

Governance & Patient Safety Seminar

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Topics

- **Tort Litigation in Ireland – A Rapidly Changing Landscape**
- **Legal Services Regulation Bill**
- **Funding the Clinical Indemnity Scheme – Time for Radical Change**

Tort Litigation in Ireland – A Rapidly Changing Landscape

Current Approaches to Awarding Damages

Damages awarded to compensate for personal injuries are intended to put the injured party in the same position he/she would have been in but for the wrong for which he/she is now getting compensation.

- Restitutio in Integrum principle

Lump Sum Payment

Intended to compensate for all past and future losses. These losses include non-pecuniary loss (general damages) and pecuniary loss (special damages).

Future Special Damages

When assessing future special damages the courts make particular assumptions in relation to some relevant factors and contingencies to include:

- The plaintiff's likely life expectancy.
- The fact that the plaintiff's condition may deteriorate.
- Cost of medical care/treatment and of medical aids and appliances.
- Loss of earnings.
- Tax rates on income.
- Inflation rates.
- Rate of return on the capital sum when invested.

Working Group on Medical Negligence Litigation and Periodic Payments

On 18th February 2010, the President of the High Court established the above Group, with the following terms of reference:

1. To examine the present system within the courts for the management of claims for damages arising out of alleged medical negligence and to identify any shortcomings within that system.
2. To make such recommendations to the President as may be necessary in order to improve the system and eliminate the shortcomings.

3. To consider whether certain categories of damages for catastrophic injuries can or should be awarded by way of Periodic Payment Orders and to make such recommendations to the President as may be necessary.
4. To provide the President with such draft legislation, regulations, and Rules of Court as may be necessary to give effect to the Working Group's recommendations.

The President appointed Mr Justice John Quirke, Judge of the High Court, as Chairperson of the Working Group. There were two other judicial appointees to the Group, Ms Justice Mary Irvine and Mr Justice Vivian Lavan, Judges of the High Court.

Criticism of the Lump Sum Award Approach

“The system encourages a conflict of evidence with both parties seeking the best possible outcome. The court is required to determine the level of future damages by seeking to resolve conflicting expert medical and other evidence. This presents the court with the almost impossible task of providing “fair and just compensation” where life expectancy is uncertain or disputed”.

- Report of Working Group on Medical Negligence and Periodic Payments, P. 12.

“Looking into a Crystal Ball” – Quirke, J. (2006)

Arguments in Favour of Lump Sum Award

“Lump sum awards, undoubtedly, have the advantage for the parties of conclusiveness and certainty in the resolution of a claim. They enable an insurer (defendant) to “close the book” on the claim and facilitate the operation of standard insurance arrangements. For a plaintiff, they offer greater autonomy in allowing him/her to decide how to dispose of the total of the award: a plaintiff might, for example, wish to invest the award in establishing a business. This argument, however, loses its force in the case of a plaintiff who is facing serious and long term or permanent incapacity”.

- Report of Working Group on Medical Negligence and Periodic Payments, P. 15.

Periodic Payment Order (PPO) as an alternative to Lump Sum Payment by way of Compensation in Catastrophic Injury Cases

Periodic Payment Order (PPO)

It involves the transfer of investment (to include inflation) and mortality risk to the defendant.

Investment Risk

- The vehicle for the investment of the lump sum may not maintain its capital value; the risk that the plaintiff will not be able to achieve the return which was assumed when calculating the value of the settlement/award.

Mortality Risk

- Risk that the plaintiff will die earlier or later than expected or assumed in the settlement/award. If the plaintiff dies later than expected, the sum in settlement (award) may not be enough to cover his/her care needs – he/she will run out of funds for their care costs. If plaintiff dies earlier than expected, his/her family will enjoy a windfall from the unused portion of the settlement/award.

Periodic Payment Order – The English Experience

- Damages Act 1996 introduced, on a statutory basis, a facility whereby damages may be awarded by means of a “periodical payment order”. On consent of the parties, the courts were empowered, to order damages awarded for personal injuries to be paid wholly or partly by PPO.
- Courts Act 2003 amended Act of 1996 such that the requirement for consent was removed.
- *Thompson -v- Thameside and Glossop Acute Services NHS Trust* [2008] 2 AllER 537 – RPI replaced by ASHE SOC 6115.

Two Critical Features of English PPO Scheme

1. Indexation of PPOs to be based not on RPI but on an official annual earnings survey applicable to care assistants and home carers; and
2. The requirement that the court is satisfied that continuity of payment under the PPO is reasonably secure.

Periodic Payment Orders

Working Group's over-arching findings:

- Lump sum payment awards are inadequate and not appropriate in cases where a plaintiff has been catastrophically injured in the long-term or permanently and will require ongoing care and medical treatment.
- Seriously injured plaintiffs should not be deprived of a right to claim within the courts that damages which are intended to pay for the cost of their future care should be paid periodically and not by way of a single lump sum.

- Defendants facing substantial claims should be entitled to claim within the courts that damages which are intended to pay for the cost of future care, treatment and medical equipment should, in the interests of justice, be paid periodically at the approximate time when the care etc is actually required.
- Capacitated adults, notwithstanding a statutory scheme, would be entitled to reach agreement and to settle claims for damages in such manner as they deem appropriate.

Working Group's Recommendations on PPOs

- Legislation should be enacted to empower the courts, as an alternative to lump sum awards of damages, to make consensual and non-consensual PPOs to compensate injured parties in cases of catastrophic injury where long-term impairment care will be required for (a) future treatment (b) future care and (c) the future provision of medical and assistive aids and appliances.

The Orders should apply to the whole or part of an award in any case where, due to:

- a) the nature of the injuries, and
- b) the circumstances of the plaintiff

the court considers it appropriate and in the best interest of the plaintiff that such an order should be made provided the parties have been heard in full.

- Courts should only be empowered to make PPOs in respect of future loss of earnings where both parties consent.
- Courts should only make PPOs where they are satisfied that continuity of payment under the PPO is reasonably secure.
- Provision must be made for adequate, appropriate indexation of PPOs – the index must be one relating to earnings of treatment and care personnel.

- Variation of PPOs should be permitted where the plaintiff's condition will deteriorate or significantly improve provided the future contingency has been factored into the original PPO.
- Provision should be made in the PPO for “stepped payments” where, for example, the plaintiff attains a particular age.

- A plaintiff entitled to a PPO should not be permitted to assign or charge that right to another without the approval of the court which made the order.
- Unless there is an express agreement to do so, PPOs should not extend to dependents of a plaintiff after his/her death.
- PPOs should be expressly exempted from income tax through the enactment of a specific statutory exemption to the Tax Consolidation Acts.

- The operation of the lodgement and tender arrangements and of S.17 of the Civil Liability and Courts Act, 2004 should be restricted to those heads of loss not covered by the PPO. Open offers and Calderbank offers should be taken into account, in determining the issue of liability for costs, concerning the other heads of loss covered by the PPO.
- The DoHC should arrange its affairs to ensure that there is no double recovery by recipients of medical card, LTI schemes etc.

Where to from Here?

1. Requirement for legislation
Civil Liability (Damages) Bill.
2. Insurers – annuities – security and continuity of payment.
3. Choice of earnings-related index for PPO – Central Statistics Office (CSO).

Catastrophic Injury Cases Managed by SCA – Current Status

A number of cases have settled on the following basis:

- Payment of a contingency lump sum.
- Two years future care costs
- case adjourned for two years with the aim of agreeing a PPO arrangement with effect from return date (assumes introduction of legislation).

Interim Settlement with Potential PPO in 2 Years

Item	Damages in €
General damages	450,000
Retrospective care costs	130,000
Future care costs – 2 years only	100,000
Aids and appliances	100,000
Assistive technology	50,000
Future accommodation costs – house	350,000
Accommodation costs to date i.e. alterations	100,000
Miscellaneous special damages – travel and car	20,000
Future loss of earnings	350,000
Total	1,650,000

Implications for Insurers

- Inability to purchase annuities.
- Increased awards?
- Re-reserving of catastrophic claims Portfolios.

Infant K.T. -v- Enterprise “X”

OUTCOME:

- a) Baby K.T. diagnosed with Cerebral Palsy with a Spastic Asymmetric Quadriparesis.
- b) Her MRI scan confirmed a profound Hypoxic or Anoxic insult at or around the time of delivery.
- c) Experts all agreed that the standard of care was grossly deficient.
- d) No Intellectual Disability; on a par with the brighter children in her class.
- e) Limited mobility.
- f) Epilepsy under control.
- g) Incontinent, though improving.
- h) Full insight into her disability.
- i) Life expectancy of 65 years.

Infant K.T. -v- Enterprise “X”

SETTLEMENT FIGURES		
	<i>Defendant</i>	<i>Plaintiff</i>
	€	€
Loss of earnings	400,000	546,000
Future Care	3,500,000	8,000,000
Aids/Appliances	1,250,000	1,900,000
Assistive Technology	750,000	1,000,000
Past Care	125,000	213,000
Accommodation	550,000	1,150,000
Wardship	3,000	3,000
General Damages	300,000	800,000
Education Assistance	500,000	800,000
Other Costs	300,000	300,000
Total	7,678,000	16,012,000

Working Group on Medical Negligence Litigation and Periodic Payments – Module II

- Adoption of a clinical negligence protocol.
- Claimant should
 - a) provide sufficient information to alert the hospital where an adverse outcome has been serious or had serious consequences;
 - b) Be as specific as possible about the records and the purposes for which they are required.
- Letter of notification.
- Letter of claim.
- Letter of response.
- ADR.
- Experts.

Legal Services Regulation Bill

Legal Services Regulation Bill

- Bill published on 12th October, 2011

“provides for a greater transparency for legal costs and greater assistance and protection for consumers of legal services. It also provides an entirely independent dispute system to determine allegations of professional misconduct and a new system for legal costs adjudication where legal costs are in dispute”

Bill makes provision for three separate, key entities:

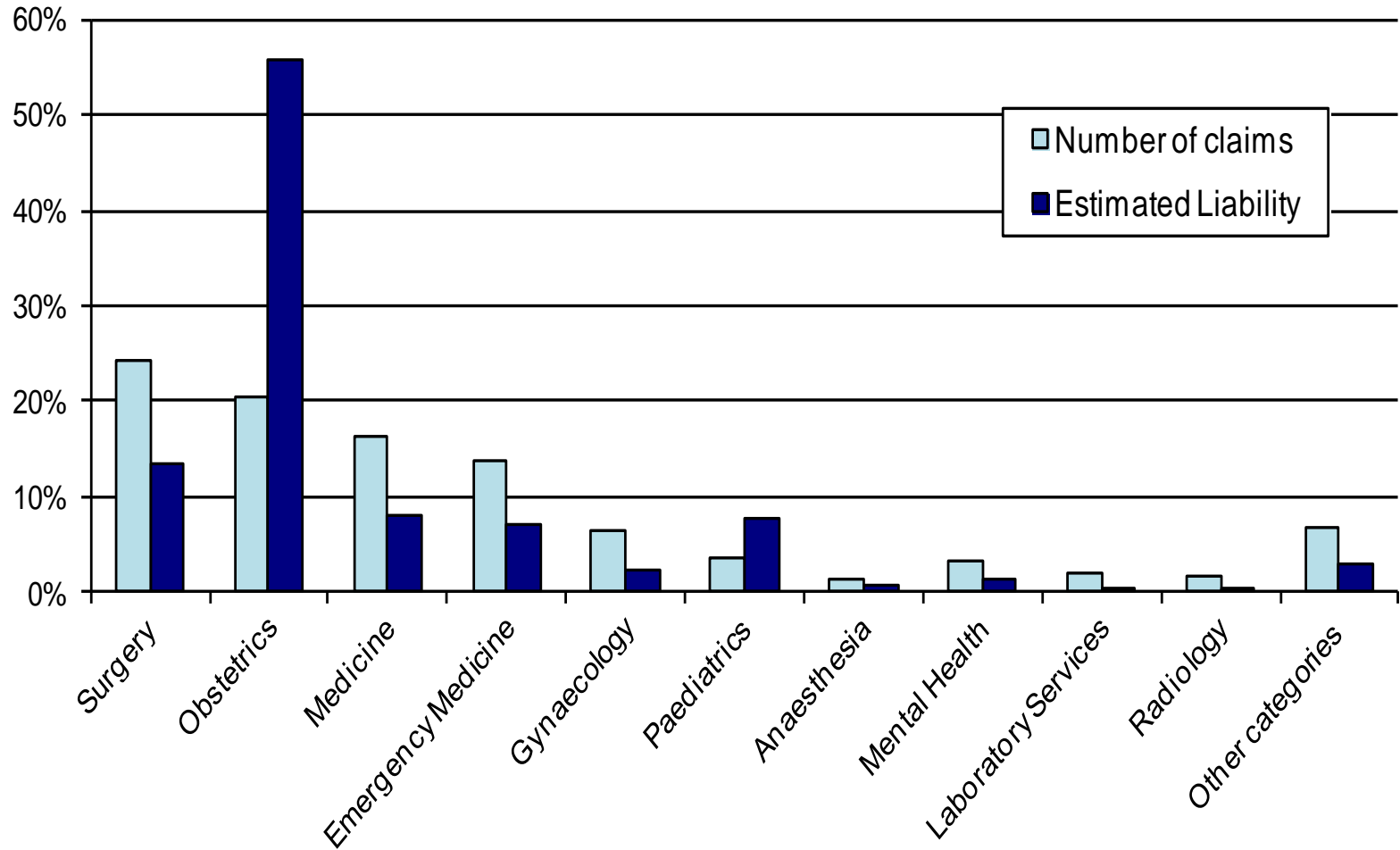
- A new, independent, legal services regulatory authority with responsibility for oversight of both of the legal professions.
- An Office of the Legal Costs Adjudicator to assume the role of the existing Office of the Taxing-Master which will be conferred with enhanced transparency in its functions. The legal costs regime will be brought out into the open with better public awareness and entitlement to legal costs information.
- An independent complaints structure to deal with complaints about professional misconduct - this would be supported by an independent Legal Practitioners Disciplinary Tribunal.

Section 95 states Legal Costs Adjudicator must:

- Verify that the matter or item represents work that was actually done, or represents disbursements made or which the party concerned is obliged to discharge.
- Determine whether or not in the circumstances it was appropriate that a charge be made for the work concerned or the disbursement concerned.
- Determine what a fair and reasonable charge for that work or disbursement would be in the circumstances.

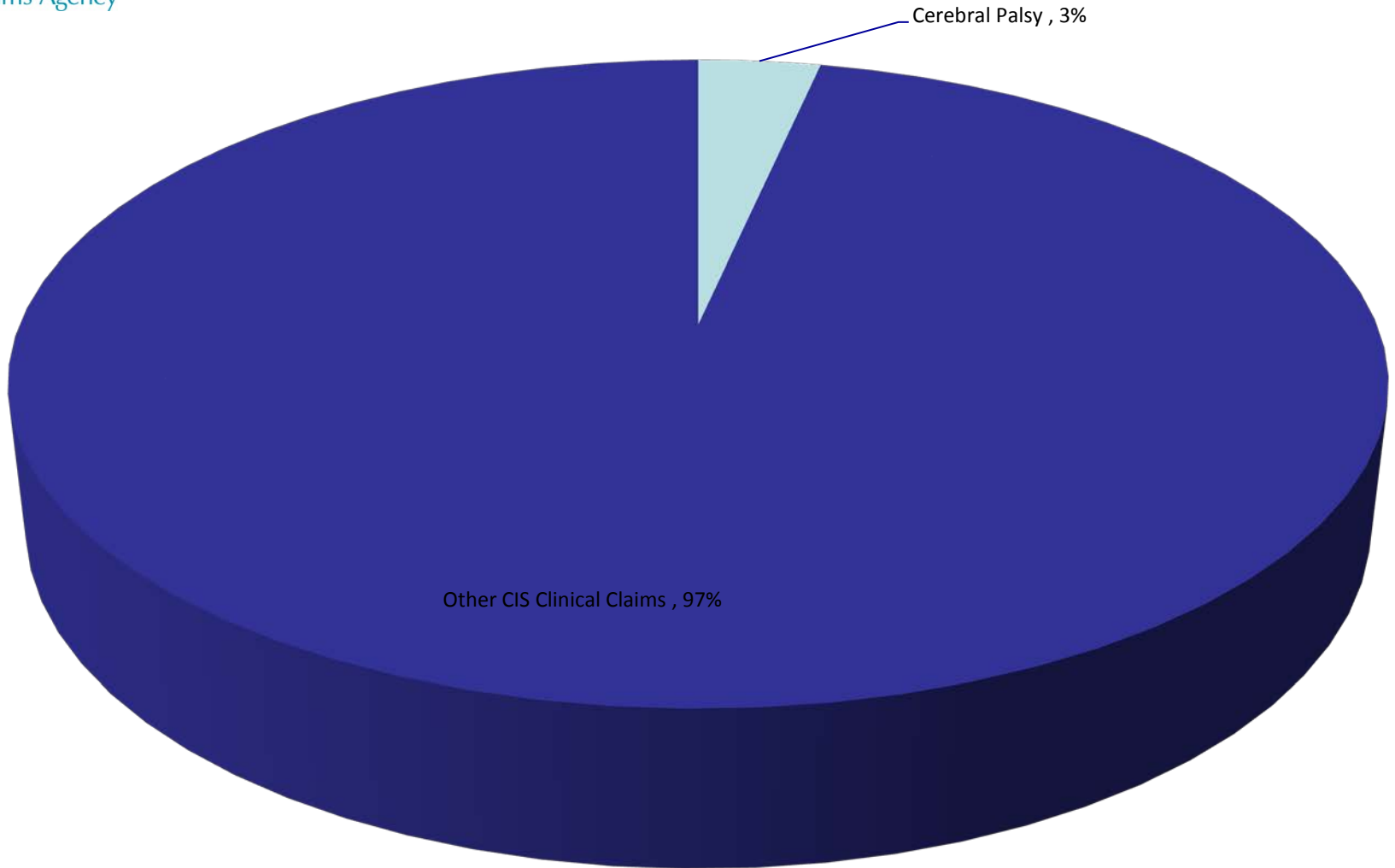
- *Section 75* requires a newly established legal services regulatory authority to engage in a public consultation process, lasting no more than 18 months, to provide a report, inter alia, in relation to the manner in which legal partnerships and multi-disciplinary practises should be formed and operated.

Clinical Claims by Specialty



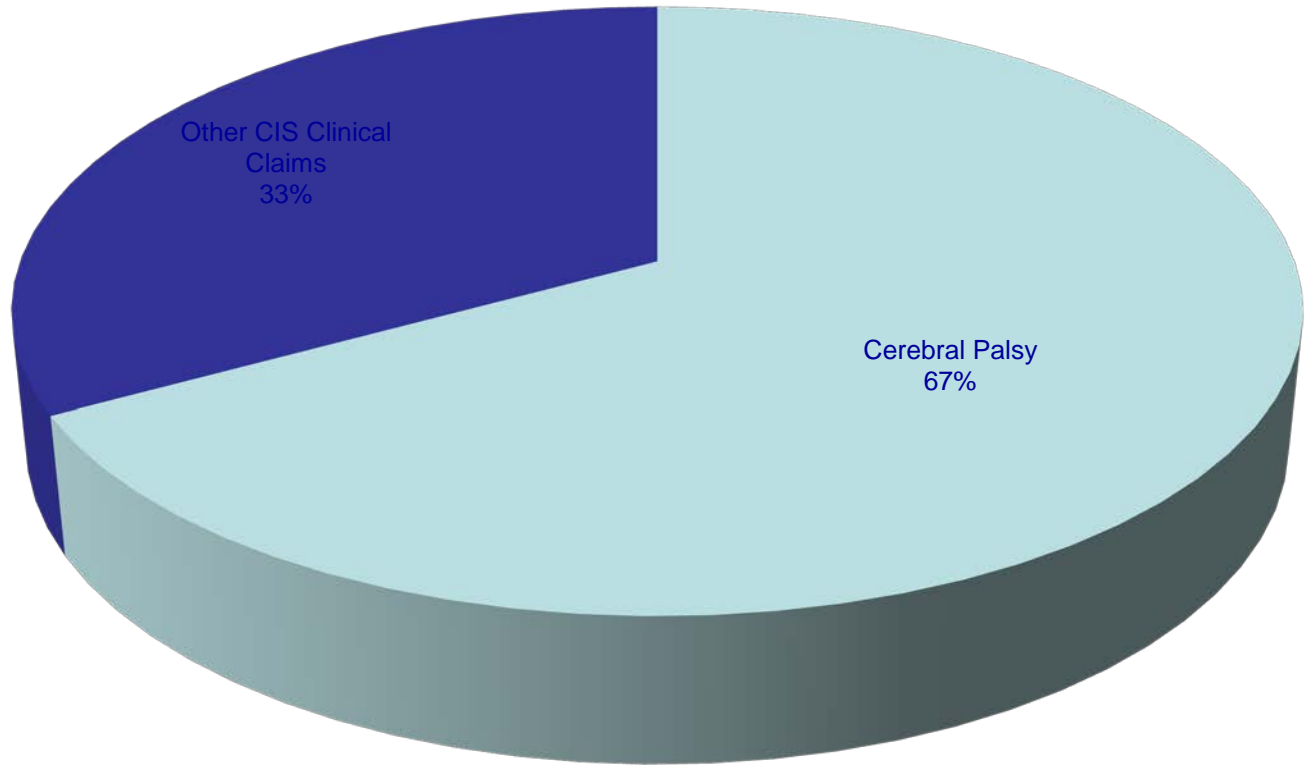
Source: NTMA

Cerebral Palsy Claims Count as a percentage of the Total CIS Claims Count

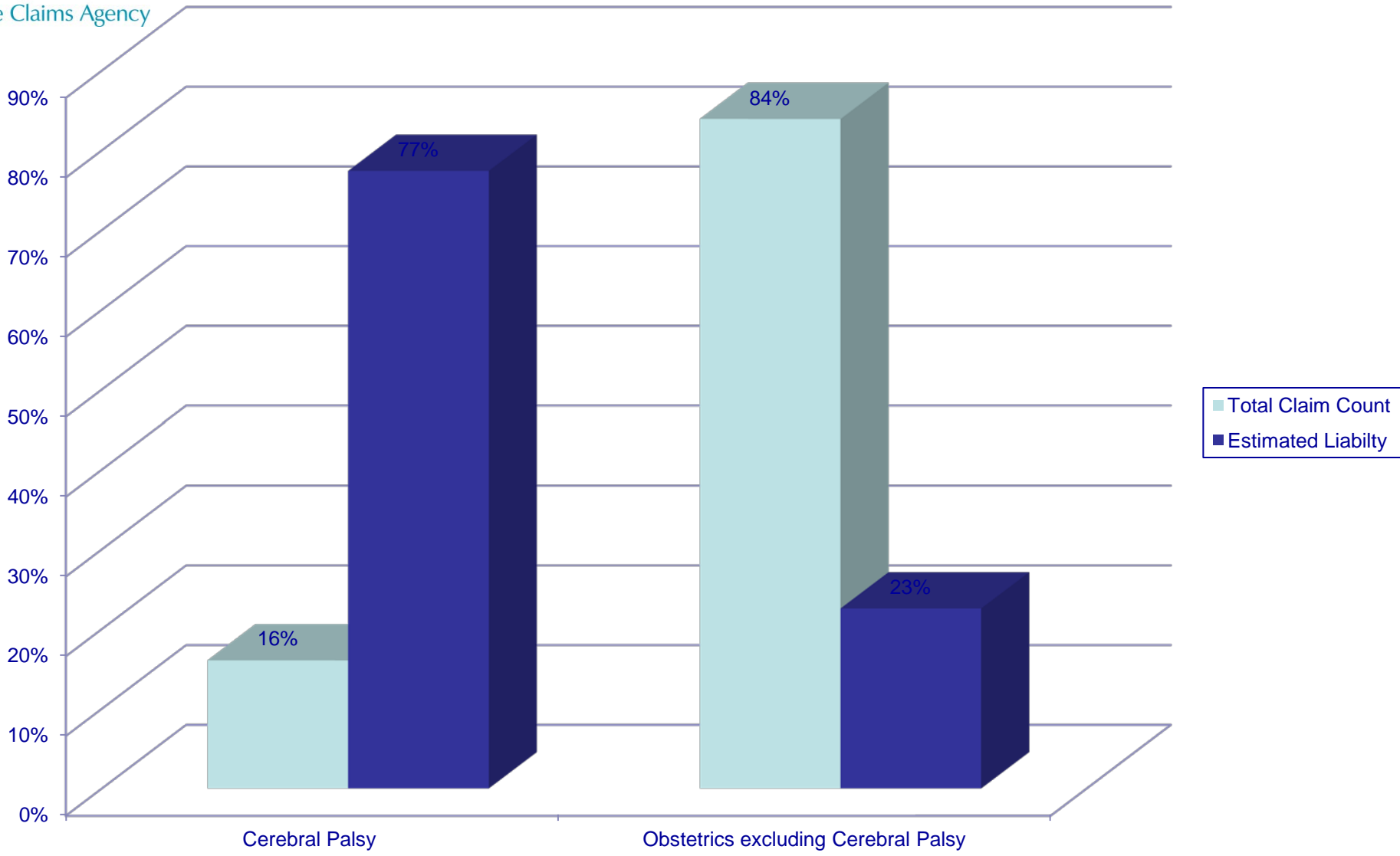


€2.5 million paid out to date by SCA on the Clinical Indemnity Scheme in relation to CP

**Estimated Liability for Cerebral Palsy Claims Count as a percentage of the O/S
Estimated Liability Total CIS Claims**



Obstetric Claims Count Vs Estimated Liability



Funding the Clinical Indemnity Scheme – Time for Radical Change

Current Funding System and its Drawbacks

- SCA settles claims by drawing funds from POSB. Quarterly bordereaux of claims' payments is submitted to HSE. HSE refund the total amount paid in the quarter to the POSB via SCA.
- Running costs of the SCA are paid for by the NTMA.
- Hospitals make no financial contribution towards the cost of settling clinical negligence cases.

Current Funding System and its Drawbacks (contd.)

- Financial cost of clinical negligence is all but invisible to a hospital's management. This removes the incentive to improve risk management practices.
- No financial incentive on hospital's part to reduce the cost of clinical negligence claims.

Alternative Mechanism for Funding Hospitals to Cover Cost of CIS Claims

- Add an additional sum of money to each hospital's budget to cover the clinical negligence exposure they represent.
- The premiums charged under CIS would be the same as the funding for clinical negligence each hospital receives. Hospitals, thus, would see their allocated portion of the cost of clinical negligence cover.

Alternative Mechanism for Funding Hospitals to Cover Cost of CIS Claims (Cont'd)

- There would be several levels of CNRM standards. For each level passed, a hospital would receive a discount in the premium it pays to SCA. The premiums saved would go towards funding healthcare in the hospital.
- The second adjustment would be for experience rating. If a hospital has fewer claims by number and value than expected according to its risk exposure then it has a reduction applied to its premium. If it has more claims than expected, its premium is increased.

Mechanisms for Calculating Hospitals' Premiums

- Number and speciality of staff as a measure of exposure to claims.
- Number and type of procedures as a measure of exposure to claims.
- Hospitals' income as a measure of exposure to claims.

SCA's Recommended Measure

- SCA recommends setting premiums on the basis of the number and speciality of the medical staff employed by each hospital.
- Exception is obstetric risks. Obstetric claims consist of 60% of the total value of claims paid out each year. Therefore, rather than considering number of obstetricians/midwives employed by a hospital, the number of births should be used as the exposure measure.

A Potential Mechanism for Applying Experience Rating

Actual/Expected	Points
+50%	+2
+25% to +49.9%	+1
-24.9% to +24.9%	0
-25% to -49.9%	-1
-50%	-2

Translating the Previous Slide into an Adjustment for Premiums

Points	Premium Adjustment
+4	+10%
+3	+5%
+2 to -2	0%
-3	-5%
-4	-10%

A Potential Mechanism for Passing Risk Management Standards

- Under CNST in England, there are currently three Rms.
 - a) Level one
 - b) Level two
 - c) Level three
- If a hospital passes level 1 it gets a 10% discount
- If a hospital passes level 2 it gets a 20% discount
- If a hospital passes level 3 it gets a 30% discount

How to Measure Good or Bad Experience

- If a hospital's claims experience is significantly better or worse than expected, this is unlikely to be purely due to random variation. It is these cases/ individual hospitals that should have a discount or a loading applied to the premium.
Example:
Hospital "A" has €5M worth of claims (assessed by SCA)
Hospital "B" has €10M worth of claims
- Which hospital has worst claims experience?

- Assume we are told that hospital “A” has had twenty claims against it with an average claim size of €250,000. Hospital “B” meanwhile has one claim only of €10M. Let us also assume hospital “A” and “B” are identical.
- Clearly hospital “A” is the “problem” hospital.
- It is important, thus, to contrast claims volume and claims size for the purposes of determining good or bad claims experience.
- SCA recommend that a hospital’s claims experience should demonstrate at least a 25% worse or better than expected claims experience to justify a loading or discount on the hospital’s premium.