REQUIRING FINANCIAL RESPONSIBILITY FROM FOREIGN HOSPITALS SEEKING MEDICAL TOURISTS FROM THE UNITED STATES

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approximately $439 billion.[2] Every year, 1.4 million Americans travel offshore to receive various treatments, such as in vitro fertilization, dentistry, cosmetic, bariatric, orthopedic, and cardiac surgeries, as well as liver and kidney transplantations.[3] Medical tourism is appealing to American patients, especially to uninsured individuals, self-insured businesses, and third-party payers, all of whom seek to save thousands of dollars for various medical procedures.[4]

In recent years, several U.S. medical centers have sought to capitalize on this growing trend by partnering with foreign medical centers.[14] Simultaneously, displaying the names of their U.S. affiliates helps foreign healthcare facilities to not only attract local and regional patients, but to also draw in American medical tourists interested in the lower prices they offer.[15] Such affiliations with domestic medical giants may offer American patients a false sense of security from the familiar names they recognize. These patients may assume that the U.S. medical standards of care and medical negligence laws apply to these institutions. Instead, victims of medical malpractice are often left without any legal recourse, because these foreign institutions cannot be held accountable in the U.S. courts.[16] Besides, even if American patients could receive some relief in foreign courts, the obstacle-ridden process is often expensive, and the financial settlements are often not enough to fully compensate patients for the harm.[17] Therefore, to protect

Similarly, Rick Perry, former United States Secretary of Energy and Texas Governor, underwent stem cell treatment for a recurring back injury.[39] The laboratory that cultured Perry's stem cells was the South Korean RNL BIO, stem cell biotechnology company.[40] Another state-of-the-art stem cell clinic well-frequented by Americans was the Xcell-Center for Regenerative Medicine with branches in Düsseldorf and Cologne in Germany.[41] Xcell-Center was the largest stem cell clinic in Europe that offered stem cell therapies for various diseases, including cerebral palsy, multiple sclerosis, autism, and spinal cord injuries.[42] After a patient died in 2010, the German government shut the centers down.[43] However, the Xcell-Center has reopened its doors in Lebanon and India under the name Cells4health, offering the same type of therapies.[44]

III. GENERAL CONCERNS WITH MEDICAL TOURISM

The development of medical tourism has raised many ethical and legal issues pertaining to malpractice, consumer protection, organ trafficking, and alternative medicine.[45] Patients traveling abroad for medical care represent a vulnerable population that can succumb to unusual or resistant infections.[46] The risk of contracting hospital-associated and procedure-related infectious diseases after receiving medical procedures in foreign countries is elevated. For example, an investigation by the Centers for Disease Control and Prevention (CDC) and a subsequent inspection by the Secretariat of Health in Mexico linked thirty-one infected American patients suffering from a debilitating antibiotic-resistant infection after undergoing an invasive medical procedure, to a single Mexican hospital that had breached safety

protocols.[47] Likewise, in 2014, the CDC identified nineteen cases of women with antibiotic-resistant infections who received cosmetic surgeries in the Dominican Republic and contracted nontuberculous mycobacterial surgical-site infections as a result.[48] Thus, foreign hospitals seeking medical tourists from the United States should be held financially responsible when American patients are harmed while receiving care at foreign hospitals.

Many countries with prominent medical tourism sectors, such as India, China, and Thailand, currently have endemic levels of commonly known infections, such as malaria, dengue, and enteric fever.[49] Some have a high prevalence of tuberculosis, HIV, as well as hepatitis B and C.[50] Generally, international standard-based certified (i.e., JCI-certified) blood and blood products used during surgeries and transfusions are not screened for dengue and West Nile viruses.[51] Additionally, receiving health care abroad carries an increased probability of acquiring infections with antibiotic-resistant organisms not commonly found in the United States. Medical tourists returning home with exotic or highly antibiotic-resistant organisms pose significant public health risks.[52] They place others at risk of exposure to these infections, burden the American medical system,[53] and create potential biosecurity issues.[54]

Although every procedure carries inherent risks, foreign medical standards of care may not reflect the same safety precautions that the U.S. standards of care requires.[55] The CDC has enumerated some risks specific to medical tourists.[56] It warned that these patients are likely to face various kinds of risks including communication barriers, antibiotic-resistant

47. [illegible]

high

emergency room visits due to botched plastic surgery procedures where women undergoing operations in Mexico are left with broken and slipping breast implants, infections, and large scars.[65]

The fact that most American physicians are reluctant to care for patients with adverse results from operations performed abroad only aggravates the problem.[66] Likewise, most American insurance companies do not reimburse for follow-up care, especially in cases in which non-FDA approved materials, procedures, or medications are used.[67] Neither health care organizations in foreign countries nor the intermediaries that facilitate overseas medical tourism are bound by regulations and standards set forth by the Health Insurance Portability and Accountability Act (HIPAA).[68] This means that foreign providers are not bound to follow the strict personal health data privacy safeguards that are required in the United States.

The intermediaries or brokerages that promote and facilitate overseas medical travel for U.S. residents receive referral fees from the offshore providers for patient referrals.[69] Nonetheless, medical tourism companies have greater expertise in tourism than in medical dealings, and in many cases, may not have any medical expertise or personnel[70] to assess the fitness of candidates for the desired procedures.

Upon return to their home countries, some patients experience medical emergencies that impact their overall medical cost substantially. Although studies in this area are limited, a study from Alberta, Canada, reported that [illegible] bariatric medical tourists [illegible] by twenty-[illegible] study suggested that complication rates were considerably higher (42.2 ± 56.1%) than similar surgeries performed in Alberta (12.3%).[72] Thus, the combined number for all

65. Id. Similarly, a woman who visited Mexico for a plastic surgery experienced severe gangrene and her skin peeled off when emergency room doctors lifted her from one bed to another. Id.

66. Boyd et al., supra note 14, at 109.

67. Id.

68. See Purvi B. Maniar, HIPAA Considerations for Intermediaries in Medical Tourism, 2 MED. TRAVEL TODAY 1, 1 (2014), https://www.ebglaw.com/content/uploads/2014/06/21090_health-article-maniar-HIPAA_considerations_for_intermediaries_in_Med_Tourism-4-30-08.pdf.

69. Brandon W. Alleman et al., Medical Tourism Services Available to Residents of the United States, 26 J. GEN. INTERNAL MED. 492, 496 (2010).

70. Roy G. Spece, Jr., Medical Tourism: Protecting Patients from Conflicts of Interest in , 6 J. HEALTH & BIOMED. L. 1, 3 (2010).

71. David Kim et al., Financial Costs and P Bariatric Surgery, 59 CAN. J. SURGERY 59, 59 (2016). Canadian data is provided as a parallel because such data for U.S. tourists is not available.

72. Id. at 60.

post-

receiving care abroad. The information available on the internet is often limited to unreliable anecdotal accounts. Alarmingly, there are only a few legal remedies available for American medical tourists when something goes awry.

In the United States, in addition to federal regulations, individual states implement guidelines on the practice of medicine through the licensure of physicians.[83] Unlike the United States, many international healthcare systems are not well-monitored or regulated.[84] For

is underdeveloped and essentially non-existent.[92] A party seeking relief may only recover for negligence.[93] $GGLWLRQDOO\ SDWLHQWV¶ PHGLFDO U ³GLVDSSHDUJHV SURKLELW SUHWULDO DLVFRYHU\ DQG successful, the recovery usually does not exceed $2,500.[94] a patient is

Like Thailand, Mexico is a civil law country; tort litigation in Mexico is virtually non-existent, and the courts do not utilize jurors or stare decisis.[95] $GGLWLRQDOO\ OLNH ,QGLD 0H[LFR¶V QHZ 1DWLRQDO Arbitration provides some relief but the compensation averages around $4,800 without recognition of non-economic damages, like pain and suffering.[96]

Many countries do not require that their hospitals participate in international accreditation programs nor do they require that these hospitals report positive or adverse patient outcomes.[97] Some locations do offer minimal quality of care statistics, but since there is no uniformity in the methodology used to gather this data, these statistics do not provide the patients with much useful information.[98] Patients often rely on hospital PRUWDOLW\ UDWHV EXW VXFK QXPEHUV DUH D ³FUXGH do not accurately capture the actual risks involved at a certain facility.[99]

Existing regulatory bodies are insufficient sources of information for medical tourists. Simply having access to non-uniform, unverified, and very limited data points is not sufficient for patients to make an informed decision regarding their care. Therefore, medical tourism destinations must ultimately provide data on quality controls and processes, equipment availability, and other key metrics that define the risk of care at a given facility. Similarly, doctors working at these tourism destinations should provide evidence of their education, training, and special skills required for procedures that they perform. This information should then be examined and scrutinized as the basis for licensing schemes for increased transparency and be presented in a manner that the average patient can easily digest. Although the malpractice insurance system creates a quasi-regulatory mechanism, in most countries other than the United States, insurance markets are typically non-existent,

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92. Id. at 43.

93. Id. Although Thailand is a civil code country, no Thai statutes specifically address medical malpractice. Thus, patients most frequently claim damages under Section 420 of 7KDLODQG¶V &LYLO DQG &RPPHUFLDO &RGH ZKLFK UHTXLUHV DQ\ ³SHUVR XQODZIXOO\ LQMXUHV WKH OLIH ERG\ KHDOWK OLEHUW\ SURSHUW\ RU remuneration. Thus, Patients bear the burden of proving negligence in Thai courts. Id.

94. Id. at 44.

95. Id. at 68.

96. Id.

97. I. Glenn Cohen, Protecting Patients with Passports: Medical Tourism and the Patient Protective Argument, 95 IOWA L. REV. 1467, 1489-91 (2010).

98. Muzaurieta, supra note 25, at 144.

99. Id.

neonatal, fertility, emergency, oncology, intensive and cardiac care services.[107] +RSNLQV LV DOVR DIILOLDWHG ZLWK 7XUNH\¶V $QD a 209-EHG DFXWH FDUH KRVSLWDO ZKLFK LW UHFRJQL]HV

In total, Johns Hopkins Hospital has eighteen partnerships, Cleveland Clinic has ten, Mayo Clinic has five, and Massachusetts General Hospital has four.[112] Many of these facilities contain state-of-the-art technology, employ U.S.-trained physicians, and are located in developing nBT-

than the local population in hospitals built for and dedicated to the local communities.[118] The combination of reputable names and cheap prices attracts many American patients to these off-shore facilities. This is evident by an increasing trend of reputable American hospitals opening their doors abroad after the terrorist attacks of 9/11, which caused a decline in the number of international medical travelers,[119] especially those from the wealthy Arab countries, due to discrimination and difficulty obtaining visas.[120] Before the attacks, the U.S. Department of Commerce reported revenues of more than one billion dollars annually from inbound travel to the United States for medical care.[121] Not wanting to forego the steady stream of cash from the Middle Eastern1 0Iq0.0000182463 -19(o7( )23(m)5)-204(U)-4(.Sn)-44(hosp)-8(t)5(a)-10de

Thailand 6%.[145] The average cost of a full JCI survey in 2010 was $46,000.[146] The majority of facilities requesting JCI accreditation are hospital programs (62%), followed by ambulatory care programs (14%), academic medical center hospital programs (8%), and clinical laboratory programs (7%).[147] The remaining are primary care programs (4%), long-term care programs (3%), home-care programs (2%), and medical transport programs (1%).[148]

Foreign hospitals are not alone in advertising their facilities and services as JCI-DFFUHGLWHG WR DWWUDFW PRUH UHYHQXH $$53¶V of Patients Beyond Borders, Josef Woodman, has also used JCI-accreditation to advertise medical tourism.[149] $FFRUGLQJ WR 0U :RRGPDQ PDQ\ ³OHD private hospitals in Mexico and Costa Rica have been awarded full accreditation by the . . . JCI, the same agency that accredits hospitals like -RKQV +RSNLQV &OHYHODQG &OLQLF DQG 0D\R KHUH L[150] What Mr. Woodman, and by extension AARP, failed to mention is the significant difference in accountability and standard of accreditation between U.S.-based and foreign institutions.

VII. LACK OF LEGAL ACCOUNTABILITY IN JCI ACCREDITED FACILITIES

JCI accreditation should give patients confidence that their chosen international healthcare provider is held to higher standards and regularly monitored.[151] For example, Dubai Healthcare City (DHCC) on its website FODLPV WKDW ³>D@FFUHGLWHG KRVSLWDOV DQG FOLQ VWULYH WR KHOS SHRSOH [152] In regard to medical QHJOLJHQFH '+&&¶V &(2 'U 5DPDGDQ $O %HORXVKL complaints of medical malpractice within DHCC are investigated by the Dubai Healthcare City Authority-5HJXODWLRQ '+&5 ³WR HQVXUH WKDW

145. Mehta et al., supra note 46, at 2.

146. JCI Accreditation, HEALTH-

equipment was placed by his bed.[162] When Mr. Hussain developed a pericardial tamponade and the subsequent hemodynamic compromise, no

medical care directives due to the lack of accountability in the cases of medical mishaps.

Injured American patients can pursue international malpractice claims by either suing the foreign providers in the foreign jurisdiction or in U.S. courts.[179] The likelihood of obtaining meaningful relief in a foreign court is low.[180]

HVWDEOLVK VSHFLILF MXULVGLFWLRQ DQG JUDQWHG GHI
wrongful death action arising from medical negligence on the part of medical practitioners who performed reconstructive surgery on a patient in Mexico.[188]

The only other avenue to establish minimum contacts is through the presence of brokers engaging in business in the forum state or through advertising services over the Internet. Under the Corporate Negligence doctrine, not only does plaintiff need to demonstrate that the foreign healthcare provider was unfit or incompetent, but also that the U.S. company knew or should have known about the incompetence based on some pattern of misconduct.[189] Thus, the majority of U.S. courts are reluctant to hold medical tourism firms incorporated in the United States accountable for the negligence of foreign physicians operating independently of the medical tourism firms.[190] Nevertheless, foreign healthcare providers could be hailed into the U.S. court system when they regularly solicit business, engage in any other persistent course of conduct, or derive substantial revenue from goods used, consumed, or services rendered in the states.[191] For example, in Gatte v. Dohm, the U.S. Court of Appeals for the Fifth Circuit found one of the co-owners of the Minnesota-based medical tourism company, Ready 4 A Change, liable because the deceased patient had used its services to schedule a post-weight loss contouring and body sculpting surgery at a clinic in Mexico.[192]

8VLQJ WKH ³=LSSR´ OLQH RI FDVHV FRXUWV KDYH KHOG WKDW ZHEVLWH¶V FRPPHUFLDO QDWXUH DQG OHYHO RI LQWHUDFWLYLW\ SXUSRVHIXO DYDLOPHQW[193] ZKHWKHU RU QRW D VWDWH¶V MXULVGLFWLRQ RYHU D ZHEVLWH¶V RZQHU LV DSSURSULDWH. Websites that simply make information available are characterized as passive and websites that facilitate or conduct business transactions are characterized as interactive. In Romah v. Scully, the U.S. District Court for the Western District of Pennsylvania held that a Toronto hospital was not bound by jurisdiction in Pe QQV\OYDQLD EHFDXVH WKH KRVSLWDO¶V PHUH advertisements for its medical services in Philadelphia and Pittsburgh were insufficient to meet the minimum contacts burden.[194] Suits that involve foreign providers in U.S. courts and personal jurisdiction laws are fact-specific, so it is difficult to

188. Gatte v. Ready 4 A Change, L.L.C., No. 11-CV-2083, 2013 WL 12347069, at *1, *3 (W.D. La. Sept. 16, 2013).

189. Cortez, supra note 84, at 15.

190. Philip Mirrer-Singer, Medical Malpractice Overseas: The Legal Uncertainty Surrounding Medical Tourism, 70 L. & CONTEMP. PROBS. 211, 216-17 (2007).

191. Linda Sandstrom Simard, Hybri Specific Jurisdiction, But Is It Constitutional?, 48 CASE W. RES. L. REV. 559, 562 (1998).

192. Gatte v. Dohm,) $ S S ¶ [WK &LU

193. See Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

194. Romah v. Scully, No. 06-698, 2007 WL 3493943, at *1, *7-*8 (W.D. Pa. Nov. 13, 2007).

predict the outcome of a case and to determine whether a U.S. court would assert personal jurisdiction over a foreign provider.[195]

B. Forum Non-Conveniens

Even if personal jurisdiction can be established, U.S. courts have discretion to dismiss a case if venue is more proper in a foreign forum where the medical procedure was performed, witnesses reside, and evidence is more readily available.[196] For example, in Jeha v. Arabian American Oil Co., the U.S. District Court for the Southern District of Texas dismissed a medical negligence suit against a Saudi-based oil company, because the critical evidence and witnesses were all located overseas.[197] And, although lengthy judicial delays in foreign courts may be acceptable to gain access to the judicial system, receiving measly recoveries from foreign courts is not an adequate reason to bypass forum non-conveniens concerns.[198] For example, in Gonzalez v. Chrysler Corp.

IX. POSSIBLE SOLUTION FOR AMERICAN PATIENTS

Medical tourism rules should be altered to allow patients to make fully LQIRUPHG GHFLVLRQV DERXW WKHLU KHDOWKFDUH QHHGV disclosure.[204] Although the parties involved in the medical tourism industry such as insurers, brokers, and foreign facilities certainly understand the risks associated with medical tourism, they are not quick to disclose these risks to vulnerable patients. Instead, they shield themselves from liability by utilizing release forms, waivers, and other contractual measures that do not specify the risks involved and do not provide full disclosures as customary.

It is nearly impossible for American courts to force foreign medical institutions to accept liability for medical mishaps that affect American patients. However, the U.S. government could exercise its authority by extending its reach to the U.S.-based tax-exempt JCI. The U.S. government should require that the JCI accredit only those foreign hospitals that show adequate liability insurance from internationally recognized insurance firms. Additionally, the U.S. government could require that the JCI, as a condition of accreditation for these offshore hospitals,[205] demand that American hospitals who lend their names to foreign affiliates assume full financial