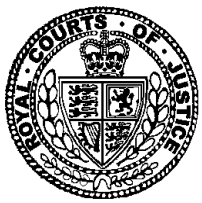

Neutral Citation Number: [2022] EWHC 488 (QB)

Case No: QB/2018/001792

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 8 March 2022

Before :

THE HONOURABLE MRS JUSTICE FOSTER DBE

- -

Between :

LAURA CLARKE	**Cla**
- and -	
ADAM KALECIŃSKI	**First Defe**
- and -	
NOA CLINIC USLUGI MEDYCZNE SP. O. O	**Second Defe**
- and -	
POWSZECHNY ZAKŁAD UBEZPIECZEŃ SPÓŁKA AKCYJNA	**Third Defe**

- -

- -

Mr Matthew Chapman QC (instructed by Messrs Irwin Mitchell) for the **Claimant**

Mr Alistair Mackenzie (instructed by DAC Beachcroft) for the **Third Defendant**

[The First and Second Defendants neither appeared nor were represented.]

Hearing date: 09 June 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE FOSTER DBE:

Introduction

The Claim

1.
This is a claim for damages for personal injury sustained during cosmetic surgery undergone by the claimant Ms Laura Clarke on 7 January 2015. Ms Clarke who was born on 11 December 1985 claims against Mr Adam Kaleciński, the surgeon who performed the breast and thigh procedures upon Ms Clarke, in Poland, and against the Noa Clinic ("the Clinic"), where the operations were carried out and she received pre-and post-operative treatment. She also sues Powszechny Zakład Ubezpieczeń Spółka Akcyjna ("PZU") who is the insurer of the Clinic. They are respectively, the first, second and third defendants to the claim.

2.
The real issue in the case is as to liability. For reasons which will become apparent, if liability is made out, there are no issues raised by the defendants as to the quantum of damages claimed, save for a limit to any liability which PZU may be required to satisfy, if such be found, against the second defendants. If the claimant succeeds as to liability she is put to proof as to the damages set out in her schedule of loss.

3.
The following matters are not in dispute. Mr Kaleciński, the first defendant, is a Polish National domiciled and habitually resident in Poland although he is registered with the General Medical Council in the UK as well as the equivalent Polish regulatory body. The Clinic is a company incorporated in Poland in which Mr Kaleciński and his wife are the sole shareholders and directors; it is understood to be owned as to 49% by her and as to 51% by Mr Kaleciński.

4.
The parties agree that the first and second defendants are liable to be sued in the Courts of England and Wales pursuant to Articles 17 and 18 of the recast Brussels I Regulation (No 1215/2012) ("Brussels I"). The third defendant is liable to be sued in the Courts of England and Wales pursuant to Chapter II, section 3 of the Brussels I Regulation (No 1215/2012).

5. It is not in dispute that under Polish law the claimant has a direct action, nominally in tort, against the third defendant in respect of liabilities which may arise in respect of their insured, the second defendant. As explained by the claimant this is an "Odenbreit claim" namely an action brought by a claimant against a wrongdoer's EU insurer in the Courts of the EU Member State where the claimant is domiciled. It is named after Odenbreit v FBTO Schadeverzekeringen NV Case C-463/06 (decided by reference to section 3 of the Brussels I Regulation: Council Regulation 44/2001 now recast in: Regulation No 2015/2012). It is an action in tort (Maher & Another v Groupama Grand Est [2010] 1 WLR 1564 (CA)), and, subject to the applicable law of the tort and the existence of a direct right of action against an insurer, by section 3 of the recast Brussels I Regulation it gives a claimant a right to assert the jurisdiction of the English Court: the Court of the claimant's domicile (see Odenbreit above).

5.
It is agreed that the third defendant does not insure the first defendant and that their total potential liability under the indemnity of the second defendant is limited to 200,000 (PLN) approximately equivalent to £38,500.

6.

The claimant sues both the surgeon and the clinic, both in contract and in tort. She seeks to hold the clinic either directly or vicariously liable for the failures of the surgeons who treated her - one other Polish surgeon was involved in her care - and the nurses who cared for her at the clinic in Poland.

7.
The contractual claim is put on the basis of breach of a contract for the provision of breast augmentation and thigh liposuction and associated pre- and post-operative advice. The joint defence of the first and second defendants admits both the contract with the first defendant as described and with the second defendant. The supply of services is in each case in London from November 2014 and in Poland thereafter until her return home on about 14 January 2015. The first and second defendants admit that they are liable to be sued in the Courts of England and Wales under Articles 17 and 18 of Brussels I and that the claimant was a consumer for the purposes of Chapter II, section 4 ("Jurisdiction over Consumer Contracts") of Brussels I.

8.
The claimant's case is that the duty in tort was to the effect that the services provided would be to a standard recognised as proper by a responsible body of like qualified professionals at the time of the care and operation and the implied duty under her contract was to the same effect. The first and second defendants admit in their joint Defence that that such a duty was owed.

9.
In respect of each cause of action the breaches and the causation are denied.

The position before the court

10.
Before turning to the more detailed facts of the case, the somewhat unusual circumstances of this hearing should be set out.

11.
The only represented parties at trial were the claimant and the third defendant. At the outset to the action all defendants had been represented by the same solicitors, DAC Beachcroft, but they came off the record in respect of the first and second defendants in March 2021, leaving the insurer of the clinic as the only defendant represented by them, and now, the only one before the court.

12.
The hearing took place as a hybrid hearing with Mr Matthew Chapman QC for the claimant and Mr Alistair Mackenzie appearing for the third defendant, present in Court, with one of the instructing solicitors. The two fact witnesses for the claimant appeared by video link and the solicitors also attended remotely.

13.
Although pleadings were exchanged between all parties running to a Part 18 response from the third defendant, further engagement from the defendants has been minimal and no or little disclosure was received from any of the defendants. Accordingly, certain basic materials usually available to the court in a medical negligence action were unavailable including, for example, the document reflecting the consenting procedure.

14.
However, in the event, no factual evidence was relied upon by any of the defendants nor did they produce any counter-vailing expert material save as to one issue: namely the limit of the indemnity

offered by the third defendant in respect of any liabilities falling upon the second defendant. That matter was, in the event, agreed. Shortly before trial it was indicated that no challenge was to be made to the factual evidence to be led by the claimant, accordingly the written statement of the claimant and that of one of her parents, Jill Clarke, were proved and admitted as evidence in chief. The witnesses were not cross examined. Likewise, the medical evidence and the expert legal evidence was taken as read as contained in reports.

15.
The third defendant however, by a case disclosed fully for the first time in its skeleton argument a few days before trial, made submissions of law concerning the adequacy and the scope of the pleadings and, in those cases where the third defendant had reserved its position, or put the claimant to proof on the pleadings, made further submissions which were dealt with as a preliminary issue.

The preliminary issue

16.
It is not disputed that the proper law of the contract is English law and it had been anticipated by the claimant until trial that it was also a matter of agreement that the proper law of the claim in Tort was Polish law.

17.
The claimant's skeleton argument stated it was common ground that Polish law would apply to the claimant's claim in tort and it would appear that the proceedings had indeed been managed on that basis. There was an order of 28 February 2020 described as having been made in the defendants' relief from sanctions application by which the claimant and the defendants (acting jointly) were given permission by Master Yoxall to rely upon medical evidence, and upon the evidence of an expert in Polish law. Reports were to be served by 26 June 2020, thereafter joint reports were to be served. At that stage the claimant had a consultant plastic surgeon expert and a consultant psychiatrist expert who had already reported. On 8 January 2021 Baker J made an order by consent in respect of later service dates for the medical expert evidence and again, evidence of Polish law, limited to the extent of the indemnity limit of the third defendant's policy of insurance, liability and quantum. A report on the indemnity issue was served by an expert on behalf of the defendants, and the expert witnesses were ad idem.

18.
It seems to me clear that a matter of a few months before the trial of this matter it was anticipated that foreign law experts would opine on the substance of the case before me, namely liability, and an expert on behalf of the claimant, on the relevant provisions of Polish law.

19.
In its skeleton argument, for the first time, the insurer raised an issue about the adequacy of the claimant's pleading arguing they had failed to plead the Polish law upon which they relied, so the proper law of the tortious claim was by default, English law.

20.
It is fair to say the matter was not entirely clear from the case on paper, and it would seem little attention had been paid to the state of the pleadings before trial. The claimant pleaded breaches of the terms of the Supply of Goods and Services Act 1982 with regard to the contractual relationship, and pleaded that the breaches of duty took place both in Poland and in England. It is nowhere expressly pleaded that Polish law applied to the claim in tort, or what Polish law was. The claimant

pleaded a contract with the first defendant and “further or alternatively” that she had contracted with the second defendant.

21.
By their joint defence the first and second defendants admitted the claimant was a consumer under Brussels I, admitted that the claimant had contracted with the first defendant as alleged, and admitted the paragraph alleging “further or alternatively” a contract with the second defendant. They admitted the allegations concerning the clinic’s website seen by the claimant; they admitted the emails sent and received, the consultation as pleaded and asserted that David and Bridget White, two people with whom the claimant had corresponded before and during the contract, were the agents of the Clinic in the UK. The surgery was admitted, but the first and second defendants asserted adequate warnings were given, the claimant had consented to the relevant risks, and that the pain and discomfort she suffered were normal. They denied the particulars of suffering after the operation, save they admitted a fever on 11 (not 10) January 2015 [in fact pleaded by the defendants as 2018], and asserted any further complications were the claimant’s fault. Liability was generally denied. No express mention was made in this pleading as to Polish Law or any other proper law.

22.
In its Defence dated 18 June 2018 the third defendant stated in its second paragraph:

“The particulars of claim allege that the first and second defendants breached obligations in tort and in contract. The alleged obligations and breaches relate to surgery undertaken in Poland and injury arising from that surgery. The particulars of claim however do not make clear which countries law is said to govern the alleged obligations and breaches and why. The schedule of special damages and future loss served with the particulars of claim relies upon Article 445 of the Polish Civil Code. **Presumably, therefore, Polish law is being relied upon.** But assuming that to be the case there are no statements in the particulars of claim of the relevant principles and rules of Polish law or to the source of those principles and rules in Polish law. The claimant should make clear which countries law she relies on and why and should identify the relevant principles, rules and sources of such law. Where the circumstances of the case clearly raise choice of law issues, the claimant should make her case clear so that the parties and the court understands the true issues between the parties to determine those issues: see Global Multimedia International Ltd v Ara Media Services [2006] EWHC 3612 (CH) and Belhaj v Straw [2014] EWCA Civ 3094. The claimant should therefore treat this as a request to provide proper information and a detailed pleading on applicable law so that the third defendant may know the case it has to meet.” [Emphasis added]

23.
In the event, no further particulars were given. The claimant proceeded on the basis that expert evidence was required of Polish law both as to liability and quantum; a report dated 22 April 2021 was served by the claimant. The expert outlined how liability for negligence was decided in the Polish law, referring to Article 415 of the Civil, and, by reference to Articles 444 and 445, set out the foundation for Polish law as to the quantum of damages. She produced a second report dated 2 June 2021, shortly before trial. This dealt with the concept of joint and several liability and its application in particular to clinical negligence under Polish law. She gave her further opinion on whether as a matter of employment law the clinic or clinic owner would be responsible for the action of its employees under Polish law and whether the surgeon and the clinic both owed the same duty of care thereunder to the patient – she opined that they did.

24.

No further material disclosure was made by any of the defendants. A Part 18 request had been made of third defendant only with respect to the nature and scope of the indemnity. Shortly before trial a second report from the claimant's Polish law expert was served, dealing with issues of vicarious liability. Although the second report was acquired before the defendant's skeleton argument was drafted, the skeleton raised vicarious liability for the first time on behalf of the third defendant.

25.
Mr Alistair Mackenzie, for the third defendant, argued in his skeleton argument and at trial (correctly) that there was no permission for the second report on Polish law, the existence of which had not been notified to the defendants until service, and to which they objected. He said no good reason was given why it was provided so late. He argued the Particulars of Claim were ambiguous as to whether English or Polish law governed the obligations, and there was no evidence before the Court as to the choice of law in any contract. Contrary to what was said by the clinic in its own pleadings, the third defendant insurer stated: "it is not admitted on behalf of PZU that the claimant in fact contracted with the clinic". The pleaded defence of the third defendant, whilst alleging a lack of clarity as to the contract or contracts, had in fact stated that the matters pertaining to the contract were outside its knowledge that it was unable to admit or deny them. The third defendant in pleadings had relied upon the matters advanced by the first and second defendants.

26.
The main thrust of the third defendant's preliminary submission was that the Particulars of Claim did not plead any provision or content of Polish law relating to liability; any understanding of the relevance of the content of Polish law was only with reference to the Schedule of Loss and as to the indemnity; it did not extend to liability in the main pleaded case. Counsel for the third defendant urged the Court to reject the proposition that it was understood Polish law would apply and accordingly, the Court should apply English law, adopting the well-known rule in Dicey and Morris. The Court should also reject the admission of the second report as to Polish law: there was no application before the court in any event. He took further pleading points to the effect that the Particulars did not plead the surgeon as an employee or a person for whom the clinic was vicariously liable. All that was said was in respect of the nurses as "their employees or agents". It was inadequate to refer as the Particulars did, to "all those who came into contact with the claimant".

27.
It should be said that none of this had been raised in the defences served. Counsel for the third defendant also sought to defend the fact that for the first time in the skeleton argument the third defendant raised an issue to the effect that Article 17 of Rome II compelled the court 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.

28.
These issues were raised at the beginning of the trial and I gave permission for the claimant to argue that Polish law governed the tortious claim, subject to pleading that issue more clearly by amendment. This was accomplished. I also allowed the third defendant to raise his un-pleaded arguments which, for reasons which will appear below, do not affect the result of this case in any event.

29.
I gave short oral reasons at the time and these are the fuller reasons for the decisions which I made. In my judgement, although the Particulars are not clearly pleaded, it is implicit that Polish law applies

to the whole of the tortious claim. It is also clear that, although particulars and clarification were requested and none given, the parties proceeded on the basis that Polish law applied to it. In my judgement, there was no measurable prejudice to the third defendant. The scope of the instructions to the Polish law expert and the substance of her report proceed on the basis Polish law applied to the Tort claim. None of the defendants chose to rely upon contrary expert evidence, nor did they take any issue with the scope and admissibility of the report. In the circumstances, it could not be said the third defendant was in any way taken by surprise in my view, nor in the event, prejudiced.

30.
Mr Matthew Chapman QC explained that the second report of the claimant's Polish law expert was helpful with regard to points taken for the first time in the skeleton argument for the third defendant. He also indicated that he was able to meet the new arguments raised by the third defendant, submitting there was in any event nothing in them. Neither side was in my judgment prejudiced by this late flurry of activity in articulating the issues. I had asked for a list of issues for the very reason that it was unclear immediately before trial. In UK Learning Academy v Secretary of State for Education [2020] EWCA Civ 370 Lord Justice Richards said the following in paragraph [11]:

"...the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate..... That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."

31.
It would have been better had the Polish law issue been clearly pleaded at the start. However, in the present case, in my judgement, the pleading points of the third defendant, even if technically available to them, ought not to defeat the proper determination of the issues which had, (save for the third defendant's own late points), been in play for a long time. The claimant's acceptance that they could meet these new points reassured the court that no prejudice was forthcoming which should prevent them from being raised.

Facts underlying the claim

32.
Ms Clarke explained in her evidence, the totality of which I accept, that she had spent several years deciding whether or not to have cosmetic surgery and in 2014 felt that the time was right to undergo breast augmentation and uplift and thigh liposuction procedures. In about August 2014 she conducted internet research as to possible providers and found the europesurgery.uk.com website. It had taken many years to save the money required.

33.
This website was written in English and the available surgical procedures and accommodation options were priced in sterling; she explains that the website recommended that getting the surgery done in Poland would be much cheaper than in the UK. It advertised consultations in the UK at a number of UK addresses, followed by surgery in Poland provided by UK-trained, UK-registered surgeons with

fluent English language skills, most prominent among them, the first defendant. Mr Kaleciński's photograph, background and details appeared prominently on the website; there were endorsements on the site from UK celebrities. The clinic in Wroclaw which was used by Mr Kaleciński in his clinical practice was also described on the website. The first and second defendants admitted the language of the website and the advertising of consultations as set out above. The print-out of the website before the court shows that the contention concerning celebrity endorsement and the prominence of the first defendant's photograph is also made out.

34.
The claimant relied in particular on the following features of the website:

"a. It was written in the English language and the available surgical procedures and accommodation options were priced in pounds sterling;

b.
It advertised consultations in the UK (at a number of UK addresses) followed by surgery in Poland provided by UK-trained, UK-registered surgeons with fluent English language skills (most prominent among them, the First Defendant);

c.
It contained UK celebrity endorsements;

d.
The First Defendant's photograph, background and details appeared prominently on the website;

e.
The Second Defendant clinic in Wroclaw (used by the First Defendant in his clinical practice) was also described on the said website."

35.
The following description of the interaction of the claimant with the first and second defendants is taken directly from paragraphs in the Particulars of Claim which are admitted by the first and second defendants. The third defendant did not plead to the factual Particulars asserted by the claimant.

36.
Ms Clarke stated it was attractive to have all of the arrangements made for her and just turn up to have the surgery, and have a short getaway afterwards. She was extremely reassured that the website informed her Mr Kaleciński used to practice in the NHS and was also registered with the GMC. She therefore thought it would be like having surgery in the UK. On 12 June 2014 she sent an email to the europesurgery.uk.com website which read as follows:

"Hello, I'm looking at prices from a breast uplift with implant. I'm also after a specific look - I like a high nipple (higher than I see in uplift pictures) is this something 1 can decide? I also want a 'tight' breast with little movement."

37.
On the same day a David White of europesurgery.uk.com in an email sent from the email address of Bridget White, replied on behalf of the clinic asking the claimant to send photographs of her chest area from the front and both sides for review by the surgeon. On 12 August 2014 the claimant sent photographs by email and stated:

“There are lots of stretch marks on my boobs you can't see very well in the photos. I'd like upper/inner thigh lipo and breast uplift possible implant.”

38.
On 20 August 2014 the claimant emailed europesurgery.uk.com stating:

“Please confirm you got 4 photos (x 2 boobs and x 2 Thighs). Upper Thigh Gap lipo and Breast Lift possible implant.”

39.
On 22 August 2014 David White replied by email to state:

“Just to confirm the surgeon has now reviewed your photos and he feels you are suitable for surgery. His recommendations are Qualifies for thigh liposuction and breast uplift.”

40.
The claimant responded by email dated 22 August 2014 stating:

“I would like to come in January 2015. Please advise on costs.”

41.
David White (again, from the email address of Bridget White) stated:

“The cost of thigh liposuction and a breast uplift is £3,240. We have all weekdays in January available from the 7th of January onwards. If you would like to book surgery all you have to do is confirm the day you prefer by email and then we can arrange this for you.”

42.
It was arranged that the claimant would travel to Poland and would undergo surgery on 7 January 2015.

43.
Ms Clarke describes David and Bridget White as her contacts during the enquiry and booking process: it was they who gave her confirmation, and on the basis of it she went ahead and booked the flights, paying for the accommodation upfront at the time as directed by them. It was also confirmed that she would be picked up at the airport by the clinic. The Whites also told her she did not have to pay any money towards the accommodation or the surgery before going to Poland, she should take cash with her to pay for the accommodation when she got there and that she would then make a bank transfer for the surgery when she was seen at the clinic. After the contract had been entered, when the claimant travelled to Poland on 6 January 2015, with her mother, the Whites were on the same flight. David White spoke with the claimant, he confirmed to her the surgeon’s view that she was a good candidate for surgery. They explained that they flew over to Poland once a month to check on the clinic and the surgeries. David White also told her he “sorts everything out before the surgery” and “looks at the pictures himself and decides whether someone is a good candidate”. The first and second defendants admit that David and Bridget White were “agents of the Clinic in the UK”, and they provided a pickup and delivery service to the claimant.

44.
I say at the outset that in my judgement, given the email exchanges, it is clear they were agents of the clinic generally with ostensible authority to bind the clinic with regard to facilitating its business and not merely as a kind of taxi service for clients.

45.
Turning to the pre-operative matters. On or about 22 November 2014 Ms Clarke attended a consultation with Mr Kaleciński before her trip to Poland at a clinic in the UK, Upper Wimpole Street, London. The doctor discussed the surgical procedures with the claimant and explained the size of implants that would be used and where the liposuction would be performed. She was informed that the procedures would be straightforward - and would have been much more expensive had they been booked with him in England. He was happy to talk through the surgery and she said he made her feel at ease.

46.
The claimant travelled to Poland with her mother as companion, and they were picked up as arranged by a driver, checking in and paying for the accommodation. The claimant was then picked up the following day and taken to the clinic early in the morning. She explains she saw a nurse who performed some blood tests and then had a quick consultation with Mr Kaleciński and a woman whom she later learned was Dr Martha Wilczyńska-Staniul, also a surgeon at the clinic. She had a psychiatric assessment and was told that everything was fine to proceed with the surgery. Mr Kaleciński asked her to transfer £4,320.00 for the cost of the surgery into his personal bank account which she did. This fee was, apart from monies paid for travel and accommodation, the only fee the claimant paid in respect of the surgery and services she received.

47.
She returned later to the clinic and was asked to shower with “special soap”, as directed by the clinic’s staff, and was taken into surgery at 4:30 PM. After general anaesthetic she woke up in the recovery room at about 7 or 8 PM and slept most of that night. The next morning, 9 January 2015, she was visited by Mr Kaleciński who examined her and said she could go back to the hotel but would need to return to the clinic each day for the next five days so she could be checked.

48.
Later that evening, after eating, Ms Clarke became shivery and extremely tired; believing it was the surgery and the anaesthetic she went to bed. Returning to the clinic the next day, she was told they were to change her dressings – she was in tears and describes that she was “in absolute agony”. She told the nurse she was shivery and felt feverish but was told she was absolutely fine and was to go back to the hotel. She was not sure that nurse fully understood her, but she was sure that her behaviour showed the nurse she was in a great deal of discomfort. She did not think the nurse made any note, and since the nurse was not concerned, she did not ask to see Mr Kaleciński whom it had been arranged she would see personally five days after the surgery. Ms Clarke describes sleeping the whole of that afternoon because she was in so much pain and so exhausted. Later that night, she had to put on her thermals because she was shivering and freezing cold. She thought she might be having a reaction to the anaesthetic.

49.
She returned to the clinic the next day, which was the weekend, there were nurses available. She was feeling hot and cold, feverish and achy but says she was ignored and was sent home and may have been given some tablets. On 11 January 2015 she returned to see Mr Kaleciński but was told he’d gone to the UK; she describes herself as being in agony and extremely upset. The nurse called Dr Wilczyńska-Staniul. Ms Clarke explained how she was feeling to her, and recalls the doctor mentioned the word “infection”. However, she was told she was fine and was to return to the hotel. She was given medication for the pain and compression leggings for the liposuction sites. The next day when she attended the clinic for the dressings to be changed and to see Mr Kaleciński, she was in floods of

tears before she had even tried to take off her underwear. She was asked to lie down by the nurse but resisted as the pain was worse in that position. She was screaming and crying and refused to take off her bra so the nurse called for Dr Wilczyńska-Staniul. Ms Clarke waited for about an hour to see her; she prescribed tramadol for the pain. The claimant explained her symptoms but was told to take the antibiotics. She then left the clinic. The following day she was seen by Mr Kaleciński who told her to lie down as he wanted to examine her but she was in so much pain that she was screaming. Dr Wilczyńska-Staniul came in and she recalls them speaking in Polish in front of her; Mr Kaleciński also said he thought her bra was the wrong size for her and that she had a very low pain threshold. They gave her a larger bra. She said she still had the fever and was told to keep taking the antibiotics and the Tramadol and she would get better. Returning to the clinic to see Mr Kaleciński again, she recalls falling asleep and being put in a wheelchair. He told her the implants would be taken out if she was no better by the morning. She stayed in the clinic overnight.

50.
In the morning Mr Kaleciński removed the implants and drains were put in - they told her for 24 hours. When Ms Clarke told Mr Kaleciński that her flight departed at 6 AM the next day he said she would be absolutely fine to fly, or if she wanted, she could “stay in Poland for a bit longer for a holiday”. He told her to go to her GP once home to have her dressings changed. Accordingly, the drains were removed and the claimant left the hospital. That evening she felt too ill to travel so her mother made plans for them to stay a little longer. At about midnight Ms Clarke woke up drenched in sweat, with the shivers, and called the emergency numbers that she’d been given by Mr Kaleciński including one for his personal mobile. There was no answer from either, nor from the clinic’s taxi driver. Having decided she just had to get home, she took a private cab to the airport boarding the 6 AM flight in a wheelchair. She remembered little about the flight other than she was “both shivering and burning up”.

51.
Before leaving Poland Ms Clarke spoke with her parent in England. Ms Clarke’s parent (who also gave live evidence to this Court) is a retired charge nurse and, fortunately, was at the airport waiting to meet Ms Clarke, took her temperature and pulse (recorded as 39.5 degrees and 136 beats per minute respectively) and rushed her straight to Southampton Hospital Accident and Emergency Department. Ms Clarke does not recall the journey there at all.

52.
Once at the Accident and Emergency Department the claimant was quickly diagnosed as suffering from severe sepsis. She went for immediate surgery to clean out the wounds and thence to the ITU. There was a series of washouts of the wounds under anaesthetic between 14 and 17 January 2015 then Ms Clarke was transferred to a specialist centre for burns and plastic surgery at the Salisbury Hospital where a PICC line was inserted for intravenous antibiotics. Further washouts on 19, 21 and 23 January 2015 removed the necrotic and infected tissue including from the infected left thigh liposuction site. On 28 January 2015 Ms Clarke went for a final washout, and the surgeon closed up the wounds on her breasts she had two skin grafts in total, remaining in hospital for five days thereafter. Following her final discharge from hospital on 2 February 2015 she underwent reconstructive breast surgery, privately, at Spire Southampton Hospital and revision procedures on 10 December 2015 and 6 July 2016.

53.
The evidence on these matters was consistent and unchallenged from the witnesses. I find these matters set out above as facts.

54.
Ms Clarke’s parent who had 10 years’ nursing experience told the Court Laura Clarke had, before the surgery, been a very successful and outgoing nightclub dancer and stripper. She had subsequently been unable to return to that job where her body was on show.

55.
Phone calls with the claimant indicated she must be suffering an infection. She had been in too much pain to speak with her parent and Ms Clarke’s mother was very frightened. Her parent was concerned it might be MRSA and was on the point of travelling to Poland. When they arrived back in the UK her parent “drove like a maniac” to get her to the hospital in time having examined her in the cloakrooms at the airport, and seeing necrotic tissue, realised she needed A and E immediately. In fact she got there “in the nick of time” as it appeared to be either necrotising fasciitis or sepsis.

56.
She was transferred to Salisbury; her parent noted she had become very withdrawn not wishing to see her young children or her partner.

57.
I accept Ms Clarke’s parent’s evidence in its entirety.

The Expert Witness

58.
The claimant relies upon three expert reports in respect of the medical aspects of the case. Two are from Mr Fulvio Urso-Baiarda BM BCh MA Hons (Oxon) MD (RES) FRCS (Plast) who has both an NHS and a private practice involving breast surgery both reconstructive and cosmetic. He has the usual memberships and affiliations, and trained in a Higher Surgical Training Rotation at the Yorkshire Deanery and cosmetic sub-specialisation through a National Interface Fellowship in Cosmetic Surgery with a Fellowship in Aesthetic Surgery in Manhattan. He is the editor and co-author of a textbook called “Evidence-Based Cosmetic Surgery”. He states that his practice includes the management of life-threatening soft-tissue infections when they are referred to him. He is an instructor in Advanced Trauma Life Support appointed by the Royal College of Surgeons. I have no hesitation in accepting the opinion of Mr Urso-Baiarda on the matters upon which he has reported for this case. The gist of his findings is as follows.

59.
On the standard of surgery he says that the development of multiple infected sites could not be attributed to bad luck. It was more likely than not to represent what he called a “procedural problem”. It is most likely that the surgery was not properly conducted by the surgeon and that the facilities in which it was carried out were inadequate and/or the decontamination measures in place were ineffective. The gist of his evidence was that it was most significant that three independent sites of surgery had become infected.

60.
In terms of the post-operative treatment, based upon the medical records obtained within the UK (none being forthcoming from Poland), and the evidence of the claimant and witnesses, it was his “strongly held opinion” that the claimant’s symptoms provided an ample basis for requiring her urgent return to theatre with a suspected infection at the time of her first post-operative attendance at the clinic. This became the more so on each subsequent visit over the following week. The definitive treatment for a severe infection was only commenced on her return to the UK, this delay worsened

her final outcome. It increased the likelihood of her suffering what he calls “grave consequences from her injury, including death”. It is his opinion that in failing to manage the potentially life-threatening complications post-surgery, the treatment provided by both of the doctors and by the clinic fell far below an acceptable standard. He comments that the unanswered emergency contact constituted inadequate provision for urgent post-operative care.

61.
Mr Urso-Baiarda further observes, having studied the website entry which induced Laura Clarke to have surgery, that the description of Mr Kaleciński as 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 implies that the Polish doctor had obtained training to the level of a British surgical consultant. In fact, Mr Kaleciński’s only experience of working within the NHS was as an intern in Welwyn Garden City. This refers to a junior doctor (it is not a UK medical professional term). The UK equivalent is a Core Trainee (erstwhile Senior House Officer) which he describes as “many years distant in experience and qualifications” from a day one NHS consultant and “some decades away from a UK senior consultant” in any speciality. Mr Kaleciński would not be recognised as a Plastic Surgeon in the UK. As far as he could see, the doctor had no specialist training in Plastic Surgery nor relevant qualifications and would not be qualified even to apply for specialist registration as a Plastic Surgeon in the UK. He said that whilst the description did not explicitly claim that Mr Kaleciński was a plastic surgeon, he “would not expect a lay person without considerable knowledge of the surgical training process to understand that he has never formally trained as one”. He concluded “as far as I have been able to ascertain” it is not the case that Mr Kaleciński has obtained training as a plastic surgeon to UK equivalent of a senior consultant.

62.
He observed that the reference to showering with “special soap” suggests this might have been Octenisan bodywash, which is routinely used for five days when MSSA (Methicillin Sensitive Staphylococcus Aureus) has been detected, together with Mupirocin nasal ointment. Had MSSA been detected preoperatively, however, a single shower on the day of surgery would be inadequate – if it had not, then its use would be unnecessary.

63.
Mr Urso-Baiarda had available to him the records reflecting the claimant’s attendance in the Emergency Department at the University Hospital Southampton on 14 January 2015 at 11 AM. They reflect that she was taken urgently to theatre with surgery in the evening and transferred into the ITU at 7:30 PM. The claimant was at once diagnosed with severe sepsis. She underwent a washout and debridement of her breasts four times in total and was given strong antibiotics. It would appear her family were told that she might not survive. On 18 January 2015 she was transferred to Salisbury Hospital Burns Unit for further management and given intravenous antibiotics. She required split skin grafting to the nipples because a quantity of tissue had had to be removed. The skin graft carried out left her breasts looking red and the scars were stretched: the plastic surgeon under whose care she was at Salisbury Hospital had indicated she would require reconstruction and nipple tattoos, which took place in due course. She had lost approximately 60% of the skin of both breasts.

64.
The expert witness deals also with the claimant’s own evidence that she felt completely disfigured “completely flat and … horrendous”. She received psychological counselling because she was severely self-conscious as a result of what happened and her well-paying job was in jeopardy. She was also very

disturbed by what her family relayed, namely that had she arrived 12 hours later at the hospital, she would not have survived.

65.
Among the significant details noted in the expert's report, reading from the UK hospital's notes at the time of emergency operation, it is quite clear there was an extremely serious case of sepsis with copious purulent discharge from the incisions underneath her breasts and around the nipples. She had a diminished blood pressure reading, and an elevated heart rate with suppressed breathing. As the report notes "copious frank pus was expressed when gentle pressure was applied to either breast". The notes also reflect the fact that Ms Clarke required continuing fluid resuscitation through the evening and ran a fever. Phenylephrine appears to have been given through that evening. The severity of infection required a further operation the next day, as recorded, and indeed she returned to theatre for further washouts thereafter.

66.
Cellulitis was also noted in her left thigh which required washing out as well.

67.
A striking note from her GP notes records on 3 February 2015 that she was "very thin and frail, not able to stand up straight and shuffling on walking, due to pain, found it difficult getting up from chair. Tearful + +". The GP notes also reflect how upset Laura Clarke was. She was in great distress at her appearance and her inability to work, she slept in jumpers and felt unable to have a relationship with her partner. By March 2015 there is a record it was impacting on every aspect of her day-to-day life.

68.
Her surgical notes include a copy of the Noa Clinic discharge letter from Mr Kaleciński. It is dated 14 January 2015 and states:

"Ms Laura Clarke – patient of mine – had surgery at my clinic in Poland on the 13th of January 2015. She underwent implants removal. First surgery, breast enlargement with uplift, was performed on 7th January. The follow up was complicated with an infection. Patient stayed at the clinic overnight and left the clinic the following day in good condition."

An oral antibiotic prescription was mentioned in the letter.

69.
Mr Urso-Baiarda's second report detailed the claimant's condition at the end of March 2016. It recorded that the claimant was unable to carry out her previous work as a lap dancer and stripper because of her physical scars and the loss of self-confidence. The injuries gave her an increased risk of developing capsular contracture which might require further surgery. Further treatment and improvement was possible but it could not replicate the effects she would have achieved had her surgical procedures been uncomplicated. Her scarring might improve but it would not disappear and there was no cure for her problems of nipple projection, in particular on the left side. She had acquired nipple tattoos by the end of March 2016.

70.
Mr Urso-Baiarda expressed the view that Ms Clarke's lack of confidence and reluctance to reveal her body either professionally or for strangers was reasonable and understandable in the circumstances. Such reconstruction as there had been was good, and she had made a good physical recovery from her injuries but the permanent physical scarring would adversely affect her ability to earn her living

as before. It would never be possible to diminish the extent of her scarring to that which would have ensued following a well conducted, uncomplicated, primary breast mastopexy.

71.
Mr Urso-Baiarda said that the implants were easily palpable, although modest in size, probably resulting from a loss of breast tissue because of the surgical debridements for the severe infection. Fat grafting could improve those sites, requiring two operative sessions. A periareolar scar revision would improve her scarring appearance. Tattooing would be difficult to retain on split skin graft tissue. That could be excised and replaced with full thickness skin graft which would retain a tattoo longer than the few years it would otherwise persist. The presence of a medial thigh abscess on her left leg had produced a prominent hypertrophic scar that might be amenable to further revision. He estimated the cost of corrective surgery, over three stages, as £22,450. The photographs before the court illustrate the extent of the injuries and reflect the seriousness as described.

72.
Dr Andrew Mogg, a consultant psychiatrist at the Maudsley Hospital and Honorary Senior Lecturer at the Institute of Psychiatry, produced a report following a visit from the claimant in April 2016. Dr Mogg was of the view that she had a moderate depressive episode which, in the context of her history, which he set out, presented a higher than average risk. However, but for the surgery and its complications, it was his view she would not have become depressed at that time. She was not depressed at the time of his interview but had ongoing self-esteem and self-confidence issues given the scarring and the effect upon her self-image. It had also impacted her intimacy. He recommended individual CBT to come to terms with the aftermath of the surgery. The effect upon her confidence would reduce the kind of job that she was prepared to take on in the future and she was at risk of further episodes of depression, given her history and the current events.

73.
Again, I have no hesitation in accepting the opinions presented in these reports. The only defendant who appeared before the court made no submissions in respect of them.

The issues to be decided

74.
The issues that require decision are the following:

1.
Did the claimant have a contract for the carrying out of the surgery and consequent care, and if so

2.
Was that contract with the first defendant, or the second defendant or with both?

3.
What law is to be applied to the claimant’s claims in contract?

4.
What other claims does the claimant have, and against whom?

5.
What law is to be applied to such claims as the claimant has?

6.
What standard of care applies to any claim in contract and/or in tort?

7.
Given the applicable standards has the claimant made out her case

- (a) in contract and

- (b) in tort?

8.
Has the claimant shown the relevant breaches so as to found a case:

-
(a) in contract or

-
(b) in tort?

9.
Is the concept of vicarious liability relevant?

10.
Is the concept of the safety standards applicable in Poland relevant?

75.
I propose to deal with the first two issues together.

Did the claimant have a contract for the carrying out of the surgery and consequent care? Was that contract with the first defendant, or the second defendant or with both?

76.
A fair reading of the joint defence of the first and second defendants is to the effect that each accepts they were contractually bound to the claimant in respect of the surgery, consequent care and clinic services provided to her. Aside from this admission, in my judgement this also represents the position in law on the available evidence. The claimant's submission was that the clinic was Mr Kaleciński's corporate vehicle. The non-engagement of the first and second defendants in the proceedings, and the absence of meaningful disclosure has meant the court has to do the best it can with the materials to hand when seeking to sort out the true relationship between the parties. A contract is admitted both by the first and second defendants, and also the fact that the claimant was dealing as a consumer. She does not allege that she signed any contract or document, save for a consent form which the court has not seen. However, in my judgement the substance of the representations on the website upon which Ms Clarke clearly relied, were incorporated into the contract between her and the clinic together with Mr Kaleciński. In my judgement this was one contract but involving both parties: the surgeon and all the other care givers at the clinic, by means of the clinic (Noa Clinic Usługi Sp. z o.o), those incorporated representations were to the following effect. The first defendant would carry out the surgery and he would carry it out to the standard to be expected of a GMC registered surgeon proficient in plastic surgery. The service provided would include a consultation with Mr Kaleciński, and all requisite clinical nursing or specialist care required for the relevant surgery.

77.
It is relevant that the admitted agents of the clinic corresponded on behalf of the clinic in respect of the nature of the surgery to be carried out, the particular requirements of the claimant, the views of the surgeon, and the price. It included availability at the clinic, and a promise to arrange the surgery on the desired day. The terms mentioned above were supplemented by the representation that the

procedures would be suitable for the claimant (she asserts she was told by the first defendant that the procedures would be straight forward, which evidence I accept and interpret to mean that she was a suitable candidate for the surgery she desired). The presence of the second doctor, Martha Wilczyńska-Staniul, the provision of an informed consent document by which the claimant signed and understood that she would receive “1. Breast enlargement and uplift. 2. Liposuction on the following areas: thighs…” together with the fact of a general anaesthetic and the subsequent nursing care indicate that the contract was for a package of care. The payment of the single fee paid to the doctor underlines this feature and makes good the claimant’s oral submission that the clinic was the corporate embodiment of the first defendant’s medical services business.

78.
Further, the website described “our team” which included both of the doctors seen by the claimant at the clinic. The first and second defendant admitted in their defence:

“the Claimant was owed a duty of care by the first and/or second defendant to treat her with the care and skill of a standard recognised as proper by a responsible body of like qualified professionals…”

and further admitted that she had entered into a contract a term of which required provision of medical services to her at a like standard. This admission fortifies the court’s finding that the first and the second defendant were parties to a contract with the claimant for provision of all of the services to the claimant at the standard set out. This would include surgery, the operative and post-operative care, nursing and drugs et cetera.

79.
It is clear given that the first defendant and his wife were the sole shareholders in proportions as to 51% and 49%, the fact that he provided the surgical services and the clinic the other medical services, yet one fee was payable for all of them, and paid to him personally, that the agents who organised and negotiated with the claimant did so on behalf of the clinic and the surgeon, that this was a contract imposing joint and several liability upon the first and the second defendants.

80.
In my judgement the clinic (and its services), and Mr Kaleciński (and his services), are, whilst separate “entities”, jointly promising to provide a package of surgery and care and were jointly and severally making promises to do that. This makes sense of the otherwise ambiguous pleading of the first and second defendants who pleaded to an allegation that the contract was with the first and/or the second defendant. Mr Chapman submitted that there might be no particular magic as to whether the claimant contracted with the first or with the second defendant or with both. I tend to agree. The third defendant, in spite of the pleadings argued that the clinic was not a contracting party. I disagree. On the available documents, the claimant has shown it is more likely than not that the contract was as I describe above. Whether or not contractual documentation exists, (none has been shown to the court), I am satisfied on the evidence of the claimant, the evidence from the website, and the exchanges by email with the agents, and the claimant’s consultation in London with the first defendant, that the position is more likely than not to be as I have set out. It is, of course, a more difficult analysis to undertake given the non-compliance of the defendants with their obligations of disclosure. The absence of contrary evidence, merely assertion on behalf of the third defendant, is helpful to the claimant. The absence of a contract of employment between the second defendant and the first defendant, or any other contracts between the clinic and its other staff, is not of significant weight. The interweaving of the first defendant’s activities with those of the second defendant and the existence of a surgery and treatment package support the analysis.

81.
The third defendant also raised a pleading point with regard to the terms of the contract and said that it was not expressly pleaded that what was on the website was incorporated. In Mr Mackenzie's submission it constituted only an invitation to treat and not an offer available for acceptance. I do not accept that analysis in respect of all matters set out on the website as set out above. Whilst of course it is the case that not everything that is said before the conclusion of a contract is incorporated as a term. The representations about the standing and experience of the first defendant do not, however, fall into the category of mere inducements or "mere puff". It was important to the claimant, indeed to any potential candidate for surgery, to understand and trust the qualification and experience of the potential surgeon. The centrality for the claimant and, (objectively judged) the intention of the clinic and the doctor, was in my judgement to form legal relations on the basis that the standard of care would be the same as a patient might expect were the surgery to be carried out in the UK. There was otherwise no purpose in the representations about Mr Kaleciński's registration and training. I do not need to deal at any length with the other terms which may have been incorporated: it was in respect of the standard of care that issue was taken. I do not accept as was also argued that the pleading was inadequate to found the submission made by the claimant.

82.
I do not accept as was argued by the clinic that it was a contract only with the first defendant, for the reasons I have set out. Further, the chronology indicates that it was towards the end of August 2014 that the claimant agreed to undergo the surgery following contact from David and Bridget White, the agents of the clinic. The finalisation of her plans was carried out through them and reinforces the case that a contractual relationship with the clinic existed, which was brokered by them, as agents for the clinic as well as Mr Kaleciński.

What law is to be applied to the claimant's claims in contract?

83.
The parties are agreed that pursuant to Article 6(1) of Rome I that the contract is governed by English law as the claimant was a consumer, and the first and the second defendants were acting in the course of their business, having directed their professional activities to the United Kingdom. As there was no written contract before the court, nor was any such document alleged to have been brought into existence, there was no express choice of law clause to suggest a contrary case.

84.
It is convenient to take issues 4 and 5 together.

Did the claimant have any other claim (tort), and, if so, against whom, and what law is to be applied?

85.
As stated, the claimant pleaded her case in terms that the particulars supported either a contractual breach or breach of a tortious duty by the first and the second defendants and these were admitted by both defendants, the burden of their defence being a denial of breach. The claimant was permitted to plead in terms of the relevant part of the Polish Civil Code, namely Article 415 concerning duty, and Article 355 concerning the standard of care. There was no contention but that these were the relevant parts and a helpful report was relied upon by the claimant by Ms Jolanta Budzowska, an attorney at law in Poland since 1996. She is a board member of the Pan-European Organisation of Personal Injury Lawyers based in Birmingham in England. She is also a member of the Association of Personal Injury

Lawyers and other relevant bodies. Again, there was no contention as to the appropriate framework and the manner in which Polish law is to be considered.

86.
Parliament and Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (OJ 2007 L199, p 40) ("Rome II") by Article 4(1) governs the issues of breach of duty and contributory negligence. The allegation of contributory negligence, made in the pleadings, was abandoned at the hearing by the third defendant.

87.
Matters of procedure and evidence are for the law of the English court (Article 1(3)) but matters of convention and practice adopted by the foreign court are included in the word, "law" in Article 15 and must be construed broadly see Wall v Mutuelle De Poitiers Assurances [2014] 1 WLR 4263 (CA). As Soole J in Syred v PZU SA (QB) [2016] 1 WLR 3211 (QB) has emphasised, where the foreign law had given a broad discretion to a judge, an English judge should likewise recognise and give effect to it. Further, and generally, the English Court is obliged to do the best it can on the basis of the foreign law opinion available to it.

88.
My attention was drawn to the decision of Cavanagh J in Scales v MIB [2020] EWHC 1747 (QB). In the event, however the approach to damages and indeed, the claimant's approach to quantum was not challenged by the third defendant nor was there any contest as to the content of Polish law in the current context. It is convenient to set out the essentials of the expert material before the court as it is relevant to the matters in issue on the tortious claim.

89.
With regard to that claim against the first and second defendants, in her report dated 21 April 2021, Ms Budzowska stated that the definition of tort under Polish law on the basis of Article 415 of the Civil Code was:

"that any person who by his or her fault caused damage to another person shall be obliged to redress it."

Accordingly, the prerequisites to liability were fault, damage and a causal relationship. She said for:

"fault to be attributed to a person their act or omission must be unlawful. Unlawfulness is…breaking any provisions of the law, or breaking common and universally binding - although non-codified norms, that prohibit behaviour which causes damage to another person".

Further,

"even the slightest negligence arising from the slightest fault is sufficient to satisfy the requisite of tort liability"

she referred to this doctrine as "culpa levissima". Ms Budzowska referred also in Article 361 to the effect that:

"the person responsible for the damage shall be liable only for the normal effects of the act or omission from which the damage resulted…that is all effects that could be expected to occur normally as a result of a specific act or omission even if they are very rare,…but…does not include those effects that are a result of a coincidence".

However, she pointed to a legal presumption in medical negligence cases which is widely accepted. In such cases, including errors in treatment, it is often not possible to be certain about a causal relationship, and it is sufficient for the plaintiff to prove the negligence itself, the damage as well as a high degree of probability that the negligence is causative of the damage. Where this is so, to avoid liability the defendant must then prove that the cause of the damage was different. It is a matter for the judgment of the court in difficult cases as to whether the degree of probability shown is sufficiently high in the circumstances of that case.

90.
The second report of Ms Budzowska for which I gave permission at the hearing, which is dated 02 June 2021 deals with issues of joint and several liability in clinical negligence, responsibility of the clinic or clinic owner in the context of employment contracts, and whether the surgeon and the clinic owe commensurate duties of care to a patient.

91.
For present purposes it is the first of these that is of relevance. Ms Budzowska refers to Article 441(1) of the Civil Code explaining that it provides “if several persons are liable for damage caused by tort, their liability is joint and several”. The plaintiff has the right to choose amongst those persons liable jointly and severally, whom he or she wishes to sue. The claimant may recover the entirety of their damages from either one and those parties may, amongst themselves, dispute the extent to which each is liable, but that does not involve the plaintiff. In other words, the liability is very similar to that under English law.

92.
I do not deal with the position as to employees and employment contracts. There was no evidence of such contracts before the court and it would be conjecture to reach conclusions on the actual relationship in law between the individuals who might be liable. The materials here in my judgement are clear on the issues of direct contractual liability.

Given the applicable standards has the claimant made out her case?

- (a) in contract and

- (b) in tort?

93.
I have come to the clear conclusion the claimant has proved her case in tort as well as in contract.

94.
The only relevant evidence before the court on liability is contained in the claimant’s materials which include the compelling reports referred to above. A striking summary of the effect of the medical evidence on the claimant’s case that the surgery and associated medical care both pre- and post-operatively was negligent and causative of her injury loss and damage is contained in the following paragraph from the report of Mr Urso-Baiarda:

“… the treatment provided to [the claimant] was inadequate pre-operatively, … there is evidence suggestive of a systematic failing in the delivery of post-operative care, and the level of care fell well below an acceptable standard post operatively, resulting in serious injury to [the claimant] which will have a long-term impact on her ability to work and engage in social activities.”

[Report dated 12 January 2016 paragraph “4.5 summary”.]

95.
In particular Mr Urso-Baiarda stated that the multiple infections could not be attributed to misfortune but on the balance of probabilities represented a problem in the process, and that the surgery was not properly conducted and the facilities where it was carried out were inadequate and/or contained inadequate decontamination measures. Regarding the post-operative period, after consideration of the claimant's notes, and assessing the state in which the claimant arrived, eventually, at hospital in the UK, he stated it was his:

"strongly held opinion that the claimant's symptoms were a basis for urgently requiring her return to theatre with a suspected infection on the first time she reattended at the clinic, … and saw a nurse describing her agony, and in tears when her dressings were changed."

The failure to treat her properly is described as increasing the likelihood of her suffering grave consequences which included death. He describes the failure adequately to manage her potentially life-threatening complications as falling "far below an acceptable standard".

96.
It is the expert's opinion that it was treatment provided by the first defendant, and the other doctor Ms Wilczyńska-Staniul, and by the clinic that fell far below the acceptable standard.

97.
I have rejected any suggestion that there is a failure adequately to plead responsibility for the negligence. It is clear that both the failure properly to guard against infection, and also the post-operative treatment were causative of the pain and suffering of the claimant and are inextricably intertwined. Given that the contract in my judgement was for a set of services to be provided by the first defendant and the second defendant, and their liability under contract and in tort is joint and several, there is no meaningful distinction in the responsibilities for the pain and suffering. The standard of care outlined as necessary by the Polish law expert is amply fulfilled by the terms of the report from Mr Urso-Baiarda. It is striking that the description of the standard of care received by the claimant is in terms that it "fell far below" acceptable standards. As the claimant argued, orally, the academic reports from which Mr Urso-Baiarda relied concerning infections in the course of breast augmentation shows there is a vanishingly small risk of infection, absent entry by infecting agents in the process, through a failure to take routine precautions.

98.
Mr Urso-Baiarda is critical of the manner with regard to the post-operative care. Striking criticism is made of the inaction of the nursing staff at the clinic. He underlines that, if left untreated, the claimant's infection could easily have produced a fatal outcome. This chimes with the evidence given by the claimant that her family had been told she might not survive when treated at A&E. I accept, as submitted on behalf of the claimant, that Mr Urso-Baiarda reasons back from the degree of injury evident on the hospital notes in the UK, relying on the only coherent body of medical records produced in the case. He looks at the standard of surgery in post-operative care, and the fact that three out of four unconnected sites were infected, at the severity of the infection and the speed at which it spread. These all support his clear opinion of the origin, nature and effect of infection and its negligent cause.

99.
I have no hesitation in concluding that the case of negligence is made out against both the first and second defendants.

100.
It was argued and accepted that the same standard attached to the contractual case under English law. On the basis of Mr Urso-Baiarda's reports it is clear that the implied standard of care in the contract between the parties was breached by the defendants.

101.
The third defendant argued that it was not possible to be critical in this case given that the law requires evidence to support the relevant standard of care by reference to the particular post occupied by the alleged tortfeasor. A precise comparison is necessary Mr Mackenzie submitted, and it is not possible to compare a Polish plastic surgeon on the basis of an English plastic surgeon's opinion. Different techniques, training and knowledge may be in play. In any event it was said we do not have the appropriate evidence to assess the standard of care, for example for the nurses. Differences in knowledge and training may be profound, and Mr Urso-Baiarda does not differentiate between the standards of care.

102.
In argument I put to Mr Mackenzie for the third defendant that the trenchant quality of the judgement reached by Mr Urso-Baiarda meant that subtle differences were not in play on these facts. He submitted that a particular comparison could not be made in the present case. I did not understand Mr Mackenzie to be saying that the court could however never come to such a conclusion on appropriately striking evidence. It was his case that in the present case there might be reasons for the failures such as training or different approaches that rendered the apparent striking failures to be nothing of the sort. I reject his submission for the same reason as his submission (which I deal with next) concerning the relevance or otherwise of the "package holiday cases". The facts of this case and the findings of the expert mean that these arguments go nowhere.

Is the concept of the safety standards applicable in Poland a relevant one for the present case?

103.
This submission proceeding from the proposition that in medical negligence cases it is necessary to be specific as to the role and circumstances of the individual professional, advanced to the proposition that only local standards of medical operation were relevant in case of medical negligence performed abroad. This was argued by an analogy with the well known cases, which the third defendant put before the court which imposed local safety standards in the context of domestic package travel to foreign destinations.

104.
The fundamental proposition relied upon was that an English standard of care could not be transposed to an alleged breach of duty in a foreign location. The courts had declined to impose an English standard of care regarding acts abroad, and to expect uniformity in medical procedures, as required of safety glass or buildings and materials regulations was unrealistic. The standard could not (on the authorities) be transposed from England, and without evidence of that local standard it was submitted that the claim cannot be made out, since it was not acceptable to judge by reference to standards reasonably to be expected of a similar professional operating in England or Wales.

105.
Reference was made to paragraph [16] of Wilson v Best Travel Ltd [1993] 1 All ER 353, the case of the plaintiff who fell through a glass patio door on holiday in Greece. The glass complied with Greek safety standards but not with English safety standards. It was not a breach of duty, so the court held,

for a tour operator to provide a hotel that complied only with local as opposed to English, safety standards. The third defendant referred also to Evans v Kosmar Villa Holidays Ltd [2007] EWCA Civ 1003 for the proposition that evidence of the local standard required to be called. The case of Lougheed v On The Beach [2014] EWCA Civ 1538 Mr Mackenzie said supported the proposition that a claimant was required to produce evidence of local standards of care in any claim for a foreign tort. The Court of Appeal there held that what was missing at trial was any enquiry as to the general practice in establishments of the sort in question, in Spain. By analogy, the claimant in the current case had adduced no evidence of a Polish standard and therefore her claim must fail. This court is required to find a standard of care applicable to this Polish surgeon operating in Poland, absent such proof, the claim would fail.

106.
The claimant, (not without some justification) described the developed argument on this point as an ambush - it had been mentioned only in the skeleton argument delivered just before trial. There is in my judgement however nothing in it. The pleadings identified the defendant's agreement to the asserted standard of reasonable care and skill. In my judgement 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.

107.
That standard applies to the tortious duty also by reason of the representations made to which reference is made above.

108.
Even if I am wrong on that, the findings of Mr Urso-Baiarda 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 of Mr Urso-Baiarda put paid to any subtlety of distinction between local custom and English practice that might if Mr Mackenzie were correct, in other circumstances be considered relevant. 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.

109.
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. It was discussed at trial at greater length than is reflected in this judgment but it is unnecessary to go further here. It is clear that the evidence of Mr Urso-Baiarda supports the claimant's case that the care of the doctor and the clinic in tort fall strikingly below any acceptable standard. As Mr Chapman argued, in any event, in Lougheed, reference was made to egregious, blatant and life-threatening negligence (see paragraph 9). There are certain irreducible standards in life-threatening situations where local custom, practice and standards are irrelevant, and this was in my judgement, such a situation.

110.
Further, in any event there is no suggestion from the Polish law expert that there is a measurable difference in the standards applied in Poland in medical negligence cases and those in England.

111.

With respect to the third defendant. This insurance company is incorporated in Poland and, by admission, provided insurance cover to the second defendant. As set out, there is no issue but that a direct action in tort exists in the claimant against the third defendant as insurer and in answer to the claimant's Part 18 request of the third defendant, they admitted provision of insurance cover in respect of any civil liability arising out of damage resulting from plastic surgery procedures or cosmetic treatments. A maximum limit of indemnity of 220,000 PLN was admitted pursuant to policy number 4WR0910002. It follows that the third defendant is liable to the extent of the indemnity.

112.
The claimant has set out in her schedule of loss and damage a claim for pain, suffering and loss of amenity in the sum of £34,684.71 and her losses to date of trial as to the past totalling £27,891.99 the schedule total for future losses and expenditure is £92,497.47. No submissions were addressed to the court on the substance of the sums claimed nor the heads under which they were claimed. I say no more about them, but give judgement for the sums claimed, and on the bases set out for the reasons given above.