

# Claims inflation and personal injury claims: a global review

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## Foreword

Claims inflation continues to be a priority topic for insurers across the globe. From increased litigation costs and an increase in psychiatric injury claims, to costly commercial care packages, claims inflation presents profound challenges for insurers. Under-reserving, solvency concerns and responding to the ever evolving needs of customers are just some of the associated issues facing the global insurance community.

In addition, rising premiums place the relationship between insurer and insured in a potentially precarious position, risking insureds either seeking to change provider or reducing the level of cover purchased. This increases the risk of challenges to the cover provided or, more commonly, to instances of underinsurance. This can leave the policyholder unable to cover the full losses claimed and make them susceptible to the 'average rule', reducing the recovery further.

Ultimately, without careful mitigation strategies in place and regular communication between insurers and their customers, we predict that the current protection or coverage gap in the global personal injury market will widen in certain jurisdictions.

Against this background, we consider the key drivers of excess claims inflation on personal injury claims across 11 jurisdictions and explore how insurers should be responding to this problematic business environment.

# Executive summary

Skyrocketing economic inflation driven by multiple headwinds over the last few years has resulted in the increased cost and volume of personal injury claims on a global scale.

Whilst global economic inflation has started to show signs of easing in 2023, insurers are not out of the woods just yet; the impact on claims, especially long-tail claims, is likely to continue for some time to come. In this report, our lawyers from 11 different jurisdictions provide their analysis of the prominent factors and impact of claims inflation in their region.

Across the world stage, the cost of living crisis, professional services spend, the cost of care and new categories of claim are key inflationary factors driving up the volume and cost of personal injury claims.

## Psychiatric injury

A recurring theme across many of the jurisdictions is the increase in psychiatric injury claims. Despite efforts to raise public awareness about mental health problems, reported rates of such problems continue to rise. Proposed explanations for the increase include the impact of the COVID-19 pandemic, greater use of social media and the impact of austerity. Some would suggest that, paradoxically, awareness efforts may be an additional factor contributing to the rise in mental health problems. As such, we are seeing more attention now being placed on mental wellbeing including in the policy arena. Earlier this year, the UK government announced £150 million funding for mental health services, by way of illustration.



Employee mental health is also increasingly becoming a strategic business priority: employers are being urged to put employee wellbeing into the 'S' of their ESG strategy.

Notwithstanding the importance in understanding and mitigating mental health problems, we are seeing increased psychiatric claims in the disputes setting. And for many jurisdictions, these type of claims are becoming increasingly common and costly for insurers.

Of particular concern to insurers is the fact that claims relating to psychiatric injury are often associated with considerable awards for damages and high legal costs for investigating and defending them. There are also reputational risks for businesses found to be in breach of the relevant legislation.

## Cost of care

Many of our lawyers report a sharp rise in the cost of care due to shrinking labour supply, insecure contracts and rising wages. As a result, not only are defendant insurers in many jurisdictions paying a premium for care services beyond what has traditionally been allocated, but there is a greater risk of significant delays in the resolution of these high value claims whilst the parties search for and obtain the care and accommodation required.

## Increasing professional services spend

Another factor identified as impacting almost all 11 jurisdictions is increasing professional services spend. In Chile, increased costs in order to maintain profits coupled with VAT changes for professional services has resulted in higher invoices for those seeking these services and advice. In the US, by comparison, rising rates of professional services spend - including expert witnesses, legal costs, as well as plaintiffs' advertising and litigating funding - have all contributed towards increased so called 'nuclear verdicts' which are exceptionally high jury verdicts.

In the UK, we are seeing a change in tactics in order to avoid the strictures of the current fixed costs and budgeting regimes in England and Wales, and frontloading costs in Scotland, with an increase in the number of heads of claim.

## Litigation trends

Arguably, the world is becoming more litigious. Indeed, compensation culture is a key theme for the majority of the 11 jurisdictions featured in the report.

Illustrating this point is the growth of class or group actions supported by third party litigation funders willing to inject funds to bring these substantial claims to court. Whilst already relatively common practice in the US and Australia, other jurisdictions are introducing legal mechanisms to facilitate similar actions.

Scotland's first formal class action framework was introduced on 31 July 2020 and Directive 2020/1828 will see the EU's first regional regime for group action claims apply in Member States as of 25 June 2023. Insureds will likely look to their liability insurers to cover their defence costs and any damages and costs awards.

**This increased level of risk could result in increased insurance premiums as insurers try to mitigate, to some extent, the exposures they face. This, in turn, could have a knock-on effect on the costs of more general liability insurances.**

Whilst the US - with its civil justice jury award system - is witnessing an increase in 'nuclear verdicts', Singapore is also experiencing a surge in multi-million dollar verdicts. Both jurisdictions are experiencing a growth in litigious behaviour, although perhaps for slightly different reasons. In the US, anti-corporate sentiment and 'blame behaviour' is translating into soaring jury awards being handed down. In Singapore, an increasingly litigious culture amongst the younger and often better educated and informed segment of society is driving higher awards.

# What is claims inflation?

According to Lloyd's of London, claims inflation refers to the change in the cost of claims of a like-for-like policy over a period of time. Claims inflation is the sum of ordinary economic inflation and excess inflation.

'Ordinary' economic inflation is calculated by use of standard economic indices, such as the Retail Price Index (RPI), the Consumer Price Index (CPI) and the Annual Survey of Hours and Earnings (ASHE), all of which are provided by the UK Government's Office of National Statistics.

Excess claims inflation, however, is the increase in the cost of a claim beyond that of ordinary economic inflation. Below are the definitions we have used in this analysis.

## Excess claims inflation

Excess claims inflation - the increase in the cost of a claim beyond that of ordinary economic inflation - is driven by many different types of inflationary factors such as:

- Advances in medical science and technology.
- Increases in certain awards of damages.
- New categories of claims.
- Professional services spend, such as experts and legal costs.
- The rising cost of energy.
- The increasing cost of care.

## Social inflation

In addition to the above economic excess claims inflation factors, social inflation is a subset of excess claims inflation. It is referred to as social inflation because the increased costs are largely attributed to social trends or movements. The 'social trends' that are increasing the volume and costs of claims include:

- Third party litigation funding facilitating a larger group of potential claimants to bring proceedings.
- Public sentiment driving an increased willingness/appetite to make a claim.
- Increases in collective or group actions.
- A civil justice jury award system leading to 'nuclear verdicts'.
- Shifts in the legal and regulatory environment.
- The COVID-19 pandemic.
- The cost of living crisis.

# Snapshot: inflationary factors

This chart provides a global snapshot of the inflationary factors identified by our lawyers impacting personal injury claims across 11 jurisdictions.

	Australia	Chile	Denmark	England and Wales	Hong Kong	Ireland	Northern Ireland	Scotland	Singapore	Spain	United States
<b>Economic inflation factors</b>											
Advances in medical science and technology	X	X		X	X	X	X	X	X		X
Increases in certain awards of damages	X	X	X	X	X		X	X	X	X	X
New categories of claims	X	X	X	X	X	X	X	X	X	X	X
Professional services spend, such as experts and legal costs	X	X	X	X	X	X		X	X	X	X
Cost of energy	X		X	X		X	X	X		X	X
Cost of care	X	X		X	X	X	X	X	X	X	X
<b>Social inflation factors</b>											
Third party litigation funding facilitating a larger group of potential claimants to bring proceedings	X	X	X	X	X			X			X
Public sentiment driving an increased willingness/appetite to make a claim	X	X		X	X	X	X	X	X	X	X
Increases in collective or group actions	X		X	X				X		X	X
Growth of claims management companies				X	X						
A civil justice jury award system leading to 'nuclear verdicts'								X			X

Shifts in the legal and regulatory environment		X			X	X	X	X	X		X
The COVID-19 pandemic	X	X	X	X	X	X	X	X		X	X
The cost of living crisis	X	X	X	X		X	X	X	X	X	X

Clearly, no jurisdiction has escaped claims inflation which, for insurers, translates into a universal rise in claims costs. As such, keeping a close eye on and factoring in the inflationary factors impacting the jurisdictions in which they operate and invest is key for insurers in order to stay profitable and competitive.

### A global deep dive

Here, we explore in more detail the most significant inflationary factors impacting personal injury claims across 11 jurisdictions on a country by country basis.





# Australia

## Increases in certain awards of damages

All Australian jurisdictions are reporting an increase in damages awards for personal injury claims. In response, in December 2022, the New South Wales District Court increased its jurisdictional limit from AUD\$750,000 to AUD\$1,250,000. It is unknown at this stage whether other Australian courts will follow suit.

Another driver is delays in the provision of healthcare, staff shortages and the increased costs of treatment. These factors have placed additional upwards pressure on claims for loss of earning capacity and out-of-pocket expenses.

// For defendants, there is more pressure than ever to investigate and determine in a timely fashion whether such treatments are a medically necessary consequence of the injury. Defendants should be prepared to obtain definitive evidence on this point rather than leave arguments until a conference stage where it may be too late and the costs have already been incurred.

Janine Clark, Special Counsel, Brisbane

Delays in the health sector, particularly to non-essential surgeries and treatments, which are further compounded by healthcare staff shortages, have become a significant problem in Australia. On 7 December 2022, the Australian Government Institute of Health and Welfare reported that the proportion of patients waiting more than 365 days for their elective surgery increased from 2.8% to 7.6% between 2020 and 2021.

The greatest increase was for total knee replacement which skyrocketed from 11% to 32%. These figures subsequently decreased between 2021 to 2022, however, the figures have not yet reverted to their pre-pandemic levels. Such delays impact when a claimant may return to work forcing economic loss claims, which are already on the rise due to higher than usual wage rises, to correspondingly increase.

The cost of treatment has increased, with healthcare costs rising faster than wages in Australia. We therefore expect to see more and more requests from plaintiffs for privately funded treatment.

## New categories of claims

Claims for mental health conditions in Australia have increased. The projection is that mental health-related claims are set to double by 2030. In 2021, according to the National Insurance Brokers Association, one in five Australians were reported to have a mental health condition. Further, the work time lost for a psychological injury was on average more than twice that of any other serious injury claim.

In October 2017, the Actuaries Institute of Mental Health and Insurance Green Paper stated that mental health was the leading cause of work absence and long-term incapacity in the developed world, and we can only suspect in a post-pandemic world, this remains true.

// In Australia, the data in relation to psychological claims is still unclear. However, as we see more of these claims, managing them will require some reform in skill set, processes and systems to mitigate the burgeoning time and costs associated with a psychological injury claim. We will need to examine and revise the way we have traditionally approached psychological injury claims.

Janine Clark, Special Counsel, Brisbane

The costs of workers' compensation claims relating to mental health are also surging. Compensation costs tripled in just under 20 years to 2018/2019. According to a 2022 report published by CEDA, with even moderate growth assumptions, they could triple again by 2030.

Recent case law in Victoria has broadened the duty of care an employer owes an employee who works in a job that has the potential to place the employee under psychiatric pressure. Further, in a recent Auditor General's report questioning the sustainability of the Workers' Compensation scheme in Victoria, it was noted that there had been an increase in the number and complexity of mental health-related claims brought by workers. Current trends show mental injury will comprise 50% of annual weekly benefit costs in 2022 to 2023, up from 38% in 2020 to 2021.

In New South Wales (NSW), 11% of active NSW workers' compensation claims relate to a psychological injury, which is a jump from 6% a decade ago. However, plaintiff advocacy groups have expressed concern that these figures understate the severity of the problem.

On 18 October 2022, the Chief Executive of the NSW State Insurance Regulation Authority commented on the rise of psychological claims and noted that people with a psychological injury are less likely to return to work and more likely to experience an adversarial claims journey.

In Queensland, data published by the Office of Industrial Relations in relation to the Queensland Workers' Compensation Scheme Statistics for 2021 to 2021 revealed that there is a 51.1% rejection rate of psychological claims at the workers' compensation statutory level, as opposed to a 3.7% rejection rate for physical claims.



### Third party litigation funding facilitating a larger group of potential claimants to bring proceedings

Australia is ranked amongst the world's most sophisticated litigation funding markets and we have yet to experience its full potential. Historically, litigation funding was confined to insolvency matters but now it is used in a much wider range of civil and commercial disputes and particularly for class actions, most notably in respect of cyber claims against telephone and healthcare giants and in sport. The litigation funding market is estimated to have grown by 8.7% per annum between 2017 and 2022 and further growth is predicted to continue.

The use of litigation funding for a broad range of class actions is a well-known feature of the Australian market and class actions are considered to represent almost half of the litigation funding market. In the past five years there has been a steady decline in funded class actions, largely due to a tightened and prohibitive regulatory framework. However, with the recent changes in the common law and legislation, and class actions being funded by litigation funders including Medibank Private and Optus (heralded to be the largest class action in Australia) following recent cyber attacks, we expect this trend to significantly reverse.

In 2022, in the decision of *LCM Funding Pty Ltd v Stanwell Corporation Limited*, the Full Court of the Federal Court of Australia unanimously held that, contrary to previous decisions, a litigation funding scheme did not constitute a managed investment scheme and therefore could not be subject to the stringent burdens of the registration and management requirements.

Following this decision, the federal government has sought to clarify the regulatory position to align with this court decision by proposing various legislative amendments aimed at exempting litigation funding schemes from managed scheme provisions. On 16 December 2022, the Assistant Treasurer and Minister for financial services announced that new regulations had come into effect to support access to justice for class action plaintiffs noting that third party litigation funding is a critical source of funding for class action plaintiffs.

Now that regulatory road blocks have been removed and Australia is facing its largest class actions in the cyber realm, we expect that there will be a significant ripple effect into the personal injuries space where funded class actions may now seem more attractive.

## The cost of living crisis

In Australia, economic inflation is growing at its fastest pace in 20 years. Australian households have had to absorb the sharpest increase in 'mortgage pain' since the 1980s after the Reserve Bank lifted interest rates for a record tenth consecutive hike. Further interest rate rises are possible throughout 2023, and it is estimated that tens of thousands of mortgagors are coming off lower fixed fee mortgages this year.



Unemployment is at a record low of 3.4%. Key industries, particularly healthcare, are experiencing significant staff shortages which has the knock-on effect of increasing commercial care costs.

Wages are also on the rise. Australia's seasonally adjusted wage price index increased by 3.1% in Q3 of 2022. Notwithstanding that, the rise in wages in Australia is not enough to keep up with the cost of living as the wage price index has increased at less than half the pace of inflation. Prices for all food and non-alcoholic beverages remains elevated compared to a year ago. The cost of goods within this subgroup continues to be impacted by flooding, heavy rainfall and hail in key growing areas, alongside high transport and fertiliser costs.

Australia currently has a tight rental market and new dwelling construction prices are rising in light of high labour costs and an exponential increase in the cost of building materials. These factors are directly impacting both personal injury (specifically for accommodation) and property damage claims, with insurers needing to carefully reconsider their reserves.

The increase in interest rates and wages is substantial and will need to be taken into account in calculating awards for damages and economic losses in addition to past and future care.

The additional stress of the cost of living crisis will also change a claimant's expectations in terms of quantum and time taken to achieve resolution, particularly if looming homelessness or prolonged displacement is a reality for that claimant.

As mentioned previously, we also expect to see an increase in psychological claims as a secondary claim to a physical injury in addition to being a primary claim as the very real and financial consequences of being injured and out of work in this current economic climate begin to bite.





# Chile

## Increases in certain awards of damages

According to a 2023 study carried out by Statista, 62% of Chileans stated that “mental health was the biggest health problem facing people in their country in 2022”. Due to a lack of available treatment, compounded by the pandemic and associated periods of lockdown, inflation and job losses, mental health is a serious concern in Chile, exposing insurers to increased claims inflation.

Further, an increase in poverty and crime has created a particularly challenging landscape for the insurance sector which faces rises in certain awards of damages beyond physical and mental health.

A sharp increase in vehicle theft has led to an increased volume of claims which, in turn, has resulted in a rise in vehicle insurance premiums. Further, riots and citizen protests in Chile in 2019 resulting in fires, lootings and property damage, have increased premiums related to property insurance.



With the cost of vehicles soaring, thefts are becoming more common. According to the Chilean Insurers Association, violent thefts increased by 67.6% in 2022.

Accordingly, automobile insurance premiums have increased by around 50%. The lack of available spare parts, delays to repairs and longer hire periods (for temporary replacement vehicles) have also pushed up claims spend.

Chilean property insurers increased their premiums by 6.1% in the last quarter of 2022 as a result of the rising price of materials and reinsurance renewal costs, along with a growth in claims as a result of riots and citizen protests. Some insurers have adjusted their policies in order to withdraw these risks, excluded certain geographical areas or drastically increased premiums.

## Professional services spend, such as experts and legal costs

Certain professional firms and institutions have increased their costs in order to maintain profits. Further, as of 1 January 2023, professional firms have been able to charge their clients VAT for their services, including law firms. As such, those seeking professional services and advice are now required to pay higher invoices.

Equifax reported in April 2023 that 28% of more than 63,000 companies have begun to pay VAT on services and of those businesses, 82% are micro, small and medium-sized enterprises (SMEs). These SMEs are reviewing whether to raise their fees further.

In January 2023, the Chilean Public Health Institute (ISP) notified Congress that it will raise its fees by over 30% in order to absorb both inflation and VAT, in relation to biometric lab services, occupational health and medicine-related services. This will have a knock on effect on the cost to insurers.

According to the Statistics National Institute, medical services have also increased their prices by around 7.6% over the last year (before the VAT application).

## The COVID-19 pandemic

Chile is one of the countries which had the longest lasting COVID-19 lockdowns. One key consequence has been an increase in unemployment. In response, there have been some extraordinary regulations brought into force which have introduced the option to subsidise salaries through the unemployment social insurance, allowing early withdrawals of money from pension funds and amending the value of peso-denominated bonds on the open market in order to finance a COVID-19 related package to support small businesses and save jobs.

For a safe return to workplaces and for the duration of the COVID-19 health emergency in Chile, in 2021 legislation was introduced which required employers to take out individual health, life and medical expenses insurance for their employees. During 2021, health insurance grew by around 1,141% with 2,290,797 subscribed policies. However, given the low claims rate, the premiums were small.

Now that the sanitary restrictions are in the rear view mirror, insurers have designed different strategies in order to absorb health risks into other health insurances or implemented new marketing approaches in order to retain customers.

## The cost of living crisis

At the end of 2022, Chile's annual inflation was 12.8%, the highest since 1991. Before the pandemic, at the end of 2019, the inflation rate was 2.56%.

In response to concerns around the impact of the cost of living crisis (heightened by the COVID-19 pandemic), some insurers are turning to innovation by developing personalised schemes of insurance or 'ecosystems' that embrace different kind of risks according to client profiles and specifications. The 'internet of things' (a network of connected smart devices) has facilitated this shift by allowing insurers to provide more tailored premiums for those with fewer risks and more expensive premiums for more risky businesses.

Supporting this shift, Chile's new Fintech legislation, which came into force in January 2023 and has formally incorporated parametric insurance coverage, is an opportunity for innovation, and could help to reduce the costs associated with claims determination and administration.

Fernanda Carvajal, Associate, Santiago



# Denmark

## Increases in certain awards of damages

In Denmark, over 80% of all salary earners are covered by collective agreements which constitute the basic framework for wages and working conditions. In 2023, a new collective agreement was negotiated by collective bargaining (known as OK2023). The agreement was passed on 12 April 2023 and it affects employees of private companies in Denmark.

Among other things, the new collective agreement includes an increase in the minimum pay rate, an increase in the pension contribution from the employer, an increase in the contribution to the free-choice system and an increased overtime payment in most business areas.

These changes affect the costs of personal injury claims seeing that the damages awards relating to loss of earnings and loss of working capacity will increase, thereby increasing the total costs of personal injury claims.

## Cost of energy

In Denmark, the cost of energy began increasing in 2021 due to a growing demand following the COVID-19 pandemic. In 2022, the cost of energy increased further following the Russian invasion of Ukraine which impacted Europe's gas supplies.



The cost of energy has led to an increase in the cost of personal injury claims seeing that certain industries, such as the healthcare industry which is a major energy consumer, are experiencing higher energy-related expenses.

This is having a knock-on impact on claims where treatment costs have increased. According to the government agency Statistics Denmark, Danish treatment costs increased by 5.3% from April 2022 to April 2023.

Additionally, the increase in the cost of energy may lead to changes in both the economy and job market. High energy costs can affect the types of personal injury claims we see in Denmark, with more people using bicycles or public transportation instead of cars.



## Increases in collective or group actions

The use of the Danish class action system has increased recently, especially with respect to securities claims.

Further contributing to the wider use of the class action system is the shift in more Danish law firms beginning to consider class action suits as a business area with potential. We have also seen extensive publicity around EU Directive 2020/1828 which is expected to be implemented into Danish law by 25 June 2023. This Directive will see the EU's first regional regime for group action claims.

// Due to the wider use of the Danish class action system, it is easy to imagine that Danish class action suits regarding personal injuries and defective products causing personal injuries will surface to a bigger extent therefore resulting in more personal injury claims to be tried before the courts.

Heidi Bloch, Partner, Copenhagen

## The cost of living crisis

The war in Ukraine has not only affected Danish energy prices, but has also contributed towards the general costs of living in Denmark. In turn, these factors have caused Danish consumers to change their consumption patterns.

Research conducted by Analysis Denmark in September 2022 shows that Danish consumers are cutting down their use of expensive medicine, especially people with chronic diseases and those with disabilities that cannot find the money to pay for their medicine and treatments.

When Danish consumers cut down on self-paid treatments and medicine, this extends their overall treatment and recovery time which can also directly impact any ongoing personal injury claim. For example, according to research by Insurance & Pension Denmark published in October 2022, these changed consumption patterns have led to some consumers cutting their private accident insurances, therefore widening the protection or coverage gap.

Furthermore, in December 2022, the Danish Dental Association stated that 70% of Danish dentists have experienced an increase in the number of patients cancelling their treatments. The Danish Chiropractor Association has seen similar behaviours amongst its patients.





# England and Wales

## Advances in medical science and technology

Amputation claims have been subject to super-inflation in recent years and there are several reasons for this trend. The costs of prosthetic devices continues to increase which can be partly attributed to continued technological developments designed to increase levels of function for amputees.

However, even without technological advancements in prosthetic devices, we are typically seeing price increases of between 5% to 8% per annum for the same products caused by a combination of general economic pressures in the UK and limited competition in the industry. New surgical techniques such as targeted muscle reinnervation (TMR) or osseointegration (where a titanium rod is implanted into the stump to which the prosthetic is attached rather than the conventional prosthetic socket) can also add an additional layer of costs.

The recent judgments of *Swift v Carpenter* [2020] and *Riley v Salford Royal NHS Foundation Trust* [2022] have assisted claimants in their efforts to push the legal boundaries and are often cited by leading claimant firms in relation to accommodation, life expectancy and loss of earnings. Finally, the catastrophic nature of injuries suffered by amputees mean that there are often claims for inter-dependent losses of accommodation and care which have also been subject to inflation in recent years.

// We expect technological and surgical developments to continue at pace in the coming years to improve the levels of function for amputees, particularly for upper limb amputees where there is a real push to improve dexterity. Improvements in design often cost more and accordingly, amputation claims are expected to continue rising in value for the foreseeable future.

James Shrimpton, Partner, Birmingham

## Professional services spend, such as experts and legal costs

Increases in legal costs continue to be a key driver of claims inflation. Guideline hourly rates (GHR), static since 2010, have been updated, with some grades of lawyer and geographical location seeing upward revision by up to 28%. There is now also a commitment to regularly review the GHR and a likely alignment with the SPPI indexing mechanism.

Claimant tactics continue to evolve to avoid the strictures of the current fixed costs and budgeting regimes, with increased frontloading of costs and seeking escape from the low value claims portals. There has to date been an apparent unwillingness by the courts to crack down on such behaviour, with the authorities of *Bird v Acorn Group Ltd* [2016] and *Lloyd v 2 Sisters Poultry Ltd* [2019] tending to support progression to the higher fixed recoverable costs stages and escape entirely at ever lower claim values.



Changes to the qualified one-way costs shifting (QOCS) regime introduced in April 2023 will restore some balance for defendants. Nonetheless, these changes are not retrospective and will do little to control costs expenditure for the foreseeable future.

The impact of the fixed recoverable costs reforms to be introduced in October 2023 remains to be seen. In theory the extension to claims valued up to £100,000 should reduce costs. However, there is a risk of unintended consequences with increased costs associated with satellite litigation and the inflation of claim values in order to drive up the recoverable costs.

## Cost of care

Increasing care costs are a significant reason for claims inflation in England and Wales. This has impacted on both claims for non-commercial care voluntarily provided by family and friends as well as commercial care required in more complex cases.

For non-commercial care, the rates on which this is based (National Joint Council (NJC) Spinal Point 8/Spinal Point 2 from April 2019) has increased by over 34% in the five years from £7.90 per hour in April 2017 to £10.60 per hour in April 2022. Whilst no figure for 2023 has been set as yet, the Local Government Employers have offered the equivalent of a further 9.42% increase.

Commercial care costs for both directly employed and agency care have also been driven upwards by a shortage of carers and the rising cost of living. Brexit, the pandemic and a lack of suitable candidates have helped drive these shortages at the very time when there is an increasing demand for care due to the ageing population.

In addition, the care sector is suffering from high turnover rates and poor staff retention with other sectors offering better pay, more sociable hours and better working conditions.

## The cost of living crisis

Fraud thrives in times of economic flux and uncertainty with previous economic downturns having been accompanied by a correlating increase in fraud levels. The cost of living crisis will continue to encourage opportunistic fraud in 2023.

In motor lines of business, data arising from the Official Injury Claims Portal (OIC) is already showing clear trends. We have seen a rise of non-tariff injuries and professional enablers in the design of cynical 'conveyor belt' processes to maximise entirely fabricated injuries or exaggerated injuries.

Accident management companies and claims farmers retain a vested interest in the exaggeration of genuine claims. Non-injury motor claims are also fertile ground for fraud enablers with bent metal experts exploiting vulnerabilities caused by vehicles now being awash with new technology.



Since the implementation of the Civil Liability Act in 2018, data insights show some legal representatives have migrated away from motor lines of business towards liability claims, often taking bad practices with them which, in turn, have led to increasing findings of fundamental dishonesty.

Data insights inform us that ‘claims creep’ is on the rise which is relative to specific representatives and experts with genuine claims often inflated with exaggerated psychological injuries.

The economic downturn has also seen a significant rise in opportunistic property claims in both residential and commercial lines. In commercial lines, arson and escape of water claims remain prevalent as COVID-19 bounce back loans and general government support have been withdrawn.

Early data insights have been crucial in the detection and disruption of loss assessors acting as professional enablers.





# Hong Kong

## Advances in medical science and technology

In Hong Kong, there have been a number of judgments handed down in relation to exoskeletons as a new head of claim.

The court unprecedentedly awarded damages for a plaintiff's claim for costs of an initial exoskeleton and then replacements in *Lai Chi Wai v Tong Hung Kwok and Tsui Siu Fai* [2020] (*Lai Chi Wai*), where the plaintiff was left totally paraplegic for the rest of his life (based on orthopaedic evidence) after a road traffic accident involving the defendants.

The court considered the replacement of exoskeletons not to be an unwarrantable luxury in light of technological advancements. It was stressed that with the benefit of aids and equipment, the plaintiff should be placed in the same position he would have been had he not been injured.

The court considered the plaintiff's suitability as a user of an exoskeleton, including whether the equipment was reasonably necessary for rehabilitation or to restore function and whether the cost of equipment was reasonable having regard to current living standard in Hong Kong.



In *Lee Hong Kong Hansen v MTR Corporation Limited* [2023], the court considered a plaintiff's claim for special damages for the incurred and future cost of their participation in a pilot scheme for spinal cord injury rehabilitation at the University of Hong Kong, deploying fairly recent exoskeleton equipment for over-ground walking training.

Although the claim was subsequently abandoned by the plaintiff due to the lack of supportive medical expert evidence, the court noted that whilst it is the plaintiff's choice to seek medical treatment, the burden remains on the plaintiff to prove the cost claimed and the reasonableness to be substantiated by medical expert evidence.

Whilst *Lai Chi Wai* demonstrates the court's acceptance towards novel medical technology, it remains to be seen whether similar claims will be granted in the future.



## New categories of claims

In Hong Kong, workplace bullying and harassment-type claims are an increasing trend. This will impact employees' compensation (EC) insurers as well as D&O policies. In particular, a new category of discrimination claims based on 'pro-female bias' has emerged.

In *Tan Shaun Zhi Ming v Euromoney Institutional Investor (Jersey) Ltd* [2022], a female employee made a complaint against a male employee for sexual harassment following an incident at a staff event. The employer required the male employee to apologise to the plaintiff but he refused, following which his employment was terminated. He sued his employer for sex discrimination in breach of the Sex Discrimination Ordinance (SDO).

The District Court inferred 'pro-female bias' as the real reason for the termination, finding that the employer had indeed breached the SDO. The judge noted that had the employee been a woman, the employer would not have treated the employee in the same way, would not have demanded that he apologise to his female co-worker and would not have terminated his employment after his refusal to do so.

## The COVID-19 pandemic

Despite the relaxation of social distancing measures and quarantine requirements since 28 February 2023, many employers are still allowing - at least in part - employees to work from home (WFH). Foreseeably, it is likely that there will be an increase in EC and negligence claims arising out of WFH accidents, given the unique challenges posed by home environments under hybrid working arrangements.

It is unclear what approach the courts will adopt as no judgments on work from home accidents have been handed down yet.

However, it is anticipated that for EC claims, as long as both parts of section 5(1) Employees' Compensation Ordinance (ECO) are satisfied, namely that an employee is able to show personal injury arising out of and in the course of their employment, the accident will be deemed to stem from the employment (in absence of evidence to the contrary) and therefore, the employer will be liable to pay compensation.

Temporal and causal tests, i.e. whether or not the work done was incidental to and in connection with employment, will still apply in determining whether an accident occurred or has arisen out of the course of employment in a WFH situation. Ultimately, the outcome will still depend on the facts of each case and will be a question of fact and degree.

For common law negligence claims, employers may find it practically difficult to implement health and safety measures in an employee's home if it is being used as a workplace but they will still need to take steps to ensure a safe system of work if they are to discharge their duty of care.



## The cost of living crisis

There has been a general rise in the cost of living rather than a cost of living crisis in Hong Kong.

The Labour Department announced on 17 March 2023 that 18 compensation items under the Employees' Compensation Ordinance (ECO) will increase by between 2.18 % and 19.05% from 13 April 2023. Examples include an increase in the minimum amount of compensation which can be awarded for death, permanent total incapacity and monthly earnings (for calculating periodical payments during work injury sick leave).

Further, according to Willis Towers Watson in its 2023 Global Medical Trends Survey, insurers anticipate higher medical inflation in 2023 at 8.8% due to the Government's relaxation of COVID-19 restrictions. Healthcare costs are therefore bound to rise with treatments becoming increasingly costly, along with wages and consumer prices. In turn, these increased costs will likely impact on the cost of care and damages awards.

**// In response, insurers should consider increasing premiums, the value of policy deductibles/excesses in line with the rate of inflation, scrutinise claims values and appropriate policy limits of indemnity, and carefully and regularly consider claims reserves.**

Meiling Yip, Partner, Hong Kong



# Ireland

## New categories of claims

The Personal Injuries Guidelines (the Guidelines) for general damage awards of personal injury claims (PI claims) came into effect in April 2021. The Guidelines were introduced to reduce costs of both PI claims and insurance and represent a downward recalibration of general damages awards.

Prior to the introduction of the Guidelines, PI claims were assessed in line with the Book of Quantum which did not cater for damages for psychological injuries. The new Guidelines divide psychiatric injuries into Post Traumatic Stress Disorder (PTSD) and psychiatric damages generally. The result has been not only psychiatric-only claims being advanced but we are noticing an increased interconnectivity with the physical injury being claimed in an attempt to keep claims within the monetary jurisdiction of the Circuit Court or High Court.

The benefit of this for claimants is twofold. Firstly, a higher level of compensation awarded to the claimant (up to €60,000 in the Circuit Court) and much higher costs claimed by their solicitors. Secondly, awards for injuries have reduced and as a result, numerous claims previously under the jurisdiction of the Circuit Court are now under the jurisdiction of the District Court (claims valued up to €15,000). This is unattractive for claimants and their solicitors (as legal fees are assessed in accordance with a fee scale for the District Court). However, by maintaining a claim for psychiatric injuries or additional physical injuries, claimants can claim their case is worth over €15,000 and therefore be allocated to the Circuit Court.

// Allegations of psychiatric injury, even if not supported by way of expert evidence, are also becoming increasingly common. For defendants, thorough investigations into causation are critical which, in turn, also increase the value of the claim from a costs perspective.

Martina O'Mahoney, Partner, Dublin

We have also seen a rise in the number of claimants alleging both physical and psychiatric injuries conjunctively following psychological distress linked to COVID-19. This is resulting in larger damages being awarded for such claims.



While it is mandatory for the court to make its assessment having regard to the Guidelines, where it chooses to depart from the Guidelines it should detail, in its judgment, the considerations which warranted that departure. As such, claimant lawyers have been urging the court, in submissions, to depart from (or uplift) the Guidelines in light of current economic inflation and widespread concern among claimants that awards of damages may be insufficient to cover ongoing and future medical treatment.

The Guidelines were prepared at a time of zero inflation in Ireland. Although they are due to be reviewed in 2024, claimant lawyers are calling on the government to review the Guidelines earlier in light of the cost of living crisis and inflation.

### Cost of care

The cost of care has increased by approximately 27.8% as outlined by nursing consultants instructed by Kennedys in their care reports. We list two examples below.

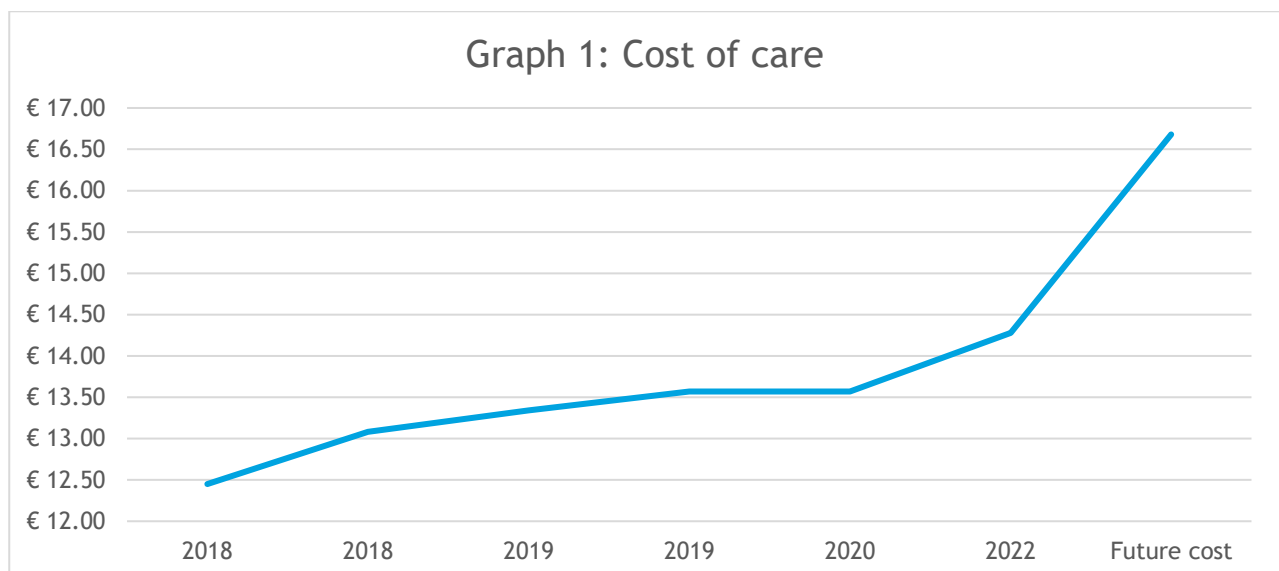
#### Case study 1: care report (dated August 2022)

The claimant underwent cervical smear testing from 2007 onwards. Following misdiagnosis of the claimant’s cancer, she was required to undergo significant invasive treatments.

Table 1 shows an appreciation of 33% in the claimant’s care cost over four years:

Table 1	
Year	Daily Hour Rate (set down by the Ireland Health Service Executive (HSE))
2018	€12.45
2018	€13.08
2019	€13.34
2019	€13.57
2020	€13.57
2022	€14.28
Future care cost	€16.68

Graph 1 displays anticipated exponential growth in the claimant’s future care cost:





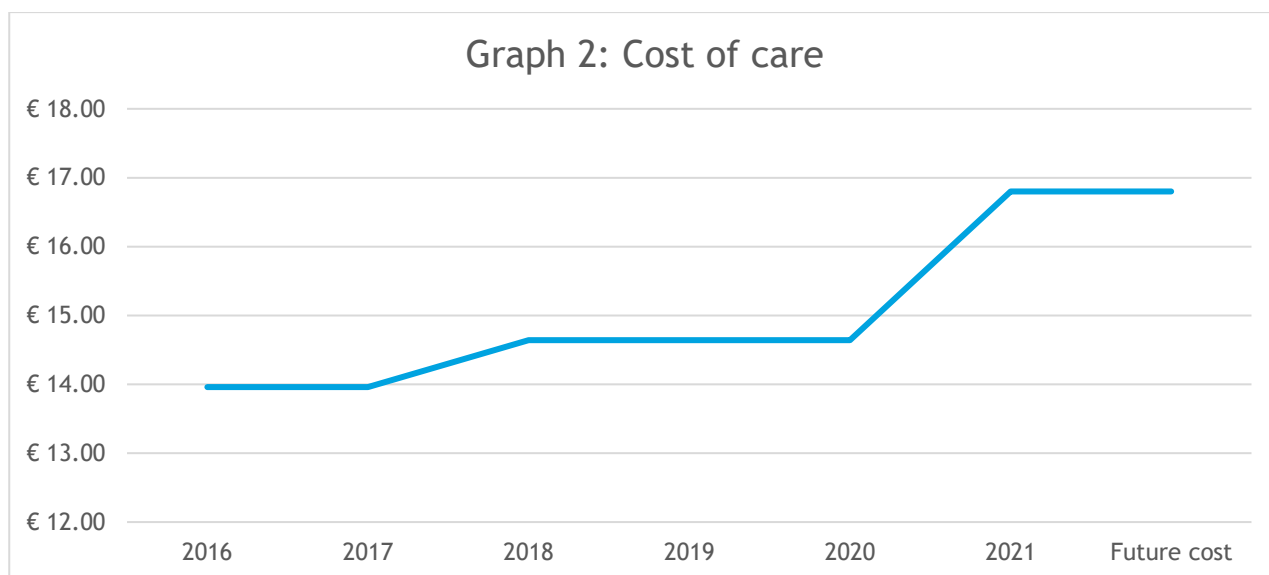
### Case Study 2: care report (dated July 2022)

The claimant underwent cervical smear tests in 2010 and 2013. Following misdiagnosis of the claimant's cervical cancer, she required significant invasive treatments. She suffered a delayed primary haemorrhage and shortened cervix which carries the risk of miscarriage and premature labour.

Table 2 is another example of the appreciates of costs of care of 20.34% in Ireland over six years:

Table 2	
Year	Daily Hour Rate (set down by the Ireland Health Service Executive (HSE))
2016	€ 13.96
2017	€ 13.96
2018	€ 14.64
2019	€ 14.64
2020	€ 14.64
2021	€ 16.80
Future care cost	€ 16.80

Graph 2 displays an approximate 20.34% increase in the claimant's care cost over a period of six years:



## Shifts in the legal and regulatory environment

### Legal changes

The Personal Injuries Resolution Board Act 2022 (the Act) came into operation in February 2023, aimed at encouraging early resolution of claims and minimising costs.

The Personal Injuries Assessment Board (PIAB) is an independent state body that assesses the damages of PI claims in Ireland. Before any PI claim can be issued in the Irish Courts, the claim must be submitted to the PIAB.

Provisions in relation to costs were introduced which places cost implications on claimants who reject awards under the Act. Where a claimant issues proceedings, in circumstances where the respondent has accepted the assessment, the claimant failing to recover a higher award in court will risk not recovering their costs and may be liable for the respondent's costs.

Before the Act came into force, the PIAB had to assess a claim within 15 months from notification of the claim. However, under the Act, the PIAB can have up to two years to assess a claim which may not be attractive to claimants who do not want to wait, particularly in light of the current economic climate.

We are not currently seeing a substantial increase in legal costs where claims are with the PIAB due to longer claim lifecycles. However, this is a concern for defendants.

It has also yet to be determined who will be responsible for the costs associated with mediation. There has been no indication from the Government as to what is envisaged. Defendants should therefore carefully monitor developments.

### Regulatory changes

Compliance with the EU General Data Protection Regulation (GDPR) remains onerous on policyholders and, in particular, policyholders running small businesses to comply with Data Subject Access Requests.

Significant time is spent by policyholders liaising with solicitors and gathering documentation so they can investigate these claims.



Failure on policyholders to adhere to these obligations can lead to complaints being lodged to the Data Protection Commission. The ICO can impose sanctions including fines, corrective measures and/or legal proceedings.

In an attempt to counter this issue, the Irish Business and Employers Confederation is expected to lobby the Data Protection Commissioner this summer in order to stress how onerous compliance with EU GDPR is in Ireland on small and medium sized businesses. Whether anything comes from this lobbying, remains to be seen.



# Northern Ireland

## Increases in certain awards of damages

The overall cost of personal injury claims in Northern Ireland has increased significantly over recent years. While costs for legal professionals and experts have largely remained static, awards for both general and special damages have increased dramatically.

However, as claimant solicitors are rarely penalised for issuing proceedings without following the pre-action protocols for personal injury actions in Northern Ireland, mitigating against increased claims costs is not an easy task.

The baseline awards for damages have increased steadily and in many cases, particularly High Court actions that have proceeded to trial, awards have been made in excess of the Green Book Guidelines (which provides guidelines for the assessment of general damages in personal injury cases). This has, at least in part, arisen from a change in the primary judge who has taken charge of the High Court personal injury lists.



The Green Book is due to be reviewed in 2023 which may well result in the brackets for general damages increasing yet further. It is anticipated that the next edition of the Green Book will be published in February 2024.

The impact of the personal injury discount rate for future loss claims cannot be overstated. On 24 March 2022, the Government Actuary concluded that the discount rate should be set at -1.5%. Whilst this was an improvement in the interim rate of -1.75%, it is still a long way from the 2.5% rate that had been in force previously based on the Wells v Wells methodology. The consequence has been that Northern Ireland has a lower rate than in any other part of the UK. This brings the risk that claimants who suffer serious and long-term injuries will ‘forum shop’ and will, if at all possible, bring their claim in Northern Ireland rather than any other part of the UK.

There has also been a change in attitude towards psychiatric injury. Whereas prior to the COVID-19 pandemic, claims for psychiatric injury arose in less than 50% of cases, it is now the ‘new normal’ to see them in most personal injury actions, particularly those involving road traffic incidents.

The judiciary has also become more accommodating of psychiatric injury since the case of *Leonard v Theedom* [2020], where a nine month adjustment disorder achieved a £10,000 award. Since this judgment was handed down, psychiatric injuries have been increasingly used to inflate damages awards. The inclusion of psychiatric injuries in most claims also result in an increase in costs due to the requirement of further expert reports to substantiate the additional element of the claim.

Additionally, injuries resulting in scarring have also seen a dramatic increase in value, particularly in minors and females. By way of illustration, a recent unreported scarring case involving a 25 year old woman who sustained modest scars to her right buttocks as a result of being splashed with boiling water was awarded £60,000. Interestingly, in a similar case three years ago where we were instructed, the claim settled for £10,000.

// If liability is not going to be an issue, there is merit in seeking the claimant's medical evidence at an early stage with a view to making early offers of settlement. Any offer must be reasonable and in keeping with the Green Book's guidance to stand a chance of success as few, if any, claimant solicitors will recommend a figure that is little more than a 'buy-off' given the current awards.

Amanda Wylie, Partner, Belfast

## Cost of energy

The increase in energy prices has had a disproportionate effect in Northern Ireland, due to the lack of any functioning government to assist, unlike the rest of the UK.

High energy costs are inflating care claims in large loss and catastrophic matters, especially in terms of heating and electricity use. Travel expenses is another head of loss that has gone up exponentially. We are seeing an increase in the cost of fuel to get to medical appointments for instance.

## Public sentiment driving an increased willingness/appetite to make a claim

Increased awards aside, we also cannot ignore the increase in the volume of claims that are arising in this post-pandemic climate due to socio-economic factors.

While employment rates increased by 2% between January 2022 and January 2023, the personal injury claims market is still feeling the effects of the pandemic when many employed and self-employed people were either furloughed or unable to work for at least the initial months of the first lockdown.

This led to a reduced income in many households and a willingness to engage in potentially fraudulent or staged incidents by the few who thereby increase the premiums of the many with increased claims histories when searching for renewal of insurance.

We have also seen an increase in claims being pursued late into their limitation periods. Effectively, these are relatively modest claims that would otherwise not have been pursued. We expect this trend will continue with the current increase in the cost of living.





# Scotland

## Professional services spend, such as experts and legal costs

Pursuers' solicitors are increasingly frontloading their cases in Scotland, with an increase in the number of heads of claim. Each head of claim is usually substantiated by an expert report which factors in matters such as the shrinking labour supply, rising hourly rates and travel costs, all of which have been affected by the cost of living crisis.

We are seeing a far greater number of cases being presented with a psychiatric element which consequently results in the instruction of a psychiatrist/psychologist who recommends treatment such as cognitive behavioural therapy. Not only do these recommendations increase the damages and outlays sought, but they also increase the level of costs that the pursuer's solicitor can recover if the matter becomes litigated. The longer the report with more elements included results in increased solicitors costs to review and consider the content, as well as travel to/from and attendance at consultations.

// In response, insurers should utilise the Scottish Compulsory Pre-Action Protocol which allows a three month investigation period into liability in order to carefully develop a litigation strategy which includes only defending cases that should be defended and factoring the overall claims spend into that decision.

Louise Houlston, Partner, Edinburgh

## Cost of care

There has been a sharp rise in the cost of commercial care packages due to shrinking labour supply and insecure contracts. Other factors include the increase in the requirement of extra PPE at increasing cost and a rise in fuel costs to travel to the pursuer's home.

Not only have we observed an increase in gratuitous care (by members of the pursuer's family), but the recent Scottish Law Commission Consultation queried whether this should be extended further. In 2022, the Commission proposed that services, in terms of Sections 8 and 9 of the Administration of Justice Act 1982, should be extended to claims in respect of necessary services provided gratuitously to an injured person by individuals who are not family members or by the injured person to non-

family members. If legislated, this could extend to flatmates, neighbours and friends with the potential to increase the reserve on almost every personal injury claim, regardless of the value.

### Third party litigation funding facilitating a larger group of potential claimants to bring proceedings

While national claimant/pursuer law firms are rarer in Scotland compared to England & Wales, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020, allowed formal regulation and capping of success fees in Scotland from 27 April 2020.

The legislation introduced caps for personal injury claims based on the level of damages (and inclusive of VAT) as follows:

- 20% of the damages up to £100,000.
- 10% of the damages over £100,000 and up to £500,000.
- 2.5% of the damages over £500,000.

It is worth noting that such fees remain unrecoverable from the compensator.

The same piece of legislation introduced qualified one-way costs shift (QOCS) to Scotland, which has arguably reduced the risk of litigating personal injury cases for pursuers/claimants and their agents but increased overall spend, with limited cost recovery.

From 31 July 2020, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 also enabled group proceedings to be brought in the Court of Session with the permission of the court. Whilst the legislation introduced a framework which allows for both an opt-in and opt-out procedure, the rules currently only provide for an opt-in procedure. However, should this change in the future, this could potentially result in an increase in group proceedings being brought in Scotland.

### The COVID-19 pandemic

The Scottish Government enforced stricter COVID-19 related restrictions for a longer period compared to the English Government. This impacted on our court services considerably which were not immediately equipped to deal with a somewhat overnight shift to an online/electronic justice system. A number of cases were sisted or under case management which resulted in a build-up of cases in the system. Further, we found that remote hearings often lasted longer as a consequence of technical issues experienced by the courts and parties. This increased the overall spend per claim which needed to be factored into recommended reserves for insurers.

The stricter and longer restrictions also impacted on access to medical treatment, delaying pursuers' recovery and extending the average life cycle of a claim and therefore reserves and overall spend per claim.

Treatment such as physiotherapy and psychiatric treatments were often provided remotely, making it difficult to access medical records and raising potential arguments around failure to mitigate losses. Further, we are still seeing remote treatment taking place, despite the restrictions being lifted, in addition to physical treatment. Where there is duplication in terms of treatment and administration, this is being challenged.

New types of claims are also emerging such as COVID-19 claims, work-related stress, depression and anxiety claims.





# Singapore

## Increases in certain awards of damages

General damages have seen marked and somewhat significant increases across the board that appear to reflect our court's cognisance of the impact of rising inflation in the following categories:

- Pain, suffering and/or loss of amenities.
- Loss of future earnings (marked increase in multipliers)/loss of earning capacity.
- Costs of future medical treatment/expenses (marked increase in multipliers).
- Loss of dependency/support (marked increase in multipliers).

Special damages have similarly seen marked and somewhat significant increases in the following categories:

- Professional services of medico-legal experts, forensic accounting, reconstruction experts, fire forensic investigators, professional engineers and automotive experts, loss surveyors and adjusters.
- Medical treatment and treatment owing to inflationary pressures and advances in medical services and technology, with the introduction of novel and costly medical procedures and drugs.

## New categories of claims

Awards for psychiatric injuries are on the rise. These include Post Traumatic Stress Disorder, Major Depression, Post-Concussion Syndrome, loss of cognitive functions or intelligence, change of personality and Chronic Pain Syndrome. Such conditions are often associated with incumbent prohibitive claims for lifelong and costly medication, therapy and new and costly pain and/or mood treatment procedures such as ketamine infusions and radiofrequency ablation.

In the recent appeal decision of *Eng Beng v Lo Kok Jong* [2023], the High Court allowed the claimant's claim for government hospital and medical expense subsidies and grants. As such subsidies and grants have historically not been claimed or allowed in the past, this decision may potentially lead to an increase in awards for such expenses by as much as 85%. That said, the High Court decision is currently on appeal.

Loss of inheritance (wealth collector cases/claims for Central Provident Fund (CPF) which is a mandatory social security savings scheme funded by contributions from employers and employees) have seen meteoric awards in the tens of millions in our local currency which would have been unheard of in the past.

The gig economy is also expanding, resulting in a widening class of people who can bring claims. It is expected that from late 2024, Singapore will mandate CPF contributions for gig workers aged below 30 and introduce work-injury compensation that has the same scope of coverage as employees. It is anticipated that there will be an upsurge in claims and pay-outs for medical leave wages, medical expenses and compensation for permanent incapacity.

### Public sentiment driving an increased willingness/appetite to make a claim

Greater awareness by members of the public of their rights as victims through various public resources has resulted in an increased appetite to bring legal claims. Further, we have seen an increasingly litigious culture in Singapore amongst the younger and often better educated segment of society in recent years.



There has also been a rise in numbers of very high value multi-million dollar claims settled and/or awarded by our courts that have caught the attention of many Singaporeans which, in turn, appears to have led to a noticeable increase in the number of multi-million dollar claims commenced for damages for personal injury or death in recent years.

Due to the ease in bringing claims for low impact soft tissue injury and an increase in motor accident claims being driven and managed by claims management syndicates working in conjunction with repair workshops, there has been a noticeable increase of nuisance claims. As such, insurers and their legal advisors should carefully scrutinise these claims.

### Shifts in the legal and regulatory environment

On 1 April 2021, the Actuarial Tables for use in Personal Injury and Death Claims introduced multipliers for future loss of income and future medical treatment and expenses. These have led to an increase in awards for such future losses by as much as 40%.

The recent adoption and application by our local courts of the MAS/CPI inflation calculator for awards of general damages for pain and suffering has also led to significant increases in these awards, with an annual compounded 1.72% inflation rate year on year according to the Monetary of Singapore Authority CPI inflation calculator.

**// The court's application of such an unrealistic inflation calculator for general damages for pain and suffering should be actively resisted by insurers and their lawyers.**

Patrick Yeo, Partner, Singapore





# Spain

## Increases in certain awards of damages

In relation to material damages, the impact of economic inflation is determined by the Consumer Price Index (CPI). This is used by the court to measure the average change in the prices paid by consumers in different sectors (e.g. automobile, construction, energy, etc.) and any increase will have a direct effect on the amounts awarded by judges.

For example, reparations of vehicles have had a cost increase ranging from 20% to 40% due to a lack of resources leading to shortages and a subsequent increase on the price of materials.

The Spanish Tribunals use the Scale of Damages for Traffic Accidents (Spanish Act 35/2015) as the tool to assess the value of personal injury damages. This Scale is updated each year to reflect the different cost increases and includes personal injuries, moral damages, compensation for death and so on.

In 2023, the Scale experienced a 8.5% increase due to inflation, doubling the increase in 2022 of 4.3%. Both figures are significantly high considering that in 2020, the increase was limited to 0.9%.

## The cost of living crisis

The impact of inflation on the cost of living in Spain is measured by the Consumer Price Index (CPI).

The table below shows the increase in prices in the years 2021 and 2022 to highlight the impact on the cost of living:

Annual consumer price index		
	2022	2021
Food and drinks	+ 15.7%	+ 5%
Clothing	+ 1.8%	+ 1%
Housing	- 4.5%	+ 23%
Medical treatments	+ 1%	+ 0.9%
Transport	+ 3.3%	+ 10.9%
Communications	- 1.9%	- 0.3%
Leisure and culture	+ 3.8%	+ 1.7%
Tourism	+ 7.8%	+ 3.1%

As shown above, the highest increases relate to day to day products such as food and drinks, transport (gas prices) and leisure and culture.

**//** This CPI increase has a direct impact in the insurance market, not only on the insured sums agreed in policies but also in the award of damages in personal injury proceedings. We have seen an increase in claimants seeking higher awards relating to advanced medical treatments to reflect rising prices and the cost of living crisis.

Miguel Angel Aviles, Associate, Madrid





# United States

## A civil justice jury award system leading to ‘nuclear verdicts’

Claims inflation in the US has been driven by factors such as allowance of punitive damage awards, the legal vehicles of class action and multidistrict litigation, the wide disparity of Federal and State venue-related risk factors and the use of contingent fees to drive higher settlements. Other contributing factors include litigation funding, the erosion of tort reform and negative public sentiment towards businesses and corporations.

However, in the US, the greatest factor driving claims inflation is the jury system and what has become known as nuclear jury verdicts. These are verdicts that are exponentially higher than what has long been considered the value of a claim.

In the US, civil cases that go to trial are decided by juries that render verdicts on the issues of both liability and damages. American jurors can come from every walk of life, any age over 18, gender, ethnic background, education level and employment status. While the selection of jurors at trial can be a lengthy and involved process, all parties run the risk of having what they consider a less than favourable jury sitting in judgment of their case.

## Examples of recent verdicts

Examples of recent verdicts demonstrate just how jury verdicts have become the leading factor behind claims inflation in the US. We explore a number of these cases below.

### *Cruz v Allied Aviation Fueling Company of Houston [2021]*

In 2021, the jury in the case of *Cruz v Allied Aviation Fueling Company of Houston* heard evidence of a plaintiff who was struck by a van, seriously injured and rendered a paraplegic. The jury returned a damages award in the staggering sum of US\$352.8 million.

Of this total amount, US\$170 million was for pain and suffering, US\$50 million was for physical impairment, US\$32.5 million for disfigurement, US\$30 million for future medical expenses, and US\$2.9 million for lost wages.

## Ramsey v Landstar Ranger, Inc. [2021]

The 2021 case of *Ramsey v Landstar Ranger, Inc.* involved the fatality of a 71 year old woman who was involved in a motor vehicle accident.

The jury returned a verdict of US\$730 million, comprised of US\$480 million in compensatory damages and US\$250 million in punitive damages.

It is not just the serious injury cases that have seen these nuclear verdicts. In New Jersey in 2016, a jury in a rural county awarded US\$19 million to a plaintiff who had suffered a single-level, unoperated herniated disk in the lumbar spine. These damages were solely for pain and suffering as there were no claims for economic loss. In 2014, another New Jersey jury awarded US\$8 million to a plaintiff who suffered non-operated disk injuries in the spine when an elevator in which he was riding suddenly malfunctioned and dropped two floors.

The possibility of nuclear verdicts is resulting in plaintiff attorneys taking more aggressive positions on the value of cases and insurance carriers becoming more willing to settle for higher amounts to avoid an excess verdict at trial. In 2022, insurance carriers in Florida settled the case of *In re Champlain Towers South Collapse Litigation* for US\$1 billion. In that case, a 136-unit beachfront condominium collapsed and was destroyed, resulting in 98 fatalities. There was intense media coverage and public investigation in this case, pressuring the defendants into a settlement less than one year after the accident.

One key reason for these nuclear verdicts is the average juror's change in perception of the value of money. Years ago, before social media and cable television, most jurors came from backgrounds that attached great value to money. Now, people are exposed to large amounts of money every day through social media, sports, entertainment and the internet. They see their favourite athlete signing a contract for US\$50 million per year, their favourite singer making over US\$100 million, or their favourite game show host making US\$15 million per year. Suddenly, those amounts seem normal and acceptable, and jurors have no concerns in awarding them.

Seeing the increase in nuclear verdicts and being willing to try cases, good plaintiff attorneys have increased their settlement demands to unprecedented levels. They are telling insurers that they either pay these higher settlement values, or face the risk of an excess verdict at trial.

// Concerned about the possibility of nuclear verdicts, many insurers are now paying amounts on claims far in excess of what they paid for the same claims a relatively short time ago. That has resulted in an appreciable increase in claim value in the US.

John Gilfillan, Partner, Basking Ridge

## Advances in medical science and technology

An increasingly key factor driving excess claims inflation is the advancement of technology, such as in relation to claims involving motor vehicle damage. The rising cost of repairs has made it more complicated to determine whether to repair or write off a vehicle. In addition, technological advances in the form of anti-crash features such as rear cameras, automatic emergency braking and parking sensors are costly to replace.

In personal injury cases, failing to adhere to appropriate safety mechanisms by product manufacturers can result in nuclear verdicts. For example, a recent case in Texas involving a collision



between a passenger vehicle and defendant truck resulted in a US\$90 million verdict when it was determined that the truck was not equipped with proper safety features.



While technological advances have driven up the cost of motor claims, the same advances can also be used to combat nuclear verdicts. For example, utilising active braking systems, cameras and telematics to monitor behaviour demonstrates a commitment to safety.

Also fuelling excess claims inflation are advances in medical science and research. Expanding health research can provide claimants with important information about disease trends, risk factors and outcomes of various treatments. Collectively, these forms of health research have led to significant discoveries, the development of new therapies, and a remarkable improvement in healthcare. A consequence has been skyrocketing hospital bills over recent years. Further, with plaintiffs surviving various injuries that they may not have in the past, plaintiffs are seeking greater amounts to cover the costs associated with these new and expanded treatments.

### Professional services spend, such as experts and legal costs

The rising rates of professional services spend, including experts and legal costs, as well as plaintiffs' advertising and litigating funding, have all contributed towards increased nuclear verdicts in the US.

The plaintiffs' bar has invested in advertising, social media and technology at growing rates in order to bring in more clients and influence jury pools, therefore driving up the influx and cost of settlements and verdicts. According to a 2022 report published by The American Tort Reform Association (ATRA), between 2017 and 2021 trial lawyers spent approximately US\$7 billion on advertising in the US across digital channels, television, radio and outdoor platforms, and the number of legal advertisements have increased by 30% since 2017.

Certain lines of insurance, in particular, directors' and officers' liability, professional indemnity, automotive and general liability policies have seen greater volume of claims in addition to greater expectations of larger settlements in the last five years as a result of broadening attorney advertising.

We have also seen more frequent attorney involvement and therefore increased defence costs in certain types of insurance claims, such as Personal Injury Protection (PIP) no-fault insurance programs which were designed and intended to eliminate most attorney involvement.

According to a market research study published in 2022 by Custom Market Insights, the third-party litigation funding market was valued at around US\$12.2 billion in 2021 and is projected to reach US\$25.8 billion by 2030. This has resulted in more lawsuits that would not have previously been filed, delayed resolution of claims and often higher settlements by removing the incentive for some plaintiffs (and their firms) to settle lawsuits in a timely manner.

Litigation funding has also resulted in plaintiff firms being able to retain the most expensive experts and pursue data-driven strategies such as working with outside vendors who utilise social media and analytics to choose 'pro-plaintiff' jury members. Plaintiffs are also using a greater number of resources to claim specialised damages in higher numbers, such as those relating to traumatic brain injuries and psychological trauma, which often require specialised cutting-edge medical testing and experts. In order to defend these claims, more resources are being directed to research, technology and experts. These factors have led to prolonged litigation and higher defence expenses, settlements and jury awards, resulting in increasing claims costs.



## Responding to and mitigating against claims inflation: global solutions to a global issue

Without careful mitigation strategies in place and regular communication between insurers and their customers, the current protection or coverage gap in the global personal injury market is at risk of widening; leaving insureds precariously exposed to the risk of underinsurance and insurers at risk of both legal and reputational ramifications and various claim handling challenges.

Whilst the gap is influenced by various factors specific to each jurisdiction and the maturity of that market, claims relating to psychiatric injury and those including commercial care packages are, in our view, at particular risk of underinsurance.



Insurers will be only too aware of the recent experience in responding to the COVID-19 and pandemic protection gap, with many facing potential losses and uncertainty as to whether some of their policies need to pay out. Similarly, now faced with rising costs and claims volumes due to inflation, insurers across the globe are again forced to consider how to respond.

Limiting cover, tightening policy wording or increasing premiums are possible options, as is withdrawing cover altogether. As highlighted by the COVID-19 pandemic, contractual certainty with

policyholders is key. Insurers will need to be thorough in their planning to mitigate these effects in order to maintain profitability.

Elsewhere, governments and regulators may well turn their attention to setting higher and clearer standards of consumer protection across financial services. In the UK, for instance, the Financial Conduct Authority intends to introduce a new consumer protection duty in July 2023, setting a higher standard of care that firms across the financial services industry give to consumers.

// Although there is no one solution to address the worldwide problem of claims inflation, there are a number of steps insurers, their underwriters and legal practitioners can take to mitigate against rising numbers of claims and soaring costs.

Richard West, Partner, London

Insurers should work closely with their customers to explore risk mitigation strategies, such as setting aside emergency funds to deal with excess claims inflation. Communication is key; for example, facilitating clear information sharing, declared values, replacement costs and scope of cover so that key aspects of both risk and policy are understood by all parties.

Insurers and their underwriters must also carefully consider how new categories of claims might impact their products and services, and review programmes to ensure the cover they are providing is clear, suitable and fit for the demands that may be placed on them during the period of cover. Brokers will also play a more important role than ever to ensure accurate insurance policy limits are in place for their clients in order to close the protection or coverage gap.

Greater accuracy in reserving accounting for claims inflation, along with agreed litigation strategies will help compensators gain control over their claims exposure and avoid being caught short at mediation or losing an appropriate settlement opportunity.

In catastrophic injury claims where the need for set care regimes is essential, problems of both cost and supply have emerged. As a result, not only are defendants in many jurisdictions paying a premium for care services beyond what has traditionally been allocated, but there is a greater risk of significant delays in the resolution of these high value claims whilst the parties search for and obtain the care and accommodation required.

Whilst not applicable to all 11 jurisdictions (for example the US), engaging in the claimant's rehabilitation management at the pre-litigation stage will assist with more accurate reserving, better understanding of the claimant's prognosis and the opportunity for interim payments to ensure the injured party starts their recovery process as soon as possible.

Further, given the often long-waiting lists of medico-legal experts, they should be selected and instructed swiftly to avoid unnecessary delays.

Invoices in relation to care, rehabilitation providers and other experts should be interrogated. Any fees sought in relation to disclosure should be carefully considered and duplication of work undertaken, challenged. Care experts should also be asked to consider alternatives, such as

live-in flat rate care, rather than simply accepting an expensive care management package, and inclusion of bonuses for care teams should be contested.

In terms of road traffic accident claims, increased scrutiny of claims for low impact soft tissue injury claims, in addition to early identification of red flags such as possible fraudulent claims, staged accidents, phantom passengers, exaggerated property and/or personal injury claims is key.

Insurers should also drive robust claim management through appointing experienced and tested industry specific insurance defence lawyers to advise on and manage the dispute whether at mediation or trial, and where required, to rigorously defend unmerited, fraudulent or exaggerated claims in order to render timely and accurate provisions for claim reserves.

Early resolution of claims, where appropriate, should be encouraged to avoid claims creep. Additionally, engaging in Alternative Dispute Resolution (ADR) methods such as mediation, issuing early cost protective settlement offers and being proactive in progressing the defence of the claim, may result in early resolution of claims benefiting both the claimant and defendant.

Costly defence litigation and the pay-out of high settlement awards will likely translate into increased insurance premiums for policyholders who, in turn, may decide to shop around for better value on policies. This will place additional pressure on insurers to drive efficiency and realise the potential of data capture. Those who fail to do so risk falling behind their competition.

Claims inflation necessitate a proactive response from the global insurance community. Failure to do so risks damaging relationships with customers, leaving insureds exposed to the risk of underinsurance and insurers at risk of both legal and reputational ramifications and various claim handling challenges. However, the benefits of considering policies and adapting to the changing risk landscape can bring about increased business efficiencies, fewer claims and a reduction in uninsured losses, thereby closing the protection or coverage gap. In turn, this offers insurers an opportunity to increase trust in the industry and enhance reputation.



# Key contacts



## Miguel Angel Aviles

Associate, Madrid

t +34 919 17 04 14  
e miguel-angel.aviles@kennedyslaw.com



## Heidi Bloch

Partner, Copenhagen

t +45 33 73 70 10  
m +45 23 31 81 55  
e heidi.bloch@kennedyslaw.com



## Sean Burns

Partner, New York

t +1 646 625 3951  
m +1 917 880 6230  
e sean.burns@kennedyslaw.com



## Fernanda Carvajal

Associate, Santiago

e fernanda.carvajal@kennedyslaw.com



## Janine Clark

Special Counsel, Brisbane

t +61 7 3724 9038  
m +61 450 457 498  
e janine.clark@kennedyslaw.com



## Alfonso De Ramos

Partner, Madrid

t +34 919 17 04 02  
m +34 679 530 284  
e alfonso.deramos@kennedyslaw.com



## Chris Finn

Partner, Sydney

t +61 2 8215 5914  
e chris.finn@kennedyslaw.com



## Nate French

Associate, Chicago

t +1 312 800 5048  
m +1 312 599 0329  
e nate.french@kennedyslaw.com



## John Gilfillan

Partner, Basking Ridge

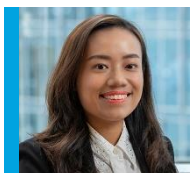
t +1 908 848 1234  
m +1 973 229 5422  
e john.gilfillan@kennedyslaw.com



## Fiona Hamilton-Wood

Corporate Affairs Lawyer, London

t +44 20 7667 9241  
m 07917494037  
e fiona.hamilton-wood@kennedyslaw.com



## Alicia Ho

Trainee Solicitor, Hong Kong

t +852 2848 6319  
e alicia.ho@kennedyslaw.com



## Louise Houlston

Partner, Edinburgh

t +44 131 285 2962  
m +44 7714 921 379  
e louise.houlston@kennedyslaw.com



## Rory Jackson

Partner, Edinburgh

t +44 131 659 9716  
m +44 7786 466 245  
e rory.jackson@kennedyslaw.com



## Michael Kavanagh

Partner, Melbourne

t +61 3 9498 6601  
e michael.kavanagh@kennedyslaw.com



### Hui Ying Lim

Partner, Singapore

t +65 6436 4346  
e huiying.lim@kennedyslaw.com



### Gian Lorenzini

Partner, Santiago

t + 56 2 32027260  
m 56999699851  
e gian.lorenzini@kennedyslaw.com



### Claire Mulligan

Partner, London

t +44 20 7667 9534  
m +44 7557 972 496  
e claire.mulligan@kennedyslaw.com



### Deborah Newberry

Corporate Affairs Director, London

t +44 20 7667 9508  
m +44 7585 901 874  
e deborah.newberry@kennedyslaw.com



### Martina O'Mahoney

Partner, Dublin

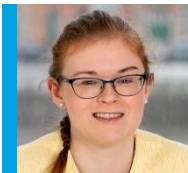
t +353 1 482 5717  
m +353 86 130 0351  
e martina.omahoney@kennedyslaw.com



### Corey Repasy

Associate, New York

t +1 646 625 4026  
m +1 862 268 7462  
e corey.repasy@kennedyslaw.com



### Aideen Shanley

Associate, Dublin

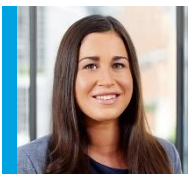
t +353 1 902 7210  
m +353 86 145 0457  
e aideen.shanley@kennedyslaw.com



### James Shrimpton

Partner, Birmingham

t +44 121 214 8030  
m +44 7974 721 376  
e james.shrimpton@kennedyslaw.com



### Hilary Simon

Associate, New York

t +1 646 625 3982  
m +1 917 580 2656  
e hilary.simon@kennedyslaw.com



### David Strahan

Partner, Dublin

t +353 1 902 7206  
m +353 86 887 2270  
e david.strahan@kennedyslaw.com



### Wilson Tam

Partner, Hong Kong

t +852 2848 6355  
e wilson.tam@kennedyslaw.com



### Karoline Ulmits

Trainee Solicitor  
(Advokatfuldmægtig), Copenhagen

t +45 33 73 70 22  
m +45 22 37 00 01  
e karoline.ulmits@kennedyslaw.com



### Richard West

Partner, London

t +44 20 7667 9166  
m +44 7775 918 424  
e richard.west@kennedyslaw.com



### Amanda Wylie

Partner, Belfast

t +44 28 9026 1474  
m +44 7585 302 475  
e amanda.wylie@kennedyslaw.com



### Patrick Yeo

Partner, Singapore

t +65 6436 4350  
e patrick.yeo@kennedyslaw.com



### Meiling Yip

Partner, Hong Kong


t +852 2848 6328  
m +852 9319 4596  
e meiling.yip@kennedyslaw.com

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