



PO Box 745 Indooroopilly QLD 4068 AUSTRALIA Ph 1300 662 173 or +61 7 3378 2668

Email info@pacificsolutions.com.au Web www.pacifictranscription.com.au

MEDICO-LEGAL SOCIETY OF NSW INC.

SCIENTIFIC MEETING

WEDNESDAY, 10 SEPTEMBER 2014 AT 6.15 P.M.

THE TOPIC:

MEDICAL TOURISM

SPEAKERS: DR GARRY BUCKLAND
MS KATE GILLMAN

Transcript prepared by Karen Russell

This transcript is the joint property of Pacific Transcription Solutions and the authorised party responsible for payment and may not be copied or used by any other party without authorisation.

DR DIAMOND: I am pleased to welcome to the lectern Kate Gillman, who is an Avant Mutual Group special counsel and works with the Avant Medico Legal Advisory Service. Kate's background as a solicitor is truly multi-national. She has worked and practised in a number of jurisdictions in international environments. She has been across cultures and across a number of different aspects of the law, including legal issues relevant to tonight's meeting.

Kate also has a very strong background in patient rights, civil rights and advocacy that underpin much of her interest and work. I am interested to hear what Kate has to tell us about the legal aspects of medical tourism.

MS GILLMAN: Chloe is 22 years old. Chloe likes going to the gym, hanging out with her friends and reality TV. For \$4,000 each she and her three friends went to Thailand and had a breast augmentation plus 10 nights accommodation at a beachside resort. They saw the surgeon on the day they arrived, just before they went into theatre and they were discharged the next day. It was all a bit of a blur for Chloe who could not quite remember what it was she was meant to do and not to do when she was discharged. However she was overwhelmed and excited by the whole experience. Then the lure of the sea took over making it really hard to resist going for a dip in the sea once she was back in the hotel with her friends. So in they went for a couple of days, swimming in the Thai sea. Then by the pool at night it was really hard not to smoke and drink. Everything was going really well until one morning Chloe woke up with a fever. Then infection set in and ultimately her wound broke down. Her friends went home, happy with the results of their surgery. Chloe on the other hand was stuck in Thailand and eventually had to have the implants removed.

So it is that it is paradise - until something does go wrong. What I am going to look at is just how often does it go wrong. For people like Chloe, what are their insurance options if something does go wrong and what are their legal options to make a claim against the doctor, the hospital or the agent. If Chloe had been in Thailand under the NIB Options package we just heard about from Dr Buckland, would the outcome have been different for her?

Statistics on adverse outcomes?

So how often does the surgery go wrong? As alluded to by Dr Buckland, there is a lack of statistical data. We know, as Dr Buckland said, there are an estimated 15,000 people who travel each year from Australia primarily for cosmetic and dental surgery, particularly into Asia. However the reality is that for these countries like Singapore, Thailand, Malaysia and Brazil, medical tourism forms part of their tourism platform. It does not come under their health policy or their department of health, it comes under tourism. Therefore it is not in the interests of these countries to collate and advertise adverse outcomes and where things go wrong.

As a result it is hard for patients to make an informed decision about the level of risk they might be incurring by travelling and having surgery overseas. Hunter Plastic Surgery, a plastic surgical practice, says on its website: "On average our practice sees at least one unhappy patient a week who has suffered complications from surgery overseas, most who have been told they will be fixed for free under Medicare".

A good study has been published this year with the title: "Sun, Sea, Sand and Silicone - Mapping Cosmetic Surgery Tourism". This was a joint survey undertaken by Dr Meredith Jones at the University of Technology Sydney, who is doing a lot of interesting work on plastic surgery and medical tourism, in conjunction with the University of Leeds UK. The study found that all of the Australian participants had travelled to Thailand or Singapore for plastic surgery; about 16.5 per cent of them experienced complications with two of the complications being really major ones; and 8.7 per cent of the survey participants required follow up treatment in the NHS or from Medicare. This is a lower figure than that from the ASPS survey referred to by Dr Buckland. However, the authors also noted during the time of their study that at least two people were reported in the media as having died as a result of medical tourism.

The message is it is really difficult to know just how often things go wrong. We do hear the horror stories but to put a figure on it has proven difficult. In my view in terms of the message that should be given to Australian medical tourists, it is that it is important to ask questions about the adverse outcome rate of particular hospitals as part of making an informed choice about where to have their surgery.

Insurance

The issue then becomes one of insurance. Although we do not know precisely how often things go wrong, we do know that there is a risk associated with medical tourism as with any surgery. You would therefore assume that if you were going to take on that risk, you would have some insurance. However the reality is, as Dr Buckland mentioned, for a lot of people in this area cost is a major driver. Hence a lot of people travelling for surgery are either uninsured or under-insured. The Leeds/UTS study found all of the Australian participants had paid for their surgery by credit card or a payment plan suggesting cost is a significant issue.

For people like Chloe where money might be tight and they may perceive the risk as being quite low, it is tempting not to have to pay for an insurance premium. But even if Chloe did have a standard travel insurance policy that would not necessarily help her. Most travel insurance policies exclude cover for elective medical procedures, unless you have obtained specific prior consent from the insurer. This is rarely given for cosmetic surgery.

What Chloe needed was medical travel insurance, which is a new insurance product that has developed in response to the worldwide medical tourism business. It is also referred to as "complications insurance". Again, people need to shop around because the "complications insurance" can vary. You need to read the fine print. It may cover you for complications after your surgery, but it can vary from a three month period to a 12 month period. For a lot of patients three months may come and go very quickly, and they may still need follow up care after that time.

The Leeds/UTS study also found that there had been a very low uptake of this "complications insurance" because it is more expensive than travel insurance. They even went as far as to suggest that governments should look at legislating to make it compulsory for people who are travelling overseas for medical treatment to have medical travel insurance in place before they leave the country. This suggestion may be because a lot of medical tourists will return home and rely on the public health system for their ongoing care.

Of course, even if Chloe did have her medical travel insurance, as with all good insurers (and because I work for an insurance company I can probably say this) there is often a glitch. There is always that fine print or that exclusion and it is the same with medical travel insurance policies. There is generally an exclusion if

you have not followed the advice of your doctor. In Chloe's case it is very likely, even though she did not understand what she was being told, that the plastic surgeon who treated her and /or the nurses, did tell her that she should not swim in the Thai sea within days of having breast augmentation surgery. It is also very likely that she was told not to smoke and to moderate her alcohol intake. Hence it may well be that even if she did have her medical travel insurance, her cover might have been excluded if there was evidence that she did not follow the doctor's advice.

The message for the Australian medical tourists in this situation is that medical travel insurance is essential, but read the fine print, work out what it is that you are covered for and make sure that you follow your medical advice.

Legal Actions

If Chloe had no insurance, or she had insurance that was insufficient to cover the problems she incurred, what are her legal options? This area is complex because it involves international litigation and suing people in different countries. One of the complexities or issues that would arise, should someone like Chloe decide to make a claim, is against whom does she make a claim? Is it against the overseas doctor, or the hospital, or the agent? Further, what about an Australian doctor, or hospital, or facilitation agent?

If she was contemplating legal action, one of the first things that Chloe would need to do is obtain a copy of her medical records. In Australia that is a simple process. We have statutory rights that allow us to gain access to our medical records. However there is no guaranteed right of access in a lot of countries around the world. There is no guaranteed right that Chloe would be able to obtain her medical records. Dr Buckland mentioned in his presentation that a lot of the international hospitals have JCI accreditation. They do have standards which run to 150 pages if you are prepared to read them. If you do, you can find some clauses relating to medical records. There is an entitlement in JCI accredited hospitals to a copy of the discharge summary but not necessarily the whole record. Even then the surgery has to have occurred in a JCI accredited hospital. Not surprisingly many clinics operating in this area do not have that type of accreditation.

I was employed in Singapore by a law firm that did work for hospitals and for doctors. It took me a while to come to terms with the fact that there was no statutory right of access to medical records in Singapore. The common law still applied there. It was very hard for me, when a patient made a complaint, to realise all we could do was write a very limited letter back to the patient outlining the treatment. The situation in Singapore changed this year as the Government has now introduced legislation. However the common law still applies in a lot of other countries.

In Thailand there is legislation that allows you access to medical records. However as this quote from the Thai law firm G.A.M. Legal Alliance "It becomes very difficult to prove a case because patients filing for malpractice cannot usually get access to medical records" demonstrates despite that legislation, it is still often a big hurdle for a lot of people who might be looking at bringing a medical negligence suit in Thailand.

If you obtain the medical records and you are going to make a claim, the issue is where do you make the claim? Do you make it against the doctor overseas or can you make it in Australia? On this point the Leeds/UTS study noted: "The contract will normally be made with the clinic with which negotiations have taken place. All too often, clinics have no insurance cover, and refer claims to the surgeon who again may also be uninsured. Some surgeons do carry professional liability insurance to cover claims against them and patients should check this before going abroad."

What is happening in response to the fear of a lot of doctors and hospitals being sued, particularly in the US, is they have quite tight contracts with exclusive law clauses which require you to bring any legal action in the country where the surgery takes place. Whether or not that would hold up in a court is another issue. However if you commence proceedings in a different country, you may also face an argument that you are in breach of your contract, which would be an interesting argument.

One option is to consider suing the Thai doctor in an Australian court. If you tried to do that, you are likely to be met with a jurisdictional argument as to whether New South Wales is the right forum to bring a case because the doctor and all the witnesses are overseas. Even if you did succeed in this argument, you

would then be subject to your case being determined according to Thai law. This is because as a matter of general principle, it would be the law of the country where the injury occurred that would be applied when considering a claim for compensation. That principle also extends to matters such as limitation periods. In Thailand the limitation period is one year as opposed to our three years in NSW. So again if you thinking about making a claim you already have a problem and need to act quickly.

Then there is the issue of enforcement. Even if you got a judgment in Australia, is it enforceable overseas? There are some countries where Australia has a reciprocal arrangement under the Foreign Judgments Act where you can have your judgment in Australia registered and recognised in another country. However Thailand is not currently one of those countries, and someone like Chloe, would come up against that problem. Singapore, for example, is a recognised country as is Malaysia and some other Commonwealth countries. Hence this might be another factor you would want to take into account in deciding exactly where you are going to have your surgery. Otherwise you may reach a point where you spend all the money fighting the case here, get your judgment and then you are unable enforce it. In addition you are also going to come up against the issue of whether the insurance of doctors overseas is adequate to pay a damages award.

The other alternative is to issue proceedings in Thailand. That means you will have to engage a local lawyer because, in Thailand for example, all court proceedings are in Thai. Also very few lawyers would work, even if they were permitted to, on a contingency fee basis. In Singapore, for example, you would probably have to pay upfront on an hourly basis to your lawyers.

You have to obtain expert reports from local experts, because what you are looking at is the local standard of care. This is in the same way we obtain reports from Australian experts on what is the reasonable standard of care of surgeons in Australia. Again in my experience of working in Singapore, it is very difficult to get other doctors to give reports against each other. It is not a very well developed industry. We often had to go out of Singapore and find Singaporean doctors working in the UK and sometimes in Sydney who would be prepared to have a look at a case and be able to draw on their experience of the Singapore health system to give advice. That becomes

relevant also for establishing negligence in another country.

You then arrive at the thorny issue of damages and the reality of how much money will be awarded. If you are going to undertake this effort on Chloe's behalf to bring legal action in another country such as Thailand, how much money is she likely to be awarded? The fact is that in Thailand there are no damages for non-economic loss. The award would only cover medical expenses and some economic loss. In Australia, particularly in cosmetic surgery cases, a large proportion of the damages that are awarded will be in relation to what we call general damages or the pain and suffering element of a claim. This is not available in Thailand.

There are some advantages to suing in places such as Singapore or Malaysia, where it is an English based legal system and court system, and where legal documents and proceedings are generally in English. It does make it easier, but you are still confronted with the fact that overall the damages are probably going to be lower than you would expect for an equivalent injury in Australia or particularly the USA.

You might then abandon the whole idea as just not worth pursuing a claim against a doctor or the hospital, which for those of us who act for doctors might think is not a bad thing. However another option for people like Chloe is to look at a potential claim against an agent. What the Leeds/UTS study found was about half of the people that they surveyed went through an agent or a third party facilitator who helped organise the surgery for them. These agents are becoming big business. They basically work as brokers between the patient and the doctors and the hospital. They can range from being former patients who have set up business at home, but have a very fancy looking website, to well established global companies. They all have a common element, as Dr Buckland has said, of relying on the internet and making representations about what it is they do and what they can offer.

In terms of whether you are going to make a claim against someone or not, you have to decide whether there is a nexus with the jurisdiction you are in. If everything you have had to do with this agency has been through the internet, is there a sufficient nexus to bring it into an Australian jurisdiction where you can make a claim

against it? You then have to look at what is it you are actually saying that they have done that is negligent and that would entitle you to some compensation from that agent. This is where the big agencies have become clever in making it very clear that all they are doing is providing you with information.

This is exactly what Dr Buckland referred to when he said we are moving away from patients to consumers and clients. That is people are going onto the internet, doing their own research, and deciding to purchase a breast augmentation in Thailand at a particular hospital. Many of them are involved in blogging and speaking to other people who have had surgery. Global Health Travel is one of the big global companies, based in Australia as well, that offers these services. On its website it makes it very clear that it gives the consumer client the information but it takes no responsibility for what is ultimately the consumer client's decision and choice. This is set out in a Q and A as follows: **"Do you recommend which hospital or advise what doctor to use?**

No. Our purpose is to give you all the tools and information you need to make an informed and educated choice about your medical tourism options. We will not encourage, advise, advocate or underwrite any of the doctors or health care facilities in our network. The final choice is completely yours." As a litigant you have to show somehow that the doctors that were recommended to you were known by the third party agent to be performing poorly or having poor outcomes and yet they did nothing do anything about it. This may be very difficult to establish.

Again, in response to potential legal action, the large agency companies have got together under the umbrella of the Association of Medical Tourism and have produced standard form contracts that their clients have to sign. As you can imagine these contracts are full of waivers and disclaimers saying they take no responsibility for any clinical care or any clinical issues or any decisions that you choose to make about where you have your surgery.

A further response by agency companies to a growing perception of risk on their part, is yet another insurance product. Just as there is the medical travel insurance product there has now been developed medical tourism facilitator insurance. This enables agents to take out insurance as well. Accordingly it is probably another piece of advice you would want to give someone

who is travelling overseas for surgery. If you are working through an agent, does your agent have medical tourism facilitator liability insurance, just in case you need to bring a claim against it? The agents are worried about it, because they are aware of the fact that it is so difficult for patients to bring legal actions against overseas doctors. It is much more attractive to the patient to sue an Australian based travel agent. If they are registered Australian companies and subject to the Australian consumer law, the aggrieved patient may well have an easier time.

At our end of the spectrum the concern is that when patients do come back, and as Dr Buckland told us, seek revision surgery in Australia, their alternative is to try to claim against the Australian doctor for what may be the results of overseas surgery. The advice we are giving to doctors is to be very careful about any promises they make to patients about being able to correct what has been done by other surgeons. Documentation as always will be most important in this area. I can imagine if we do get to a point of having litigation like this, there will be significant arguments about the scope of liability of our doctors who are involved in that type of revision surgery. Another big issue will be who is going to pay for the revision surgery. This is particularly when we know that a lot of patients do not have a lot of money, which is why they went overseas for their surgery in the first place.

Finally I know it does not look too promising for the unfortunate Chloe at the end of all that analysis, but would she have been better off if she had taken out the NIB Options package? As Dr Buckland noted you do not have to be an NIB member to buy one of these packages. You simply telephone and speak to a customer care consultant. That consultant then makes a recommendation of a number of accredited hospitals and doctors overseas. The benefit of this option is they are accredited hospitals. The NIB Options people also say they only recommend plastic surgeons of a certain level of accreditation, qualification and skills. An option that can be added to the package is medical travel insurance with a twelve month after care promise. However as Dr Buckland pointed out there is a catch - conditions apply. One of those conditions is you have to follow your doctor's advice.

We have now gone full circle for poor Chloe. It is likely the NIB medical advisory committee will obtain Chloe's medical records and see that she was given advice not to

swim in the Thai sea. It is also possible they would have access to her Facebook account and her Instagram account confirming her swimming in the sea. In that case she could be excluded from cover for that 12 month after care promise as well.

In conclusion we are working in a largely unregulated market where there is a lack of reliable data. It is hard for people to be able to say they can make an informed decision in that sort of environment. That said, a lot of people, as was shown in the Leeds/UTS study, are perfectly happy with the results of their surgery. I am sure a lot of people will continue to go overseas and be prepared to take risks because of the savings they make.

The issue I have tried to highlight tonight is that everything is fine until something does go wrong. People need to be aware that when something goes wrong, they may not have access to the same legal recourse with access to medical records that they would have in Australia. They need to take that into account.

Finally my view is there is a responsibility on the part of the AMA and of ASPS to make these issues known to Australians who are travelling overseas for medical treatment. They will then be better informed and at the very least ensure they have insurance, make arrangements to obtain their medical records, arrange follow up care in Australia and particularly, as all good lawyers would tell you, read the fine print of any contracts they enter into including insurance contracts.

Thank you