

By Dan Jerker B Svantesson

# MEDICAL tourism and telemedicine



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## The latest arenas for international torts litigation

A report released in February 2011 shows that, for 2008–09, the total expenditure on public health activities in Australia was \$2,300.2 million.<sup>1</sup> The same report also makes clear that, after adjustments are made for the effects of inflation, there has been a continuing growth in public health expenditure, averaging 7.3 per cent per year since 1999–2000.<sup>2</sup> In other words, health is undoubtedly a major expenditure. And, with an ageing population, it can be expected that the cost of health will continue to increase.

**I**n this time of outsourcing and globalisation, with increasingly sophisticated information technology and falling prices of international travel, it is only logical that health, and health costs, are being approached from a global perspective. This has sparked two interesting phenomena.

The first is often referred to as ‘medical tourism’; that is, people travelling overseas for medical treatment and procedures that they often combine with a holiday. While we often talk of this as something new, medical tourism has a long history with people travelling to particular places – such as Lourdes – thought to be beneficial to healing. Thus, the real novelty lies in the reason for undertaking the journey. Modern medical tourism is often undertaken

in pursuit of lower medical costs and less waiting time, rather than the belief that a particular location assists in the healing process.

This form of medical tourism is now rather well-established, as the following statistics show:

- It has been estimated that approximately 374,000 people visited Singapore in 2005 to get medical treatment;<sup>3</sup>
- It has been suggested that by 2012, the medical tourism market in India could be worth as much as US\$2.3 billion;<sup>4</sup>
- While a heart valve bypass is estimated to cost US\$159,000 in the US, the same procedure costs approximately US\$9,500 in India;<sup>5</sup> and
- While a breast augmentation in Malaysia or Sri Lanka, combined with ten nights’ accommodation, costs

approximately US\$4,600 the same procedure, without the holiday, would cost US\$6,900-12,300 if carried out in New Zealand.<sup>6</sup>

The second phenomenon discussed here is so-called 'telemedicine'. Put simply, telemedicine refers to technology-assisted medical services over a distance:

'At its most basic level, telemedicine amounts to all health aspects of practising medicine at a distance. Practising medicine includes diagnosing and treating patients, physician education, patient education, administrative functions, video conferencing, and continuing medical education. Therefore, telemedicine can be described, broadly, as the use of telecommunication technology to deliver medical services.'<sup>7</sup>

Elsewhere,<sup>8</sup> I have identified and distinguished between five different types of telemedicine carried out over the internet:

1. The sale of medical products such as prescription drugs, non-prescription drugs, dietary supplements and medical tools;
2. General medical information provided over the internet directly to consumers;
3. Medical advice specific to a particular person provided over the internet, where the provider does not otherwise interact with that person;
4. Medical advice provided over the internet by a doctor specifically to her/his patient; and
5. Outsourcing and other task distribution, among medical service-providers, over the internet (including, for example, telepathology, teleradiology and telesurgery).

Both medical tourism and telemedicine give rise to a range of legal issues, and some instances where medical tourists or telemedicine patients have suffered damage as a result of their treatment will end up in the courtroom. From a legal perspective, the first key questions are then (1) in which country will a case be heard; and (2) which country's laws will govern the dispute.

### JURISDICTION

In examining the question of where an aggrieved telemedicine patient or medical tourist can sue, account must of course be taken of those against whom such a person is taking action.

For example, there are typically three parties that can be sued in relation to a failed medical tourism procedure. First, and most obviously, an action can be taken against the members of the medical team that carried out the procedure. Second, an action can be taken against the hospital at which the medical procedure was carried out. Third, medical tourism is frequently promoted by companies – 'medical travel businesses' – such as AllMedicalTourism.com,<sup>9</sup> which specialises in helping people to find a suitable hospital and organise the practicalities of medical tourism. Such companies can, of course, also be targeted by unhappy patients. Indeed, the possibility of suing such medical travel businesses is a unique aspect of medical tourism litigation, compared with traditional medical litigation. Finally, where an insurance company has opted to encourage medical tourism in a particular case, it may possibly be the target of a law suit

should something go wrong in the medical procedure.

The parties involved in telemedicine are equally diverse, and range from those actually providing the medical service to any parties acting as intermediaries.

The jurisdictional question will also be guided by the type of action that is taken. Failure to provide medical services of an adequate standard can, of course, result in a range of types of litigation, primarily the following:

- breach of contract;
- criminal actions;
- violation of consumer protection law stemming from statute; and
- tort law.

### TORTS ACTIONS

This article focuses on torts actions.

#### Negligence

The most obvious legal argument an aggrieved medical tourist or telemedicine patient can present is that the medical procedure was carried out in a negligent manner. To argue the tort of negligence successfully, the plaintiff typically has to show four things: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant breached that duty of care; (3) that the plaintiff suffered damages; and (4) that the damages were suffered as a consequence of the defendant's breach of its duty of care (causation). In a genuine case of >>

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negligently provided medical services, the only difficulty would seem to be proving that there was an actual breach of the duty of care.

### Misrepresentation

Another possible tort that may arise in the context of telemedicine and medical tourism is the tort of deceit (misrepresentation). Such an action would be particularly useful where it can be argued that information provided by some party involved in the medical tourism or telemedicine operation was false. Courts have held that such a tort is committed where the recipient of the information is located.<sup>10</sup>

A significant difference can be identified between the procedure of suing the medical team or hospital on the one hand, and suing the medical travel business on the other. The key difference is that while the medical team and hospital are located at the place of the procedure, the medical travel businesses may be located in the same place as the aggrieved patient. Suing a party locally is, of course, considerably easier than suing a party located overseas.

As to the location of the law suit, an aggrieved medical tourist would typically have two options: suing at the place of the medical procedure, or suing in her/his home country. In some cases, there will be legal advantages in suing in the home country. For example, the law may be more fully developed and provide a better protection there. However, in all cases, there are practical advantages for an aggrieved medical tourist to sue in his or her home country. When suing a party overseas, the aggrieved party will have to hire a foreign lawyer, perhaps travel to a foreign country, and possibly have the dispute adjudicated in a foreign language. The irony of such practical considerations motivating a person to sue in their home country, when they were been willing to travel overseas to obtain medical services, is undeniable.

In Australia, jurisdiction is frequently claimed in relation to cross-border torts if:

- the tort was committed within the forum;<sup>11</sup> or
- the proceeding is brought in respect of damage suffered within the jurisdiction.<sup>12</sup>

Placing these two grounds for jurisdiction in the context of somebody providing medical advice, information, products or services from outside of Australia, it is obvious that the Australian rules have a very wide reach. However, such wide jurisdictional rules are not particularly uncommon.<sup>13</sup>

Finally, the application of these jurisdictional rules may be affected by 'choice of court' clauses. It is often the case that those involved in medical tourism and telemedicine contractually specify which forum shall have jurisdiction in the event that a dispute arises.

### CHOICE OF LAW

It is therefore not always the case that an Australian patient can litigate a tort matter arising from medical tourism or telemedicine in Australian courts. And where such a matter is litigated overseas, it will be the choice of law rules of the foreign court that nominate the applicable law.

The current choice of law rule for torts in Australia is the so-called *lex loci delicti* rule – the law to be applied is the law of the place of wrong. On its own, however, this rule does not identify the applicable law, since it is not always immediately obvious what the 'place of wrong' in a specific situation is.

As far as medical tourism is concerned, the place of wrong would typically be the place where the medical procedure took place. Thus, even where an aggrieved patient manages to take action in an Australian court, the applicable law would in most instances be the law of a foreign country.

In contrast, where the action is based on the tort of deceit (for example, in the context of false claims in advertisements for medical tourism aimed at Australians), the place of wrong seems to be the place where the content was read by the patient.

In telemedicine situations, the place of wrong may be harder to identify. This is not least so in light of the widespread adoption of inherently ubiquitous so-called 'cloud computing' that allows data and software applications to be stored in the 'cloud' rather than on a specific machine.<sup>14</sup>

Finally, just as in relation to the question of jurisdiction, it is common for the applicable law to be regulated in the contract in the form of a choice of law clause. Where upheld, such clauses will of course affect the question of which substantive law will determine the dispute.

### CONCLUSION

An aggrieved person may therefore struggle to take action based on a tort committed against her/him in the context of medical tourism or telemedicine. Should an aggrieved Australian medical tourist or telemedicine patient manage to overcome all the hurdles outlined above and, on top of that, manage to get a favourable judgment against a party involved in the relevant medical procedure, the question remains as to what she/he can do with that judgment. If the judgment is against a party located in the same jurisdiction as the court handing down the judgment, then the enforcement of that judgment is typically uncomplicated. However, if the judgment is against a medical team or hospital located overseas, enforcement is much more difficult and may, indeed, be unpredictable.

The first thing the patient needs to do in such a case is to identify places at which the defendant has assets that can be used to satisfy the judgment. In many cases, the only place fitting that description will be the place at which the medical procedure took place. The patient must then examine the law of that place to determine under which circumstances the courts in that country recognise and enforce foreign judgments. The willingness to recognise and enforce foreign judgments varies throughout the world. For example, while not a likely destination for medical tourism, Sweden does not generally recognise and enforce any foreign judgments in the absence of international agreements. Further, countries with strong focus on medical tourism may be inclined to protect their medical industry by not recognising and enforcing unfavourable judgments from overseas courts.<sup>15</sup> In other words, it should not be assumed that a patient can necessarily succeed in enforcing an Australian judgment in a

country in which the defendant has assets; and, if she/he fails to do so, the judgment is virtually worthless. As discussed by Marie Bismark and Tom McLean, the problems associated with recognition and enforcement favour alternative forms of dispute resolution, such as arbitration.<sup>16</sup>

In conclusion, there is no doubt that torts committed in these new arenas raise significant legal issues. And, as usual, there is a degree of uncertainty as to how the law will, and should, address these situations. ■

This article draws upon: Dan Svantesson, 'Cross-border Telemedicine – New Area, same Legal Challenges?', *Masaryk University Journal of Law and Technology*, Vol. 3, No. 2 (2009); pp227-38 and Dan Svantesson, 'From the Airport to the Surgery to the Courtroom – Private International Law and Medical Tourism', *Commonwealth Law Bulletin*, Issue 34(2) (2008); pp265-76.

**Notes:** **1** Australian Institute of Health and Welfare, 2011, 'Public health expenditure in Australia 2008–09', *Health and welfare expenditure*, Series No. 43. Cat. no. HWE 52. Canberra: AIHW. <http://www.aihw.gov.au/publication-detail?id=10737418329&tab=2> (accessed 14 July 2011), at v. **2** *Ibid.* **3** *Singapore welcomes the Arab world* (6 December 2006) <http://www.medicaltourisonline.com> (on file with author) **4** 'Medical tourism in India may be worth US\$2.3 billion by 2012', *India Daily* (2 February 2005) <<http://www.indiadaily.com/editorial/02-02a-05.asp>>. **5** Geraldine Chew & MT Norzilawati, 'The Lure of the Medical Tourism in Asia', *Medical Tourism Magazine*, Issue 1, at 6 <<http://www.medicaltravelauthority.com/Medical-Tourism-Magazine-Issue-1.pdf>>. **6** Rebecca Todd, 'Worry over cosmetic surgery

tourism surge' (17 January 2008) <http://stuff.co.nz/4359325a19716.html> (Visited 15 November 2011). **7** J F Daar, and S Koerner, (1997-1998), 'Telemedicine: Legal and Practical Implications', *Whittier Law Review* 19(3) **8** Dan Svantesson, 'Cross-border Telemedicine – New Area, Same Legal Challenges?', *Masaryk University Journal of Law and Technology*, Vol. 3 No. 2 (2009); pp 227-38. **9** AllMedicalTourism.com; <http://www.allmedicaltourism.com/home/> (Visited 15 November 2011). **10** *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. See, also, *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 (relating to internet defamation). **11** Applicable in all Australian jurisdictions. See, further, R Mortensen *et al.*, *Private International Law in Australia*, 2nd Edn (Chatswood, LexisNexis, 2011), p62. **12** Available under the court rules of all Australian jurisdictions apart from Western Australia. See, further, R Mortensen *et al.*, *Private International Law in Australia*, 2nd Edn. (Chatswood, LexisNexis, 2011), p68. **13** See, further, Dan Svantesson, *Private International Law and the Internet* (Kluwer Law International, Aalphen aan den Rijn 2007). **14** See, further, Dan Svantesson and Roger Clarke, 'Privacy and consumer risks in cloud computing', *Computer Law & Security Review*, Vol. 26 No. 4 (July 2010); pp391-7. **15** This can be done by reference to various public policy objectives. However, at the same time, such countries must remember that a decision not to recognise and enforce reasonable judgments from overseas courts may negatively affect their medical tourism industries. **16** See, further, Marie Bismark and Tom McLean, 'New Frontiers in healthcare mediation', *ADR bulletin* 9(3) (2006), pp41-3.

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