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Abstract

In England and Wales the arrangements for compensating victims of lawyer default, fraud, incompetence and misconduct, are extensive. Solicitors, the largest profession, maintain a compensation fund. Both solicitors and barristers require practitioners to carry professional indemnity insurance covering liability to clients. An agency deals with complaints about all regulated lawyers. This article outlines the jurisdictions dealing with lawyer default and the mechanisms for delivering compensation. It uses publicly available data generated by insurance claims and complaints to identify the causes of lawyer default. It analyses the volume and value of claims, the incidence of liability by areas of work and by different types of complaint. The article concludes by considering the relevance of, and current limitations of, default data in understanding lawyer default and in shaping regulatory policy.

Key words: Liability, Regulation, Professional Indemnity Insurance, Compensation Funds.

Understanding lawyer default in England and Wales: An analysis of insurance and complaints data

Andrew Boon*

INTRODUCTION

Lawyer default, including fraud, incompetence and misconduct, is a threat to trust in lawyers, to confidence in legal services and to a belief in the capacity of the legal system to produce justice.¹ Understanding lawyer default is the first step to evaluating ways of dealing with it more effectively, for example, by greater reliance on liability claims,² and insurance requirements,³ as control mechanisms. In England and Wales, default may result in disciplinary proceedings, civil claims or complaints and is dealt with in a variety of jurisdictions; tribunals, courts and agencies. This article explores data generated in relation to cases in these different jurisdictions through insurance and complaints records. These data are used to assess the scale and incidence of default, and its possible causes, by examining the risks posed by particular activities, individuals or types of organisation. The article proceeds by briefly outlining the origins and development of professional liability and the range of liability mechanisms in respect of which compulsory professional indemnity insurance (PII) is currently required. It then identifies data available in relation to insurance claims and complaints and uses it to analyse the volume and value of claims, the incidence of liability by areas of work and the frequency of different types of complaint. The article concludes by identifying the most salient issues raised by the data, considers the relevant regulatory implications and examines the potential for, and limitations of, using default data in shaping regulatory policy.

DEFAULT AND COMPENSATION

The relationship between professionals and their clients was traditionally defined by the contractual relationship and the scope of what solicitors call the retainer. The 1930s recognition of consumer remedies for negligence⁴ only impinged on lawyers following *Esso Petroleum Co. Ltd. v. Mardon*,⁵ which established the principle of concurrent liability in contract and tort and discussed its application to professionals.⁶ This benefited claimants in cases where the limitation period had expired in contract but not in negligence⁷ but proving a causal connection between negligence and loss remained a barrier to claims.⁸ Barristers continued to enjoy immunity from suit in respect most failures of care in conducting a case in court. This ‘forensic immunity’ was based on a raft of public policy reasons, including the

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¹ R Abel *Lawyers in the Dock* (New York, Oxford University Press, 2008) particularly Chapter 1 and 2.

² D Wilkins ‘Who Should Regulate Lawyers’ (1992) 105 *Harvard Law Review* 799, argues that liability is traditionally used, along with disciplinary controls, institutional (court) controls and legislative controls, to control legal service providers.

³ AE Davis ‘Professional Liability Insurers as Regulators of Law Practice’ (1996-1997) 65 *Fordham Law Review* 209, C Silver ‘professional liability insurance as Insurance and as lawyer Regulation: Response to Davis (1996-1997) 65 *Fordham Law Review* 233.

⁴ *Donoghue v Stevenson* [1932] AC 562.

⁵ *Esso Petroleum Co. Ltd. v. Mardon* [1976] Q.B. 801.

⁶ *Henderson v. Merrett Syndicates* [1995] 2 A.C.145 (H.L.)

⁷ *Midland Bank Trust Co. Ltd. and Another v. Hett, Stubbs & Kemp (A Firm)* [1979] Ch 384.

⁸ *Green v. Collyer-Bristow* [1999] Lloyd's Rep. P.N. 798.

fact that barristers could not refuse clients because of the so-called cab-rank rule, the risk of satellite litigation, particularly in criminal cases, and a perceived threat to the advocate's duty to the court posed by being liable to advocacy clients.⁹ Immunity was extended to solicitor advocates¹⁰ and, following the Courts and Legal Services Act 1990, to all persons entitled to conduct advocacy or litigation by virtue of the Act¹¹ but, in 2000, the rationale for immunity was swept aside by a majority of the House of Lords.¹² Third parties injured by the actions of opposing lawyers fared less well. Fears about the scope of liability for pure economic loss¹³ left a high water mark of lawyer liability to beneficiaries whose bequests failed because of negligence by the testator's solicitor,¹⁴ gratuitous obligations accepted or advice given to third parties.¹⁵ In addition to civil liability in contract or negligence, lawyers can also be liable to clients or third parties for wasted costs under inherent jurisdiction of the court.¹⁶ The grounds for such orders were formalised by the Court of Appeal in 1994¹⁷ and included in the Civil Procedure Rules 1998 (CPR). Liability can also arise from complaints.

The Law Society was given jurisdiction over consumer complaints following the Solicitors Act 1974, but this was amended in 1985 and 1990 to allow imposition of sanctions for inadequate professional services.¹⁸ The Law Society's various complaints agencies attracted criticism for inefficiency and a single agency for all providers of legal services was established under the LSA.¹⁹ Constituted under a new Office for Legal Complaints, the Legal Ombudsman (LeO) became operative in 2010. LeO only had jurisdiction over complaints brought by recipients of legal services from providers authorised in respect of reserved legal activities;²⁰ meaning rights of audience, conducting litigation, preparing certain documents relating to probate and conveyancing, acting as a notary and administering oaths. This covered all the work of approved persons, practising lawyers, including their delivery of non-reserved activity. LeO has no jurisdiction over a large unregulated sector, estimated to comprise some 130,000 service providers in England and Wales.²¹

Whereas the Law Society's schemes did not deal with negligence claims, LeO adopted scheme rules providing that '[w]here a complaint is about professional negligence or judgement, the OLC will consider (on a case-by-case basis) whether the issue is one that the OLC can deal with or whether the issue would be better dealt with in court'.²² The fourth and final area of potential liability arises in relation to misconduct. Complaints to LeO can only

⁹ *Rondel v Worsley* [1969] 1 AC 191 per Lord Reid at 227, *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 per Lord Wilberforce at 213, RF Roxburgh 'Rondel v. Worsley: The Historical Background' (1968) 84 *Law Quarterly Review* 178 and 'Rondel v. Worsley: Immunity of the Bar' (1968) 84 *Law Quarterly Review* 513.

¹⁰ *Somasundaram v. M Julius Melchior & Co* [1988] 1 WLR 1394.

¹¹ Courts and Legal Services Act (1990) s.62.

¹² *Arthur J.S Hall and Co. v. Simons* (2000) 3 AER 673 per Lord Steyn at page 677.

¹³ *Junior Books Ltd v. Veitchi Co. Ltd.* [1983] 1 A.C. 520.

¹⁴ *Ross v. Caunters* [1980] Ch 297.

¹⁵ *Gran Gelato Ltd. v. Richcliff (Group) Ltd.* (1992) Ch 560, *Al-Kandari v. J.R. Brown & Co.* (1988) QB 665 per Bingham LJ at 675, *Dean v. Allin & Watts* [2001] All ER (D) 288, J Ross 151 *New Law Journal* 960 (June 29 2001).

¹⁶ *Orchard v. SE Electricity Board* [1987] 1 All ER 95.

¹⁷ *Ridehalgh v. Horsefield and anor.* [1994] Ch. 205.

¹⁸ Administration of Justice Act 1985 and the Courts and Legal Services Act 1990.

¹⁹ Boon, *The Ethics and Conduct of Lawyers* above, pp. 218-221 and 232-234.

²⁰ LSA s.128(1) and (4).

²¹ *LeO Annual Report 2013-14* (The Office for Legal Complaints, London, 2014) p. 13 (Last accessed 28/1/2015 at <http://www.legalombudsman.org.uk/downloads/documents/publications/Annual-Report-2012-13.pdf>).

²² *LeO Legal Ombudsman Scheme Rules* January 2015, fn 44.

be made by clients in respect of matters within its remit, which does not include disciplinary matters, so the professions must maintain residual complaints processes, some of which may result in disciplinary proceedings. Disciplinary sanctions include fines, which are not paid to complainants.

The gradual accumulation of consumer remedies explains why, before 1975, lawyers were not obliged to carry professional indemnity insurance (PII).²³ Many solicitors' firms did so to cover partnership liabilities, but the Solicitors Act 1974 gave the solicitors' professional body, the Law Society, powers to make rules requiring protection from civil liability.²⁴ Following the Act the Law Society tried a number of mutual PII arrangements but the volatility of claims led to difficulties in sustaining the arrangements.²⁵ Consequently, from September 2000 each principal in a law firm was required to obtain qualifying insurance with a participating insurer on the open market. The Law Society operated an Assigned Risk Pool (ARP) for firms unable to obtain insurance on the open market, but this was abandoned by the SRA in 2013. Firms unable to obtain insurance were then required to close.

The current rules covering PII are made by the SRA as the independent regulator of solicitors under the LSA. The SRA Indemnity Insurance Rules 2013 require that solicitors must insure with participating insurers. There were 36 participating insurers approved for 2014/15²⁶ although the top six of these share about 80 per cent of the business.²⁷ PII policies must meet minimum terms and conditions (MTCs), indemnifying firms against civil liability including psychological injury or emotional distress arising from a breach of duty in the performance of (or failure to perform) legal work²⁸ and defence costs.²⁹ The MTCs allow only limited exclusions, for example, for death or bodily injury.³⁰ Under the MTCs the minimum level of cover per claim is set at £2 million for sole practitioners and partnerships and £3 million for limited companies and limited liability partnerships. Firms can arrange any level of excess. If firms do not pay the excess the insurer must pay and claim from the firm. Insurers are not allowed to repudiate for non-disclosure, misrepresentation or failure to pay premiums.³¹ Breaches reported to the SRA by insurers can result in misconduct charges or, in extreme cases, intervention in the firm's operations.³² The Compensation Fund, also established under the Solicitors Act 1974, is maintained by practitioner contributions. It provides grants of up to £2 million to replace money stolen by a solicitor or to alleviate hardship, for example, when solicitors fail to account for client funds,³³ but does not compensate victims of negligence. The SRA may waive the upper limit for payments.³⁴

²³ *Normid Housing Association v Ralphs* [1989] 1 Lloyd's Reports 265, 273.

²⁴ Solicitors Act (1974) section 37.

²⁵ See further M Davies 'Wither Mutuality?: A Recent History of Solicitors' Indemnity Insurance' (1998) 5:1 *International Journal of the Legal Profession* 29 at fn 5.

²⁶ SRA *SRA Participating Insurers* (<http://www.sra.org.uk/Solicitors/Code-of-Conduct/professional-indemnity/qualifying-insurers.page>)

²⁷ K Malcolm, T Wilsdon and C Xie *Review of SRA client financial protection arrangements* (London, Charles Rivers Associates, 2010) Figure 5, page 23.

²⁸ SRA Indemnity Insurance Rules 2013, Appendix 1 rule 6(2) (Last accessed 28/1/2015 at <http://www.sra.org.uk/solicitors/handbook/indemnityins/content.page>).

²⁹ Ibid, above, rule 4(2)(c) and Appendix 1 rules 1(1) and 2

³⁰ Ibid, Appendix 1 rule 6.7.

³¹ Ibid, Appendix 1, rule 4(1).

³² Ibid, rule 17(1).

³³ SRA *SRA Compensation Fund Rules* 2011, rule 17(1) ((last accessed 24/6/2015 at <http://www.sra.org.uk/solicitors/handbook/compfund/content.page>).

³⁴ Ibid, rule 24(1).

Self-employed barristers were required to have PII as a condition of practice from 1980. The Bar initially opted for an open market solution but, by 1985, the participating insurers had shrunk to two and only one was willing to provide a quotation to all Chambers.³⁵ The criteria for setting premiums were not transparent, quotations were volatile and offers of insurance were often received late. As a result of these difficulties Bar Mutual Insurance Fund (BMIF) was established in 1988 and currently covers around 13,000 self-employed barristers. The terms of cover include civil liability and the sanctions and costs of disciplinary proceedings, subject to exclusions such as fraud.³⁶ BMIF currently provides a minimum level of cover per claim of £500,000 and a maximum of £2,500,000. In 2014-15 a contribution assessed at between £100 and £300 would buy the basic cover of £500,000 and a contribution of £1,000 would buy the maximum cover.³⁷ Additional cover is available for £100 for each additional £500,000 of cover. The new independent regulator for barristers, the Bar Standards Board (BSB) requires that BSB authorised persons or bodies have PII³⁸ but BMIF is only committed to considering applications from BSB regulated entities on a case by case basis.³⁹ The BSB does not currently operate a compensation fund because the scope for fraud is limited; most barristers operate as independent practitioners and do not handle client money.

THE NATURE OF DEFAULT

Data sources

Important indicators of lawyer default are the volume, value and incidence of claims, settlements and determinations. The legal professions' regulators have not consistently collected, collated or published data. BSB state that they receive no data from BMIF nor have leverage to obtain it.⁴⁰ BMIF did not respond to a request from the author for information. The SRA faces the difficulty that private insurance companies treat their own data as commercially sensitive. Many did make aggregated data available to Charles Rivers Associates (CRA), consultants conducting a review of insurance arrangements for the SRA in 2010.⁴¹ CRA also drew on data from the SIF scheme, from the operation of the ARP and from information provided by the Association of British Insurers (ABI) as at 30th September 2009.⁴² Its report suggested that the SRA was in the process of improving its reporting mechanisms to improve the sharing of information. In 2015, however, the SRA still had no useable data.⁴³ Indications of the types, nature and scale of default can, however, be glimpsed from the fragments that are publicly available. Even were data more complete, they would not give a full picture of liability claims, for reasons explained in the sections that follow. In setting out these data, percentages are rounded to the nearest whole number except where small differences are significant.

Conduct and liability

Careless behaviour is common to the jurisdictions. The common law standard of care for negligence in professional work is that of the 'ordinary skilled man exercising and professing to have that skill'.⁴⁴ In this test the emphasis is on the standard of performance rather than the

³⁵ BMIF *Chairman's Interim Report* 2015.

³⁶ BMIF 2015 *Terms of Cover* paras. 1.1 and 3.

³⁷ *Ibid.*

³⁸ BSB Code of Conduct rC76.

³⁹ BMIF Mutual *Chairman's Interim Report* 2015.

⁴⁰ Email for BSB research team dated 30th June 2015 (on file with author).

⁴¹ Malcolm, Wilsdon and Xie, above.

⁴² *Ibid* page 17.

⁴³ Email from SRA dated 25th June 2015 (on file with author).

⁴⁴ *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 per McNair J at p.121C-H.

outcome. A solicitor does not promise to win a case,⁴⁵ but to perform with the care expected of a reasonably competent solicitor specialising in that particular area of law.⁴⁶ Despite the implicit intention of the LSA to drive down legal costs through the commoditisation of legal services, the courts insist on high standards for legal professionals. The Court of Appeal recently held that a firm providing a cheap and efficient service by post must still explain matters in person to ‘unsophisticated’ clients.⁴⁷ There is overlap between the conduct punished by awards in Negligence and the wasted costs and LeO jurisdictions. Wasted costs are payable when incurred as a result of improper, unreasonable or negligent act or omission, such as where a solicitor is forced to accept a third of the sum originally offered in settlement and is liable for costs three times the settlement figure.⁴⁸ Third parties can seek wasted costs orders against opposing lawyers, but there are relatively few successful cases.⁴⁹ This is partly because the adversarial system tends not to impose duties to help the other side, even when they are acting in person.⁵⁰ A problem area is the claim or defence that is plainly doomed to fail.⁵¹ Lawyers are only liable to third parties for wasted costs in such circumstances where it can be shown that a claim is an abuse of process⁵² or where no reasonably competent legal adviser would evaluate the chance of success as being such as to justify continuing with proceedings.⁵³

LeO views cases through the lens of inadequate professional service rather than negligence,⁵⁴ but the published data is organised in categories consistent with negligence; failure to advise, (18 per cent of all complaints), failure to follow instructions (16 per cent), delay (8 per cent), failure to progress (8 per cent), failure to keep informed (7 per cent) and failure to reply (6 per cent). To obtain compensation complainants must prove direct financial loss. Allowable categories include inconvenience and distress, correcting a specified error, omission or other deficiency or taking specified action in the interests of the complainant.⁵⁵ Cases of misconduct dealt with by disciplinary tribunals may give rise to fines but not to compensation for victims. Nevertheless the conduct often traverses the boundaries of other kinds of default. This can be illustrated in relation to the regulators’ complaints jurisdiction. In 2013/14 the BSB handled 499 internal complaints, those brought by the BSB, and 433 external complaints.⁵⁶ The external complaints included 15 cases of incompetence, 18 of not acting in the client’s best interests and 14 of undue delay in dealing with papers.⁵⁷ Some conduct might be grounds for wasted costs orders; there were, for example, 151 cases of dishonesty or discreditable conduct and 98 case of misleading the court. None of these claims were defined as potential negligence claims, although 5 had been in the previous year. Of the BSB caseload, 29 were referred to a disciplinary tribunal⁵⁸ and around 10 might have been referred

⁴⁵ *Lanphier v. Phipos* (1838) 8 C. & P. 475 per Tindal C.J.

⁴⁶ *Green v. Collyer-Bristow and Midland Bank Trust Co. Ltd. and Another v. Hett, Stubbs & Kemp (A Firm)* above.

⁴⁷ *Procter v. Raleys Solicitors* [2015] EWCA Civ 400.

⁴⁸ *C v. C* [1994] 2 FLR 34.

⁴⁹ *Byrne v. Sefton Health Authority* [2001] EWCA Civ 1904

⁵⁰ *Sherman v. Fitzhugh Gates (A Firm)* [2003] P.N.L.R. 39.

⁵¹ *Ridehalgh v. Horsefield and anor* per Lord Bingham at 863a.

⁵² *Persuad v. Persuad* [2003] EWCA Civ 394.

⁵³ *Dempsey v. Johnstone* [2003] All ER (D) 515.

⁵⁴ Email from LeO dated 2nd July 2015 (on file with author).

⁵⁵ LeO *Legal Ombudsman Scheme Rules* January 2015 Glossary para 1.6 and para 2.6.

⁵⁶ *Ibid*, page 14, Table 10 Final outcomes of internal complaints.

⁵⁷ *Ibid*, page 8, Table 3 Aspects of new external complaints.

⁵⁸ *Ibid* at page 13, Table 9 Final outcomes of external complaints.

to LeO.⁵⁹ As is clear from these examples of conduct, there are similarities in lawyer behaviour dealt with in the different jurisdictions.

Jurisdictions

In cases other than applications for wasted costs decided summarily, claimants have some choice of venue. The main determinant is the value of compensation. From February 2013 LeO could order authorised persons to pay compensation of up to £50,000 for direct financial loss, together with interest and costs. In pursuing claims over £50,000 through the courts complainants face financial and other barriers. Legal aid for Negligence claims has been replaced by different forms of contingency fee agreement, but restrictions on success fees chargeable deter lawyers taking on claims with even modest litigation risk. Claims under £10,000 are generally determined without a formal hearing and lawyers' costs are not recoverable.⁶⁰ LeO therefore offers distinct advantages over the court system to those with low value claims. The LSA requirement that ombudsman complaints are resolved 'quickly and with minimum formality'⁶¹ demands an economic process which includes a participative informal resolution procedure. Although LeO's literature emphasises that little is gained by adjudication nearly half of concluded cases go to hearing. This is a common feature of ombudsman schemes.

The volume of matters

The information available on the numbers of matters varies significantly between jurisdictions. The 932 complaints handled by BSB, as described at the end of the section before last, can be contrasted with the 50 most recent regulatory decisions published on the SRA's website.⁶² Between May 23rd and June 25th 2015 ten of these decisions were for referral to the SDT, and seven involved Regulatory Settlement Agreements, typically minor matters that could have been referred to the Solicitors Disciplinary Tribunal (SDT). The balance mainly covered interventions in firms, conditions imposed and rebukes. Since the latest 50 cases were generated in a month it is likely that the SRA makes around 600 regulatory dispositions relating to solicitors during the course of a year. The SDT handles around two hundred applications involving practising solicitors annually.⁶³ In 2013-14 the highest fine imposed was £40,000 and the next £20,000.

In its 2013 report LeO reported receiving 71,000 'contacts' and handling 7,630 cases against all authorised persons.⁶⁴ This differs considerably from the 18,500 complaints against solicitors handled annually by the last of the Law Society's complaints agencies, the Legal Complaints Service, in 2010. The difference is explained by how 'contacts' are recorded and complaints defined. Of the compensatory jurisdictions LeO provides the best data on cases that are accepted onto its scheme in its Annual Reports. Of the 4,682 cases it concluded in 2013/14, around 2,439 involved payments apparently similar to those involved in negligence cases.⁶⁵ In 1,885 cases lawyers paid compensation for the emotional impact or disruption caused by the failure. Other categories, such as paying complainants' expenses, may have formed part of a claim. In a further 32 cases an order to pay someone else to complete work was made. The alternative in a negligence claim is a financial award to cover this cost.

⁵⁹ Ibid, page 12, Table 7 Stages at which external complaints were closed.

⁶⁰ Last accessed 28/1/2015 at <https://www.gov.uk/make-court-claim-for-money/going-to-court>

⁶¹ LSA s.113(1).

⁶² Last accessed 28/1/2015 at <http://www.sra.org.uk/consumers/solicitor-check/recent-decisions/recent-decisions.page>

⁶³ See e.g. SDT *Annual Report 2013-2014* (London, SDT, 2014).

⁶⁴ The Office for Legal Complaints *Annual Report and Accounts for the Year Ending 31st March 2013* (London: The Stationery Office, 2013) HC 152.

⁶⁵ LeO Annual report 2013-14, above.

Apart from the periods of mutual insurance in the solicitors' profession it is more difficult to determine the numbers of liability claims made through the courts. During the ten years between 1987 and 1996, for example, SIF paid out on 32,461 claims.⁶⁶ There is no equally reliable data to compare this with. Recent Law Society research established that 40 per cent of a sample of firms had notified their insurer of circumstances that could give rise to a claim against the firm in the previous year, and just over 22 per cent had received a claim that they passed to their insurers.⁶⁷ Since there are very roughly 10,000 private practice firms⁶⁸ the figures suggest around 4,000 claims made and around 2,000 handed to insurers. These figures suggest that there could be significantly fewer claims being paid out than the average of just over 3,000 per annum during the SIF period, particularly if the settlement rate is low.

The value of compensation

SIF records suggest that the value of claims for the year was around £220 million in 1999/2000 and £226 million in 2000/2001. Data supplied by the Association of British Insurers to CRA suggests that between 2002-3 and 2009-10, PII premiums covering the MTC were between £200 million and £250 million annually. Adverse conclusions about the rising global figure for default must take account of the steady growth of the solicitors' profession and changes in the numbers of firms seeking insurance cover. In 2001 there were 68,466 solicitors in private practice and 8,319 firms in England and Wales earning at least £15,000 per annum.⁶⁹ Therefore, average compensation payments made by insurance companies were around £3,400 per solicitor and £27,000 per firm. By 2009, the numbers of solicitors in private practice firms had increased to over 85,000 and, although the Law Society could no longer verify whether firms were active, the number of firms on its REGIS database had increased to 10,362.⁷⁰ Based on the value of premiums for the compulsory MTC in 2008/09, £245.6 million,⁷¹ average liability had actually fallen to £2,885 per solicitor and to £23,702 per firm. The apparent downward trend in payments per head must be treated with caution. Premiums are only a rough guide to compensation paid. Claims against large firms, for example, may well lead to damages awards in many millions but firms need only insure up to £2 million per claim, the primary layer insurance, and different levels of excess, or 'deductible', are often payable on each claim. In addition to PII claims, the SRA Compensation Fund typically made payments of between £10 million and £21 million each year between 2000 and in 2010.⁷² The annual cost of solicitors' default since then has probably been between £210 million (the lower end of combined PII and Compensation Fund payments in the preceding periods) and £270 million (the upper end). These figures were confirmed by SRA as correct for 2014/15.⁷³

BMIF reports suggest that outstanding claims against barristers tend to exceed £30 million at the end of each year, but settlements totalled only £8,261,088 in 2009 and £13,298,286 in

⁶⁶ Based on a Table compiled by M. Davis, above, at 46.

⁶⁷ L Adams, B Gunstone and J Huntley Hewitt *Professional Indemnity Insurance Survey 2012-13* (London, IFF Research, 2013) para. 1.32.

⁶⁸ B Cole *Annual Statistical Report 2013* (London: The Law Society, 2014).

⁶⁹ Ibid.

⁷⁰ B Cole *Trends in the Solicitors' Profession: Annual Statistical Report 2000* (London, Law Society, 2009) 15 and 21.

⁷¹ Malcolm, Wilsdon and Xie above, p. 20.

⁷² Ibid p. 159.

⁷³ SRA *SRA Discussion papers: Protecting client's financial interests* 8th July 2015, para 7 (Last accessed 28/1/2015 at <https://www.sra.org.uk/sra/consultations/discussion-papers/protecting-clients-financial-interests.page>)

2010.⁷⁴ There are two obvious points of comparison with the figures for solicitors. The first is the relative volatility of payments year on year, confirmed by payments of £14,508,361 for the financial year to March 2013 and £9,211,593 for the 2014 financial year.⁷⁵ The second is the much smaller scale of barristers' PII. This is partly due to the Bar being a smaller profession, but average payments per head are also smaller. There were 12,420 (80.7%) self-employed barristers in 2010. Taking the higher figure for that year as the reference point, the compensation per barrister averaged nearly £1,071, significantly less than the solicitors' £2,885 per head for the previous year and a fraction of the £23,702 payable per solicitors' firm. It has been noted that each barrister is an independent practitioner with no qualified staff and no capacity to handle funds, but another variable is gross fees. Whereas gross fees for the solicitors' profession in 2009 were around £19 billion,⁷⁶ around £223,000 per head and approaching £2 million per firm, they were probably significantly less on average for barristers. This is difficult to verify but is a figure consistent with available data.

In 2012 the chair of the Young Bar Committee (YBC) estimated that young barristers at the criminal Bar could expect to earn less than £20,000 in the first few years post-pupillage less tax and expenses.⁷⁷ Another QC suggested that this could rise to £50-60,000 p.a. less tax and overheads of 30 per cent for a typical criminal barrister of 4-5 year's call and experience in all criminal court trials.⁷⁸ At the top end of criminal legal aid work only 3 barristers earned between £750,000 and £1 million from criminal legal aid in 2009 and none did so in 2013.⁷⁹ In 2013 only four barristers earned between £500,000 and £750,000 from legal aid and a further 27 earned between £300,000 and £500,000. The chair of the YBC suggested that one family set claimed its barristers earned from £60,000 in the first year to £120,000 after seven years, gross per annum. At the commercial Bar he indicated initial earnings approaching six figures, with successful barristers earning over £250,000 after seven years.

LeO received 7,995 complaints against approved persons in 2013-4. Of these 94 per cent were about solicitors (7,516) and nearly 4 per cent were about barristers.⁸⁰ Solicitors comprised about 89 per cent of combined practitioner numbers of approximate 145,000 (130,000 solicitors and 15,000 barristers) and, particularly given the fact they have more contact with clients, were only slightly over-represented. There was found to be no evidence of poor service in 48 per cent of resolved cases. The remainder were either settled informally or determined by Ombudsman's decision.⁸¹ Settlements under £299 comprised 26 per cent of informal resolutions and 16.6 per cent of Ombudsman's decisions. These small claims represented an even larger percentage of disposals because the total includes dismissed claims. In only 0.2 per cent of informal resolutions (6 cases) and 0.5 per cent of determined cases (16 cases) were complainants awarded more than £20,000. A further 161 cases were

⁷⁴ BMIF *Directors' Report and Financial Statement for the Year Ending 31st March 2010* (London, Bar Mutual, 2010) 10.

⁷⁵ BMIF *Directors' Report and Financial Statements* Income and Expenditure Account for the year ended 31st March (London, Bar Mutual, 2014).

⁷⁶ Malcolm, Wilsdon and Xie above, p. 20.

⁷⁷ D Nicholls 'Earning at the Bar: Great Expectations?' 4th December 2012 (last accessed 7/1/2016 at <http://www.lawcareers.net/Information/LCNSays/Earnings-at-the-Bar-great-expectations>)

⁷⁸ N Green 'The Future of the Bar' Bar Council 2010.

⁷⁹ Legal Action Group 'Figures show a fall in income for Criminal Legal Aid Barristers' <http://www.legalactiongroupnews.org.uk/figures-show-a-fall-in-income-for-criminal-legal-aid-barristers/>

⁸⁰ LeO 'Who was Complained About' Our performance - KPIs 2013 – 2014 (Last accessed 28/1/2015 at <http://www.legalombudsman.org.uk/raising-standards/data-and-decisions/#complaints-data>)

⁸¹ LeO *Annual Report 2013-14*, above, p. 13.

determined or settled with compensation of between £5,000 and £20,000. The total compensation awarded by LeO appears to be considerably less than £1 million. In the majority of such cases representation in court proceedings would not have been economic and most such claims would be within the scope of an insurance excess.

The incidence of liability claims

Little is known about the volume of different kinds of liability claims against barristers. BMIF annual reports contain scant detail beyond total claims, payments and premiums. It does however publish a rating schedule according to which the basic level of contribution is applied to income declared under different areas of work. This is apparently set to reflect inherent risk, with crime and family rated at 0.15 per cent and non-contentious revenue work at .6 per cent. The highest rate is 2 per cent applied to Chancery work, non-residential landlord and tenant and defamation.⁸² The Chairman of BMIF has said that the abolition of advocates' immunity had absolutely no impact on PII claims.⁸³

Material on the incidence of claims against solicitors would also be scarce but for the CRA data. Insurers reported disproportionate claims from those establishing practices soon after gaining the permitted three years post qualification experience (PQE) and from overseas lawyers becoming solicitors by taking the Qualified Lawyers Transfer Test (QLTT). Dividing the value of claims against practitioners in different sizes of practice by the numbers of practitioners in each category suggests that sole practitioners and partnerships with fewer than five partners were responsible for higher aggregate value claims per fee earner.⁸⁴ Sole practitioners were responsible for three times the value of claims compared with their number, two partner firms around five times more and three to four partner firms four times more. There was also evidence that default is linked to some areas of practice. As shown in Figure 1, during the period of the SIF, commercial work, conveyancing and litigation, personal injury work in particular, consistently produced the largest numbers of claims.

Figure 1 about here

Between 1992 and 1996 conveyancing was the source of nearly 34 per cent of the number of claims and 27 per cent of the value of claims.⁸⁵ In contrast, criminal law produced just 0.03 per cent of claims by value and 0.24 per cent by number.⁸⁶ There are a number of possible explanations for this phenomenon. Most obviously, conveyancing is traditionally the main work of most solicitors' firms and continues to be significant by volume and value. Research reported by the Legal Services Board in 2010 showed that conveyancing represented thirteen per cent of defined areas of solicitors' work by gross turnover, second only to finance and business at thirty one per cent.⁸⁷ The profession has always urged that data on conveyancing default be viewed in perspective. In 1996, the chairman of a Law Society Conveyancing Working Party estimated that between 1987 and 1994 solicitors conducted 23 million land transactions and that conveyancing accounted for only seven claims per 10,000 transactions.⁸⁸

⁸² BMIF *Rating Schedule* 2014/15 (Last accessed 28/1/2015 at http://www.barmutual.co.uk/fileadmin/uploads/barmutual/Bar_Mutual_Rating_Schedule_2014.pdf)

⁸³ Haller (this collection)

⁸⁴ Malcolm, Wilsdon and Xie above, Figure 12 page 45.

⁸⁵ M Davies, above, p. 47.

⁸⁶ Ibid.

⁸⁷ *LSB Market Financials: Turnover and Profitability* (last accessed 28/1/2015 at <https://research.legalservicesboard.org.uk/analysis/supply/market-financials/turnover-and-profitability/>).

⁸⁸ P Marsh reported in the *Law Society Gazette* (1996) 193 (11), 20 and cited by M Davies at 48.

The spike in claims depicted in Figure 1 can be explained by various factors including court decisions. The courts had traditionally argued that not every error by a professional person indicates negligence⁸⁹ and that practitioners need not be particularly meticulous or conscientious.⁹⁰ From the mid-1970s decisions against surveyors, valuers, architects and engineers suggested a harder judicial line.⁹¹ In 1993 the Law Lord, Lord Hoffman explained the expansion of professional liability as an example of judicial risk allocation arguing:

‘What you are getting very close to there is treating the conveyancing solicitor as if he had contracted to produce a result. He has contracted to give you a clear title and practically any mistake on his part which prevents that result from being attained will attract liability. The underlying truth seems to be that judges regard conveyancing as an activity which should give a result to the client.’⁹²

Another hypothesis is that the data in the SIF period was distorted by solicitors implicated in conveyancing fraud. A buoyant property market in the 1980s led to a considerable ‘over-lending’, subsequently exposed by re-possession of property in negative equity. The volume of conveyancing PII claims would have been swollen by claims against innocent partners for the fraud of dishonest members of firms. Some of the remainder may have ended up as Compensation Fund claims. This link is supported by the fact that the Law Society won a test case defeating prospective claims of £25 million against the Compensation Fund in relation to solicitors assisting purchasers to buy overvalued properties.⁹³ Another credible explanation of the SIF figures is that conveyancing is relatively high value work conducted across the profession including by small firms, the group with the highest claims incidence. The 1980s spike may then be explained by cost-cutting to compete on price with licensed conveyancers.⁹⁴ The relationship between conveyancing claims and small firms is supported by CRA data. It shows that commercial conveyancing accounted for 11.2 per cent of the value of claims made on the SIF but was the source of only 4.1 per cent of the number of claims. It also showed that law firms with less than five partners generated 64 per cent of the value of all property claims.

Data from the post-2001 period showed that conveyancing continued to be a major source of claims against the small firm members of the ARP. After 2005/06, a time when the pool contained no firms with more than 5 partners,⁹⁵ conveyancing generated eighty five per cent of the value of claims against member firms.⁹⁶ The negligence claims within this figure may be due to the gearing of conveyancing firms. CRA found that many firms with less than five partners had large numbers of staff without practising certificates. It is also possible that fraud continued to be a problem. Rules tightening up on acting for purchaser and lender were not introduced until 2007⁹⁷ and claims by mortgage lenders represented around 50 per cent of all claims against firms in the ARP, and around 60 per cent of all conveyancing claims. It is not known to what extent the 2007 rule changes helped to abate conveyancing claims.

⁸⁹ *Stewart Wrightson Group Ltd v. Crocker* (1979) *The Times* 19th December cited in M Davies *Solicitors’ Negligence and Liability* at 52.

⁹⁰ *Saif Ali v Sydney Mitchell and Co* [1980] AC 198, HL.

⁹¹ See e.g. *G & K Ladenbau (U.K.) Ltd. v Crawley & De Reya* [1978] 1 W.L.R. 266; *Edward Wong Finance Co. v. Johnson, Stokes & Master* [1984] A.C. 296.

⁹² Address to the Professional Negligence Bar Association on 14 October 1992: see (1994) 10 P.N. 6. Cited by J Powell QC *Professional negligence: The changing coastline of liability* (2000) (Last access 26/6/2015 at www.4newsquare.com/Files/PDF/Article/JP%20article.doc).

⁹³ *R. v. The Law Society ex. p Mortgage Express Ltd.* [1997] 2 All ER 348.

⁹⁴ S Domberger and A Sherr, ‘The Impact of Competition on Pricing and Quality of Legal Services’ (1989) 9 *International Review of Law and Economics* 41.

⁹⁵ Malcolm, Wilsdon and Xie above, p. 40.

⁹⁶ *Ibid* p.39.

⁹⁷ Boon *The Ethics and Conduct of Lawyers* above, p. 404.

Between 2008 and 2010 Compensation Fund payments rose from £9.23 million to £21.2 million. It may be coincidental that this spike, and the spike in the SIF period, coincided with a decline in the property market. If the majority of claims are rooted in negligence rather than fraud, it would suggest that the decline of property value encourages parties to focus on mistakes that might be overlooked in a rising market as a cause of loss of value. The SRA recently suggested, however, that conveyancing continues to be a major source of claims under the open market regime.⁹⁸ Announcing a recent review of conveyancing regulation the SRA noted that:

‘many insurers that have responded to consultation have argued that much of their risk management and underwriting resource is now focused not on negligence but on dishonesty – either from within authorised bodies or through authorised bodies’ risk management and controls systems being so weak as to allow them to become subject to the activities of dishonest third parties.’⁹⁹

Better data would be needed to confirm the proportions of claims due to fraud and to negligence.

High-risk areas of work indicated by PII data can be usefully compared to those indicated in complaints data. The majority of complaints to LeO were about residential conveyancing, (20 per cent of the total) Family Law (18 per cent), Wills and Probate (13 per cent) personal injury (10 per cent) and Litigation (10 per cent). There were small numbers of complaints, around, 100 each, about commercial law services (1 per cent) and Financial Law services (1 per cent), possibly because the value of such claims exceeds LeO’s jurisdiction. These data are relatively stable. Of the 7,370 complaints registered in 2014-15 the most concern residential conveyancing (23 per cent), followed by Family Law (14 per cent), personal injury (12 per cent) and Wills and Probate (11.85 per cent).¹⁰⁰ Two of the areas, conveyancing and personal injury, are also in the top four substantive areas identified by CRA. The notable exceptions are commercial areas, which are significant in the value of PII claims but are less than two per cent of total complaints. LeO’s data suggests that the largest category of default in residential conveyancing was failure to advise (24 per cent of cases) and the next failure to follow instructions.¹⁰¹ None of 15 other categories of default exceeded ten per cent. A category of ‘potential misconduct’ accounted for seven per cent of cases.

Conclusion

Although the data are patchy and the overall picture inconclusive there are two large areas of regulatory activity where the material outlined in this article is provocative. First, the data raises questions about the differences in default between different types of lawyer and between different areas of work within the same profession. Analysis of the factors underlying these differences may help in understanding default and identifying regulatory interventions that may be effective. Second, it raises questions about the effectiveness of different jurisdictions in dealing with default. There may be lessons to be learned from, for example, the conditions of participation, the effectiveness of remedies in each jurisdiction and the accountability of legal services providers in each jurisdiction. It is proposed to reflect

⁹⁸ SRA financial protection policy statement (19 April 2011) (last accessed 15/12/2015 at <http://www.sra.org.uk/solicitors/code-of-conduct/professional-indemnity/financial-protection/financial-protection-policy-statement.page>) .

⁹⁹ Ibid at para 68.

¹⁰⁰ LeO ‘Complaints Data 2014-15’ (last accessed 26/6/2015 at <http://www.legalombudsman.org.uk/raising-standards/data-and-decisions/#complaints-data>).

¹⁰¹ LeO ‘What was the area of Law by Regulator’ Our performance - KPIs 2013 – 2014 (last accessed 26/6/2015 at <http://www.legalombudsman.org.uk/raising-standards/data-and-decisions/#complaints-data>).

briefly on these questions before returning to consider the potential for using insurance and complaints data in order to better understand lawyer default.

One of the notable features of the causes of default is the clear difference in the scale of the default of solicitors and barristers, the two professions considered in this article, and the kinds of activity regarded as risky. Compensation payments per head are nearly two thirds more for solicitors than barristers, there is a rising trend in the value of claims against solicitors over a period of years and some areas of work, notably conveyancing and personal injury, are consistently implicated in these rises. Further data is required in order to explain these differences adequately. Working hypotheses include the fact that solicitors could be more prone to liability claims and complaints than barristers. This could be for a number of reasons, including different modes of practice, different areas of work and different practice requirements. A significant factor could be the fact that barristers cannot handle client money. The upward trend in the value of claims against solicitors could point to failings in regulation or could be explained by factors such as judicial attitudes to professional negligence, increased numbers of practitioners or larger commercial settlements. The consistently high value of insurance payments in respect of solicitors handling conveyancing and personal injury could result from small numbers of large individual claims in those areas or large numbers of claims against small solicitors' firms. Both kinds of claim could be due to fraud or negligence.

Identifying more closely the nature of default is the key to determining effective intervention, whether in terms of educational provision, conduct rules or regulatory activity. If a high proportion of Compensation Fund and PII claims involve payments in respect of dishonesty, this raises questions about the level of default that is to be expected, or is 'acceptable', in relation to that area of work. If it is decided that prevailing levels of default are not tolerable, it then falls to decide whether the causes of such claims are remediable and what measures might reduce their impact. One solution may be to review licensing requirements for areas of high risk, for example, imposing specific entry requirements, activity authorisation or regular audits on providers. Another may be to change the nature of operations, for example, imposing restrictions on handling client money in relation to some solicitors or some areas of work. This may not assist, however, if the major problem is mortgage fraud, which need not depend on handling money. The appropriateness of any targeted measure depends on the size of the market, the scale of activity and the proportionality of regulatory intervention.

The second large question raised by the data relates to the limitations of the venue dealing with default. The LeO data points to a possibly significant overlap between jurisdictions in default involving negligence. Cases gravitate to the different jurisdictions according to factors such as whether loss was caused, how much loss was caused, who it was caused to and the circumstances in which it occurred. The courts are by far the most significant liability jurisdiction by volume and value of claims, even though claimants face potential costs barriers in bringing claims. The value limit for LeO cases forces higher value claims into the court system where claimants risk incurring high costs or losing part of their damages as the cost of a fee agreement with their lawyer. Despite these difficulties, clients of the professions regulated under the LSA enjoy a relatively privileged position under present arrangements. Two significant groups face greater difficulty in pursuing remedies for lawyer default. The first group is third parties which, because LeO's jurisdiction is restricted to clients, are forced into the court system. This may be considered bad policy in terms of encouraging lawyers to strike a balance in pursuing client rights while avoiding third party harms. The second group suffering prejudice is the clients of a growing unregulated legal services sector. Clients in this

sector may find that legal services providers are uninsured and that LeO has no jurisdiction over its activities.¹⁰²

In considering the role of data in policy formation it is important to note that a potentially considerable volume of lawyer default is unrecorded. This may be because default is undetected. Some of the data considered in this article points to this possibility. For example, several of the complaints categories concern failures the discovery of which is probably accidental. Data may also be unreliable because, although default exists, victims are disinclined to pursue remedies or are required to prove a causal link to harm before receiving compensation. The consequence of these difficulties is twofold. First, they may undermine the case for greater reliance on liability claims, and insurance requirements, as mechanisms for controlling lawyer default. Second, the potential for the significant under-recording of default means that policy makers need to be aware of data limitations when formulating regulatory policy. Despite these caveats, published data appears to offer considerable potential both for understanding lawyer default and for tailoring interventions. Insurance data provides indications of the scale of detected and remediable default and of particular risk areas. These data are potentially useful in determining regulatory focus and intervention strategies. They enable options to be considered in the light of the reasons for default, the overall sums involved and the convenience to clients of existing arrangements. Complaints data are more detailed. They could be particularly useful in identifying the kinds of errors that typically occur in particular kinds of work. This information could also be useful in shaping regulatory policy, but might also assist in designing education and training or in refining workplace systems designed to minimise lawyer default. These observations suggest that greater transparency in data collection, collation and publication may well be the key to understanding and regulating default.

¹⁰² LeO Annual report 2013-14, above.

