



Neutral Citation Number: [2023] EWHC 2794 (KB)

Case No: QB-2016-005735

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 November 2023

**Before:**

**DAVID PITTAWAY KC**  
**(Sitting as a Deputy Judge of the High Court)**

-----  
**Between:**

**ROGER MANN**  
**(Executor of the Estate of Denise Mann deceased)**

**Claimant**

**- and -**

**TOWARZYSTWO UBEZPIECZEN INTER**  
**POLSKA S.A**

**Defendants**

**- and-**

**NOA CLINIC – USLUGI MEDYCZNE SP.Z.O.O.**

**-and-**

**ADAM KALECINSKI**

-----  
-----

**Aliyah Akram** (instructed by **Irwin Mitchell**) for the **Claimant**  
**Feliks Kwiatkowski** (instructed by **Ardens**) for the **Defendant**

Hearing dates: 17 October 2023  
-----

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 9 November 2023 by circulation to the parties on their representatives by e-mail and by release to the National Archives.

## DAVID PITTAWAY KC:

### INTRODUCTION

1. This is an assessment of damages hearing arising out of a claim for damages following cosmetic surgery undertaken on Mrs Mann at the Noa Clinic, Poland by Dr Kalecinski. on or around 24 September 2013. Mrs Mann died on 8 February 2016. The cause of death, bronchopneumonia, was unrelated to the surgery.
2. The claim has had a tortuous procedural history.
3. Proceedings were issued on 20 September 2016 by Mr Mann, as his wife's executor against three defendants, Noa Clinic's Polish insurers, Towarzystwo Ubezpieczen Inter Polska S.A ("the insurers"), the Noa Clinic and Dr Kalecinski. The Particulars of Claim were served on 21 May 2017.
4. Mr Mann brought proceedings against the three defendants for breach of a contract made in England and Wales for the provision of cosmetic surgery by Dr Kalecinski at the premises of the Noa Clinic in Poland. The claim alleged that under Polish law Mr Mann had a direct right of action against the insurers, as the insurer of the Noa Clinic pursuant to Article 18 of Rome II. Mr Mann's case is that the governing law of the contract was that of England and Wales and, in respect of Dr Kalecinski and Noa Clinic, pursuant to Article 8(1) of the Brussels (1) Regulation (Regulation (EU) 1215/2012 of the European Parliament and of the Council) he was entitled to bring a claim in this jurisdiction. Further that Mrs Mann's injuries were caused by the negligent surgery by Dr Kalecinski for whom the Noa Clinic and the insurers were liable.
5. A default judgment was entered against Noa Clinic's insurers on 31 August 2017. The insurers applied to set aside that judgment on 14 April 2019. Master Thornett dismissed that application on 1 November 2021, after hearings on 11 November 2019, 29 July 2021 and 5 October 2021. On 24 March 2022 the claim against Dr Kalecinski and the clinic were stayed, pending disposal of the claim against the insurers. An appeal against Mater Thornett's order of 1 November 2023 was dismissed by Mrs Justice Foster on 3 May 2021.
6. The matter appeared before Caspar Glyn KC on 15 May 2023 for the assessment of damages hearing, which was adjourned following submissions made as to the purpose and effect of the default judgment. That hearing was also adjourned to allow Mr Mann to obtain expert medical evidence addressing causation.
7. Caspar Glyn KC directed that the following allegations had been conclusively determined against the insurers:
  - i) *“Failed to perform or undertake an adequate assessment of the deceased's needs prior to the operation;*
  - ii) *Failed to adequately warn the deceased of the risks involved in the prospective procedures;*
  - iii) *Failed to perform the thigh tuck und breast reduction procedures on the Deceased to an acceptable standard;*

- iv) *Negligently severed lymphatic vessels during surgery;*
  - v) *Failed to realise that that a lymphatic vessel had been severed and take appropriate action thereafter;*
  - vi) *Failed to diagnose nipple necrosis of the deceased's left nipple;*
  - vii) *Failed to adequately treat nipple necrosis of the deceased's left nipple;*
  - viii) *Failed to provide an appropriate standard of after care;”*
8. As well as the assessment of damages hearing before me, there remains an outstanding issue as to whether the limitation of the indemnity on the insurers policy, of 100,000 Euros, is inclusive or exclusive of the costs of these proceedings. Ms Akram, on behalf of Mr Mann, accepts that the damages claimed are now below 100,000 Euros, however, the limitation is of considerable importance to the question of costs. Both parties are agreed that in the absence of evidence from Polish legal experts, which is not available today, that issue should be put over to another hearing.

## **EVIDENCE**

9. Ms. Mann had a history of morbid obesity and multiple other physical and mental health conditions. In January 2010, she underwent a gastric bypass procedure on the NHS at St. Thomas’ Hospital, London. The procedure was successful, and her recovery was unremarkable. She subsequently lost more than 20 stones in weight, dropping from 38 to around 15 stone, reducing her BMI to 32. As a result of the massive weight loss, she was left with excessive skin, which caused her severe concern. This large amount of excess skin on her breasts, thighs and abdomen hung down and restricted her mobility. She was unsuccessful in seeking to have the excess skin removed by the NHS. Through searching the internet, she found the Noa Clinic, Poland where Dr Kalecinski was offering cosmetic surgery.
10. On 25 May 2013, Ms. Mann travelled to the Noa Clinic, Poland for the removal of the excess skin by Dr Kalecinski. After an initial brief consultation, Ms. Mann was considered to be a suitable candidate for multiple post-bariatric surgeries (abdominoplasty, breast reduction, thigh lift and liposuction to knees and thighs). She underwent the first session of surgery, and later told Mr Frati, consultant plastic surgeon, in 2015, that she was generally satisfied with the outcome. However, she was not completely happy with the appearance of her abdomen. She nonetheless decided to go back to the Noa Clinic for further surgery on her breasts and thighs. She returned to Poland on the 23 September 2013, where after a brief preoperative consultation, further surgery was carried out the following day by Dr Kalecinski.
11. The course of events that followed is set out in the agreed joint statement prepared by Mr Frati and Professor Myers, the parties’ expert plastic surgeons, on 22 July 2023.

*“2.11 She returned to the UK on 1 October 2013 having received Dr Kalecinski's reassurances, but her nipple remained black and started to deteriorate. She also reported tightness over the abdominal wound and the feeling that her abdomen was full of fluid particularly over her pubic area.*

2.12 Ms. Mann then noted that the nipple was getting worse. During the postoperative period, she repeatedly approached Dr Kalecinski in respect of her concerns but Dr Kalecinski told her that her nipple would heal of its own accord over time. The scars on her thighs started leaking clear fluid. On 14 October 2013, she was told by Dr Kolinski's assistant that this was normal, and that the fluid would drain away over time. She was advised to visit her GP for further management.

2.13 The fluid collection did not drain away, and it became increasingly painful. A large amount of pus fluid was continuously leaking from her thighs.

2.14 Ms. Mann again visited her GP who made an urgent referral to the NHS to attend Medway Hospital on 21 October 13 where she was admitted.

2.15 Whilst at the hospital, she underwent various investigations: including ultrasound and computerised tomography [CT] scans. She was assessed by the surgical team and was noted to have a necrotic left nipple with a wide area of superficial infection for which IV ABX administered.

2.16 The USS and CT scan showed abscesses in both her thighs, and an extensive infection to her left necrotic nipple. However, these former could not be removed via the USS. She was put on IV antibiotics. She underwent emergency surgery to have the collections evacuated from both thighs. A washout was also performed. The left leg in particular was shown to have an extensive liquefied collection measuring 190 x 178 mm. A lymphatic vessel was also noted to be cut during her surgery on 24 September 2013. VAC drains were inserted to both thighs wound and were connected to a pump to keep the wounds clean and stimulate healing.

2.17 Ms. Mann was kept for 10 days after the emergency procedure. She was discharged with VAC pumps still in situ.

2.18 After 2 days, she then returned to the A&E, and she was kept for five days during which she was draining a lot of fluid. At discharge the VAC was removed and her thighs wound were packed with gauze. A district nurse was arranged on a daily basis for wound care until June 2014.

2.19 Ms. Mann's infection eventually resolved but she was left with permanent injuries as a consequence. She had large areas of scar tissue on her thighs, stomach, arms and breasts and had poor contouring of her thighs. She had suffered seromas and cellulitis, and continued to suffer from lymphedema. Since then she had struggled to come to terms with what had happened to her and she remained deeply traumatised by her experience.

2.20 She attended the hospital and wound clinic on a regular basis for treatment. She also experienced significant and constant pain in her thighs. Ms. Mann reported a significant impact on her emotional wellbeing.

2.21 Upon review she was told that she has been left with poor scarring and poor contours of her thighs, for which revision surgery will be mandatory, and also suffers from lymphedema as a result, for which she is required to wear stockings. She was informed that she is likely to need revision surgery to her breast although the prospects of success are low. The overall outcome of all the surgery that she had undergone was poor.

2.22 In February 2016, Ms. Mann suddenly passed away in her sleep on 8 February 2016. The postmortem report showed that the cause of death was bronchopneumonia.”

12. Mr Frati prepared two expert reports dated 22 May 2016 and 27 June 2023. Professor Myers prepared one report on 14 October 2022. As I understand the position, when Mr Frati prepared his first report he examined Mrs Mann and was provided with colour photographs of the scarring. The photographs now only exist as poor quality photocopies. Professor Myers did not examine Mrs Mann and did not see the original photographs. There are two joint statements of 18 November 2022 and 22 July 2023.
13. Following the hearing before Caspar Glyn KC on 15 May 2023, the expert plastic surgeons considered causation at paragraph 4.19 of their second joint statement. Their criticisms of Dr Kalecinski’s competence as a plastic surgeon and the aftercare Mrs Mann received are damning. They concluded as follows:

“(a) *The failure to undertake an adequate assessment prior to surgery and the aggressive approach taken contributed to Mrs Mann’s post-operative complications (see also para 4.2);*

*(b) It is unlikely Mrs Mann would have proceeded with the surgery had she been adequately advised of the risks involved and the potential length of recovery;*

*(c) Poor surgical technique caused Mrs Mann’s breasts to be scarred and misshapen (see also paras 4.4 and 4.6) and her nipples to be irregular and uneven in shape, size and position (see also para 4.5) and likely contributed to the left nipple necrosis;*

*(d) Poor surgical technique contributed to the poor cosmetic outcome on her thighs;*

*(e) Any lack of infection control protocols and guidelines in the hospital and during the aftercare stage will have been instrumental in the postoperative infection, seroma (an accumulation of serous fluid) and wound breakdown;*

*(f) Poor aftercare also resulted in retracted and unsightly scars on Mrs Mann's breasts (see also para 4.6);*

*(g) Mismanagement after the diagnosis of nipple necrosis resulted in infection, which led to bad scarring, chronic inflammation and permanent pain in Mrs Mann's left nipple (paras also 4.7 and 4.8);*

*(h) Failure to provide appropriate aftercare, including early and premature discharge, caused wound breakdown, infection, cellulitis (an infection of the deeper layers of skin and the underlying tissue) and seroma in her thighs which led to unsightly scarring, permanent pain and discomfort and chronic lymphedema (tissue swelling) (see also para 4.17);*

*(i) Inadequate management of her infection caused permanent pain in Mrs Mann's breasts (para 4.10)."*

14. The expert plastic surgeons summarised Mrs Mann's condition as follows:

*"4.1 Mrs. Mann underwent multiple post-bariatric surgeries in two stages (May 2013 and September 2013) by Dr Kalecinski under the auspices of the Noa Clinic in Poland. Mrs. Mann developed serious complications (leg abscesses, left nipple necrosis) and thereby suffered a prolonged period of delayed healing which was very uncomfortable and made it impossible for her to work and to conduct a normal working life.*

...

*4.17 As a consequence of the prolonged lymphedema, seroma and cellulitis, Ms. Mann was left with severe and permanent injuries. In particular the delayed and poor management of the above complications significantly contributed to produce bad scarring, fibrosis which caused permanent pain, disfigurement, and chronic lymphedema. The delayed wound healing and breakdown along with the infection and subsequent seroma caused by early mobilisation and premature discharge after surgery, resulted in bad scarring. Due to the substandard surgical technique, these scars were also mal-positioned, off the natural groin crease. They appeared unsightly, irregular, retracted, hard and lumpy as a result of the complications of surgery. Both scars restricted Ms. Mann's range of thigh movements with the persistent pain and discomfort."*

15. I have had the advantage of hearing Mr Mann give oral evidence and accept that he has given an honest and truthful account of the care that he provided his wife before her death. He volunteered both in his witness statement and orally that he had primary responsibility for looking after their sons and the house before his wife's surgery. He had not worked fulltime as a carpenter since 2012 and his wife had not worked since before her youngest son had been born in 2004. He also accepts that his wife had

suffered from a number of disabling conditions, partly as a result of her weight, and partly as a result of depression before the surgery. He was taken by Mr Kwiatkowski to entries in the medical records that show that she had regularly attended her GP and hospital appointments before the surgery.

16. Mr Mann maintains that, following the surgery on 24 September 2016, there was a major step change in his wife's ability to function normally. She was unable to give him any meaningful assistance, spending her time lying on the sofa, often not dressing during the day, and losing interest in her children, which members of the family understandably found distressing. Whereas she had been able to carry out some housework and food shopping before the surgery, she was unable to do so afterwards. Initially she went upstairs once each day but by the end of her life was no longer doing so. When I asked Mr Mann about his wife's personal care after the surgery, it was evident that he had been responsible for assisting her to the bathroom, washing her, and being responsible for her personal cleanliness. He clearly also had to provide substantial emotional support to the whole family as a result of the failure of the cosmetic surgery.

## SUBMISSIONS

### Pain Suffering and Loss of Amenity

17. Ms Akram accepts that none of the categories in the *Judicial College Guidelines* (16th Ed.) directly relate to Mrs Mann's injuries. She referred me to Chapter 6 on Injuries to Internal Organs, which allows approximately between £25,000 to £60,000 for a range of injuries to internal organs, for example, kidney, bowels, and the digestive system, and Chapter 11 on Non-Facial Scarring, which allows for noticeable scarring £7,830 to £22,730 but admits that this is an area in which "*it is not possible to offer much useful guidance*".
18. Similarly, I was informed by Ms Akram that comparable reported cases are of limited assistance, Ms Akram derives some assistance from the case of *Rye v Fields Engine Service Ltd* (2003) in which £68,548 (updated for inflation and to take account of the *Simmons* uplift) was awarded to a claimant who suffered severe infections and significant scarring.
19. Given the nature of the suffering, and the devastating effect the failed cosmetic surgery had on Mrs Mann, Ms Akram submits that an appropriate award would be in the region of £42,500. She has calculated interest at 2% from service of the claim form on 7 May 2017 at £5,445.
20. Mr Kwiatkowski submits that the current edition of the *Judicial College Guidelines* contains the best guidance available. He relies upon Chapter 11, which contains the bracket for non-facial scarring of up to £22,730. He submits that the fact that Mrs Mann only lived for about 2 ½ years after the surgery is also a relevant consideration as to the size of any award. Even allowing for inflation to the date of the hearing, he submits that any reasonable award is below £30,000.

### Past care and assistance

21. Ms Akram submits that a figure of £25,803 is appropriate to cover the period between Mrs Mann's surgery and her death in 2016. The schedule itemises the claim for

additional care at 2 hours per day except for when Mrs Mann was in or had been recently discharged from hospital, when eight hours per day are claimed. The sum claimed also reduces towards the end of her life. Given the severity of Mrs Mann's post-surgery condition, Ms Akram submits that this is a modest claim for the additional care Mrs Mann was receiving after the surgery. In her skeleton argument, Ms Akram refers to two cases, *Grant v Secretary of State for Transport* [2017] EWHC 1663 (QB), 31 and *Welsh v Walsall Healthcare* [2018] EWHC 1917 (QB), 112, where the award for past care included emotional and practical support. Ms Akram has calculated interest at the special account rate from 8 February 2016 at £1,678

22. Mr Kwiatkowski accepts that damages are recoverable in principle and the financial methodology in the schedule, however, he puts Mr Mann to proof of the care delivered. He does not put forward an alternative figure but submits that Mrs Mann's pre-existing conditions significantly reduce the amount of additional care required. He cross-examined Mr Mann on the basis that he was already caring for his wife, children and house before his wife's surgery. I note that no deduction has been applied to the hourly rate to reflect the fact that Mr Mann was providing non-commercial gratuitous care.

#### **Past travel expenses**

23. Ms Akram has estimated travel expenses at £694 whereas Mr Kwiatkowski has allowed £219.05. The claim is advanced on the basis of travel to and from the hospital and Mrs Mann's GP surgery. The claim is fully itemised in the schedule. Mr Kwiatkowski accepts that that damages are recoverable in principle. He disputes the cost of travel to and from Poland for the surgery and the cost of accommodation in Poland, as being irrecoverable. Ms Akram calculates interest at the special account rate from 11 July 2015 at £47.

#### **Past surgery costs**

24. Ms Akram submits that Mr Mann is entitled to recover the cost of the surgery of £5,100, which is disputed by Mr Kwiatkowski. Ms Akram maintains that there was defective performance of the contract and as a result Mr Mann is entitled to recover the sum paid for those negligent services as wasted expenditure. Mr Kwiatkowski maintains that the loss does not form part of the consequential losses from the negligent surgery. Ms Akram has calculated the interest at the special account rate from 24 September 2013 at £392.

### **ASSESSMENT OF DAMAGES**

#### **Pain Suffering and Loss of amenity**

25. Whilst I accept that the *Judicial College Guidelines* do not give definitive guidance on this issue, it seems to me that the top bracket for Non-Facial Scarring of up to £22,730, does not reflect the scale of the disfigurement that Mrs Mann sustained, or the disabling effect upon her condition, both mental and physical, that she suffered. The extensive medical records I have seen indicate that she was a vulnerable person before she went to Poland to undergo the surgery, who suffered greatly as a result of Dr Kalecinski's inept surgical technique. There was a substantial physical element to Mrs Mann's disabilities following the surgery. Her ability to be mobile was significantly affected as a result of the physical injuries she sustained as well as the damage to her mental health.



26. In my view, that takes the case outside the bracket provided in the *Judicial College Guidelines* for Non-Facial Scarring. I should add that Ms Akram accepts that the case of *Rye Services* she referred me to is concerned with a claimant with more serious injuries. Whilst Mr Kwiatkowski makes the fair point that Mrs Mann only suffered for a period of about 2 ½ years before her unfortunate death, it seems to me that the award of general damages is closer to the figure submitted by Ms Akram of £42,500 than Mr Kwiatkowski's figure of below £30,000. I award £37,500 under this head of damage for the thoroughly miserable 2 ½ years Mrs Mann suffered after the surgery until her unfortunate death from unrelated causes.

### **Past care and assistance and Travel Expenses**

27. Turning to the items of past loss, I am satisfied that the level of personal care, and rates, claimed are a reasonable estimate of the additional care that Mr Mann provided. I am mindful that Mrs Mann may not have been contributing greatly to the household before the surgery. To this figure a 25% deduction should be made to reflect that Mr Mann was providing non-commercial gratuitous care. I allow the sums for transport for medical appointments as claimed.

### **Past Surgery and Travel Expenses to Poland**

28. The more difficult question arises as to whether Mr Mann is entitled to recover the cost of the original surgery and travel costs to and from Poland. I remind myself that the claim was pleaded in both contract and tort. Ms Akram maintains that the cost of the surgery, and associated travel costs, amount to wasted expenditure which Mr Mann should be entitled to recover. Mr Kwiatkowski submits that Mr Mann is only entitled to recover the losses as a result of Dr Kalecinski's breach of duty. Mr Kwiatkowski said in his skeleton argument that: "*those expenses cannot rationally be construed as having arisen in consequence of any breach by the [insurer] or its insured.*" For completeness, I should add that no further reconstructive surgery was carried out, which the expert plastic surgeons considered, if undertaken, had a poor prognosis. Both parties have referred me to passages in *McGregor on Damages* (21<sup>st</sup> Ed). but to no specific authorities on this issue.
29. There is remarkably little learning to be found in reported cases or in the textbooks on this subject. The position would have been simpler if the contract had been made after the *Consumer Rights Act 2015* came into force, in particular section 54, but that remedy is not available in this case.
30. It is trite law that the distinction between the award of damages in contract and tort lies, in the former case, in putting the claimant into the position they would have been in if the contract had been performed, and in the latter case, to restore as far as possible the status quo. In my view, it was clearly not possible to wind the clock back and put Mrs Mann in the position that she would have been had the surgery been carried out properly or to restore her to the condition she would have been in, if she had not undergone the surgery.
31. After careful consideration, I have come to the conclusion that the cosmetic surgery performed on Mrs Mann by Dr Kalecinski was so bad that it was valueless. In my view, Mrs Mann derived no benefit from it at all and only suffered as a result of it. There is

support for this reasoning in *Jackson and Powell Professional Negligence* [9<sup>th</sup> Ed.] at para 3.014, where it is said in the Chapter 3 on *Loss of Remuneration*:

*“The approach which is adopted in most cases, and which, it is submitted, is correct, is that where the defendant’s negligence renders the services provided valueless, the defendant is not entitled to recover (or to retain) any remuneration for the work in question.”*

32. If I am wrong, then, I would consider that there is authority to support Ms Akram’s submission that Mr Mann is entitled to recover the cost of the surgery, and the associated travel and accommodation costs, claimed as wasted expenditure, *Grange v Quinn* [2013] EWCA Civ 24, where the Court of Appeal allowed a claimant to recover a premium paid for a lease.
33. It follows that I reject Mr Kwiatkowski’s submissions that in principle there is no basis in law for the recovery of the cost of the surgery and travel costs to and from Poland.
34. I invited counsel to draw up an order for the total sum assessed and interest as claimed. I am informed that it is agreed between the parties that the total sum is £69,348. The parties should submit a draft order to me for approval, which should also contain directions for the trial of the remaining issue on the limitation of the indemnity, within 14 days of the judgment being handed down.