Bodily Injury – Where next?
Tim Jordan – The MDU
Cherry Chan – Barnett Waddingham
James Turner – The MDU
Expressions of individual views by members of the Institute and Faculty of Actuaries and its staff are encouraged.

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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
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

14 October 2013

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


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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.

Similarities to other liability classes - PPOs

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

© NHSLA Annual Report
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

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
Differences to other liability classes

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

![Graph showing the ratio of legal costs to damages for NHSLA clinical claims closed.](image)

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

Reported Claims frequency
Clinical Vs Motor Third Party Injury claims

The average rate of inflation for the reported claims frequency by LTPS exposure is 10.8% shown by the dotted line.

Source: NHSLA, Third Party Motor Working Party, ONS

Claims Reported Change Year on Year*

Analysis of claims frequency YoY change

Source: NHSLA, Third Party Motor Working Party, ONS
Claims Severity

Average cost of paid claims

The average rate of inflation for total claim severity is 10.6% shown by the dotted line.

Cost of claims

Year


The average rate of inflation for total claim severity is 10.6% shown by the dotted line.

Source: NHSLA

Claims Severity Change Year on Year

Change in Average cost of paid claims (%)

Change in Average cost of paid claims (%)

Year


Source: NHSLA

14 October 2013

14 October 2013
Compare with Motor Third Party Injury (TPI)

Average Cost Per Claim Clinical Vs Motor TPI

Source: NHSLA, Third Party Motor and PPO Working Party

Compare with Motor TPI – indexed values

Indexed Average Cost Per Claim

Source: NHSLA, Third Party Motor Working Party
Workers’ Compensation – Top 10 US States

Average workers compensation claim costs – top 10 US states

The average rate of inflation for medical costs is 5.6%

Source: Oliver Wyman “Examining Costs and Trends of Workers’ Compensation”

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Motor TPI/TPD ratio vs CMC density

Geographic analysis

TPI / TPD ratio in 2011

CMC density 2011

Relative to the number of TPD claims, the North West has a lot of TPI claims. Results for Scottish islands based on insufficient data to be statistically significant

CMC location and density loosely similar to TPI/TPD. Relationship is weaker around London.


14 October 2013
Number of clinical claims reported 2011/12 by Post Area

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

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

2006/07

2011/12

Frequency of clinical claims – by Strategic Health Authority

2006/07

2011/12
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

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

USA
Annual Payout $3.6bn
Population 313.9m

Scotland
Annual Payout £55m
Population 5.3m

Wales
Annual Payout £46m
Population 3.1m

England
Annual Payout £1.26bn
Population 53.0m

New Zealand
Annual Payout NZD 106m
Population 4.4m

Italy
Annual Payout >€10 bn
Population 60.9m

MDU Research, 2013

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)
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?

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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