The Applicable Standard of Care in Cases Involving Medical Negligence Abroad

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There is a paucity of reported decisions addressing the question of what the applicable standard of care is in cases involving negligent medical treatment carried out outside of the UK. There is considerable authority on the applicable standard of care in cases involving accidents occurring during package holidays to foreign destinations. It is a firmly established principle that the court must consider in the first instance, the local prevailing standards (in the place where the accident occurred) in determining whether there has been a breach of duty. Whilst compliance with local standards is not necessarily determinative (such as in cases where for no justifiable reason, those standards fall so far below internationally accepted or English standards that the court must look to other evidence to determine the appropriate standard); prevailing local standards is a very important signpost (for further discussion see the author's review of the judgment in *TUI v Morgan* [2021] PIQR P12.

Is the same approach taken by the court in cases involving negligent medical treatment performed abroad? This was an issue that was considered by Foster J in the case of *Clarke v Kalecinski* [2022] EWHC 488 (QB).

Factual Background

The Claimant brought claims in contract and tort, seeking damages for personal injury sustained during a cosmetic procedure carried out in Poland by the First Defendant, a surgeon at the Second Defendant clinic. The Third Defendant was the insurer of the clinic.

The Claimant found the First Defendant on a website, which advertised surgical procedures in Poland and UK trained and UK registered surgeons, fluent in English language, the most prominent among them being the First Defendant. It advertised consultations in the UK at a number of UK addresses followed by surgery in Poland. The Second Defendant clinic which the First Defendant used was also advertised on the website.

The Claimant was therefore persuaded to book to undergo breast augmentation and uplift and thigh liposuction procedures at the Second Defendant clinic. She then travelled to Poland and underwent the procedures. The Claimant subsequently developed infections in the surgical sites and went on to develop severe sepsis. The Claimant did not receive definitive treatment until she returned to the UK a week or so after the procedures. She was admitted to hospital where her wounds were washed out on multiple occasions to remove the necrotic and infected tissue. She then underwent two skin grafts and subsequently underwent reconstructive breast surgery. The Claimant was left with permanent scarring and psychological injury and was unable to resume her previous work as a lap dancer and stripper.

The evidence from the Claimant's medical expert was that on the balance of probabilities, the surgery was not properly conducted by the First Defendant, the facilities in which the surgery was carried out were inadequate and/or the decontamination measures in place were ineffective. The expert also concluded that ([61]):

> *"…in failing to manage the potentially-life threatening complications post-surgery, the treatment provided by both the doctors and by the clinic fell far below an acceptable standard"*.

Notably, the expert also opined that the First Defendant would not be recognised as a Plastic surgeon in the UK and that the UK equivalent of a doctor with his experience and qualifications would be a Core Trainee (formerly Senior House Officer).

The Issues Before the Court

There were a number of issues upon which Foster J was required to adjudicate.

There was no dispute that the Polish law of tort applied to the claim (specifically articles 415 and 355 of the Polish Civil Code). It was agreed that the Defendants were liable to be sued in the courts of England and Wales (pursuant to articles 17 and 18 and chapter II, section 3 of the Recast Brussels I Regulation (No. 1215/2012). It was agreed that under Polish law, for the purposes of the claims, the Claimant had a direct action in tort against the Third Defendant insurer (per *Odenbreit v FBTO Schadeverzekeringen NV Case* C-463/06).

One of the arguments advanced by the Third Defendant was that it was not possible to assess the conduct of a Polish plastic surgeon based on the opinion of an English plastic surgeon as different techniques, training and knowledge might be at play. It was argued that ([104]-[105]):

> *"it [was] necessary to be specific as to the role and circumstances of the individual professional [and] … that only loc*al *standards of medical operation were relevant in the case of medical negligence performed abroad";*
>
> *"the English standard of care could not be transposed to an alleged breach of duty in a foreign location";* and
>
> *" without evidence of that local standard…the claim [could not] be made out, since it was not acceptable to judge by reference to standards reasonably to be expected of a similar professional operating in England and Wales."*

The Judge's Findings

Foster J rejected the Third Defendant's arguments, finding that English standards applied for the following reasons:

- The representations on the website (where the Claimant found the First and Second Defendant) induced the Claimant to book the procedures and those representations were incorporated into a contract for a "*package of surgery and care*" that arose between the Claimant and the Defendants. Those incorporated representations were that the First Defendant would carry out the surgery and that he would carry it out to the standard to be expected of a GMC registered surgeon proficient in plastic surgery.
- "*Where it was a term of the contract that the First Defendant would operate to the same standard as a UK surgeon, skilled in this specialism, and registered with the GMC, it is <u>that</u> standard, that applied to the activities in issue [and] the care offered by the clinic*" ([107]).
- That standard applied to the tortious duty also by reason of the representations made.
- "*…the findings of the Claimant's medical expert [were] couched in such stringent terms that they cover[ed] any surgical and indeed clinical practice whether governed by local Polish customs or not…What took place fell so far below acceptable standards [that Foster J could not] accept the contention that local standards or practices might have rendered the egregious failings in this case acceptable as a matter of contractual or tortious obligation*" ([109]).

Foster J, whilst declining to say anything decisive about the applicability of the tour operator cases to the concepts arising in medical negligence, inclined strongly to the view that ([110]):

> *"they are inapplicable in such a context given the notion of a package holiday, and the policy reasons behind the case law that has been discussed".*

Foster J did not elaborate further on those policy reasons.

The Third Defendant's argument was perhaps otiose in any event as there was no suggestion from the Claimant's Polish law expert that there was a measurable difference in the standards applied in Poland in medical negligence cases and those in England.

The Claimant was successful in her claim.

Comment

What conclusions can be drawn from this decision?

Notwithstanding Foster J's "*strong inclination*" as to the inapplicability of the principles in package holiday cases to

claims involving medical negligence abroad, there is a compelling argument that the courts should seek to maintain a consistency of approach when adjudicating upon claims arising from negligence abroad not least given the well established principles in package holiday litigation and rationale behind them.

Moreover, it seems somewhat unfair to impose English standards on practitioners who reside in countries where the standards are different and where those practitioners probably have no knowledge of or expectation that they could be held to standards applicable in other countries.

The court's decision to apply English standards in *Clarke* was based on fact-sensitive findings that were available to Foster J on the evidence, thus, the English standard *was* the applicable standard. Accordingly, the learned Judge's approach was not incongruous with that adopted by the courts in package holiday litigation. If there had been evidence that the Defendants' conduct was in keeping with local standards in Poland, this would clearly have been a case where the exception in package holiday cases would apply namely, that the conduct in question fell so far below any accepted international or English standard that it could not be regarded as determinative of the liability issue and the court would thus look to other evidence to determine the appropriate standard.

It is surprising that there is a lack of jurisprudence on this issue, especially given the prevalence of English residents travelling abroad. It will be interesting to see whether there will be any further guidance from the courts on the point in the future.