



Global Healthcare Brief

Medical malpractice claims inflation: a global perspective

February 2024

Kennedys



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Foreword

Our global healthcare lawyers in Australia, Canada, Denmark, England, France, Hong Kong, Ireland, Israel, Latin America and Spain explore the extent to which these jurisdictions are experiencing medical malpractice claims inflation.

Inevitably, where economic inflation has risen more steeply in recent years, this is reflected in the claims inflation being experienced. In contrast, the experience in other jurisdictions, such as Hong Kong and Israel, has been of more gradual and moderate economic inflation, and consequently modest claims inflation. Higher medical inflation is expected in Hong Kong in the year ahead.

In Canada, legislation requires the cap on general damages awards to be adjusted for inflation. Elsewhere, in Denmark, an increase in damages awards is mostly associated with the level of interest that is applied to the awards in accordance with legislation, rather than as a consequence of a rise in the level of particular aspects of the damages award itself.

For those dealing with medical malpractice claims in England, with the exception of general damages, the greatest claims inflation is seen in the life changing claims where there are extensive care, accommodation and earnings claims.

We will continue to track medical malpractice claims inflation globally to assist indemnifiers in setting damages reserves.



Christopher Malla

Global Head of Healthcare, London

t +44 20 7667 9194

m +44 7818 451 908

e christopher.malla@kennedyslaw.com



Australia

Australia has seen significant increases in respect of both care and accommodation claims. Home care costs for one of the major private providers has recently increased by 22% (having last increased two years ago).

Higher accommodation claims - often representing an increase of up to 50% - are driven by non-availability of materials, in part as a consequence of the pandemic, but also due to the considerable resources required following significant weather events in New South Wales and Queensland.

Healthcare costs in Australia are tracking ahead of other elements of medical malpractice claims. The cost of most procedures has risen by approximately 10%, and in some cases by considerably more. The cost of total knee replacements, for example, has increased by up to 32%.

Other heads of loss have also risen in Australia, as average weekly earnings have increased by 5.5%, and general damages (linked to CPI) by 6.8%.



Cindy Tucker

Partner, Melbourne

t +61 3 9498 6607

e cindy.tucker@kennedyslaw.com



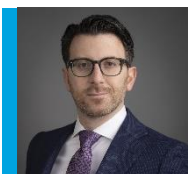
Canada

In Canada, economic inflation has been factored in to the assessment of damages in tort claims for some time.

In 1978, the Supreme Court of Canada imposed a cap of CAN\$100,000 on general damages awards for pain and suffering. The cap, however, was to be adjusted for inflation. It currently sits at approximately CAN\$450,000 (approximately £265,000).

In the context of medical malpractice claims specifically, the most significant claims inflation may be with respect to health care costs. In 2023, Canada's health care Consumer Price Index (CPI) rose by 3.49%.

While it may yet be too early to measure the true impact of recent claims inflation, the anecdotal evidence is that increases in wages and the cost of medical care in Canada will generally be gradual and not keep pace with general inflation rates.



Jason Arcuri

Dolden Wallace Folick LLP, Ontario

t +647 670 2150

e jarcuri@dolden.com



Denmark

In Denmark, an increase in damages awards is mostly associated with the level of interest that is applied to the awards in accordance with Danish legislation, rather than as a consequence of a rise in the level of particular aspects of the damages award itself.

Section 16(2) of the Liability for Damages Act stipulates that damages awards are subject to interest from the time the claim can be raised in accordance with subsection (1) at an annual interest rate corresponding to the interest rate in section 5 of the Interest Act. The applicable rate - i.e. the reference rate - is the official lending rate set by the Danish central bank (which is set twice a year), plus a supplement of 8%.

The official reference rate as of 15 September 2023 is 3.75% compared to 0.8% on 9 September 2022, an increase which will affect the total amount to be paid in the event of a claim.



Thomas Arleth

Legal Director, Copenhagen

t +45 33 73 70 53

m +45 40 16 99 00

e thomas.arleth@kennedyslaw.com



England

For those dealing with medical malpractice claims in England, with the exception of general damages, the greatest claims inflation is seen in the life changing claims where there are extensive care, accommodation and earnings claims. For claims which include limited future losses the most significant potential increase is in relation to any future increase to general damages.

Maximum severity claims in clinical negligence have seen substantial increases in care costs, driven upwards by a shortage of carers and the rising cost of living. We are also seeing claims for 24 hour waking night care - not by a sleeping carer but two waking night carers which could potentially increase a care claim by up to £100,000 per annum.

The increased cost of materials, in part as a consequence of the pandemic, and disruption to global supply chains arising from geopolitical instability has led to an increase in the adaptations costs associated with accommodation claims.

We have also seen movement in general damages awards for the most catastrophically injured. In the recent decision in *CCC (by her Mother and Litigation Friend MMM) v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] the general damages award was £390,000.

The claimant has been granted permission to appeal by the Supreme Court on the issue of entitlement for child claimants to claim for 'lost years'. If the appeal proceeds and is successful, this will increase relevant damages claims.

Claims inflation will also need to be considered in the context of any change in the current personal injury discount rate (PIDR) of -0.25%, which has had a significant effect on damages inflation.

Ahead of the next formal review of the PIDR in England and Wales - which must begin by 15 July 2024 - and following a call for evidence exploring the option of a dual or multiple PIDR system, the Ministry of Justice has launched a further call for evidence. The intention being to obtain data on several factors, including claimant investment behaviours and associated expenses, to assist the expert panel that are advising the Lord Chancellor. The call for evidence closes on 9 April 2024.



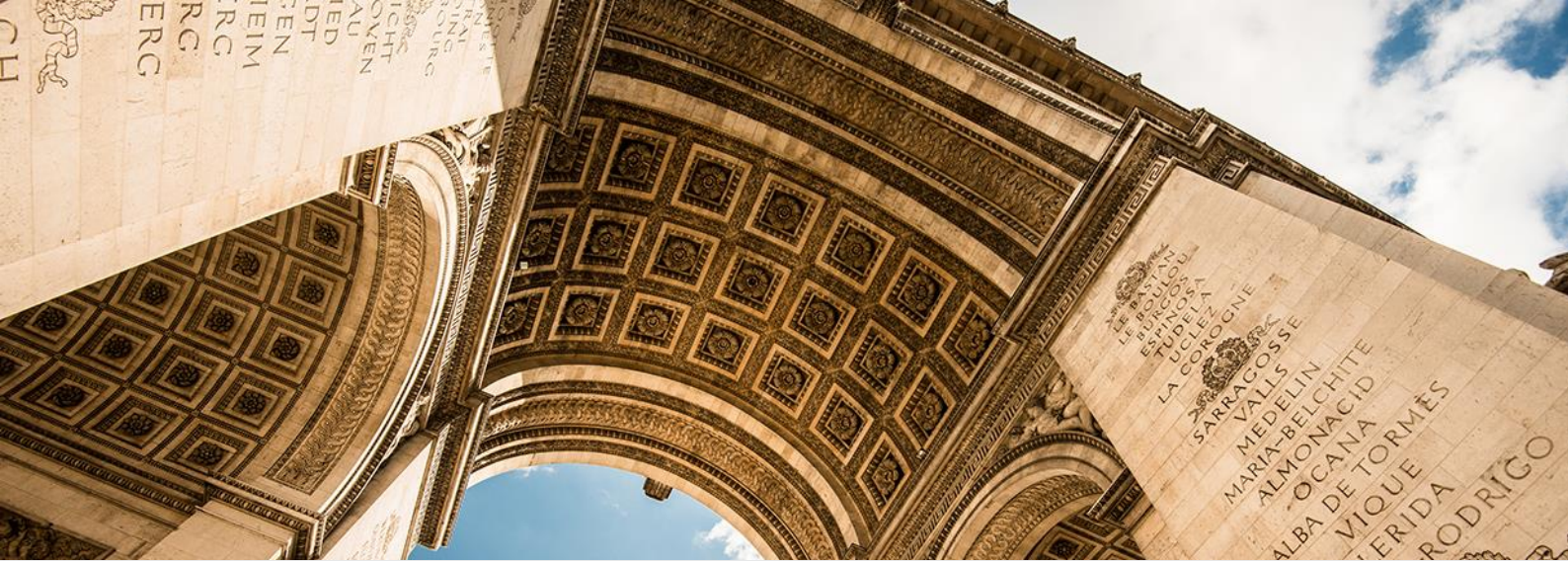
Christopher Malla

Global Head of Healthcare, London

t +44 20 7667 9194

m +44 7818 451 908

e christopher.malla@kennedyslaw.com



France

In France, compensation in medical malpractice claims generally rises in line with the cost of living, but the courts do not explicitly take this criterion into account when assessing damages.

The courts determine compensation on a case-by-case basis, and there are no legal or regulatory scales for assessing bodily injury. However, after several years of inflation, compensation awards in bodily injury claims are now being brought into line with the reality of increased prices.

However, in the case of claimants who receive an annuity that is indexed annually and revalued every year, inflation is considered when calculating the annuity or lump-sum payment awarded to the claimant.

According to the MACSF annual report (2022) on the risks of healthcare professionals (Mutuelle d'assurance des professionnels de la santé (MACSF), rapport annuel, 2022), compensation awarded to claimants by civil courts increased sharply in 2022 compared with 2021. The average cost of claims has risen, despite a fall in the number of claims.

As set out in the same MACSF annual report, surgical risks, general medicine, and gynaecology-obstetrics claims accounted for 69% of the total damages awarded in medical negligence claims in 2022. The report also provides that compensation arising from claims made in respect of alleged surgical negligence has been steadily increasing, with a higher number of claims over €500,000.



Aurélia Cadain

Partner, Paris

t +33 1 84 79 37 82

m +33 6 26 02 03 82

e aurelia.cadain@kennedyslaw.com



Hong Kong

Claims inflation in Hong Kong has remained relatively modest.

The statutory award for bereavement was increased by 4.9% based on the region's change in consumer price index in the recent biennial review.

Insurers meanwhile anticipate higher medical inflation in 2024 due to the prevalence of chronic diseases and the lifting of COVID-19 restrictions. Resumption of delayed operations and patients from mainland China are expected to drive up hospitalisation demand. Lengthy waiting times within the more affordable public healthcare sector means an increasing number of patients are seeking treatment within the private sector. Along with wages and consumer prices, it is anticipated these will likely impact on the cost of care particularly for catastrophic injuries.

The High Court in Hong Kong confirmed it remains the claimant's burden to prove the reasonableness of medical costs, particularly on more advanced medical treatment and equipment, such as a robotic exoskeleton (*Lee Hong Kong Hansen v MTR Corporation Limited* [2023]).

The latest figures on wages up to September 2023 indicate on average an increase of 3-4%, representing a manageable increase in loss of earnings claims. Although for those in senior positions, the increase would be higher and damages awards can be affected by particularly high earning claimants.

A recent interlocutory decision revealed that a claimant was suing for nearly HK\$24 million (approximately £2.42 million) with approximately 97% of the amount claimed being pre-trial loss of earnings, as the claimant was a specialist doctor (*Wong Ying Grace v Dr Ho Wing Chiu Clement and another* [2022]).



Christine Tsang

Partner, Hong Kong

t +852 2848 6350

e christine.tsang@kennedyslaw.com



Eric Wong

Senior Associate, Hong Kong

t +852 2848 6326

e eric.wong@kennedyslaw.com



Ireland

In Ireland, the claims inflation picture is similar to that of the UK and Australia.

In the context of loss of earnings, there has been an increase of approximately 10% to the national minimum wage, and our sense is that salaries in some industries and sectors have increased by up to 15%-20%.

Whilst reforms to general damages have seen a 50% reduction in the lower level of general damages, for the most catastrophically injured the cap has increased from €500,000 to €550,000.



Joanne O'Sullivan

Partner, Dublin

t +353 1 902 7202

m +353 86 145 1075

e joanne.osullivan@kennedyslaw.com



Israel

Economic inflation in Israel has been relatively modest in the last three years (2.8% in 2021, 5.3% in 2022 and 3% in 2023), when compared with some other countries.

The general inflationary rise in 2022 was considered relatively high and returned to a more moderate level last year. In the context of medical malpractice claims, claims inflation has similarly been modest, and has essentially been tracking general inflation.

The maximum award for pain and suffering and shortened life expectancy in a catastrophically injured claimant may currently reach about NIS 1,200,000 (approximately £280,000), which reflects an increase in relation to recent years.

We have seen a fairly significant increase in the average salary figure in the market to NIS 148,548 per year (approximately £32,300). This figure - applied to a loss of earnings claim where the claimant is a child - is calculated using the number of the population in employment. During the pandemic there was a reduction in the number of people in employment which resulted in a higher average salary figure. However, it is anticipated that this average salary figure will reduce when this is next calculated reflecting the return to a higher level of employment post-pandemic.

The National Insurance Institute publishes the average salary in the market every January. The Bureau of Statistics may publish the figures on a non-regular basis whenever there is a material change.



Chaim Zelichov

Partner, Tel Aviv

t +972 9 9711111

e chaim.zelichov@kennedyslaw.com



Peru and Chile

In Peru, inflation has not been a major concern in medical malpractice claims.

By 2022, the cost of medical treatment and care had returned to pre-pandemic levels.

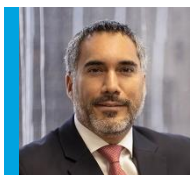
Currently, whilst inflation has increased slightly, the impact on the three main types of damages recognised in Peru - consequential damages (expenses incurred), loss of profit, and non-pecuniary damages (pain and suffering) - has been minimal.

For consequential damages, the increase in the cost of medical services last year was relatively modest at 0.7%. The cost of medicines has not risen above 0.5%. Similarly, care costs in catastrophic injury claims have not significantly impacted the cost of claims. Since 2022, the minimum salary for a live-in domestic helper is Sol 1,025 per month (approximately, US\$277).

In Chile we had a similar scenario, the increase on health expenses was 1.5%, according to the National Statistics Institute.

However, in Peru, the increase of the national minimum wage by approximately 10% in 2022 may affect a claim for disability (loss of profit), but the minimum wage is not expected to increase in the near future.

In Peru and Chile, an element of the compensation awarded is for moral damages, as part of non-pecuniary damages (for example, emotional distress). It is difficult to assess the impact of inflation on this category of damages, but it may have been minimal.



Fernando Hurtado De Mendoza

Partner, Lima

e fernando.hurtadodemendoza@kennedyslaw.com



Gian Lorenzini

Partner, Santiago

t + 56 2 32027260

m 56999699851

e gian.lorenzini@kennedyslaw.com



Spain

In Spain, the impact of claims inflation on medical malpractice claims can be seen with reference to the ‘Scale of Damages’ applicable to road traffic collisions (the Scale).

Whilst not compulsory for claims unrelated to road traffic collisions, the Scale is frequently applied by both claimants and the courts when determining damages arising from medical malpractice as it provides an objective basis for valuations.

The Scale, a tariff system which provides economic values relating to permanent injuries and the number of hours of third party assistance, for example, is updated every January to take into account inflation.

In January 2023, the values were increased by 8.5% and the increase for 2024 has been announced as 3.8%, demonstrating that inflation has recently had a significant impact on the valuation of losses in recent years.



Alfonso De Ramos

Partner, Madrid

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



Geoffrey Ratcliffe


Associate, Madrid


t +34 919 17 04 13
e geoffrey.ratcliffe@kennedyslaw.com

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