With medical technology advancing worldwide, individuals travelling outside of their native city, state, or country, to receive medical treatment worldwide, also known as medical tourism, is growing in popularity. One of the reasons for medical tourism is the broader availability of advanced medical technology and sophisticated treatment at a lower financial cost. In light of these realities, this article will address why United States insurance companies are incentivising medical tourism, and the liability issues when medical tourism treatment goes wrong.1

Medical Tourism can loosely be defined as travel across borders, albeit city, state, or country borders, to seek medical treatment and care. Medical tourism is not a new phenomenon, as individuals have been travelling world wide for cosmetic-type, spa procedures, for decades. What is new, however, is individuals leaving the country for medically necessary procedures such as joint replacements, heart surgery, and infertility treatments. The reasons for its increasing popularity include lower cost, long wait times for procedures in the United States, the attraction of a traditional socialised medicine country, and most importantly today, employer and insurance company incentives.2

The numbers of those who travel outside their home country for medical treatment are staggering. For example, in 2003 an estimated 350,000 patients travelled to countries such as Cuba, India, Jordan, Malaysia, Singapore, and Thailand for various medical treatments. In 2004, 150,000 individuals travelled to India alone. In 2005, about half a million United States citizens travelled overseas for surgery, with over 55,000 Americans travelling to Thailand for medical care.3 Between 2002 and 2005, the number of tourists tripled, and was expected to rise by over 600% between 2005 and the present day.4

While many individuals are familiar with elective medical procedures, such as cosmetic surgery, being widely available in Latin American countries such as Brazil, what is less well known is the increasing popularity of medical tourism destinations in Asia, India and Thailand which now attract some of the largest international medical tourism populations.5 One of the

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1. This article is concerned only with individuals in the United States who seek treatment outside its borders.
most significant increases in the numbers of patients travelling for medical care has taken place in India. According to estimates, India’s current medical tourism market is worth over $700 million dollars, and projections are that in 2012, it will surpass $1.1 billion. With this number of individuals coming to India for the reduced cost of care and the availability of medical procedures, ranging from plastic surgery, to hip, knee, and spinal cord surgery, as well as cardiac procedures, India has become a world leader in this type of tourism.\textsuperscript{6}

Cost cutting seems to be the primary reason for individuals to become medical tourists. According to some sources, medical tourism can cut health care costs by up to 90\%.\textsuperscript{7} As a consequence it has become an increasingly popular approach for employers and private insurers as well. They are encouraging their insureds and employees, sometimes with financial incentives, to seek treatment overseas. This allows insurance companies and employers to keep their insured’s healthy, but at a lower cost.

The relative inexpensiveness of foreign health care is astonishing. The National Business Group on Health (referred to as the NBGH) reported in 2009 the following pricing for a variety of common procedures:

<table>
<thead>
<tr>
<th>Procedure</th>
<th>Thailand</th>
<th>India</th>
<th>Singapore</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Heart Valve Replacement</td>
<td>$10,000</td>
<td>$9,000</td>
<td>$12,500</td>
<td>$160,000</td>
</tr>
<tr>
<td>Heart Bypass</td>
<td>$11,000</td>
<td>$10,000</td>
<td>$18,500</td>
<td>$130,000</td>
</tr>
</tbody>
</table>

With such a clear difference in cost between the foreign countries and the United States, the question becomes, why the difference? It comes down to lower wages of providers, lower malpractice costs in foreign countries, lower insurance costs, and lower prices for medical devices and pharmaceuticals.\textsuperscript{8} Recent estimates indicate that the average procedure performed in Asia costs about a quarter of that of its American counterpart.\textsuperscript{9} With these staggering differences it is no wonder that employers and insurance companies are sending patients out of the country.\textsuperscript{10}

The remainder of this article will address this relatively new phenomenon. It will discuss the process an employer or insurance company goes through, and at what point in time liability may arise, and if so, how to remedy the situation, moving step by step, from diagnosis to post-operative return, or in a worst case scenario, death.

Let us consider a US patient in need of heart bypass surgery. The first step is that the doctor informs the employer or medical insurance company. In response, the employer or insurance company informs the patient of costs, both in the United States, and abroad, say in India (assuming the employer or insurer is a proponent of the practice of medical tourism). The insurance company or the employer provides the patient with options: choose to have the procedure done in the United States, with the insurer paying all the costs or take a trip to

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\textsuperscript{6} Gluck, Elizabeth. "Incredible [Accreditable] India: Trends in Hospital Accreditation Coexistent with the Growth of Medical Tourism in India." \textsuperscript{[2008]} \textsuperscript{1} STLJHLP 459.

\textsuperscript{7} Brady, Christopher J. "Offshore Gambling: Medical Outsourcing versus ERISA’s Fiduciary Duty Requirement." \textsuperscript{64} Wash. & Lee L. Rev \textsuperscript{1073} (2007)

\textsuperscript{8} Santonocito, Paula. "Medical Tourism." \textsuperscript{[2009]} \textsuperscript{18} WINTER INTLHRJ 4.

\textsuperscript{9} Brady, p. 1073.

\textsuperscript{10} Kopson, Mark S. "Medical Tourism: Implications for providers and Plans." \textsuperscript{[2010]} \textsuperscript{3} JHTHLSL 147
India to take advantage of not only a lower priced surgery, but any incentives the employer or insurance company may provide. An illustration of this type of incentive plan would be the Blue Ridge Paper Products company that offered numerous incentives, the largest being a bonus of up to twenty-four percent (24%) of the savings realised by the current health plan, to be paid directly to the patient.\footnote{Boyle, p. 44.}

Assuming the patient chooses to participate in medical tourism, the planning begins. The patient may be able to schedule the procedure through a medical tourism provider, such as MedicalTourism.com, or perhaps their insurance company provides them with a provider in the country to which they plan on travelling. In the case of Companion Global Healthcare, a major US medical tourism provider, they schedule everything from the flights, to the hotel, to the doctor’s visits, to the hospital.\footnote{Companion Global Healthcare, available at http://www.companionglobalhealthcare.com/groupleaders/travelarrangements.aspx, last visited May 10, 2010.} Bringing together an individual, their insurance company, and a medical provider in a foreign country raises the first of many questions. Who covers the cost of travel? Who covers accommodation? Who will take care of the patient in India? Who is the doctor? Are they qualified to perform the treatment? Is the hospital a clean, safe one? And there are many more potentially pressing questions. What if something untoward happens at the place of lodging or during travel – who will pay for the extra costs? Where does the individual obtain essential medical aftercare? What happens if something goes wrong along the way? Where will they be able to seek damages? Whether an employer or insurance company works directly with a hospital or provider in a foreign country or puts the insured in contact with a medical tourism provider with whom they contract with directly, these are complex questions.

To put it in a nutshell, what happens if the patient travels to India, has the surgery, and dies? The US next of kin or the deceased’s estate have a number of possible targets: the employer, the insurance company, the medical tourism provider, the airline, the hospital and staff in the foreign country, the doctors and other medical professionals in the foreign country, and the list goes on. The litigation that may ensue could be long, difficult, and costly, with numerous challenges, including serving process on foreign defendants, enforcement of any judgments, personal jurisdiction issues, limitations on subpoena powers, plus the obvious language and geographical barriers.\footnote{Kopson, p. 148.}

The employer’s potential liability

According to a recent interview with David Boucher, CEO of Companion Global Healthcare, a subsidiary of Blue Cross Blue Shield of South Carolina, and a proponent of medical tourism, both the employer and insurance company who participate in medical tourism, reduce their liability by offering the option of purchasing an additional insurance policy in order to cover any problems that may arise during the travel to the destination, during the time of stay, the procedure itself, and the return.\footnote{Telephone Interview with David Boucher, Chief Executive Officer, Companion Global Healthcare (April 20, 2010).} Additionally, companies such as Global Protective Services,
an insurer utilising coverage by Lloyds of London, offer specific insurance to employers that insures them against any possible legal action arising from a medical tourism programme.\textsuperscript{15} While these added medical tourism insurance policies do exist, information about payout, such as the ease and timing of it, is difficult to obtain. According to the Global Protective Services website, it offers employer limits of up to five million United States dollars, with benefits tailored to each employer needs, from accidental death and dismemberment, to additional medical or surgical benefit, from the loss of reproductive functioning from a treatment to travel gone awry.\textsuperscript{16}

The Medical Insurance Company and its potential liability

Because they provide the option to go overseas to seek treatment, health insurance companies, such as AOLS Assurance Company Limited and Companion Global Healthcare, have partnered with specialised liability insurance companies to offer insurance to cover negative outcomes resulting from overseas medical procedures. Moreover, when an insured has a problem with a doctor, hospital, or any treatment performed during a medical tourism trip, the health insurance company, according to Boucher, is not liable, and the health insurance insured would be forced to seek relief through the normal channels, as in the case of any treatment provided in the United States.

The Medical Tourism provider and its potential liability

A medical tourism provider is a travel agent of sorts that offers package deals or ‘a la carte’ type services to those individuals seeking treatment outside of the United States. Tourism providers trade most often on the internet and exist in relatively large numbers. MedicalTourism.com, holding themselves out on their website to be the ‘No. 1 medical tourism site’, offers information about destinations, finding a hospital or clinic, locating a doctor, a local ‘facilitator’, cost comparisons, and of course, the ‘package’, including travel, accommodation, and side trips . The packages range from dental services in Ecuador to gastric bypass procedures in Costa Rica, from in-vitro fertilisation treatments in Turkey to orthopedic services in India. Prices vary greatly and there are several incentives offered through booking with the agency, such as a free massage for the patient and their partner, free breakfasts, and free airport transfers. Often, the tourism providers, also known as facilitators, are faced with potential conflicts of interest.

A facilitator can either be paid by a foreign provider to direct a potential patient to them, or an insurance company can pay a tourism provider to guide their insured through the murky waters of medical tourism packages.

Because the patient often relies on the tourism provider’s apparent expertise, some providers specifically note in their advertising that if an individual is concerned about his or her chances of legal recourse in the event something does go wrong, they should reconsider


\textsuperscript{16} Supra, Global Protective Solutions
medical tourism as an option to receive their medical treatment. Regardless of this, when something does go wrong, and an individual has utilised a medical tourism provider or facilitator, there may be a potential tort claim situation – holding this player responsible for damages in the event a patient needs to seek compensation. If an insurance company or employer has utilised a tourism provider or facilitator, a legal question arises as to the relationship between the two: would the provider or facilitator be considered an independent contractor, insulating the company from a tort claim, or one whose relationship implies a contract relationship and a fiduciary duty that imposes liability on the medical tourism provider, directly or on the basis of vicarious liability.

The foreign hospital, doctor, nurses and staff and their potential liability

The most obvious target of a liability claim based on medical malpractice is the doctor or hospital in a foreign country. There is a common misconception that those travelling abroad to a country like India cannot initiate medical malpractice litigation against hospitals or doctors. That is not the case. However, although the court system in India for example, is similar to that of the United States and the UK, for litigation to run its course often takes over a decade and awards of damages are significantly less than in the US. Another option, if the individual did not take out their own travel liability policy, is to try to establish personal jurisdiction over the physician through a US state long arm statute.

Another option

To seek legal redress against a hospital or physician in the United States that may provide pre-operation or post-operation care, a patient may invoke a potential violation of fiduciary duties under the Employee Retirement Income Security Act of 1974 (commonly known as ERISA). The fiduciary duty of a provider under ERISA is to act in the interest of the patient: if the financial incentive outweighs the medical benefit to the individual, a statutory violation may lie.

17. Kopson, p. 150.
19. While the focus of this paper is solely on foreign providers, it is important to note that pre and post travel care can often take place in the United States. Additional liability has been mentioned for any pre-travel medical testing, treatment, medications, meaning any United States provider providing such services could be named in the event that something goes wrong between the time they leave the provider and reach their overseas destination for their service. This should be covered under their United States medical malpractice liability insurance. Kopson, p. 147.
A Solution?

The primary motivator for medical tourism is clearly the rising cost of medical treatment in the United States. Therefore, the most obvious solution to the legal difficulties arising from this phenomenon is to reduce health care costs in the United States. But it may not be that simple. If United States employer-based health care plans, and major medical plans are encouraging this practice, but still not taking on any liability for it, what is their incentive to change?

There is evidence that, in response to the rise in medical tourism, US insurance companies are evaluating the pricing contrast and are negotiating with providers and their insured for competitive pricing at home.22 For US citizens, this could very well be the best case scenario because it brings the treatment, and the work, back stateside, addressing the current employment and income issues being dealt with in virtually every US jurisdiction.

Set against that is the fact that several states are pressuring for legislation to introduce the option of medical tourism into state-based health care plans for state workers. When a bill was introduced in the West Virginia legislature to add financial incentives to state employees who would participate in a medical tourism type plan, it was said that the state would save upwards of $2 million annually. The bill’s incentives included waivers of co-payments and deductibles, payment for travel and lodging for the employee and a companion for the length of the treatment/procedure, as well as payment to the employee’s agency for seven days of paid sick leave which would not be counted against an employee’s already accrued/approved sick leave, and finally a rebate of up to twenty percent of the cost savings paid to the employee.23

Promulgating medical malpractice reform in the United States would be another, albeit controversial, way of reducing the increasing popularity of medical tourism. With medical malpractice costs on the rise, contributing significantly according to some to a large increase in the cost of medical care, it is no wonder employers and insurance companies encourage their employees and insured to go elsewhere.24 Add to this the reported average cost of more than $110,000 to litigate a medical malpractice case in the United States, it is not surprising that medical tourism is an attractive alternative.25

Conclusion

Taking a vacation is nice. Taking the opportunity to have open heart surgery in a safe, controlled, foreign facility is better. However, patients need to weigh very carefully the benefits of cheaper healthcare against the detriment of costly, uncertain and difficult litigation when things go awry. Their attorneys are advised to counsel them appropriately.

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24. Brady, p. 1086.