender has never entered the process.

[4] It is over 10 years since the action was raised. For reasons which are not entirely clear to me the action was sisted for several years. That seems to have been the primary reason for the delay although the action was appointed to the additional Chapter 36A procedure and there has also been an appeal process on one particular aspect of the case. In any event the action eventually proceeded to a preliminary proof before answer on the issue of time bar which commenced on 3 December 2024. The length of time it has taken to progress the action has not made it any easier for the court to adjudicate on the key issues.

[5] In advance of the proof the parties lodged a list which identified the issues to be determined at the preliminary proof as follows:

> "The date on which the pursuer became, or on which it would have been reasonably practicable for her to become aware:
> (a) That the injuries in question were sufficiently serious to justify her bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;
> (b) That the injuries were attributable in whole or in part to an act or omission; and

(c) That the first and third defenders were persons to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person."

These issues (a), (b) and (c) are the facts set out in section 17(2)(b) of the Prescription and Limitation Act 1973 (the 1973 Act). For the sake of brevity, the defenders referred to these facts as the statutory facts and I shall do the same in this judgment.

[6] The action proceeded to preliminary proof on a record dated 13 April 2024, No 30 of process. In the course of the action the pursuer lodged two inventories of productions; the first defender also lodged two inventories.

[7] The parties entered into two Joint Minutes of Agreement prior to the preliminary proof. In addition, the first defender served a Notice to Admit upon the pursuer. The pursuer intimated a Notice of Non Admission in response. The extent to which evidence was agreed in terms of the Joint Minutes and deemed to be agreed in terms of the Notice to Admit/Notice of Non-Admission procedure is reflected in the findings in fact.

[8] I heard evidence in the preliminary proof on 3 December 2024 and at a continued diet in April 2025. I then heard parties' submissions at a separate hearing on 10 November 2025. At the conclusion of the hearing on submissions I made avizandum. I now issue my judgment.

Summary of the evidence

The pursuer's proof

The pursuer

[9] The pursuer is 47.

[10] She has had longstanding problems with her vision.

[11] In August 2002 she underwent LASIK laser eye surgery on both of her eyes as a result of her condition. She had further LASIK laser eye surgery on both of her eyes in November 2003. In August 2004 she had LASIK laser eye surgery carried out to her right eye. All three surgeries were carried out at the first defender's Glasgow clinic.

[12] At some point prior to June 2009, she started to wear glasses.

[13] In June 2009 she attended an appointment with Dr Nabili, locum consultant ophthalmologist. He discussed a problem which she had with constant watering of her right eye which he thought was unlikely to be related to her previous eye surgery. She also expressed disappointment that she still required to wear glasses despite her previous eye surgery. Dr Nabili told her to speak to the first defender about this matter. Although she required glasses Dr Nabili assessed the pursuer's corrected visual acuity as being very good.

[14] She did not contact the first defender in relation to her disappointment that she still required to wear glasses. She thought that she had to wear glasses because of a natural deterioration in her eyesight. It would have cost her approximately £1,000 to go back to the first defender for any form of treatment. Also, because her corrected visual acuity was very good she thought that the problem that required her to wear glasses was a minor one.

[15] In April 2012 she started suffering from double vision. She was very concerned about this development and sought urgent treatment as a result.

[16] Having been unable to see her usual optician Mr Hughes she attended an appointment with an optician in Main Street, Uddingston. He recommended that she wear glasses with prism lenses. She tried glasses with prism lenses but that did not cure her double vision.

[17] On 16 May she attended an appointment with Mr Hughes. He advised her that she had double vision or ghosting and an intermittent squint or lazy eye. He recommended that the pursuer see a consultant ophthalmologist about these problems.

[18] On 23 May she saw Dr Mulvihill consultant ophthalmic surgeon. Her mother attended with her because she was so worried about her double vision. She could not remember everything that was discussed during the consultation with Dr Mulvihill which she described as "a very technical conversation". She did remember being told by Dr Mulvihill that the problem with double vision was only related to her right eye. Dr Mulvihill also told her that her problems could be caused by a number of things including a genetic condition. She had no recollection of being told that her problems were related to her previous eye surgery. Dr Mulvihill could not diagnose her condition because he did not have the right optical equipment to give a diagnosis. She had no idea if her condition was treatable at the end of the consultation with Dr Mulvihill. Her urgent priority remained to obtain a diagnosis.

[19] Immediately after the consultation with Dr Mulvihill the pursuer called the first defender and spoke to Nicola Hurst. She had no recollection of what was discussed during this telephone call.

[20] On 30 May 2012 she attended an appointment with Malissa McWilliams an optometrist with the first defender. Her mother attended this appointment as well. She had limited recollection of what was discussed during the appointment with Malissa McWilliams. At the end of the appointment, she was disappointed that she still did not have a diagnosis. Mrs McWilliams advised her that she would arrange for the pursuer to attend an appointment with Dr Samuels, one of the first defender's eye surgeons in London.

[21] Because of her concern about the length of time that it would take to arrange an appointment with Dr Samuels the pursuer arranged a private referral through her GP. She saw Mr Srinivasan consultant ophthalmologist on 29 June 2012. She wanted a diagnosis.

[22] Dr Srinivasan told the pursuer that she had post-LASIK ectasia. This was the first time that the pursuer had received a diagnosis and the first time that she had been told that her condition was linked to her previous eye surgery.

[23] She attended an appointment with Mr Samuels, a consultant ophthalmologist with the first defender in July 2012 because she believed that she might receive free treatment from the first defender in terms of a lifetime guarantee.

[24] She did not find out that there had been negligent treatment until 2015 when she received a draft expert medical report.

[25] After her first appointment with Mr Srinivasan the pursuer had collagen cross linking treatment which stabilised her vision.

[26] In cross examination the pursuer stated that her eyes were damaged during all three of the laser surgeries which she had.

[27] She accepted that the first defender's retreatment fee for the second surgery was £95 and that she had been advised subsequently that any re treatment fee would be waived indefinitely (No 5/2/5 of process, entry dated 14 June 2004).

[28] There was a further deterioration in her eyesight between 2009 and 2012.

[29] She denied receiving the letter No 6/3/5 of process at the time that it was sent. She read the letter years after it was written when she received a copy from her GP.

[30] In relation to the examination by Dr Mulvihill the pursuer stated that he did not tell her that she had an ectasia which resulted from the laser surgery and which was causing her double vision.

[31] She could not recall asking Mrs McWilliams questions about corneal thickness when she saw her on 30 May 2012. She thought that she or her mother might have discussed corneal thickness with Mr Srinivasan on the phone prior to the consultation with him. She denied that she had been investigating treatment options for Keratoconus and that she went to Mrs McWilliams to discuss treatment options with her.

[32] She asked Mrs McWilliams about the first defender paying for her costs in travelling to London for a further appointment. She did so because there was a possibility that her problems were related to the previous surgery. She could not recall if Mrs McWilliams told her that the scans seemed to back up the possibility of ectasia in the right eye.

[33] She was referred to the records of the consultation with Mr Srinivasan on 29 June 2012, No 5/3/21 of process. She could not recall telling Mr Srinivasan that she had been told that she had ectasia in the right eye on 30 May 2012.

The defender's proof

Dr Alan Mulvihill

[34] Dr Alan Mulvihill is a consultant paediatric ophthalmologist practising at the Al Jalila Children's Hospital in Dubai. In 2012 he was employed as a consultant ophthalmologist by NHS Lothian. He also did private work at the Spire Hospital in Edinburgh.

[35] Dr Mulvihill examined the pursuer as a private patient at the Spire Hospital on 23 May 2012. Nos 6/3/3 to 6/3/4 of process are handwritten notes taken by him at the time of his examination of the pursuer. No 6/3/5 of process (also lodged as No 6/1 of process) is a copy of a letter dated 23 May 2012 sent by Dr Mulvihill to the pursuer's GP and copied to the pursuer.

[36] Dr Mulvihill was referred to a document No 5/3/29 of process which bore to have been prepared by the pursuer's optician, Mr Hughes at the time of the pursuer's referral to Dr Mulvihill.

[37] No 5/3/29 contained firstly a chronological record of the pursuer's glasses prescriptions. Secondly it contained an entry dated 16 May 2012. This entry refers to the pursuer developing RXOT (right exotropia or an out turning squint) and diplopia (double vision). The entry also records a corneal scan thickness in the right eye of 429 microns.

[38] The corneal scan thickness of 429 microns in the right eye is indicative of the cornea becoming thin and bulging. It is consistent with Dr Mulvihill's findings on examination of the pursuer.

[39] The record of the pursuer's glasses prescriptions in No 5/3/29 of process is indicative of increasing blurring of the pursuer's vision between 2009 and 2012.

[40] The Spire Hospital did not have the necessary equipment to enable a definitive diagnosis of the pursuer's condition to be made.

[41] In the course of his examination Dr Mulvihill told the pursuer, incorrectly, that she had Keratoconus. He incorrectly referred to the pursuer suffering from Keratoconus and Post-LASIK Keratoconus in his notes Nos 6/3/3 to 4 of process and in his letter No 6/3/5 of process. He should have referred to the pursuer possibly having Post-LASIK ectasia.

[42] The pursuer's double vision was only in her right eye, most likely the result of the pursuer's previous surgery. The fact that surgery had been carried out three times increased the risk of Post-LASIK ectasia. In his letter No 6/3/5 of process Dr Mulvihill stated: "This double vision is due to the Keratoconus/ectasia of the right cornea and most likely the result of her previous LASIK surgery". It is likely that Dr Mulvihill told the pursuer in the course of the examination that her problems were caused by her previous surgery.

[43] Following his examination of the pursuer, Dr Mulvihill discussed treatment options for the pursuer with one of his colleagues. He also discussed the possibility of the pursuer seeking a legal opinion on the surgery which she had. He could not recall whether he discussed the issue of obtaining a legal opinion with the pursuer. In the letter, No 6/3/5 of process, Dr Mulvihill stated:

> "I am. However, not an expert in the area of LASIK surgery and if Miss Cox at some stage in the future decides to seek a legal opinion regarding this, it would be best to seek the expert opinion of an Ophthalmic surgeon specialising in Refractive Surgery"

[44] In cross-examination Dr Mulvihill accepted that the pursuer may have developed double vision more recently and not over a number of years. He also accepted that the pursuer may have left the consultation thinking that she might have Keratoconus but that no definitive diagnosis of her condition could be made.

Nicola Hurst

[45] Nicola Hurst was a customer service specialist with the first defender in 2012. She dealt with inbound and outbound calls for patients and customer service issues generally. She has no medical training.

[46] She could not remember speaking to the pursuer. She spoke to the first defender's records No 5/1 of process and explained how those records were compiled.

[47] The entry dated 23/05/2012 timed 17:35:03, at No 5/2/4 of process was a record of a telephone call made by the pursuer to Ms Hurst on 23 May 2012. The entry recorded that the pursuer told Ms Hurst that she had been to see her opticians and eye doctor and was advised by them that she had developed Keratoconus as a result of laser surgery. That information came from the pursuer.

[48] Ms Hurst was not cross-examined.

Malissa McWilliams

[49] Malissa McWilliams worked as an optometrist for the first defender in 2012.

[50] She spoke to No 5/1/7 of process which is a printout of the medical notepad for the pursuer. The medical notepad is a computerised record of the results of the findings from consultations with the pursuer. Ordinarily the notes contained in the medical notepad were compiled during or directly after a consultation.

[51] The entry dated 30 May 2012 No 5/1/9 of process is a record of the findings from Mrs McWilliams' consultation with the pursuer on that date.

[52] Mrs McWilliams recalled meeting the pursuer and her mother on 30 May 2012. She remembered the pursuer complaining of double vision and being worried about suffering from Keratoconus.

[53] The pursuer told Mrs McWilliams that she had been advised by an ophthalmologist that she had Keratoconus as a result of laser treatment. Mrs McWilliams told the pursuer that one of the first defender's consultants would advise her on the diagnosis and treatment options.

[54] The pursuer asked a number of questions including questions about corneal thickness prior to her last treatment. When patients were being seen in relation to laser treatment scans would be taken of their cornea to check that their cornea was thick enough for laser treatment. Mrs McWilliams and the pursuer also discussed collagen cross linking treatment and Intacs which are physical supports placed in the cornea.

[55] Following the consultation with the pursuer Mrs McWilliams sent an email referring the pursuer to Mr Samuels a consultant ophthalmologist with the first defender.

[56] In cross-examination Mrs McWilliams confirmed that she did not give the pursuer a diagnosis.

The pursuer's submissions

[57] The pursuer adopted her written submissions No 17 of process.

[58] The court has to consider two periods of time.

[59] The first period is the triennium which is referred to in section 17(2) of the 1973 Act.

[60] The second period is the notice or awareness period. This period starts to run when the pursuer becomes aware of any one of the statutory facts. The pursuer then has a period of time to investigate matters and become aware of all of the statutory facts.

[61] In this case, under reference to *Agnew* v *Scott Lithgow (No 2)* 2003 SC 448, the notice period should be at least 4 months.

[62] The proceedings were served upon the defenders on 26 June 2015. Therefore, as long as the notice period ended at some point after 26 June 2012 the action is not time barred.

[63] The pursuer had no knowledge of any injury prior to 2012. The defenders' submission that she was made aware during the consultation with Dr Nabili in June 2009 (or afterwards by virtue of the letter No 5/3/56 of process) that she had suffered injury as a result of the LASIK eye surgery was misconceived. Her position was that she had to wear glasses in 2009 because of a natural deterioration in the vision in her right eye.

[64] The pursuer started suffering from double vision in April 2012. She could not possibly have been aware of any of the statutory facts in April 2012. Even if she did have the necessary awareness, 4 months' notice from 17 April 2012 would take you to 16 August 2012. That is after 26 June 2012 and therefore the claim is not time barred.

[65] Nothing significant happened to change the pursuer's awareness of the statutory facts between 17 April 2012 and 23 May 2012. On 23 May 2012 she attended the appointment with Dr Mulvihill. After the consultation with Dr Mulvihill she still did not know what was wrong with her. She did not have a diagnosis – Dr Mulvihill did not have the equipment to make a diagnosis. Nor did she know if her condition was treatable. She did not know what had caused her condition nor that it was caused by the first defender's act or omission. Dr Mulvihill's reference to Keratoconus had resulted in her "barking up the wrong tree" – see *Spargo* v *North Essex Health Authority* [1997] PIQR 235 at p242. The letter No 6/1 of process sent by Dr Mulvihill to the pursuer's GP did nothing to change the pursuer's awareness of the statutory facts.

[66] Again, even if the pursuer was aware of any of the statutory facts after meeting Dr Mulvihill, she should still be allowed a period of 4 months from 23 May to investigate matters and become aware of all of the statutory facts.

[67] Nothing that was discussed in the telephone call to Nicola Hurst on 23 May 2012 or during the appointment with Malissa McWilliams changed the pursuer's level of awareness. She still did not have a diagnosis.

[68] It was not until the meeting with Mr Srinivasan on 29 June 2012 that the pursuer became aware of one of the statutory facts ie that her injuries were sufficiently serious to justify her bringing an action of damages (section 17(2)(b)(i)). She still was not aware that her condition was attributable to an act or omission or that the defenders were persons to whom the act or omission was attributable.

[69] The pursuer took all reasonably practicable steps to investigate her condition. She acted urgently after she first experienced double vision symptoms.

[70] In conclusion the pursuer invited the court to repel the first pleas-in-law for the first and third defenders and allow a proof before answer.

The defenders' submissions

[71] The first and third defenders adopted their joint written submissions.

[72] The two Joint Minutes detailed a number of matters which were agreed. In addition, paragraphs 1, 3, 6, 7, 8, 9 and 13 of the defenders' Notice to Admit should be treated as deemed admissions in terms of Ordinary Cause Rule 29.14.

[73] It is a matter of agreement that section 17 of the 1973 Act applies to the pursuer's case and that she sustained injury more than 3 years prior to the commencement of the action. In order to postpone the start of the triennium in terms of section 17(2)(b) the pursuer had to aver and prove that she was not, and could not with reasonable diligence have been aware, of the statutory facts.

[74] Four important principles are particularly relevant to the pursuer's case. I shall return to those principles later in this judgment.

[75] The pursuer's case is that, at least since her operations she suffered impaired vision and other difficulties with her right eye. She was sufficiently concerned about her symptoms to consult with Dr Nabili in June 2009. She did not follow Dr Nabili's advice by contacting the first defender. With reference to *Webb* v *BP Petroleum Development Ltd* 1988 SLT 775 (per Lord Weir at p776 J - K) she does not attempt to aver or prove that she could not, with reasonable diligence, have been aware of her injuries prior to 26 June 2012. On that basis she has not relevantly invoked section 17(2)(b) and the action should be dismissed.

[76] The defenders' esto position related to the start of the pursuer's double vision symptoms in April 2012 and to her awareness of the statutory facts from then on.

[77] In general, it was submitted, under reference to *Henderson* v *Benarty Medical Practice* [2022] CSOH 28 (per Lady Wise at paragraph 49) that unless supported by independent, objective, contemporaneous documentation, or a reliable corroborative source, the pursuer's evidence should not be accepted as being credible or reliable. Observations were made about specific parts of the pursuer's evidence. For example, her evidence relating to her discussions with Malissa McWilliams about corneal thickness and treatment options was particularly unsatisfactory.

[78] Neither the pursuer's mother nor Mr Srinivasan gave evidence. The court should draw the inferences most favourable to the defenders on matters which those witnesses could have given evidence on (*Royal Bank of Scotland* v *Carlyle* [2010] CSOH 3 at paragraph 36).

[79] The pursuer had knowledge of the statutory facts by, at the latest, 23 May 2012 when she consulted with Dr Mulvihill.

[80] She was, on her own evidence, aware by then that her injuries were sufficiently serious to merit bringing an action of damages (section 17(2)(b)(i) of the 1973 Act).

[81] She was also aware that her injuries were attributable in whole or in part to an act or omission (section 17(2)(b)(ii) of the 1973 Act).

[82] Reference was made to the letter sent by Dr Mulvihill to the pursuer's GP, No 6/1 of process, which the pursuer had read. Dr Mulvihill's evidence was clear. It was very likely that he told the pursuer during the consultation on 23 May 2012 that her problems were most likely caused by the LASIK eye surgery (page 138 of day 2 of the transcript of evidence).

[83] There were a number of other pieces of evidence which supported the proposition that Dr Mulvihill advised the pursuer that she was suffering from a condition known as

Keratoconus or Ectasia which was responsible for her symptoms and which had been caused by the LASIK eye surgery (paragraph 22(a) - (h) of the defenders' written submissions). For example, the pursuer stated that she discovered that she sustained injury as a result of her laser surgery on 23 May 2012 in her letter to the first defender dated 25 January 2015, No 6/2 of process.

[84] It was enough to engage awareness in terms of section 17(2)(b)(ii) that the pursuer knew only of the possibility that her problems were caused by her laser surgery. A precise diagnosis was not necessary.

[85] The pursuer's knowledge of negligence was irrelevant and the defenders insisted upon their objection to that line of evidence. In any event there was no record for the evidence led in respect of that matter.

[86] Finally, the pursuer was aware by 23 May 2012 at the latest that the first defender was a person to whose act or omission her injuries were attributable, in whole or in part, or the employer or principal of such a person.

[87] In summary the first and third defenders invited the court to sustain their first pleas-in-law and dismiss the action.

Decision

[88] The defenders made two main submissions in support of their time bar pleas.

[89] The first submission was that the pursuer has not averred or proved that she could not, with reasonable diligence, have been aware of the statutory facts relative to her injuries prior to 26 June 2012. The second submission was that in any event the pursuer was aware of the statutory facts relative to her injuries by, at the latest, 23 May 2012. Before considering

these submissions in more detail it is appropriate to make some preliminary observations about the evidence and the law.

[90] In relation to the evidence, I make three comments.

[91] The first comment relates to the pursuer's proof.

[92] At paragraphs 12 and 13 of their written submissions the defenders suggest that the pursuer's evidence should not be accepted for a number of reasons. I will not rehearse those reasons here. Suffice it to say that the defenders' observations match my own assessment of the pursuer's evidence in the course of the proof and my subsequent analysis of the transcripts. The pursuer's evidence about her discussions with Mrs McWilliams relating to corneal thickness was a particular area of concern. Mrs McWilliams was clear that the pursuer asked her questions about corneal thickness prior to last treatment. Given what the pursuer had been told by Dr Mulvihill the only reasonable inference from the pursuer asking such questions is that she was concerned that she should not have received the last LASIK eye surgery because of the corneal thickness of her right eye. Her explanation that she or her mother may have discussed the issue of corneal thickness with Mr Srinivasan did not ring true. The defenders submitted that I should not regard the pursuer's evidence as credible and reliable unless it was supported by independent, objective contemporaneous documentation or a reliable corroborative source. That is going too far. I did find some aspects of the pursuer's evidence to be credible and reliable. For example, her evidence about being scared when her double vision symptoms started in April 2012 was entirely understandable. However, I do consider that it is necessary to treat the pursuer's evidence with a considerable degree of caution for the reasons stated by the defenders.

[93] Secondly, in relation to the defenders' proof I found the evidence of Dr Mulvihill, Nicola Hurst and Malissa McWilliams to be credible and reliable. I was satisfied that all

three were doing their best to recall the position with consultations/discussions which they had with the pursuer. Overall, where the pursuer's evidence conflicted with that of the defenders' witnesses, I preferred the evidence of the defenders' witnesses.

[94] Thirdly the events which give rise to the defenders' time bar arguments occurred more than 13 years ago. Not surprisingly, given the passage of time, the witnesses could not always remember what was said in the course of meetings and consultations. Because of that it is important to consider the terms of letters and documents prepared at the time for the purpose of recording what was discussed. For example, the pursuer could not recall the terms of her conversation with Nicola Hurst on 23 May 2012 (page 51 of day 1 of the transcript of evidence). In her evidence in chief Ms Hurst testified that the entry dated 23/05/2012 timed 17:35:03, at No 5/2/4 of process was an accurate record of her telephone conversation with the pursuer on that date.

[95] On the law the defenders detailed in their written submissions four principles which they stated were particularly relevant to determination of the issues in this case. I agree with the defenders' analysis of the law. It is helpful to set out the four principles referred to by the defenders:

(i) As the purpose of section 17(2)(b) is to fix the starting date for the limitation period, it is reasonable that only a modest level of awareness is required, given from that point on there still remain 3 years to carry out necessary investigations, arrive at a clearer view of the cause of the injuries, and raise an action: *Johnston*, Prescription and Limitation (2nd Edition), paragraph 10.24. As was stated in *Simpson* v *Dumfries and Galloway Health Board* [2025] SAC (Civ) 12, at paragraph 20:

> "The statute allows three years for such investigations to be conducted and for a case to be built; but the starting point for that period of investigation need only be 'a relatively modest level of awareness' - Johnston, supra paragraph 10.24."

See also *M* v *O'Neill* 2006 SLT 823, per Lord Glennie at para [32].

(ii) For time to run, the pursuer does not require to have knowledge of the "detailed diagnosis of her condition, nor of questions of prognosis and aetiology": *M*, supra, at para [32]. In *Chinn* v *Cyclacel Ltd* [2010] CSOH 33 Lady Smith said this (at paragraph 48):

> "It cannot be the case that the fact that a pursuer does not have the correct diagnosis of an injury of which he is well aware delays the start of the triennium. It is not unusual for it to take some time for a correct diagnosis to be made though an injury has clearly been sustained. […] That does not mean that the start of the triennium is postponed. The use of the word ' injury', in section 17, is not indicative of a pursuer requiring to have the right 'label' for an injury of which he is well aware before time starts to run."

(iii) Knowledge of the precise act or omission is not necessary, although the pursuer must know in broad terms the facts upon which the complaint is based and that there is a real possibility that those acts or omissions were the cause of the pursuer's loss: Johnston, paragraph 10.59, citing *Haward* v *Fawcetts* (a firm) [2006] 1 WLR 682.

(iv) For the purposes of section 17(2)(b), knowledge that any act or omission was or was not, as a matter of law, actionable is irrelevant: section 22(3) of the 1973 Act; *M*, supra, at para [32].

[96] In the course of the proof the defenders objected to questions asked of the pursuer of when she became aware "that something might have gone wrong" (see page 75 of day 1 of the transcript of evidence). I allowed the evidence under reservation of its relevancy and competency. The defenders renewed their objection in their written submissions. The issue

of when the pursuer may have become aware that she had an action in negligence is irrelevant for the purposes of determining awareness or constructive awareness. Accordingly, I sustain the defenders' objection and exclude from probation any evidence led on this line.

[97] The pursuer's primary submission on the law was that there were two periods to consider for the purposes of determining the time bar issue. She cited *Agnew* (supra) in support of that proposition. In *Agnew* the pursuer sued three defenders for damages as a result of developing vibration white finger. It was accepted that his exposure to vibration ended more than 3 years before his action was raised. As submitted by the defenders Agnew was concerned with the pursuer's constructive awareness. The critical issue was when the pursuer ought, with reasonable diligence, to have been aware that his injuries were attributable to his employers' acts in exposing him to vibrating machinery. There was no issue with the first and third statutory facts. In determining the timeline for assessing the pursuer's constructive awareness the court commented at paragraph 24 that when the pursuer did eventually see a solicitor, he obtained a definitive diagnosis within 4 months. That was the context in which reference was made to a period of 4 months. *Agnew* is not authority for the proposition stated by the pursuer that the court requires to consider two periods of time. Section 17 refers to two dates, not two periods of time. The pursuer's submission is misconceived. In fact, in *Agnew* the court observed:

> "There is no room, in our view, for interpreting the provisions of sec 17(2) as allowing any additional unspecified period for what was described by counsel for the reclaimer as 'dithering time.' The language of the section does not support such an approach."

[98] Against the foregoing evidential and legal background, I turn to consider the defenders' two main submissions in more detail.

The defenders' primary submission

[99] On record the pursuer avers in article seven of condescendence that she suffered from progressive short-sightedness and astigmatism in her right eye. She had developed or alternatively was at high risk of developing corneal ectasia by the time of her third LASIK eye surgery in August 2004. In Article 8 of condescendence, she avers that she has continued to experience impaired vision and other difficulties with her right eye since.

[100] In her evidence the pursuer stated that her eyesight was damaged by all three surgeries. She consulted with Dr Nabili in June 2009. In cross-examination she accepted that her eyesight deteriorated between 2009 and 2012 (page 41 of day 2 of the transcript of evidence).

[101] Initially in her evidence in chief she testified that after the third LASIK eye surgery her vision was absolutely perfect. She did not need to wear glasses. She stated that she would have been most upset if she had to wear glasses because the whole point of the surgery was so she would not have to wear glasses (pages 10 and 14 of day 1 of the transcript of evidence). However, in response to further questioning it became apparent that at some point prior to being seen by Dr Nabili in June 2009 she required to wear glasses.

[102] When she was asked about why she did not accept Dr Nabili's advice to contact the first defender, she stated that she thought she had to wear glasses because of a natural deterioration in her eyesight which she described as a minor problem (pages 16 and 17 of day 1 of the transcript of evidence). I found this evidence difficult to follow. It was at odds with her earlier evidence about why she underwent surgery in the first place. Also, it did not fit with the terms of Dr Nabili's letter, No 5/3/56 of process, which referred to her disappointment at having to wear glasses <u>despite</u> (my emphasis) the previous LASIK eye

surgery. It is much more likely that one of the reasons why the pursuer consulted with Dr Nabili was because she thought that her LASIK surgery should have removed the need for her to wear glasses.

[103] Dr Mulvihill gave clear, unchallenged evidence about the progression of the pursuer's condition. He testified that the deterioration in the pursuer's eyesight between 2009 and 2012 was caused by worsening changes in the shape of the cornea of the right eye. That view was consistent with the changes in the pursuer's glasses prescriptions confirmed by Mr Hughes' records (see No 5/3/29 of process). The deterioration in the pursuer's condition accounted for the increasing blurring of her vision. These problems were not the result of a natural deterioration in the pursuer's eyesight but were caused by the LASIK eye surgery. I accept Dr Mulvihill's evidence on these matters.

[104] In their written submissions the defenders cited *Aitchison* v *Glasgow City Council* 2010 SC 411 at paragraphs 34 to 41 as authority for the proposition that any damages arising out a defender's negligence must be sought in a single action. This proposition was not challenged by the pursuer and I accept it. The defenders also cited *Webb* v *BP Petroleum Development Ltd* 1988 SLT 775 as authority for the proposition that the onus is on a pursuer to make relevant averments and lead sufficiently detailed evidence to enable section 17(2)(b) of the 1973 Act to be invoked. Although the issue of onus is discussed in *Webb*, I consider that the matter is more helpfully discussed in the later case of *McArthur* v *Strathclyde Regional Council* 1995 SLT 1129 which was also included in the defenders' joint bundle of authorities.

[105] In *McArthur*, Lord Abernethy made the following comments in relation to the interpretation of section 17(2)(b) of the 1973 Act:

> "It was a matter of agreement between counsel that it was for a defender to plead time bar as a defence to an action. But once a defender has taken that plea, as the second defenders have done here, it is in my opinion for the pursuer to bring himself within one or other of the provisions which will allow him to proceed with the action. In that sense the provisions are conceived for the benefit of the pursuer. In the present case the appropriate part of s 17 is subs (2) (b). So the pursuer must aver and, if necessary, prove which of the facts listed in subparas (i), (ii) and (iii) he did not become aware of until after any date mentioned in para (a)—in this case the date on which the pursuer's injuries were sustained. That seems to me to be in accordance with good sense, because in a question with a defender, only the pursuer can be expected to know which of these facts he was or was not aware of. For the same reasons the date on which the pursuer became aware of the particular fact must in my opinion be a matter for the pursuer to aver and, if necessary, prove. Counsel for the pursuer appeared to accept all this and, of course, the pursuer has averred here that it was fact (iii) that he was not aware of until about February 1988, a year after he sustained his injuries.
>
> But even if the pursuer adequately avers these matters, he is in my opinion still not free to proceed in the face of the time bar plea. He is not free to do that unless and until it is averred that the action was brought within three years of it being reasonably practicable in all the circumstances for him to have become aware of the particular fact. For that date may obviously be different from the date on which he did become aware of it and if they are different, what para (b) is clearly looking for is the earlier of those two dates. So in my opinion the word 'or' in para (b) is a conjunctive 'or'. To allow the case to proceed under this paragraph there must be relevant averments that the pursuer was not aware and that it would not have been reasonably practicable for him to have become aware of the particular fact before a date less than three years before the action was commenced."

[106] After making these comments Lord Abernethy stated that the onus lies upon the pursuer to make averments and lead evidence to invoke section 17(2)(b).

[107] In this case the defenders' averments anent time bar are contained in answer 10 of their defences. In response, in Article 10 of condescendence, the pursuer focuses on her consultation with Dr Mulvihill on 23 May 2012, her attendance with Ms McWilliams on 30 May 2012 and her consultation with Mr Srinivasan on 29 June 2012.

[108] A curious feature of the case is that none of the parties make any express averments about the pursuer's consultation with Dr Nabili in June 2009. I am conscious that the action was raised as a personal injuries action under the Chapter 36 procedure of the Ordinary

Cause Rules. The averments in this type of action need only be brief and such as are required to establish the claim. Perhaps on that basis the view was taken, on a liberal reading of the averments, that the pursuer's consultation with Dr Nabili was part of the overall picture covered by the general averments at the start of Article 8 of condescendence that the pursuer continued to experience impaired vision and other difficulties with her right eye since and has required frequent treatment. In any event evidence was led from the pursuer about her consultation with Dr Nabili without objection.

[109] Leaving aside the position with the consultation with Dr Nabili there are no averments, or at least no proper averments, in Article 10 explaining that the pursuer was not aware and that it was not reasonably practicable for her to become aware of the statutory facts on a date less than 3 years prior to the commencement of the action on 26 June 2012. In fact, the phrase "reasonably practicable" does not feature in the pursuer's averments at all. The averments which the pursuer makes about what she was told by Dr Mulvihill, her attendance with Mrs McWilliams and the diagnosis by Mr Srinivasan on 29 June 2012 fall far short of the pleading requirements outlined by Lord Abernethy in McArthur.

[110] Of course, the pursuer's averments must be read as a whole. However, there is nothing in the remainder of the pursuer's averments on record which assists her in relation to reliance on the terms of section 17(2)(b).

[111] Turning to the evidence, by the time the pursuer consulted with Dr Nabili she was aware that her eyesight had deteriorated such that she required to wear glasses. She expressed disappointment that she had to wear glasses despite the LASIK eye surgery. She was given a very clear steer from Dr Nabili that she should discuss the reason why she had to wear glasses with the first defender. She did not take this step. Contacting the first defender was a reasonably practicable step which she could have taken to investigate

matters further. It follows that the pursuer has failed to aver and prove that she was not aware and that it would not have been reasonably practicable for her to become aware of the statutory facts before a date less than 3 years prior to the commencement of the action on 26 June 2012.

[112] In the circumstances I consider that the defenders' primary submission is well founded. The action falls to be dismissed on that basis.

The defenders' alternative submission

[113] The defenders' esto position was that even if the pursuer could not with reasonable diligence have been aware of the statutory facts until after she developed double vision the action was in any event time barred. This submission was advanced on the basis that the pursuer was aware of the statutory facts by, at the latest, 23 May 2012.

[114] It is convenient to analyse this submission by considering each of the statutory facts:

Section 17(2)(b)(i) -- that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree

[115] In *AS* v *Poor Sisters of Nazareth* 2007 SC 688 at paragraph 25 the court commented in relation to the first statutory fact that:

> "In other words, the actual or constructive awareness in relation to this sub-head is awareness that injury has been suffered which is sufficiently serious to be above a minimum threshold in terms of quantum of damages. Time does not run against a claimant who lacks actual or constructive awareness that he has suffered injury or that the gravity of his injury is sufficient to bring it above the minimum — and quite low — threshold of justifying proceedings on the assumptions of admitted liability and a solvent defender."

It is clear from the Inner House's comments that what is required is a minimum "quite low" threshold.

[116] By the time the pursuer consulted with Dr Mulvihill she had been suffering from double vision for approximately 5 weeks. She was upset and worried about her condition. The speed with which she acted following the development of her double vision is a clear indication of how serious she regarded her symptoms. She arranged to be privately referred to Dr Mulvihill because she did not want to wait for NHS treatment. On any view the pursuer was aware that her injuries were sufficiently serious to justify bringing an action of damages by the time she consulted with Dr Mulvihill on 23 May 2012.

Section 17(2)(b)(ii) -- that the injuries were attributable in whole or in part to an act or omission

[117] In paragraph 18 of their written submissions the defenders submit that the pursuer's awareness of this statutory fact is the nub of their second submission. I agree.

[118] The awareness which is required is "awareness that the injuries are capable of being attributed to those acts or omissions; that such attribution is a real possibility, not a fanciful one, a possible rather than a probable cause" --- see *Simpson* v *Dumfries and Galloway Health Board* [2025] SAC (Civ) 12, at paragraph 17.

[119] Dr Mulvihill stated that it was very very likely that he advised the pursuer that her problems had been caused by the LASIK eye surgery. The LASIK eye surgery is the act for the purposes of section 17(2)(b)(ii). His evidence fits with the letter, No 6/1 of process, which he copied to the pursuer on the day he consulted with her. It is also consistent with Dr Mulvihill's contemporaneous notes of the consultation. I accept his evidence on this matter.

[120] In any event the pursuer is deemed to have admitted in terms of the notice to admit procedure that Dr Mulvihill told her that her visual difficulties with her right eye could have occurred as a result of her LASIK eye surgery.

[121] Dr Mulvihill's evidence was corroborated by evidence from a number of other sources.

[122] Nicola Hurst testified that the pursuer told her in the course of a telephone call on 23 May 2012 that she had been to see her opticians and her eye doctor and had been advised that she had developed Keratoconus as a result of laser treatment. Her evidence on this matter was not challenged.

[123] Mrs McWilliams stated that the pursuer told her on 30 May 2012 that she had been advised that she had Keratoconus as a result of her laser treatment. Her evidence on this matter was not challenged.

[124] In her letter to the first defender of 25 January 2015 the pursuer gave details of her three LASIK eye surgeries. She then stated: "I discovered the injury on 23/5/12" when I attended an optometrist. This comment fits with Dr Mulvihill's evidence that he told the pursuer about her problems being caused by the LASIK eye surgery when he saw the pursuer on 23 May 2012.

[125] In her evidence in chief the pursuer's final position was that she could not remember being told by Dr Mulvihill that there was a link between her problems and her LASIK eye surgery (see page 49 of day 1 of the transcript of evidence). However, in cross examination her position was confused. Initially she seemed to accept that she could not recall being told by Dr Mulvihill that there was a link between her problems and her LASIK eye surgery. She then denied that she was told by Dr Mulvihill that there was a link (see pages 49 and 50 of day 2 of the transcript of evidence).

[126] In her submissions the pursuer's position came to be that she could not have awareness of the second statutory fact until she received a diagnosis. The difficulty with this submission is that it flies in the face of the previous decisions interpreting section 17(2)(b) - see the earlier references to the dicta in *M* and *Chinn*. These and other cases make it clear that for time to run, the pursuer does not require to have knowledge of the "detailed diagnosis of her condition, nor of questions of prognosis and aetiology" (*M* supra at paragraph 32).

[127] The pursuer's argument that Dr Mulvihill's reference to Keratoconus had resulted in her "barking up the wrong tree" was similarly flawed. This argument was based upon comments made in the Court of Appeal case of *Spargo* (supra). However as observed by the Inner House in *Agnew* (supra) when commenting on the Court of Appeal case of *Allen* v *British Rail Engineering Ltd* [2001] ICR 942:

> "It is clear to us that the English statutory provisions are couched in quite different terms and in particular make no reference to 'reasonably practicable' as being he relevant test. The English authorities thus require to be approached with considerable caution".

In any event, even if I was to take the view that I could consider *Spargo,* comments made by Brooke LJ in that case are at odds with the pursuer's proposition that the clock should not start to run until she received a diagnosis. At p244 Brooke LJ stated:

> "A little earlier the judge had spoken of the solicitor's perception that he needed confirmation that there *was* the relevant causal connection, and a little later he added that the question will, in certain circumstances, be whether a particular injury *was* caused by an operation or *was* caused by something else. In my judgment, in all these passages the judge is substituting the much tougher test of proof of causation for the much less rigorous statutory test of attributability, in the sense that the identified injury was capable of being attributed to the identified omission. The test is a subjective one: what did the plaintiff herself know? It is not an objective one: what would have been the reasonable layman's state of mind in the absence of expert confirmation? After all, the policy of Parliament, in these cases which would otherwise be statute-barred, is to give a plaintiff who has the requisite low level of knowledge, three years in which to establish by inquiry whether the identified injury

> was indeed probably caused by the identified omission and whether the omission (identified initially in broad terms) amounted to actionable negligence. The judge's approach would be to stop the three years from even starting to run until a much more advanced stage of the investigation had been completed."

[128] In conclusion on this point given the quality and weight of the evidence of Dr Mulvihill, Nicola Hurst and Mrs McWilliams (all of which I accept), and the pursuer's deemed admission, I have found that the pursuer was aware, by 23 May 2012, that she had suffered her injuries as a result of the LASIK eye surgery.

Section 17(2)(b)(iii) -- that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person

[129] In *Johnston*: Prescription and Limitation of Actions (2nd Edition) at paragraph 10.65 it is observed that there are few cases in which this statutory fact is likely to be relevant.

[130] In her evidence the pursuer testified that she was aware that she had LASIK eye surgery at the first defender's clinic. As submitted by the defenders she also gave evidence in cross examination that she was aware of who carried out each of the LASIK eye surgeries in 2002, 2003 and 2004 and that she had always been aware of their identities (see pages 30 to 31 of day 2 of the transcript of evidence). Accordingly, there is no doubt that the pursuer had awareness of this statutory fact as at 23 May 2012.

[131] In summary there is compelling evidence from a number of sources that the pursuer was aware of the statutory facts by 23 May 2012. Accordingly, I accept the defenders' alternative submission. It follows that the action falls to be dismissed on that basis too.

[132] To give effect to my decision I shall repel the pleas-in-law for the pursuer, sustain the first plea-in-law for the first and third defenders and dismiss the action in so far as directed against the first and third defenders.

[133] The parties did not make any submissions in relation to the issue of expenses. In the circumstances I have fixed a hearing on expenses to take place on 23 February 2026 at 9.30am within Glasgow Sheriff Court, 1 Carlton Place G5 9DA to call in open court. If parties are able to reach agreement on the issue of expenses, they can contact my clerk to seek to have the hearing discharged and an appropriate interlocutor pronounced.