

Tort law reform for personal injury
claims – is it needed and does it work?
An international perspective

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Catalyst for this presentation

- In February there was a change in calculation of the lump sum value of future cost of care and other economic loss in England & Wales, which for serious cases of personal injury would more than double the payment made
- In March, following this decision, an NHS Trust increased its settlement of a claim from €4.1m to €10m
- Insurers and the NHS were left in a state of shock

Summary of claims in the UK

- Over 30 years highest value claims have risen from €1m to €35m
- During this time price inflation has been 2.5x, wage inflation about 4x
- NHS Hospital Trusts in England had liabilities of €70bn at 31.3.17
- Across all of the UK, including GPs and private hospitals covered by medical defence organisations and insurers, the figure is approaching €90bn

Putting it into perspective

- In England, NHS hospitals employ 106,000 doctors of which 4,000 are obstetricians
- If the €70bn liability was split between the doctors it would equate to €660,000 each
- However, nearly 60% of claims relate to cases involving brain damaged infants and other obstetric claims. If these were spread amongst the 4,000 obstetricians it would be €10,000,000 per doctor
- Note: The above is simplified as it ignores errors by nurses, midwives and the hospitals and is meant to illustrate a point.

USA - reasons for introducing tort law reforms

- Doctors unable to afford insurance premiums and leaving their State to work elsewhere
- Doctors unable to obtain cover as insurers withdrew from offering medical malpractice cover
- The huge stress caused on healthcare professionals from the prospect of being regularly sued
- The escalating cost of healthcare due to defensive medicine caused by fear of being sued

USA - most common legal reforms

- Cap on non-economic damages introduced by 33 states
- Overall cap on damages introduced by 6 states
- Reduce period a claim can be made under statute of limitations, most states
- Restricting plaintiff legal fee recovery introduced by 16 states

USA - examples of legal reforms

- California
 - Cap on non-economic loss of €300,000
 - Attorney fees limited to 40% first €60k, 33% next €60k, 25% of the next €600k and 15% in excess of €720k
- Indiana
 - Cap on non-economic loss of €300,000 per provider
 - Overall cap on total damages of €1,500,000

USA - current claims experience

- Three websites in the USA claim to report the 10 highest medical malpractice awards ever made. There is little overlap and excluding 2 extraordinary outliers the overall top 10 average is €44m.
- In many states, awards of €5m are considered very high and €10m rare or unknown
- Claims involving serious injury in the USA are not much higher than those now awarded in the UK but on average are lower in value

USA - have tort law reforms worked? (1)

- The Doctors Company at the end of 2016 stated that:
 - In 2016 doctors are currently paying less on average than they were in 2001 despite inflation since then
 - The number of claims reported more than halved between 2003 and 2016
- In Texas, which introduced the most far reaching legal reforms in 2003
 - Between 2003 and 2011 the number of lawsuits fell by two-thirds and the average award fell by 22% to €240,000
 - The trend of doctors leaving Texas to practice elsewhere reversed and since 2003, 28,000 new doctors were licensed

USA - have tort law reforms worked? (2)

- Doctors unable to afford insurance premiums and leaving their State to work elsewhere **Yes**
- Doctors unable to obtain cover as insurers withdrew from offering medical malpractice cover **Yes (but cover is available in all 50 states)**
- The huge stress caused on healthcare professionals from the prospect of being regularly sued **Perhaps some reduction**
- The escalating cost of healthcare due to defensive medicine caused by fear of being sued **No**

USA - estimates for cost of defensive medicine

- Cleveland clinic study in 2013 based on 3 hospitals €60bn
- Washington Post article 2016 “studies suggest ..” €120bn
- Republicans in House of Representatives €400bn
- Congressman Tom Price 2010 proponent of reforms €780bn
- Although the number of claims has fallen it is clear that most doctors have not altered their mindset when it comes to defensive medicine and it is thought that it will take a generation for any difference to be noticed

Australian experience (1)

- In 2000/01 a crisis arose in Australia which included:
 - UMP, the medical defence organisation covering over 40% of doctors in Australia, went into administration unable to meet its liabilities
 - Nearly all reinsurers pulled out of Australia as a result of what they considered to be irrational court judgements
 - Schools, charities and community organisations were unable to purchase affordable liability cover and events were cancelled
 - Medical negligence premiums for obstetricians, neurosurgeons and rural GPs became unaffordable for many

Australian experience (2)

- The government ordered a review and demanded that the states introduce sweeping changes to fix the problem
- The result included a swathe of tort law reforms in every state that were broadly the same, although not identical. These included:
 - Reducing the period allowed for bringing claims
 - Nearly halving the awards for the highest and most serious claims
 - Requiring someone to have a permanent disability before being eligible for general damages
 - Capping the maximum loss of earnings claim to a multiple of the national average wage

Australian experience (3)

- Following these tort law reforms, the number of claims fell by more than 50% and the average value of claims fell by 20%
- Before the reforms, the highest claim in Australia had been settled for €10m in 2001
- After the reforms, highest awards fell to around €6m but over the last 15 years they have been gradually increasing and have recently surpassed the 2001 figure with a claim settled for €13m

A quick review of New Zealand

- In 1972 NZ introduced a no fault compensation scheme called ACC
- It covers all personal injuries whether caused by an accident at home, on the road, in the workplace or as a result of a medical mishap
- A person who qualifies for a payment under ACC is unable to sue anyone who may have been responsible for the injury
- The awards are far lower than for a successful claim in the UK but individuals are looked after speedily and with no lawyers involved
- Although not perfect, it is virtually impossible to find anyone in NZ who would swap ACC for the ability to sue their doctor

Conclusions (1)

- We have seen that other countries have taken action to reduce the cost of medical negligence, in the USA by piecemeal tort law reforms over the last 25 years and in Australia by concerted one-off action driven by federal government
- In the UK and Ireland, however, the costs continue to spiral upwards
- In both countries, when crises about affordability occurred in 1990 and 2001 respectively, the solution was not tort law reform to reduce the number and value of claims but instead for the State to take over all or part of the payments

Conclusions (2)

- In the USA there is an effective limit to claims which is the amount of insurance that a doctor has or the hospital carries
- For the individual doctor, it is not uncommon for limits on their insurance policies to be \$1m, \$2m or even lower. Anything above \$10m, even in high litigation states would be rare
- Hospitals have much higher limits but not all, as some have chosen to spend their money on healthcare for their patients
- High awards are frequently reduced to the level of the insurance available

Conclusions (3)

- The UK and Ireland have a legal system which allows no limit on the awards that can be granted for personal injury.
- As the governments pay for all the serious cases involving injury at birth (and in Ireland also subsidises doctors working in private hospitals by paying for claims in excess of €0.6m/€1.2m depending on specialty), there are not the same pressures that have arisen in the USA and Australia for tort law reform
- It is the tax payer on whom the burden for personal injury awards falls but whereas in every other area of government expenditure there is scrutiny on how it spends tax revenue, the courts are under no obligation to consider whether society can afford the awards made