

STANDARD PRACTICE



IAN DENHAM ON ESTABLISHING BREACH OF DUTY WHEN CLINICAL NEGLIGENCE OCCURS ABROAD

So-called ‘medical tourism’ is on the rise. There is a constant stream of media reports of incidents of dissatisfied individuals who travel far and wide to receive medical treatments and therapies. These procedures range from the well-publicised cosmetic treatments to those who undergo serious medical procedures, quite possibly due to lengthy NHS waiting lists and the high costs of private treatment in the UK.

A number of medical providers have included such treatments in ‘a package’, combined with either accommodation, flights or both. Package holidays are governed by the Travel Package and Linked Travel Arrangements Regulations 2018 (PTRs), which implement the EU Package Travel Directive 2015.

A package is defined as ‘a combination of at least two different types of travel services for the purpose of the same trip or holiday’. The travel services must be either selected, combined, advertised, purchased or sold in one of the ways described in sections 2(5)(a) and (b).

Section 2(1) defines a travel service as (a) the carriage of passengers, (b) provision of accommodation, (c) rental of cars, certain motorcycles or other motor vehicles (together, ‘the listed tourist services’), or (d) ‘any other tourist service’. Sections 2(4) and 2(6) further impose requirements for combinations consisting of at least one ‘other tourist service’ and no more than one of the listed tourist services. They state that, firstly, the service should ‘account for a significant proportion of the combined value of services’. According to the Directive, this should be interpreted to mean accounting for ‘25% or more of the value of the combination’. The second requirement is that the ‘other service’ is ‘advertised as, and... represent an essential feature of the trip’.

It is anticipated that there may be debate as to whether a particular combination of medical procedure and accommodation and/or transport can amount to ‘a package’ for the purpose of the PTRs. It is also anticipated that there may well be arguments as to whether a medical procedure falls within the definition of ‘any other tourist service’.

That debate falls outside the scope of this article, which seeks to explore how one might establish a breach of duty, in the case where the medical procedure does fall within the scope of ‘a package’.

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The standard of care in cross-border clinical negligence claims

Where it is established that clinical negligence arose from services provided pursuant to a package contract, the law of England & Wales, Northern Ireland or Scotland will apply depending on the terms of the contract and where the claim is pursued.

This article focuses on such claims from an English law perspective. However, the application of English law will not necessarily result in claims being dealt with in the same way as a purely domestic clinical negligence case.

The standard of care under the PTRs

Any personal injury or clinical negligence claim arising from a package contract remains in its most simple terms a claim for breach of contract. Thus the starting point when assessing the appropriate standard of care must always be to consider the express or implied terms of the agreement.

The first implied term of import, by virtue of regulation 15(2), is that 'The organiser is liable to the traveller for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers.' It follows that the organiser

has a contingent liability for any improper performance of the travel services, which may include medical treatment or procedures supplied as part of the contract. Accordingly, where a claimant is able to establish a lack of conformity with the terms of the contract, they would, by section 15(5) of the PTRs, be able to seek compensation pursuant to section 16 of the PTRs.

In terms of assessing the standard of care owed, the starting point must be consideration of the terms of the contract itself. These terms may give rise to strict obligations, while others may only require that reasonable care and skill should be exercised in the delivery of the service. Strict liability tends only to apply where there is a specific representation that a service or facility would be available or would meet a specific standard. In the field of clinical negligence, it is doubted that breach of an express term will often form the basis of a claim in damages.

The vast majority of obligations under a package contract will demand no more than the organiser or its suppliers to exercise reasonable care and skill, as implied into each consumer contract by section 49 of the Consumer Rights Act 2015. Clinical negligence claims will be no different. Accordingly, for the most part, the question of lack of conformity will turn on whether the services were performed with 'reasonable care and skill'. That in turn raises the question as to what amounts to reasonableness where surgery has been performed abroad.

Although English law applies, should the case be treated like any other clinical negligence claim where the treatment was administered abroad?

The standard approach in claims falling within the scope of the PTRs is that the question of reasonableness should be assessed by what would be considered 'reasonable' in the place where the services were to be performed.

The genesis of this principle is *Wilson v Best Travel Limited* [1993] 1 All ER 353, a personal injury case arising from a consumer falling through a glass balcony door in Greece, with the principle being confirmed and refined in multiple authorities since. The importance of local standards evidence was solidified in the judgment of the Court of Appeal in *Loughheed v On The Beach Limited* [2014] EWCA Civ 1538, a case that involved a slipping accident in Spain. In confirming the importance of local standard evidence, Tomlinson LJ held:

'I cannot accept... [the] broad submission that local standards are a distraction and not determinative of the issue [of] whether reasonable skill and care has been exercised.

'I would accept, as is obvious, that mere compliance with locally applicable regulations will not exhaust the enquiry, for the very reason that the locally applicable standards may recognise that such compliance is of itself insufficient.

'But I reject the suggestion that the English court can, if it finds local standards to be unacceptable, judge performance in that locality by reference to the standards reasonably to be expected of a similar establishment operating in England or Wales. Such an approach is neither sensible nor realistic. It is also precluded by authority.'

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Further, Tomlinson LJ went on to consider the appropriate means of providing the requisite local standards, and held as follows:

'I would not however wish it to be thought that evidence of relevant local practice or standards can only be given by an expert witness called as such, or at any rate in the form of a report of an expert for the introduction of which evidence the permission of the court has been given. I agree... that it is ordinarily preferable that evidence of these matters should be given in that way, not least because both the opponent party and the court has the protection and the reassurance of the standard form of declaration given by any person who seeks to give expert evidence. A claimant who chooses not to adduce such evidence in a case of this sort does so at his peril.'

Tomlinson LJ affirmed the importance of establishing the prevailing local standard in a package travel claim and emphasised that the burden of proving the requisite standard fell on the claimant and that, in general terms, such evidence should be proven by way of admissible expert opinion. However, Tomlinson LJ cautioned that:

'... is not however to say that the evidence could not in an appropriate case be given by an appropriately experienced and qualified individual who nonetheless did not put himself forward as professing expertise in the field. Because cases are infinitely various, and the exigencies of litigation unpredictable, I would not wish to be over-prescriptive. However, in the vast majority of personal injury claims arising from the alleged improper performance of a package contract, the claimant would be well advised to adduce evidence of local standards by way of an expert report.'

It has become established practice in package claims that expert evidence is required to prove the prevailing local standards. The only exception tends to be that where a breach is particularly obvious or egregious, a Court may dispense with the need for such evidence.

In the field of clinical negligence, it is doubted that breach of an express term will often form the basis of a claim in damages

Local standards in clinical negligence claims

While authorities addressing local standards evidence in non-clinical negligence claims are plentiful, there is, surprisingly, no direct authority on the role of local standards evidence in the clinical negligence sphere.

The best available guidance can be derived from the judgment of Foster *J in Clarke v Kaleciński* [2022] EWHC 488 (QB). The brief facts of the case are that Miss Clarke underwent a negligently performed surgical procedure in Poland. The surgery did not form part of 'a package'.

It is material that the website that Mr Kaleciński used to advertise his services stated that he was 'a British GMC registered surgeon trained in the UK at the Queen Elizabeth II Hospital in London to the same level as UK senior consultants'. In reliance on the representations, Ms Clarke believed that 'it would be like having surgery in the UK.'

It was common ground that the contract for services was governed by English law and it was held that Polish law applied to the claim brought in tort. However, there remained an issue as to whether the adequacy of the surgery should be assessed by English or Polish standards.

At trial, the defendant contended, in reliance on article 17 of Rome II, that the Court was 'compelled ... to take into account as a matter of fact, the rules of safety and conduct in force at the place and time of the event namely Poland. Accordingly, in the same way as in the package holiday foreign tort cases, the standards of performance expected of Polish professionals were relevant to the issue of liability.'

The defendant also sought to criticise Ms Clarke's reliance on the expert opinion of an English qualified plastic surgeon, contending that 'the law requires evidence to support the relevant standard of care by reference to the particular post occupied by the alleged tortfeasor'. The defendant further sought to argue that 'only local standards of medical operation were relevant in

case of medical negligence performed abroad', with the defendant seeking to rely, by analogy, on the established case law relating to local standards evidence in package holiday claims, considered and reviewed above.

The Judge dismissed the defendant's argument on the grounds that 'in the context of this case, where it is 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 that standard, that applied to the activities in issue here. The care offered by the clinic likewise.' Accordingly, on the facts of the case it was appropriate to adopt English standards, given the representations made by Mr Kaleciński.

The Judge went on to hold that even if she was wrong, 'the findings of... [the medical expert] are couched in such stringent terms that they cover any surgical and indeed clinical practice whether governed by local Polish customs or not. The conclusions... put paid to any subtlety of distinction between local custom and English practice that might if... [the defendant] were correct, in other circumstances be considered relevant.

Although English law applies, should the case be treated like any other clinical negligence claim where the treatment was administered abroad?

It has become established practice in package claims that expert evidence is required to prove the prevailing local standards

'What took place fell so far below acceptable standards I cannot 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.'

Thus, in the alternative, the Judge found, on the facts, that the standard of surgery was so poor that she could not contemplate that it would be deemed acceptable in Poland.

Foster J went on to observe, obiter, that 'I say nothing decisive upon the applicability of the tour operators cases to the concepts arising in medical negligence. I incline strongly to the view that 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.'

The starting point must always be to consider the express or implied terms of the agreement

These comments, albeit obiter, should be treated with caution.

First, it may well be that there is a legitimate expectation that in particular European countries, the standard of medical practice is reasonably consistent and comparable; however lessons learned generally in travel package claims are that standards can vary wildly. Further, as Tomlinson LJ observed in *Lougheed*, an English Court should not compare the standards that prevail in similar situations in England with those abroad and seek to draw analogies. Indeed he observed that to do so is 'precluded by authority'.

Second, this author would advise caution to any party seeking to place reliance on the obiter observations that local standards might be inapplicable to clinical claims. There has been a long line of authority based on the concept, succinctly put by Tomlinson LJ in *Lougheed*,

that 'An Englishman does not travel abroad in a cocoon'. While there may in general terms be less variance in medical practice abroad, that is not to presuppose that there are no variations; and these might well be of significance.

As Mr Mackenzie, for Mr Kaleciński, contended, 'Different techniques, training and knowledge may be in play', just as a different building regulations or inspections regime might apply. Even if it were contended that there was a general 'international standard' that applies to a particular treatment or procedure, that would still need to be evidenced, even if that amounted to evidence that demonstrated an international standard applied, and that standards in the UK were consistent with such a standard.

Finally and by way of analogy, although article 17 of Rome II relates to claims brought in tort, some useful parallels might be drawn. Article 17 provides that:

'In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.'

The European Commission's Proposal Document for Rome II stated as follows in respect of what would become article 17: 'Where the law that is designated is not the law of the country in which the event giving rise to the damage occurred, ... [the article] requires the court to take account of the rules of safety and conduct which were in force at the place and time of the relevant event.' The Commission's Proposal goes on to state: 'The rule in ... [the article] is based on the fact that the perpetrator must abide by the rules of safety and conduct in force in the country in which he operates, irrespective of the law applicable to the civil consequences of his action, and that these rules must also be taken into consideration when ascertaining liability.'

A claim brought under the PTRs will be governed by English law, but the breach will have occurred elsewhere. Thus there is a logic to assessing the prevailing 'rules of safety and conduct' that applied in the same way as the jurisprudence on local standards has developed in package travel claims.

In conclusion, where there are clear representations that the standard of care will be of or materially similar to standards in the UK, it might be considered unnecessary to adduce local standards evidence in respect of the place where the medical procedure or treatment was provided.

Otherwise, a claimant would be well served by adducing evidence of the applicable standards even where one might expect the standards to be similar or comparable. To do otherwise would be 'at their peril'.

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That in turn raises the question as to what amounts to reasonableness where surgery has been performed abroad

