



Institute
and Faculty
of Actuaries

GIRO40

8 – 11 October, Edinburgh



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Bodily Injury – Where next?

Tim Jordan – The MDU
Cherry Chan – Barnett Waddingham
James Turner – The MDU

Artisan
Sponsorship
Thought leadership
Progress
Community
Sessional Meetings
Education
Working parties
Volunteering
Research
Shaping the future
Networking
Professional support
Enterprise and risk
Learned society
Opportunity
International profile
Journals
Support

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Questions

Comments

Expressions of individual views by members of the Institute and Faculty of Actuaries and its staff are encouraged.

The information in this presentation is based on our understanding of current taxation law, proposed legislation and HM Revenue & Customs practice, which may be subject to future variation.

The views expressed in this presentation by Cherry Chan are those of the presenter.

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Purpose of Presentation

- Long time admirers of the Third Party Working Party
- Compare and contrast Clinical Negligence claims to Motor Bodily Injury claims
- Wealth of data available on NHSLA claims
- Draw out any insights that will predict future for Clinical Negligence claims and give insight into future for Injury claims

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Introduction to NHSLA

- The NHS Litigation Authority (NHSLA) was established in 1995.
- Provides indemnity for all claims made against NHS organisations
- Works to improve risk management practices
- Unlike insurance, claims are met on a discretionary basis

Source: NHSLA Reports

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Introduction to NHSLA

- “First, patients who have been injured as a result of clinical negligence must have access to justice, so that they can receive proper compensation. Secondly, this huge area of public expenditure must be kept under proper control, so that the resources of the health service are not being squandered unnecessarily on litigation costs.”

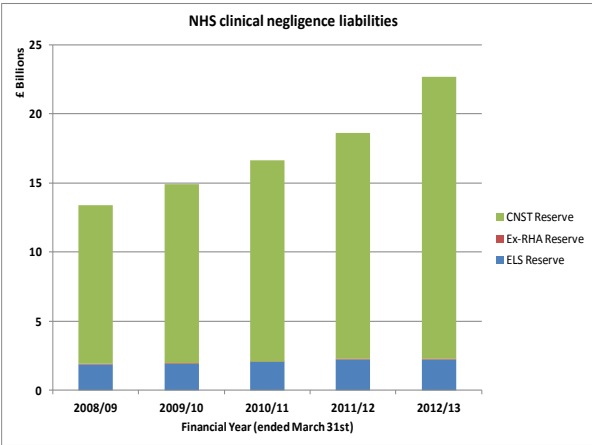
Lord Justice Jackson, 2009

Source: Review of Civil Litigation Costs: Final Report December 2009

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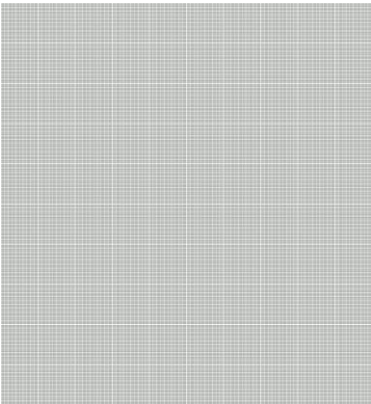
Introduction to NHSLA



MDU interpretation of NHSLA data

Introduction to NHSLA

- How big is £22 Billion?



Source: Jay Epperhart blog

How does it work?

- CNST is a pay-as-you-go scheme
- Each member's CNST contribution is determined in the following way:
- The NHSLA Board determines the total amount to be collected based on actuarial analysis of the estimated value of claim payments in the forthcoming year.
- The total amount to be collected in 2012/13 to cover claim payments and scheme expenses for CNST is £950m;
- the total amount is then split between members according to their relative risk within the scheme to determine a basic contribution;
- each member's basic contribution is adjusted to allow for:
 - ☐ material favourable or poor claims experience to date; and
 - ☐ any discount applicable as a result of the level of Risk Management achieved by the member.



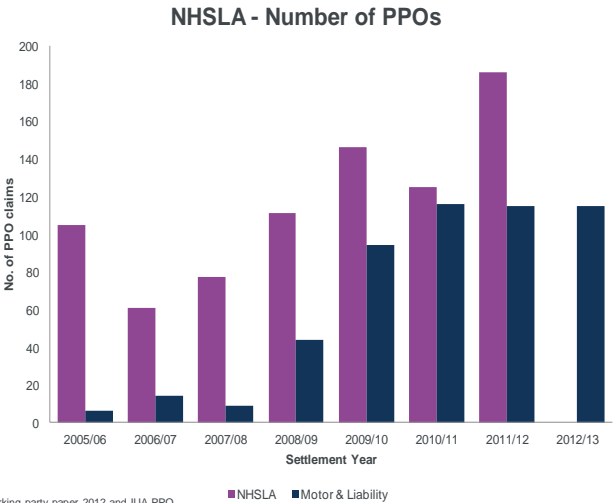
Source: NHS CNST contribution Finance Q and A (1).pdf

© NHSLA Annual Report

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Similarities to other liability classes - PPOs



Source: GIRO PPO working party paper 2012 and IUA PPO Study

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Similarities to other liability classes

- February 2012 – NHS Chief Executive letter regarding promotion of Personal Injury Services
- August 2013 – Sky News report suggests still occurring



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Differences to other liability classes

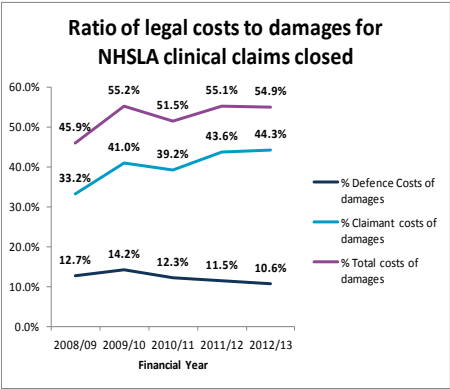
- Unlike TPI, where fraudulent claims are an issue for whiplash there seems to be no evidence of fraudulent claims being reported to the NHSLA
- “We have also strengthened our approach to claims where claimants exaggerate their symptoms, to ensure that payments are made only where it is appropriate and only to those who are entitled to receive compensation.”

Source: NHSLA Annual Report 2012/2013

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Differences to other liability classes



- Steep increase in claimant costs as percentage of damages
- Defence costs as percentage of damages

© NHSLA Annual Report 2012/2013

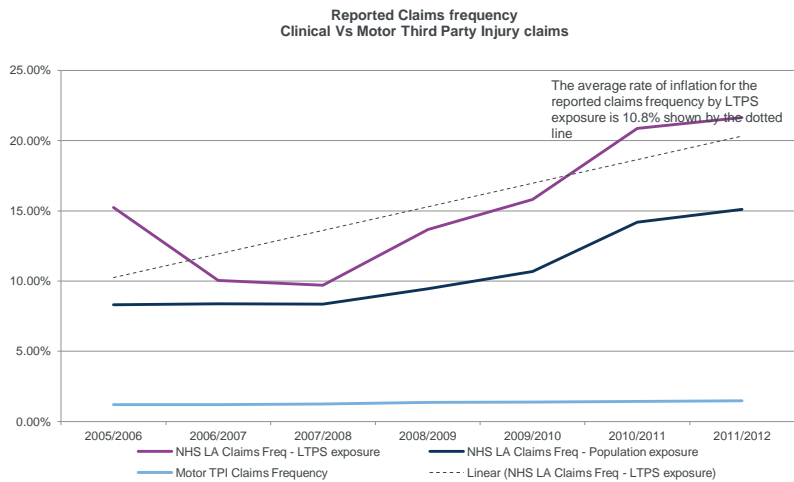
Differences to other liability classes

- Approximately 40% of all those claims received by the NHS are resolved without a damages payment

Source: NHSLA Annual Report 2012/2013

- In 2012 around 70% of MDU medical cases were resolved without a financial settlement with the claimant
- Motor TPI nil proportion – about 18%

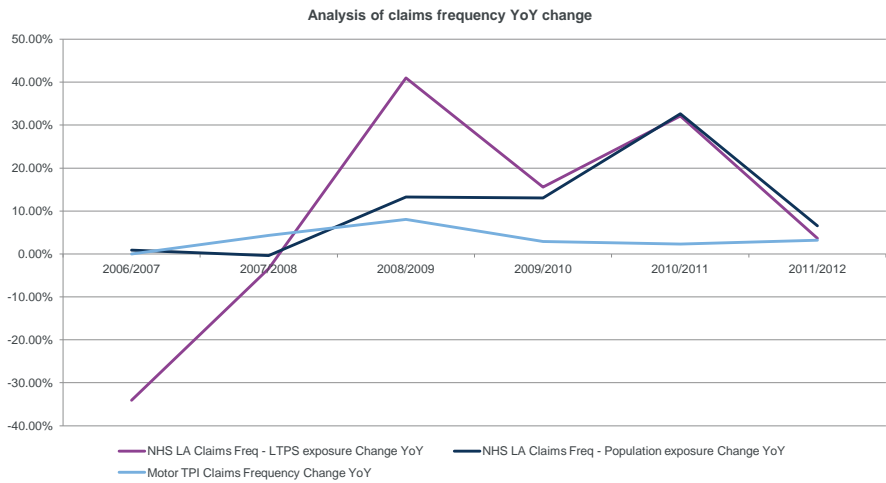
Claims Reported Frequency



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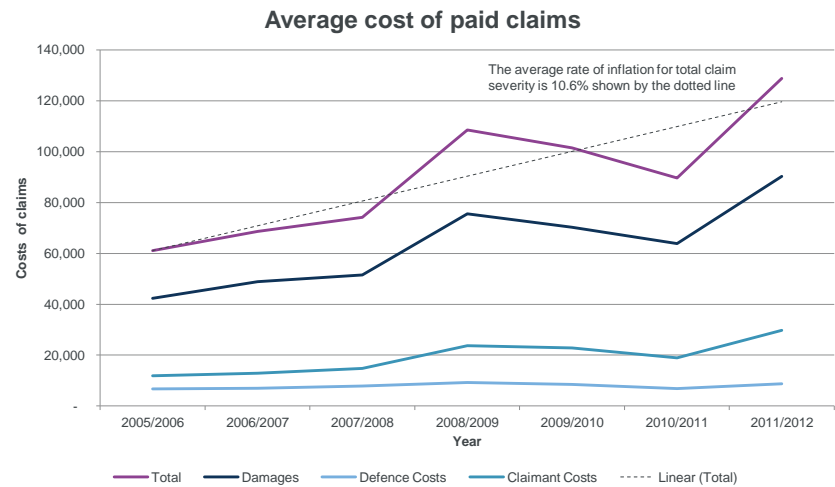
Claims Reported Change Year on Year*



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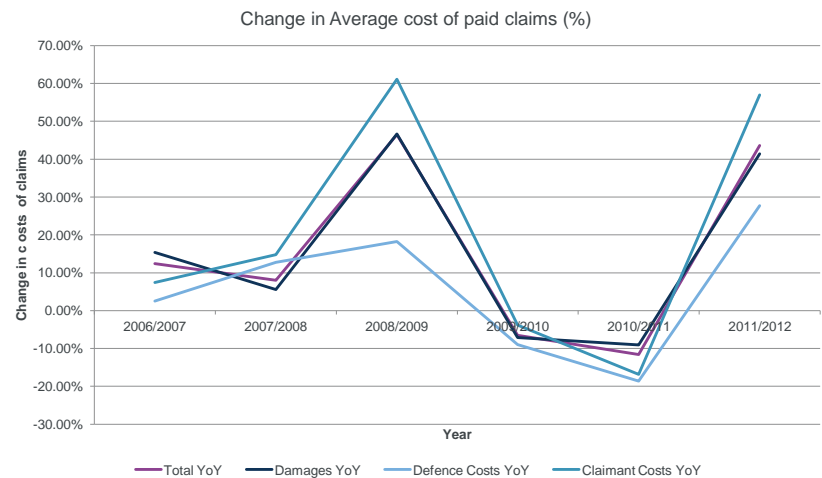
Claims Severity



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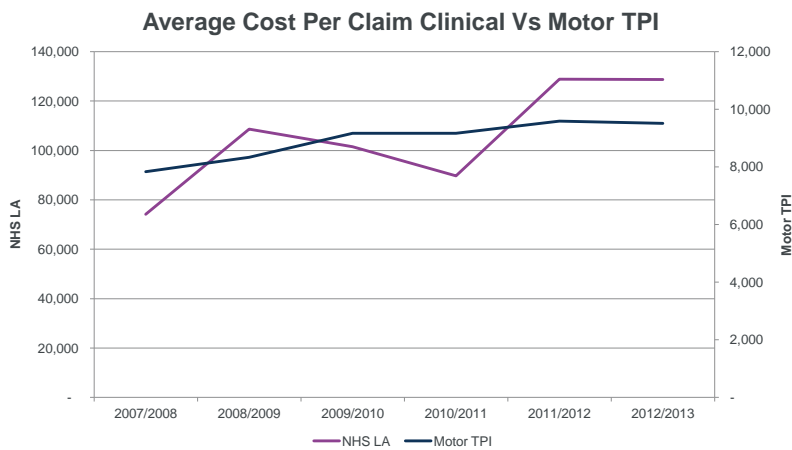
Claims Severity Change Year on Year



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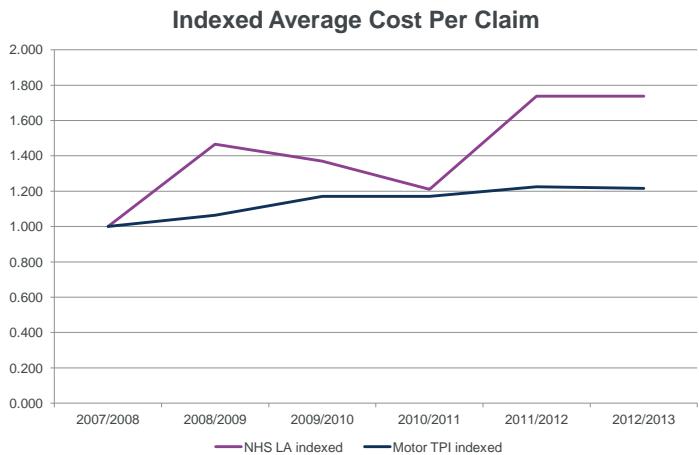
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Compare with Motor Third Party Injury (TPI)



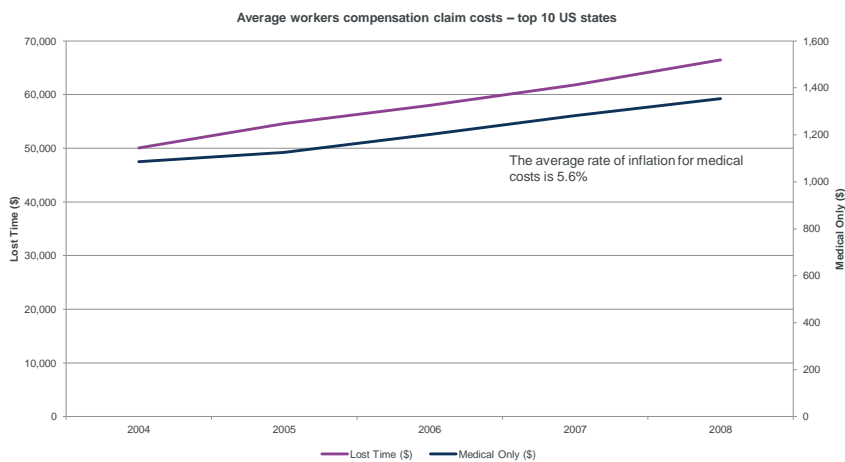
Source: NHSLA, Third Party Motor and PPO Working Party

Compare with Motor TPI – indexed values



Source: NHSLA, Third Party Motor Working Party

Workers' Compensation – Top 10 US States



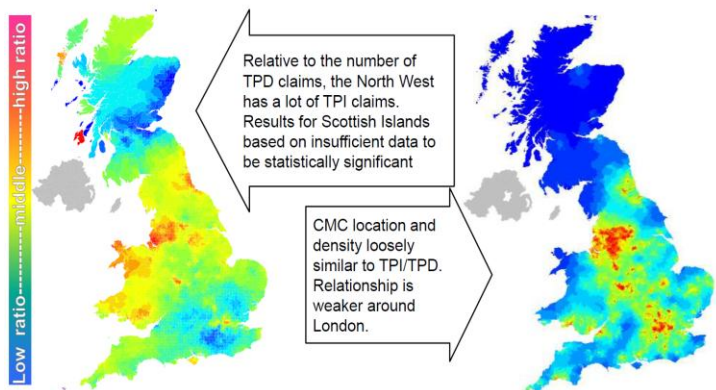
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Motor TPI/TPD ratio vs CMC density

Geographic analysis
TPI / TPD ratio in 2011

CMC density 2011



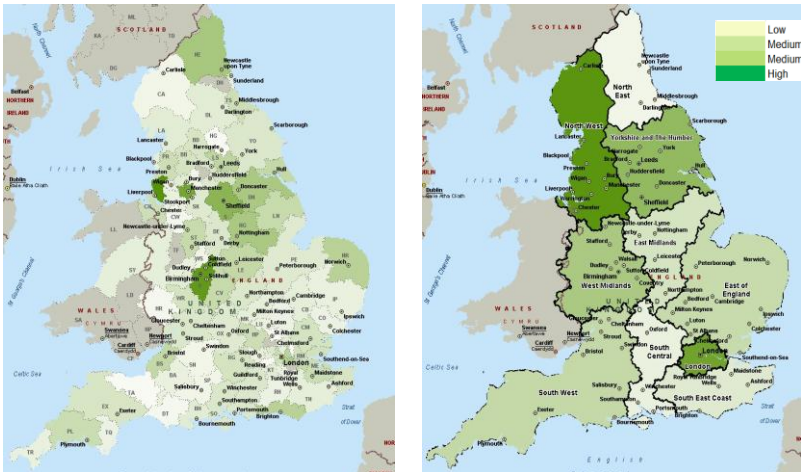
Source: "The Isles of Wonder", Third Party Working Party GIRO 2012, reproduced with kind permission

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Number of clinical claims reported 2011/12 by Post Area

by SHA



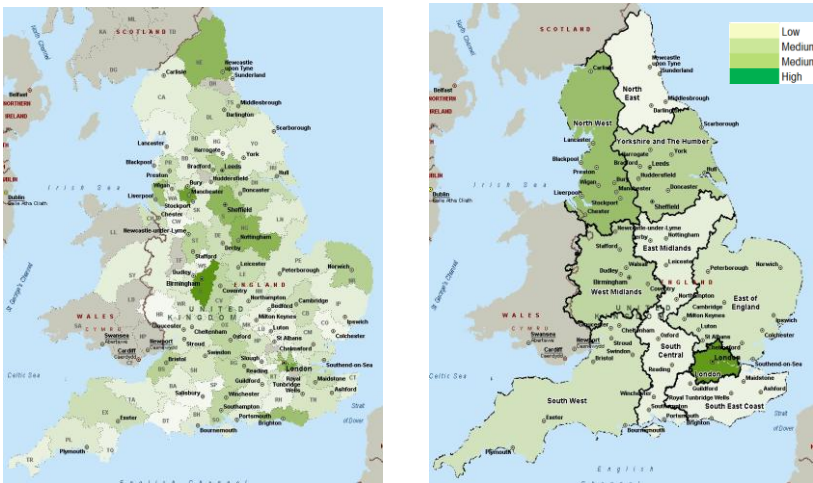
Interpretation of NHSLA data

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Exposure 2011/12 by Post Area

by SHA

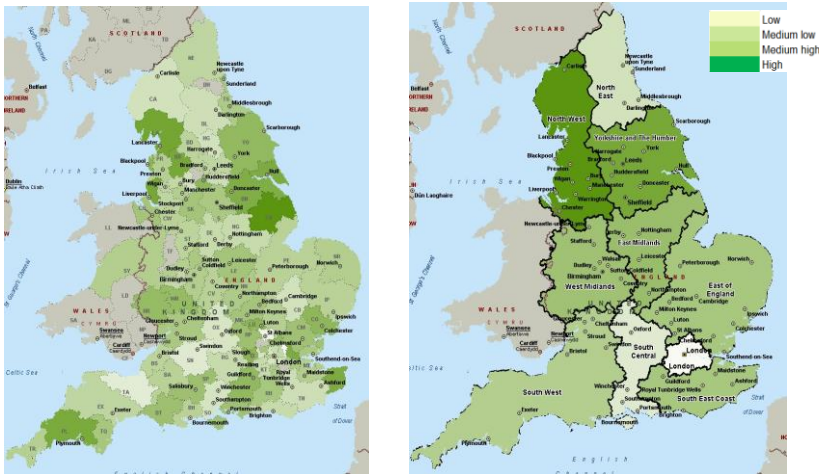


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Frequency of clinical claims 2011/12 by Post Area by SHA

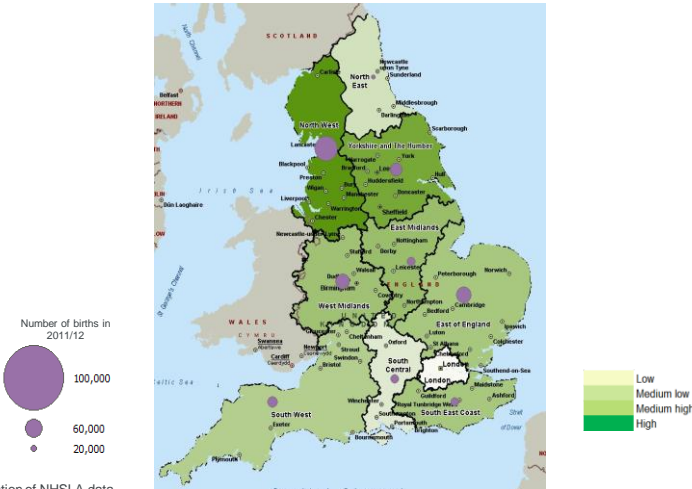


Interpretation of NHSLA data

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Frequency of clinical claims – by SHA including the number of births (2011/12)

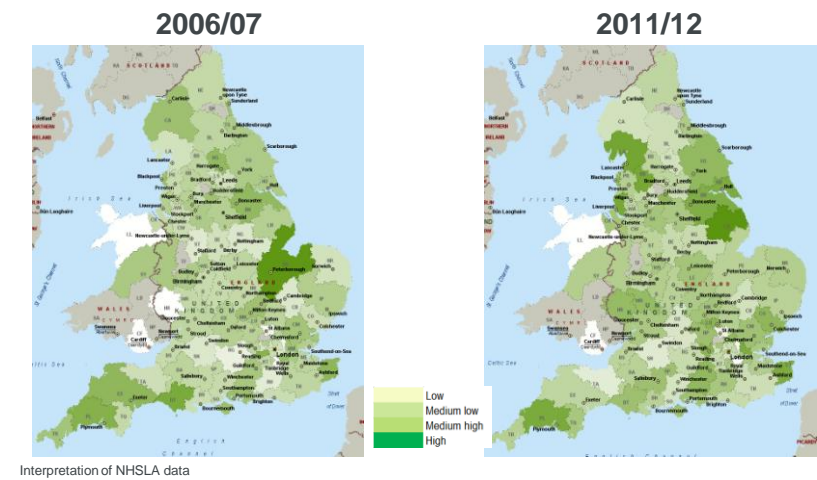


Interpretation of NHSLA data

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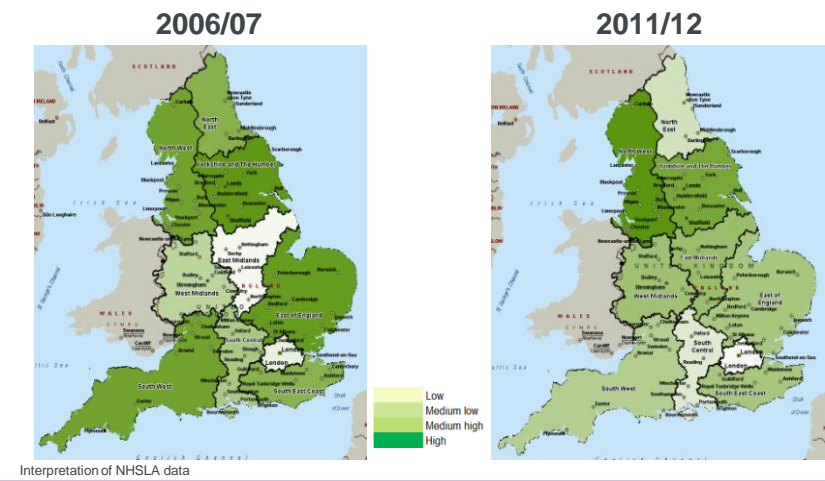
Frequency of clinical claims – by Post Area



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Frequency of clinical claims – by Strategic Health Authority



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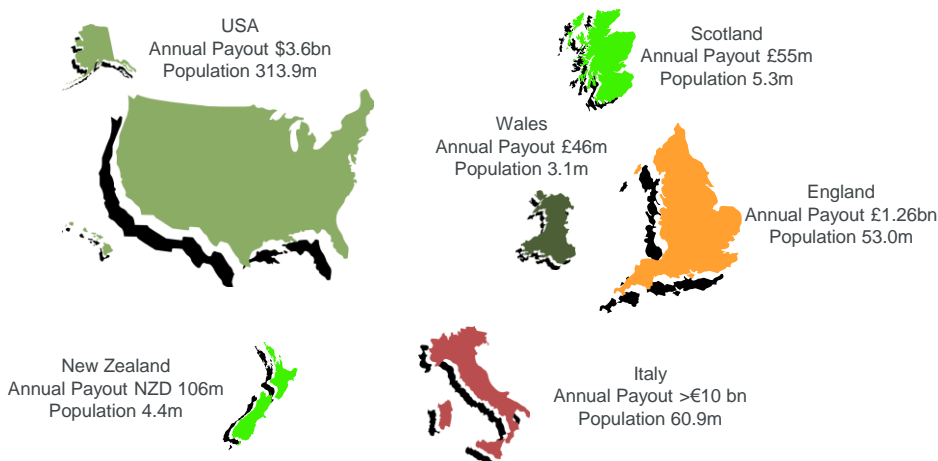
Jackson Reform - background

- Legal Aid, Sentencing and Punishment of Offenders Act 2012
- Aim
 - controlling the rising costs of the civil litigation process
 - speed up claims settlement
- Main changes
 - Methods of funding
 - Cost budgeting

Post Jackson comments

Changes	Effect	Outcome
Success Fee – no longer recoverable from losing party, cap at 25% of the claimant's damages	Lower defendant's costs if they lose and put some responsibility to claimants to control their own legal costs	Claimants may receive less damages than before Risk that lower value claims may no longer be economic to pursue (is that fair?)
ATE insurance premiums– no longer recoverable from losing party except for expert reports	Controlling the cost of litigation	Claimant may have to pay the ATE premiums up front or fund from their own fund
10% increase in general damages	Compensate for the claimant having to pay success fee and ATE premium out of their damages	Claimants may receive less damages than before Solicitors may not recover full fees as before too
Qualified One-way Costs Shifting (QOCS)	Claimant no need to pay defendant's costs if the claim is unsuccessful	No need for ATE premium except for their own disbursement. Defendant cannot recoup their legal fees if they win
Part 36 offers	Make both sides consider Part 36 seriously – hope to speed up claims settlement	See more claimants part 36 offers?

An International Perspective – Annual Clinical Negligence Payouts



MDU Research, 2013

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Approaches Taken in Different Jurisdictions

- Tort reform: examples - United States and Australia
- No fault schemes: Sweden, New Zealand, FL, WV, under active consideration in Scotland; has been considered for UK in late 70s, 90s
- Arbitration: Germany (from 1970s) and France (Patients' Rights law of 2002)
- NHS Redress Act 2006 sets framework for claims less than £20,000 but no plans to bring into force in England. A similar scheme is in force in Wales for claims up to £25,000 (hospital claims only)

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What Could Happen in the UK?

- Law Reform Personal Injuries Act 1948 (S2(4)) means awards in the UK are made without regard to care that is available through the NHS
- Tort reform: has reduced costs in US and Australia. Favoured by the MDOs.
- Caps on damages for future care costs and caps on loss of earnings?
- No fault schemes:
 - effect on costs uncertain. NZ scheme does not look especially cheap; some level proof still needed
 - reduction in legal costs; more open culture
- Change to discount rate?

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Summary

- NHSLA liabilities are large and growing
- Nature of future claims costs is uncertain, especially effect of Jackson reforms
- Basing NHS liabilities on cost of private care per 1948 Act may be unsustainable

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