Global healthcare insights

Asia Pacific | EMEA | Latin America and the Caribbean | North America

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Kennedys

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Foreword

During Kennedys' annual global healthcare webinar programme in 2021, our medical malpractice specialists across the globe provided insights into the healthcare system and medical malpractice claims within their jurisdictions.

Whilst there are undoubtedly some commonalities between jurisdictions, it is evident that there are a number of nuances and differences with regard to the claims landscape, the framework within which those claims are brought and handled, and the level of damages awarded.

Against this background, Kennedys' medico-legal experts across Asia-Pacific, EMEA, Latin America, the Caribbean and North America highlight what was discussed, along with overviews of these types of claims in their regions, recent developments and emerging risks.

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About Kennedys

Healthcare is one of the most complex, fastest growing and heavily regulated industries, requiring specialised legal representation and a law firm that will help you think ahead. We're a fresh-thinking firm, and not afraid to bring new ideas to the table beyond the traditional realm of legal services.

Kennedys is a global law firm with particular expertise in litigation and dispute resolution, especially in defending insurance and liability claims. Our global, market-leading healthcare team has over 30 years' experience in successfully handling medical negligence claims and advising on clinical and health law issues.

Working with both private and public sectors, healthcare professionals and their insurers, Kennedys' legal and clinical experts across the world handle medico-legal matters on an international scale. Our team have significant experience in acting for a range of complex civil and multi-jurisdictional claims, along with managing both contentious and non-contentious matters.

Acting across jurisdictions and in both the public and private healthcare sectors gives us a unique understanding of healthcare law from every perspective. This enables Kennedys to deliver straightforward advice to clients, even when the issues are complex.

Global reach / Local expertise

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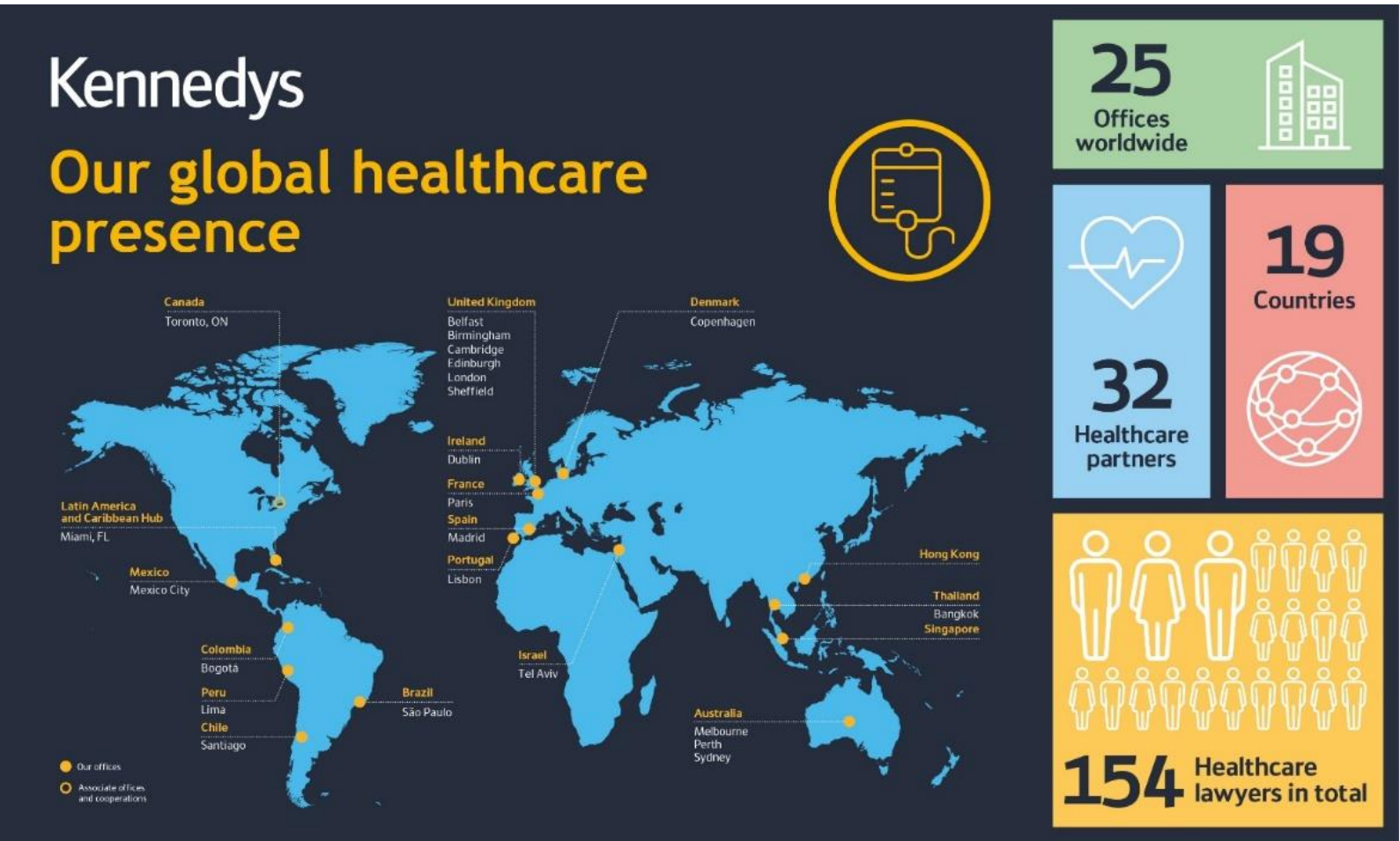

Asia Pacific

Australia

Victoria

In Victoria there are no pre-action protocols governing the conduct of medical malpractice claims prior to the issue of proceedings. Depending on the complexity and level of damages claimed, claims are either issued in the County Court or Supreme Court, the latter being the highest court in Victoria.

Limitation

The limitations period is three years from the date the cause of action is discoverable or six years in relation to infants or a person with a disability. There is also a long-stop period of 12 years from the date of the alleged negligence.

However, case law in Victoria demonstrates that the court is minded to extend the limitation period in certain circumstances. A recent example being a case in 2017 brought by a plaintiff where there was a 16 year delay in issuing proceedings, the Court of Appeal finding in his favour and extending the time period.

Civil Procedure Act 2010 — obligations

Parties to litigation in Victoria are bound by the Civil Procedure Act 2010 and must file certificates with the court attesting to compliance with the Act. The obligations under the Act include to act honestly, to only make claims with a proper basis, to narrow the issues in dispute, to minimise delay and to ensure costs are reasonable and proportionate.

Timeframes

The timeframe between the issuing of proceedings and a trial date in medical malpractice claims in Victoria is generally between 12 to 15 months, with directions hearings called in the event of delays occurring.

Mediation

In Victoria, mediation is compulsory and court-ordered. The settlement rate for mediation in Victoria is very high, with only approximately 1% of matters proceeding to trial.

Medical Board, Health Complaints Commissioner and the Coroners Court

Plaintiffs can and do go through the Medical Board, Health Complaints Commissioner and the Coroners Court before the time limit expires for bringing a civil claim. Expert reports and views as to the medical practitioner's conduct may then be used to assess the merit of a civil claim.

> **"Data in the higher courts has demonstrated that awards of damages have remained stable in recent years, with high settlement rates at mediation expected to continue."**
>
> *Anjali Woodford, Partner, Melbourne*

Damages and future legal landscape

Looking at the future legal landscape for medical malpractice claims in Victoria, data in the higher courts has demonstrated that awards of damages have remained stable in recent years, with high settlement rates at mediation expected to continue.

In the last two to three years we have seen a significant increase in the number of expedited claims (delay in diagnosis of metastatic cancer) and we anticipate that these may increase further as a result of the COVID-19 pandemic.

New South Wales

In New South Wales (NSW), the overwhelming majority of medical malpractice cases settle before trial and are very actively managed by the courts.

As is the case in Victoria, there are no pre-action protocols and most medical malpractice claims, once litigated, are dealt with in the District Court and Supreme Court of NSW. Similar to Victoria, limitation periods are three years after discoverability or 12 years from the act/omission (long stop). The question of discoverability is a much debated issue in NSW.

Alternative dispute resolution

Mediations and informal settlement conferences are often ordered and are all but compulsory in NSW.

> **"The courts are becoming increasingly prepared to order costs against a party who does not attend a mediation in good faith."**
>
> *Raylee Hartwell, Partner, Sydney*

The courts are becoming increasingly prepared to order costs against a party who does not attend a mediation in good faith.

There have also been recent cases where successful parties have not received costs because they did not participate in a court ordered mediation.

Costs cap

In matters where damages are no more than A$100,000, a costs cap applies limiting the costs a plaintiff can recover to either 20% of the amount recovered or A$10,000, whichever is greater (this includes lawyers and barristers fees) plus disbursements (such as photocopying). This means costs can be capped at for example A$20,000 for a A$100,000 claim.

COVID-19

We have not yet seen new areas of claim in relation to COVID-19 but we anticipate these may emerge in the future. We anticipate potentially a reduction in claims arising from elective surgery as those procedures have reduced due to the pandemic.

We anticipate that the particularly challenging circumstances of the pandemic will be factored into the standard to which doctors are likely to be held to during these difficult times. We have however seen an increase in disciplinary actions during the pandemic including claims concerning telehealth.

Western Australia

Claims for damages for medical negligence (medical malpractice) in Western Australia (WA) are commenced in the District Court of WA, which is the intermediate court, and a court of first instance. It has exclusive and unlimited jurisdiction in 'personal actions' (claims for damages in respect of the death or personal injury to a person).

If the decision of the primary court is appealed, it is heard by the Court of Appeal of the Supreme Court of WA.

As in Victoria and New South Wales, there are no mandatory steps or pre-action protocols to commencing an action for damages for medical negligence but claims are subject to case management and prescribed timetables from when the action is commenced.

Case management

The case management regime is as set out in the District Court Rules 2005 (WA). Usually, an action will progress through three stages of active case management, including compulsory participation in settlement negotiations at a 'pre-trial conference', conducted on a without prejudice basis to attempt to facilitate settlement.Parties to litigation in the District Court of WA are not limited to one pre-trial conference and can, by consent or on application, list a matter for a further pre-trial conference or a mediation conference in lieu of a pre-trial conference (which is not common).

Limitation

As in Victoria and New South Wales, claims for damages for medical negligence are subject to maximum statutory time limits to commence an action.

A plaintiff has three years to commence legal proceedings, which time starts to run from the earlier of when the person became aware they sustained personal injury or the first symptom or clinical sign occurred.

If a claim which relates to personal injury sustained during or as a result of child birth, a plaintiff has up to six years.

These are the usual statutory limitations period which can be extended by application. Other time limits apply depending on the age of the plaintiff at the time the cause of action accrues or if the person was under a disability: see the Limitation Act 2005 (WA).

Liability

Liability is determined by application of the 'general principles' in Part 1A of the Civil Liability Act 2002 (WA) (CLA) and common law principles.

Quantum

The quantum assessment of damages is governed by Part 2 of the CLA and common law principles. In this jurisdiction, a discount rate of 6% is adopted when quantifying the present value of the future loss.

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Hong Kong

Hong Kong has 43 public hospitals and institutions managed by the Hospital Authority, and many general and specialist clinics managed by the Hospital Authority and Department of Health. There are also 13 private hospitals, including the newly opened CUHK Medical Centre, and many private day procedure centres, clinics and nursing homes.

When there is a medico-legal incident, a claimant (or plaintiff) in Hong Kong (who is usually the patient, or in the case of a deceased individual, their family member) can bring a civil claim in court seeking compensation (medical negligence claim). In a deceased case, at times, an inquest will be held in the Coroners' court to investigate into the cause of and circumstances leading to death, and the evidence given at the inquest will greatly impact on the merits of the parallel medical negligence claim.

If the plaintiff is claiming for less than HK$3 million (approximately £280) proceedings must be commenced in the District Court. For claims exceeding HK$3 million, proceedings must be commenced in the Court of First Instance of the High Court.

The duration of most medical negligence claims is between one to four years. Particularly complex cases, for example where there are a high number of liability and quantum experts, the claim may take several more years to be resolved.

> **"The pandemic has also had an impact on the duration of cases but this is now improving."**
>
> *Sandy Cho, Partner, Hong Kong*

Following Civil Justice Reform in 2009 courts in Hong Kong have been more proactive in case management and have imposed stricter deadlines for parties to prepare court documents or to set the case down for trial. They are also more intolerant of delays and late discovery and expect parties to cooperate with each other in the conduct of proceedings and identifying issues to be resolved at trial.

Courts also encourage parties to reach a settlement out of court, so a trial is not necessary. Parties now have to have pre-action discussions, and the plaintiff is required to send a pre-action letter to the medical professional. There should be mutual discovery of documents, even at the pre-action stage, and if any party is found to be uncooperative, that party may be penalised by paying the other party's legal costs.

The plaintiff is also expected to disclose an independent expert report to support the allegations against the medical professional. Failing which, the defendant can apply to court to ask the claim to be struck out. If the plaintiff disclosed an expert report, and the defendant disclosed theirs - the experts would need to meet and discuss in order to try to limit the issues in dispute.

Damages

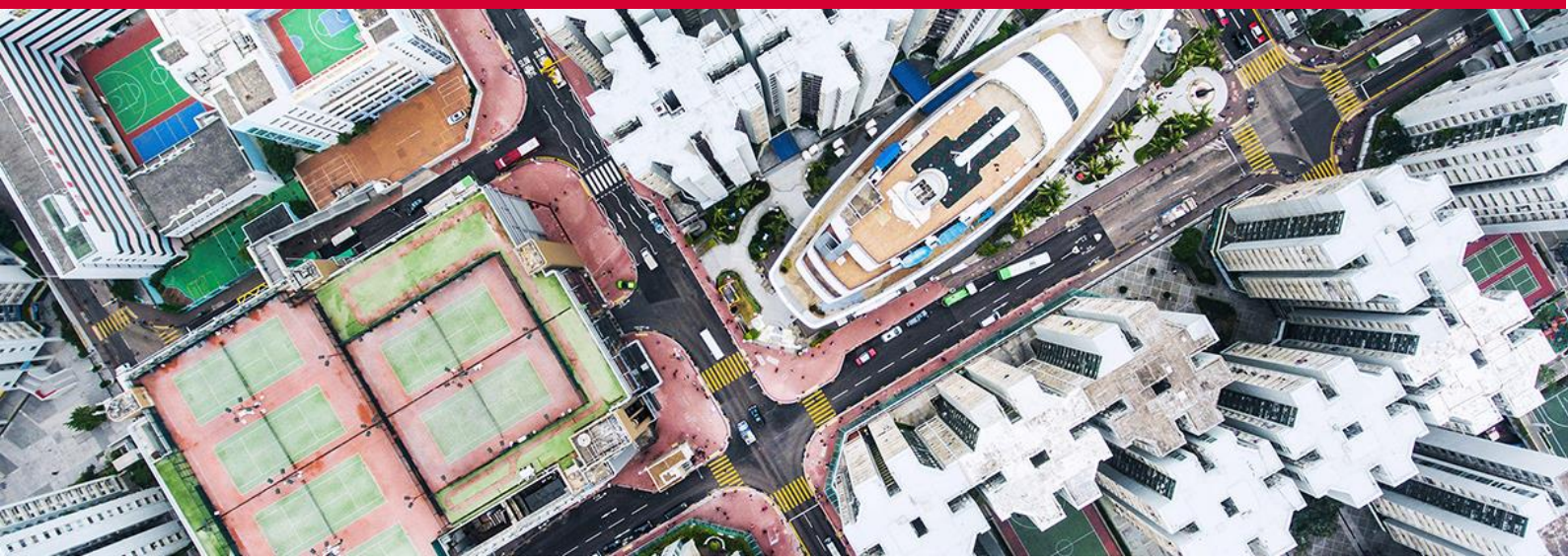
Damages awards have increased steadily in Hong Kong, but not significantly.

Many people live in public housing estate flats so if a plaintiff has become wheelchair bound after a medical incident, courts will allow the cost of alternative accommodation, usually by renting a more suitable and spacious flat. Care costs such as hiring a live-in domestic helper may be awarded in catastrophic injury cases.

Discount rates

Discount rates were adjusted in 2013 after the case of *Chan Pak Ting* and it provides three different rates, depending on how long the plaintiff's future needs are expected to last for.

The relevant rates are 2.5% for loss which is more than 10 years, 1% for loss between five and 10 years and minus 0.5% for loss which is less than five years. It would appear that these rates will not be adjusted for some years yet.



Mediation

Mediation is commonly used in Hong Kong and almost always attempted in medical negligence claims, unless of course the plaintiff's claim has been dismissed or a settlement has been reached prior to attempting mediation.

Many medical professionals favour mediation, because it is a confidential process, and allows parties - typically the patient and treating doctor - to meet face-to-face to explain matters, including the treatment provided.

> **"The success rate of mediation is very high."**
>
> *Christine Tsang, Partner, Hong Kong*

According to the figures published by the Hong Kong Judiciary, approximately 47% of civil claims commenced in the Court of First Instance which had attempted mediations, resulted in agreements. The District Court also has similar figures.

Periodical payments

Periodical payments have been discussed in Hong Kong for many years but currently courts are still not empowered to order periodical payments. However, parties can agree to periodical payments if they so wish.

Complaints and disciplinary proceedings

In Hong Kong, there are many different regulatory boards or councils which regulate the practice of medical/healthcare professionals. The majority of our work mainly involves disciplinary investigations against medical doctors.

Complaints to regulatory bodies cannot be settled directly between the complainant and the medical/healthcare professional. Unless the complaint is dismissed during the preliminary investigation stage, it has to go through an open inquiry hearing which will usually be reported by media.

If the medical/healthcare professional is found guilty of professional misconduct, they may not be able to continue practice medicine or provide healthcare services, or at least for a certain period of time.

According to the latest annual report issued by the Medical Council of Hong Kong (MCHK) in 2019, there were 3,286 complaints received by the MCHK in 2019, which is almost five times higher than the number of complaints received in 2018 and in previous years.

Below are the key factors that contributed to the sharp increase in the number of complaints in 2019:

- A shortage of medical and healthcare staff at all levels and increasing demand on health services due to the aging population.
- Easy access of the medical information on internet allows patients to challenge doctors'

advice and management more readily which encourages the development of a complaint culture in Hong Kong.

- Greater awareness of the channel for reporting a complaint, which is relatively simple and economic to use, as it does not involve any court fees. The MCHK will investigate the complaint and will take the burden of proof of professional misconduct against the doctor.

Preliminary Investigation Committee

Cases received by the MCHK are screened by a Preliminary Investigation Committee (PIC), and quite a high percentage of complaints are dismissed. In recent years, the majority of complaints against doctors have related to allegations of issuing misleading or false medical certificates, the provision of negligent treatment, and inappropriate prescription of drugs.

Only a small proportion of complaints received by the MCHK proceed to an inquiry hearing. In 2019, the PIC experienced a significant backlog.

Upon receipt of a complaint, either the Chairman/Deputy Chairman of the PIC will perform an initial screening of the complaint. If they consider the case is frivolous/groundless or the complaint does not fall within the jurisdiction of the MCHK, the complaint will be dismissed.

If the complaint is not dismissed it will be referred to the committee for consideration. The PIC will issue a Notice to the doctor notifying them of the complaint and the doctor can choose to provide a written explanation for consideration during the PIC meeting, or to wait for the outcome of the first PIC meeting.

Inquiry Panel

At the Inquiry, the doctor can be found guilty or not guilty. The doctor can appeal to the Court of Appeal in relation to the conviction or sentence or both.

If the Inquiry Panel find the doctor guilty of professional misconduct, the doctor will be given an opportunity to make a submission on mitigation at the hearing. The Inquiry Panel will then take into account the seriousness of the charges, the conduct of the doctor throughout the process of the complaint handling, the mitigation submission and documents, and any past records, in deciding the appropriate sanction.

Currently, it takes approximately one year following receipt of the first Notice from the PIC and for the PIC to investigate and dismiss a complaint. For those cases that proceed through to an Inquiry the process can take approximately two or more years. However, for cases involving more than one defendant doctor, we have seen a delay in fixing the Inquiry as the investigation on the part of PIC may take longer.

Current and future claim and complaint trends

The number of medical negligence claims has remained fairly stable over the past few years. We anticipate there could be a slight decrease in the number of claims next year due to the suspension of some hospital services during the pandemic.

However, in the coming year (2021/2022), we anticipate that the number of complaints to disciplinary bodies may continue to increase.

We have also seen an increase in the number of patients who have reported medical incidents to the police, with an increase in the number of criminal investigations and convictions especially those cases connected with aesthetic/cosmetic medicine.

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Thailand

In Thailand, there are no specific laws governing or dealing with medical malpractice so the process will depend on relevant rules and regulations based on how a claimant initiates the claim.

In any event, compensation is determined pursuant to the wrongful act under the Civil and Commercial Code. In some medical malpractice claims, the National Health Security Act or the Consumer Protection Act may also come into play when determining compensation.

In practice, there are four main routes through which medical malpractice claims may be initiated, outlined below.

Direct claim against the medical professional or hospital

Firstly, and it is the most common practice in Thailand for a claimant to make a claim against a doctor, nurse or a hospital directly, either verbally or in writing.

In most cases, if not all, the claimant will also refuse to pay medical bills. As a consequence, the process and handling of the claim, and negotiation or settlement will be regulated by the Civil and Commercial Code.

Complaint to the Medical Council of Thailand or the National Health Security Office

In some cases, the claimant may file a complaint to a competent authority such as the Medical Council of Thailand or the National Health Security Office. In this regard, the claim process differs.

For example, if the claim is filed with the Medical Council of Thailand, the Medical Council will act according to their power and authority under the Medical Profession Act.

The Medical Council will then provide its opinion as to whether medical malpractice has occurred or if the relevant medical practitioner failed to comply with professional regulations.

> **“Whilst the opinion of the Medical Council is not binding it can often promote settlement.”**
>
> *Tassanu Chutikanon, Special Counsel, Bangkok*

Alternatively, if the claim is filed with the National Health Security Office (NHSO), the committee may summon the relevant doctors or hospital to provide information and statements.

If the NHSO considers there was medical malpractice, the NHSO has the power to award compensation to the claimant and subrogate the right to recover that from the hospital. However, compensation under the NHSO Act is relatively low compared with compensation that can be recovered under the Civil and Commercial Code. The maximum is less than £9,000.

Filing a claim at the Civil Court

In most cases, if settlement cannot be reached through negotiation or where the claim has not been made directly against the doctor or hospital, the claimant may file a claim at the Civil Court.

> **“Under the Thai legal system, medical service is determined to be a business falling within the scope of the Consumer Protection Act. As such, the claim process is based on the Consumer Case Procedure Act.”**
>
> *Tassanu Chutikanon, Special Counsel, Bangkok*

Police station

The last common route by which a claimant may file a claim against a doctor is at a police station, on the basis that the claim involves bodily injury or death of the patient.

In the absence of specific laws dealing with medical malpractice, all medical malpractice claims in Thailand can be considered criminal offences under the Criminal Code, with the claim process in those circumstances based on criminal proceedings.

Compensation

Regarding a claimant's entitlement to compensation in medical malpractice claims in Thailand, compensation is based on actual losses. Such losses must also be supported by laws such as the Civil and Commercial Code.

In some cases, non-monetary damages may be awarded. However, it has to be proven that the loss or damage is severe and/or the patient is unable to enjoy their normal life. This compensation will be determined by the court.

"Under the CCPA, the court has discretion to grant punitive damages up to twice that of compensation granted if the court considers the medical malpractice is gross negligence or intentional."

Tassanu Chutikanon, Special Counsel, Bangkok

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EMEA

Denmark

Denmark has a predominantly public healthcare system, with a small private sector. The public healthcare system is financed and driven by five local healthcare Regions.

> **"All healthcare regions in Denmark are self-insured, however insurance companies can be granted a concession to underwrite."**
>
> *Thomas Arleth, Senior Associate, Copenhagen*

All Regions (hospitals and other healthcare providers) are liable according to The Patient Insurance Act.

Denmark, Sweden, Norway, Finland and Iceland have similar systems - claims are made by notice to The Patient Insurance Authority, the idea being to facilitate high quality and fast claims handling and that the patient does not need legal assistance. The Authority investigates the claim, with medical consultants providing a decision on liability or otherwise.

Both the patient and the Region can appeal the decision to the Appeal Board. The Appeal Board makes the final administrative decision, following a review by different medical consultants. The chairman of the Appeal Board is a judge and the members are two medical specialists, one legal specialist, representatives from the Regions, representatives from the insurance industry and representatives from different patient organisations. Following this, if the patient or the Region remains unsatisfied with the decision an action can be brought against the Appeal Board through the courts.

Damages

The assessment of damages is regulated by the Danish Liability Act 1984, which enables the recovery of temporary and permanent medical expenses, including treatment, up to a maximum of ten years, with any public benefits to be deducted.

Damages (for the following losses by way of example) are limited as follows (2021 figures):

- **Permanent injury:** maximum DKK1.126.000 (€151.140).
- **Pain and suffering:** maximum DKK82.000 (€11.006).
- **Temporary loss of income:** no maximum but usually a limited period until permanent loss of income is paid.
- **Permanent loss of income:** maximum DKK 9.859.500 (€1.323.422).

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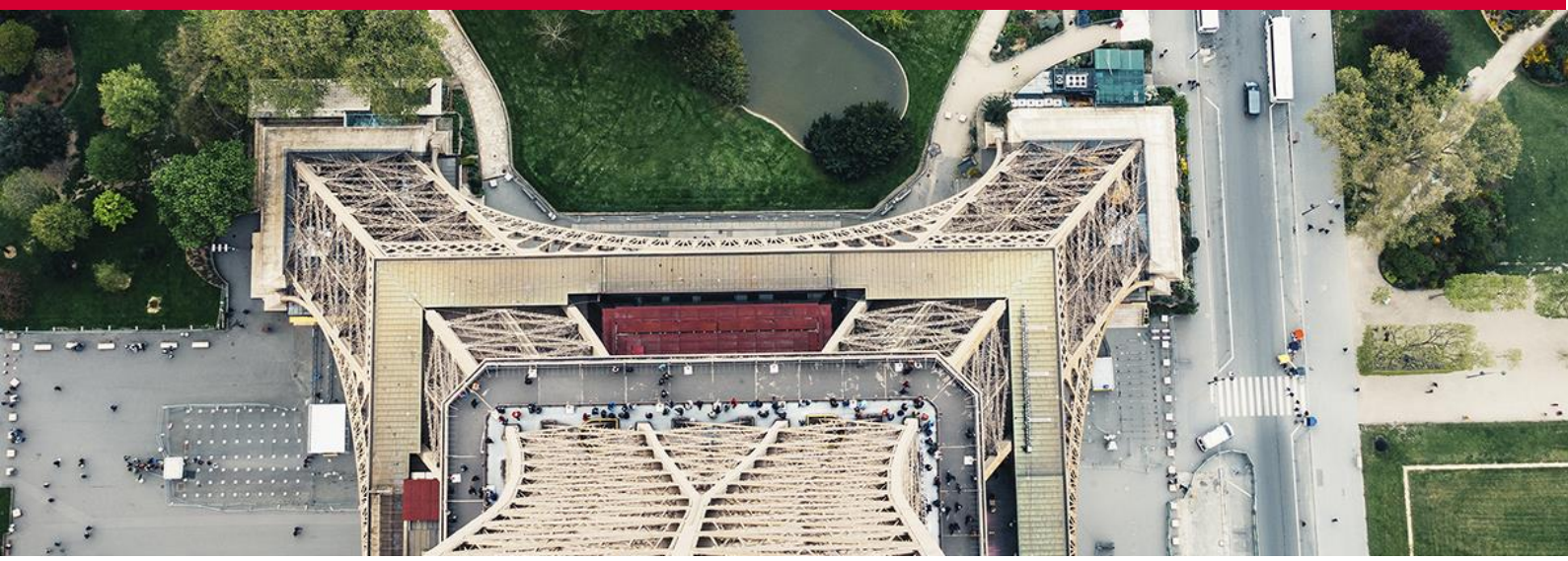

France

Between 2019 and 2020 there have been an increasing number of claims against healthcare institutions and professionals in France, with surgery, general medicine and anaesthesia/ resuscitation as the three areas of healthcare where medical malpractice claims are the most prevalent.

Assessment of damages

In France, the assessment of injuries is subject to adversarial appraisal (based on expert evidence and a case by case analysis, either in a judicial or amiable context).

> **"The assessment of damages is left to the sovereign power of the judge which can lead to significant disparities in amounts awarded."**
>
> *Aurélia Cadain, Partner, Paris*

Under the principle of full compensation there are no punitive damages and no obligation for the plaintiff to mitigate their loss.

Increasing recourse to amicable settlement of claims

In 2002, French law introduced a specific scheme to provide a faster and better compensation for claimants - the Commission de Conciliation et d'Indemnisation (CCI) (i.e. Conciliation and Compensation Commission (CCC)).

The CCC is expressly entrusted with the task of promoting the amicable settlement of disputes relating to medical accidents, hospital-acquired infections, iatrogenic conditions, and other disputes between healthcare institutions and users. It issues non-binding opinions in which it indicates the applicable compensation regime.

The Commissions have two main objectives:

- To provide quick, free and amicable compensation to victims of medical accidents.
- To facilitate amicable resolution of disputes arising between plaintiffs and medical professionals, both in cases of medical malpractice and in cases of medical hazard, in the absence of any negligence from a healthcare professional.

In 2020, 4,500 claims were filed with the CCCs (compared with 4,612 in 2019), with 3,700 opinions issued by the CCCs. The figures for 2020 indicate an increase in the average amount of compensation awarded by the CCC, from €114,000 to €125,000, with five plaintiffs (out of a total of 1050 who obtained compensation) receiving compensation in excess of €1 million.

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Ireland

Among the key areas of discussion in relation to clinical negligence claims in Ireland was the recent introduction of the Judicial Council Personal Injuries Guidelines 2021 and the latest developments in relation to the personal injury discount rate.

Judicial Council Personal Injuries Guidelines 2021 (the Guidelines)

The Guidelines came into effect on 24 April 2021 replacing the Book of Quantum in terms of assessment of general damages for cases post-April 2021 and are applicable to medical negligence claims.

The Book of Quantum will continue to apply to personal injury proceedings commenced prior to 24 April 2021. This means there will be a dual system in place for the foreseeable future where both the Book of Quantum and the Guidelines will be in use.

> **"With the introduction of the Judicial Council Personal Injuries Guidelines 2021 there has been a significant reduction in general damages awards."**
>
> *Joanne O'Sullivan, Partner, Dublin*

Judges are now also required to provide reasons for any departure from the Guidelines when awarding general damages.

Personal Injuries Assessment Board - statistics

Statistics from the Personal Injuries Assessment Board (PIAB) (Values Report October 2021) highlight the following dramatic changes in the personal injury sphere, post the introduction of the Guidelines:

- Average awards for general damages decreased by 46% since April 2021.
- Average PIAB awards dropped from €23,877 to €14,233.
- Almost 50% of PIAB awards are now under €10,000 (compared to 12% prior to the changes).
- Acceptance of awards by claimants dropped from 50% to 41% during the same period.

A very welcome change is that the Guidelines have also introduced new and more comprehensively assessed heads of damage, including for scarring, PTSD, psychiatric injury generally and loss of fertility.

Discount rate

In Gill *Russell v HSE* [2015] IEHC Mr Justice Cross, reduced the real rate of return from 3% to between 1% (for care) and 1.5% (for earnings). This was upheld by the Court of Appeal.

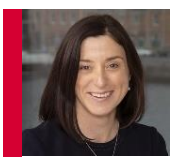
In September 2020, Department of Justice and Equality invited submissions on the discount rate, including on whether the courts should continue to set the rate on a case by case basis; whether the Minister for Justice should set the rate and review at intervals; and whether the rate should be revised.

An update from the Department of Justice and Equality is currently awaited and it remains to be seen whether the Republic will follow England and Wales and Northern Ireland in terms of setting a negative discount rate.

Related item

- The Personal Injuries Guidelines 2021: Ireland

Contact



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Israel

It has been reported that the number of claims brought against doctors and medical institutions in the last decade has increased by 30%, and the overall sums paid in compensation within the framework of legal proceedings have more than doubled.

During that time, the average sum paid in compensation in a single medical negligence claim has almost tripled.

The reasons for this increase include:

- Increased life expectancy.
- The number of services and medications included in the 'public healthcare basket' is growing every year.
- Higher quality of medical care leading to higher expectations.
- Increased public awareness.
- Courts developing case law, new causes of action and new heads of damages.
- A growing number of medical malpractice lawyers.

The healthcare system is composed of state-owned and non-state-owned organisations on one side, and on the other side – a network of privately owned hospitals, institutes and clinics – all of which are intertwined with the public system. This causes difficulties in claims involving multiple defendants.

> **"The state is its own insurer, which means that all treatments carried out within state institutions are covered by the state (through the internal fund for governmental insurance)."**
>
> *Yaron Ben-Dan, Partner, Tel Aviv*

The state does not however, cover the treatments of state-employed doctors, carried out in their private clinics. For such activity, the individual physician must purchase insurance privately.

The combination between public and private institutions, doctors partially working in both the public and private sectors and the 'basket' of services being performed both publicly and privately, create a complex situation as far as coverage is concerned.

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Spain

Spain has a very strong decentralised public health system governed by public law and financed by taxes, as well as a private healthcare sector.

Medical malpractice claims arising in the public health system are handled by the Administrative courts, with a limitation period of one year commencing once the injuries sustained have healed or are deemed to be permanent.

Insurers are brought in to the proceedings as a potentially directly liable party. Expert reports are central to court proceedings, with the judge assessing the evidence to determine liability and quantum.

For medical malpractice claims brought in connection with healthcare delivered in the private sector, the claimant has a direct action against civil liability insurers.

> **“Mediation is possible, however it is not very common. Conciliations, however, often take place within the court proceedings process.”**
>
> *Alfonso De Ramos, Partner, Madrid*

Civil courts deal with these claims and healthcare insurers can also be called in civil proceedings for any liability arising in connection with the treatment/services provided by the medical practitioner and/or hospital.

Criminal courts in Spain also deal with medical malpractice claims in certain cases, such as those involving allegations of gross negligence. Insurers are also brought in to such proceedings, with the civil liability claim and criminal case dealt with together.

> **“Punitive interest is an important consideration in medical malpractice claims in Spain, as it can substantially increase quantum in those claims that are decided in court.”**
>
> *Alfonso De Ramos, Partner, Madrid*

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Latin America and the Caribbean

Latin America

In Latin America there have been several legislative changes that have impacted the amounts awarded to claimants such as:

- The amendment to the Political Constitution of the United Mexican States in 2011 as Mexico has formally recognised the principle of "full reparation".
- The revised version of the Bill (identified as "Proyecto de Ley 010 de 2020") that sets the foundations for the forthcoming reform of Colombia's social security healthcare system.
- The establishment of entities such as SUSALUD (Superintendence of National Health) in Peru that provide access to relevant information to patients (health rights, available mechanisms to file a claim, prohibited activities to hospitals, among others) and allows insurers or healthcare service users to file their claims against private hospitals and doctors.

These changes in the region are indicative of a shift towards an increase in medical malpractice claims being brought in many Latin American countries, which is currently most evident in a few of the region's countries (for example, Mexico and Brazil).

The COVID-19 pandemic may result in the further increase of medical malpractice claims in years to come. We anticipate that contributing factors are likely to be the limitations on medical services (medical care exhausted personnel and temporary medical centres), less use of preventive medicine, potential consequences of low/limited availability of vaccines, priority of vaccination campaigns and increased use of telehealth.

The judicial process for medical malpractice claims differs in each country, with claims typically taking over four years to be resolved.

> **"Indemnity amounts for medical malpractice claims vary in each country, in accordance with the types of damages recognised by each legislation."**
>
> *Fernando Hurtado de Mendoza, Partner, Lima*

Other aspects such as burden of proof, joint liability of medical centres and practitioners, a mediation procedure carried out prior to court proceedings, among others, also differ in the region.

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The Caribbean

In the Caribbean, the laws governing medical malpractice claims are as varied as the jurisdictions. For instance, the US Virgin Island (USVI) has a per incident cap of US$250,000 on all medical malpractice claims and routes all claims through a medical malpractice administrative body before reaching the courts.

In the Commonwealth Caribbean jurisdictions of Barbados and Jamaica there is no such cap on damages and there has been a noted increase in the litigiousness in both jurisdictions in recent decades.

> **“Claimants in these countries can bring a lawsuit in court without going through an administrative body.”**
>
> *Anna Weiss, Regional Managing Partner, Miami*

It can however, take the courts several years to resolve these claims, sometimes taking up to six years in Jamaica (by comparison, averaging three to four years in USVI courts). However, alternative dispute resolution may be available and can greatly reduce the time for resolution of a claim.

> **“As in many jurisdictions, the pandemic has led to a backlog of cases in Caribbean courts.”**
>
> *Anna Weiss, Regional Managing Partner, Miami*

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North America

Canada

Claims profile

Statistics from the Canadian Medical Protection Association (the body that indemnifies virtually all doctors across Canada) offers the most comprehensive data set for the jurisdiction on litigated medical malpractice claims. The claims statistics from 2016 through to 2020 illustrate a fairly settled picture.

The population in Canada is approaching 38 million (around 60% of the population in England & Wales). For new litigated claims per year, the statistics indicate that the average is approximately 860/870 claims, with a slight drop off last year primarily due to the pandemic which impacted on the claims being brought for traditional medical practice (the new litigated claims figure for 2020 was 732).

In terms of the claims that were resolved in each respective year, approximately half of those cases were dismissed, discontinued or abandoned, with approximately a third of claims leading to an award of damages. The CMPA statistics also show that in 2019 the total damages paid out by the CMPA was $223 million and in 2020 a total of $206 million. For the period from 2016 to 2020, the total damages paid was approximately $1.2 billion, indicating a relatively consistent exposure just above the $200 million mark*.

Taking England and Wales as a comparison, Canada has a significantly lower volume of claims. Certain key considerations explaining the different level of exposure between the jurisdictions is as follows:

Funding

The 'no win, no fee' arrangements in Canada broadly equates to plaintiff lawyers being paid approximately a third of the damages payments. Accordingly, the volume of low value claims brought in England and Wales is substantially more and is a significant area of exposure not replicated in Canada.

> **"As in many jurisdictions, the pandemic has led to a backlog of cases in Caribbean courts."**
>
> *Anna Weiss, Regional Managing Partner, Miami*

Quantum

High value claims in Canada do not reach the levels of high value claims in England and Wales. Whereas, for example, in England and Wales compensation in birth injury claims can often reach £10 million or more, comparable cases show that such damages are rarely seen in Canada. The model upon which long-term care is calculated is for a community based programme instead of home care for life.

Liability

There is no appreciable difference in the law and therefore this cannot explain the difference.

Procedural

The potential financial exposure of the patient if a case is lost is a big deterrent for bringing a claim. Also, the discovery process in Canada is a key adversarial step where a plaintiff is examined and tested on their claim, a step really only replicated in the courts of England and Wales at trial.

** CMPA 2020 Annual Report - A year in numbers*

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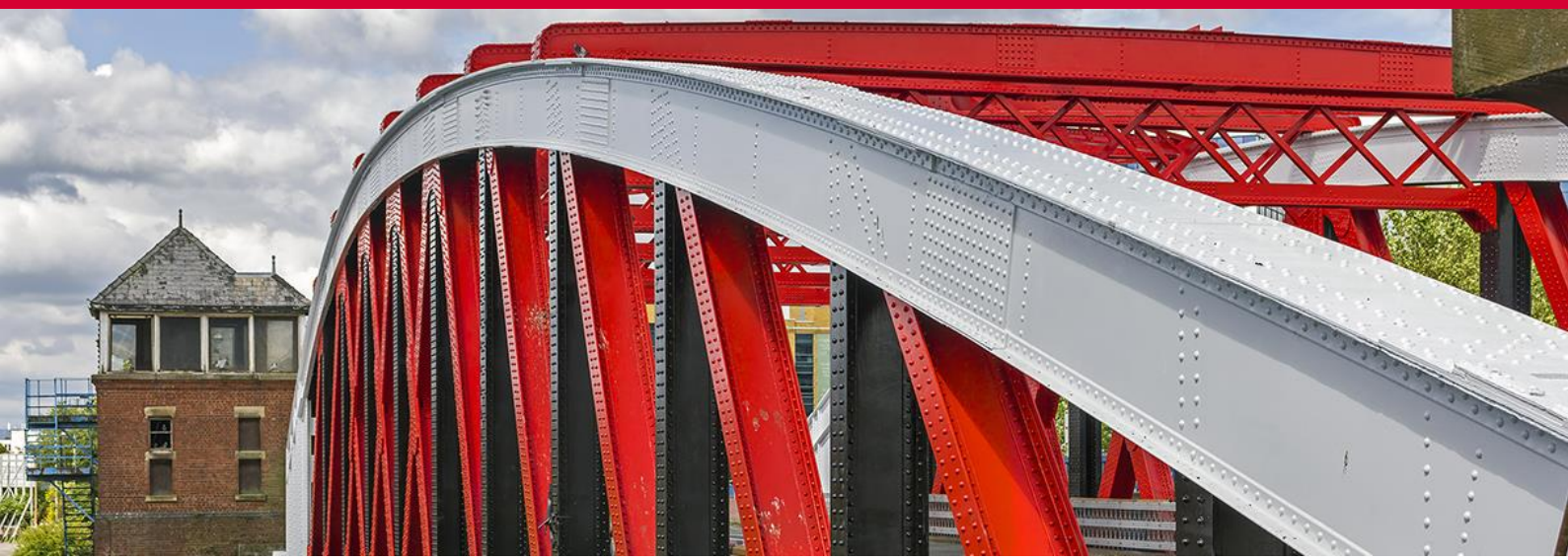

UK closing commentary

As a part of the global healthcare initiative, our experts in the UK examined the important considerations for healthcare professionals once an individual's gender identity has been changed on their medical records, as well as key elements for successful adoption of digital healthcare systems. We also considered the UK Government's consultation on reforms to data protection law and provide a summary of the updated clinical negligence protocol now in force in Northern Ireland.

Our team also expanded on the global healthcare initiative by providing insight on whether it is legally permissible for medical practitioners to refuse to see unvaccinated patients in person in non-emergency situations across multiple jurisdictions.

Related items

- Transgender patients: providing effective healthcare services
- Digital healthcare and patient safety – the journey continues
- A new direction for UK data protection: the life sciences and healthcare perspective
- Updated clinical negligence protocol in Northern Ireland
- Refusal to treat unvaccinated patients in non-emergency situations: a global healthcare perspective

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