Medical injuries under national disability care and support schemes

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Background

- **October 2006**: NSW Lifetime care and support scheme introduced to cover catastrophic motor vehicle injuries
- **2008**: Australia 2020 Summit pushes to extend this scheme to all serious disabilities
- **2008-2009**: Disability Investment Group established and produces report on initial costings. Calls for further feasibility study
- **2009**: Productivity Commission inquiry established
- **2011**: Productivity Commission releases draft report
Draft report proposals

• Two Schemes:
  – **National Injury Insurance Scheme (NIIS)**: Removes long term care and related heads of damage from existing accident compensation schemes and administers them in an holistic no-fault framework. Only covers new disabilities
  – **National Disability Insurance Scheme (NDIS)**: Covers significant disabilities. Covers new and existing disabilities. Full rollout to start January 2015

• “Medical Injuries” to fall under NIIS - to start October 2013
Current medical negligence system

- Common Law (Tort) based.
- Indemnity split between public and private patients.
- Negligence based
  - Duty of care
  - Breach of duty of care
  - Causation

- Causation “in fact”
- Causation “in law”
- Proximity

- Not an issue
- NIIS to remove this for future care
Medical injury questions

- What counts as a catastrophic medical injury?
- How should these injuries be funded under the NIIS?
- What happens to the residual claim?
- What is the effect on doctors’ premiums?
- How many people are affected?
- Who pays while claims are being assessed?

“Simple. My nurse blindfolds me, I spin around a few times, and then I try to reattach your tail.”

Productivity Commission seeks feedback on these
NSW Lifetime Care and Support Scheme

• Covers lifetime care and related components of catastrophic motor vehicle injuries
• No-fault
• Precludes claiming under common law
• CTP insurer may apply for assessment
• Funded by levy on motorists
  • Causation is usually obvious for CTP
• Almost entirely brain and spinal cord injuries
• High proportion of young males
NZ Accident Compensation Corporation

- Requires causation in fact ("but for") and "unexpected consequence"
- Pre-2005: "Medical Misadventure". Split into:
  - "Medical error": incorrect treatment
  - "Medical mishap": rare adverse outcome
- From 2005: "Treatment Injury"
- Currently funded by a combination of general revenue and earners’ levy
- Provision for levying practitioners and hospitals (though not currently applied)
Florida and Virginia

- Covers birth related neurological injuries only
- Only available if there has not been a settlement in a lawsuit
- Obstetricians and midwives can choose to participate
- Funded by combination of state funds, assessments on physicians and hospitals and participation fees.
- If scheme is actuarially unsound, casualty insurers may be assessed a portion of prior year net direct premiums written.
- Virginian scheme currently actuarially unsound (deficit of $167m\(^{(1)}\))

Existing government schemes

- **Exceptional Claims Scheme**: Covers the cost of claims above the limit of a doctor’s insurance cover (no claims yet)

- **High Cost Claims Scheme**: Reimburses insurers 50% of the excess over $300k of each claim

- **Premium Support Scheme**: Subsidises portion of eligible doctors’ premiums

- **Run-off Cover Scheme**: Covers claims made against retired/deceased/no longer practicing privately/etc. doctors

- **IBNR Scheme**: Funds UMP’s IBNR liabilities for incidents prior to 30 June 2002
Premium Support Scheme

Medicare paid\(^{(1)}\):
2008/09: $16.1m
2009/10: $17.2m

Covers 80% of the amount by which the practitioner's gross premium exceeds 7.5% of their estimated private billings

Sources:
(1) Medicare Australia Annual Report 2009-2010
(2) Based on data provided by Avant Insurance Limited
High Cost Claims Scheme

Medicare paid\(^{(1)}\):

- 2008/09: $19.5m
- 2009/10: $21.4m

Based on notification date

![Bar chart](chart.png)

**Average eligible HCCS benefits per claim ($300k threshold)**

- General Practice (low risk): $190,000
- General Practice (high risk): $750,000
- Obstetrics and Gynaecology: $800,000
- Other: $290,000

**Estimated High Cost Claim Scheme Utilisation by number**

- General Practice (low risk): 21%
- General Practice (high risk): 8%
- Obstetrics and Gynaecology: 17%
- Other: 54%

Sources:

1. Medicare Australia Annual Report 2009-2010
2. Based on data provided by Avant Insurance Limited on claims finalised since 2003
National Injury Insurance Scheme

- Proposed 2013 commencement in each state for MVA and catastrophic “medical accident” occurring after commencement date
- No fault - unexpected and unusual outcome from medical treatment
- No cover if treatment appropriate and no obvious cause for condition apart from underlying health condition (would be covered under NDIS)
- Brain damage, paraplegia, quadriplegia, blindness, severe burns
- Cerebral palsy causation noted to be difficult

Feedback requested
Avant high cost medical injury claims

• 63 files finalised 2008-2010 with paids > $1m
• All likely to be classified “medical accident” but only 55 potentially scheme eligible (87%)
• Not eligible - “wrongful birth” (3) and death (5)
• 37 were “catastrophic” injuries (59% of total, 67% of scheme eligible medical accidents)
• 22 of these cerebral palsy (59% of the 37)
• Other 15 - brain damage, paraplegia, quadriplegia, blindness
• Incidents notified 4 months – 19 years after accident
Cerebral palsy

• Most common physical disability in childhood, 600 – 700 new cases per year
• Associated with many factors during pregnancy, birth and after birth
• 5-8% due to birth asphyxia – main potential cause of CP to be classified "accident"?
• Represents 30-56 cases per annum caused by birth asphyxia
• Varying disability but mostly profound
• Negligent vs non negligent
• Compromised settlements
Causation and the NIIS

- How to assess claims to ensure early intervention?
- Accept early and review ongoing eligibility later?
- Causation in birth cases invariably complicated, may be “too hard” for families without accessing legal advice
- Causation in delayed diagnosis claims also difficult e.g. epidural abscess - underlying condition so paralysis not an “accident”?
- Introduction of NDIS would ease pressure
What remains with MIIs?

- All incidents occurring before NIIS commences (until NDIS in place)
- Dependent on legislative changes in each state and territory
- Right for defendant to refer claimant for assessment of eligibility for NIIS?
- Plaintiffs preference? If fail at common law – can participate in NDIS?
- Effect on gross claims reserves will be considerable – eventually
- Number of notifications will likely remain steady - but will affect development
- To what extent would medical and other costs remain with the MIIs?
Other issues

- Can those already successful at common law action participate in NDIS – co-contribution?
- Wrongful birth cases - vexed question as not the disabled child who is compensated currently
- Effect on residual claim - fight harder over smaller sum...or accept more readily?
- Reduced need for (often conflicting) medical evidence concerning future life expectancy
- Removal of compromise on care costs likely to outweigh savings from legal and other expenses
Avant Case Studies
Case 1

- Teenager - cardiac arrest following a viral illness, suffered severe brain damage
- 8 months between incident and notification by doctor, claim finalised 7 years after incident
- Contested on liability and causation at original trial and appeal
- Verdict for plaintiff
- “Medical accident”?  
- Damages agreed at $8m, with costs totalled $9.8m
Case 2

- Failure to promptly diagnose meningitis in an infant, resulting in severe brain damage
- 1 year between incident and notification by doctor, claim finalised 13 years after incident
- Dispute over life expectancy prior to mediation agreed it was not significantly diminished
- “Medical accident”? 
- Settled for $7.75m (with costs $8.5m), contribution from hospital

If occurred post 2013 $7.75m \(\rightarrow\) NIIS

Not necessary or less

Remain with insurer

Costs

General damages and past expenses

Other future funds management and medical expenses

Case management and medical equipment, therapy, medicals, home modifications

Future attendant care plus equipment, therapy, medicals, home modifications

Not necessary or less
Case 3

- Cerebral palsy
- Foetal distress, attempt at forceps delivery complicated by cord prolapse, emergency Caesarean section
- Significant occult antepartum haemorrhage was noted
- 1.5 years between incident and notification by doctor, claim finalised 14.5 years after incident
- Quantified by plaintiff at $9.5m
- Matter settled for $4.625m plus costs
Case 4

- Complications during surgery for ruptured intracerebral aneurysm
- Damage to optic nerve with blindness
- Allegations that not all measures taken to prevent the damage during procedure
- 4.5 years between incident and notification by doctor, claim finalised 8 years after incident
- Settled for $1.09m plus costs
Who this helps...

Questions?