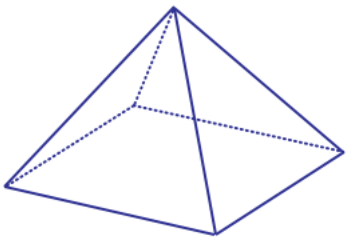
On The Geometry of Mandatory Insurance Relationships

James Davey*



I. Introduction

Let me start with the title. What I have in mind is the additional complexity that exists when we move from a linear relationship between two contracting parties to a 3D network of relationships, some legally derived, some social.[1] It may be that this is ends up being a consideration of topology rather than geometry. Time will tell. With that concept in mind, this paper starts an investigation into the likely effects of liability insurance contracts on the delivery of legal services in the United Kingdom. In doing so, it draws upon several streams of literature and associated case law.

Predominantly, this is a study of the effects of 'collectively bargained' minimum liability insurance cover on managerial strategy in law firms. In the UK, legal practitioners are commonly divided into solicitors and barristers, based on an ancient distinction between those who provided advocacy before the courts, and those who did not. This distinction is now mostly redundant in terms of advocates vs others, but its legacy is strongly felt in the regulatory systems that apply.[2] Unless stated otherwise, I am considering the governance effects on solicitors, but readily acknowledge that any comprehensive study in this area would need to investigate both. For now, I am content to draw out issues that would be tested empirically in work to follow.

---

* Professor of Insurance & Commercial Law, University of Southampton. This is work-in-progress. Comments are welcome to J.A.Davey@soton.ac.uk.

[1] I suspect thanks are owed here to Dr Johanna Hjalmarsson who alerted me to the Edwin Abbott's 1884 novella, *Flatland: A Romance in Many Dimensions,* some years ago and which has lurked at the back of my mind ever since. The shape of networks and connected contracts was famously the subject of G Teubner, *Networks as Connected* Contracts (Hart, 2011, with introduction by H Collins).

[2] Recent evidence suggests that some forms of regulatory arbitrage continue to exist, with solicitors recreating their practice as barristers in order to escape certain onerous requirements, including the minimum terms for liability insurance.

The key literature for my study is the emerging field of 'insurance as governance'. This field has received significant contributions from scholars from law & economics and law & society, without much of the 'talking at cross purposes' that often occurs in insurance theory. The relationship between the State, society and insurers has produced genuinely insightful research into the governance effects of contracts more generally. The leading sociological work in this field, Ericsson, Doyle & Barry's *Insurance as Governance*[3] developed the concept of 'moral risk', as a means of charting the influences of commercial insurers on market and social activity. Ben-Shahar and Logue sought to show that these governance effects are often superior to State action in the design and enforcement of safety standards.[4] Talesh's qualitative survey suggests that Ben-Shahar & Logue are unduly optimistic, and that the transformative effect of insurance on risky conduct can, in some circumstances, be seriously diminished, and even socially malign.[5] Whilst the field of professional legal ethics and corporate governance is fairly well developed, no UK scholars appears to have considered the role of the insurance industry as quasi-regulators of legal practice. Work of this type exists in the US context,[6] but the system of regulation there is sufficiently different to justify a separate consideration of the UK position. This has become particularly timely for the current position in England, as regulators begin to implement a substantial reduction in the requirements for solicitors to practice.

At the heart of this vision of the insurance industry lies the concept of influence through price and contract design. Risks which fit within the constructed 'normal' bracket are readily accommodated by the insurance market. Risks which are abnormal may not be insurable, or not insurable at levels which allow the activity to be carried out profitably. Insurers take on a licensing function, but one which is fairly sophisticated. The significance of insurance availability is only exacerbated by any move to make insurance a pre-condition of certain activities. Here, the licensing function of insurers is enshrined in law and/or market practice. This phenomenon was described early in the creation of compulsory insurance regimes,[7] but has only been theorised in more recent times.

---

[3] R Ericsson, A Doyle & D Barry *Insurance as Governance* (Univ of Toronto Press, 2003).

[4] O Ben-Shahar & K Logue, (2012) 'Outsourcing Regulation: How Insurance Reduces Moral Hazard', 111 Mich L Rev 197.

[5] S Talesh, 'Insurance Companies as Corporate Regulators: The Good, the Bad, and the Ugly' (2017) 66 DePaul L Rev 463.

[6] A Davis, 'Professional Liability Insurers as Regulators of Law Practice' (1996) 65 Fordham L Rev 209; C Silver, 'Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis' (1996) 65 Fordham L Rev 233; T Baker & R Swedloff, 'Regulation by Liability Insurance: From Auto to Lawyers Professional Liability', (2013) 60 UCLA L Rev 1412 and T Baker & R Swedloff, 'Liability Insurer Data as a Window on Lawyers' Professional Liability' (2015) 5 UC Irvine L Rev 1273.

[7] See J Davey, 'A compulsory diet of chickens and eggs: the EU Motor Insurance Directives as a shadow tort regime', in P Giliker (ed) *Research Handbook on EU Tort Law* (Edward Elgar, 2017), p. 242.

In the UK markets for legal services, solicitors and barristers carry liability insurance. Solicitors are required by law to do so, and barristers are required by the rules of professional conduct. The minimum levels of cover, both in financial terms and in respect of exclusions, have considerable influence on the effective levels of compensation received by clients whose lawyers fail to maintain professional standards. These minimum cover limits are negotiated by professional bodies, whose interests may diverge from those of the individual lawyer. In any collective bargaining scenario there are likely to be averaging and smoothing effects, and this makes the nature and extent of collectivisation key. This is more than the standard effect of insurance as governance, with an underwriter seeking to influence an individual insured. We are moving from a linear relationship to a polygon.

In the UK system, the move is from a simple two-party relationship (the neo-classical contract) to five active parties. The underwriter is represented in the collective bargaining round by the ABI and other trade bodies, the solicitors by the SRA (and other trade bodies). But the minimum terms established by the collective bargaining round are far from complete, and substantial issues remain to be negotiated, not least whether cover will be offered and at what price. The third-party, who is the ultimate beneficiary of the scheme in real terms, is not a party to the contract, but is recognised judicially and politically as a stakeholder. Claimants are not unionised, and may only be represented by proxy, such as by organisations representing claimant lawyers, such as APIL, or by consumer champions.

We begin our investigation (in part II) of this multi-faceted relationship by considering the judicial approach to compulsory liability insurance generally, and in (part III) how this is reflected in the scheme professional liability for lawyers. Part IV sets out the literature in this area, both theoretical and empirical in nature, in search of lessons for the UK. Part V starts to shape a research agenda to test the regulatory effects of liability insurance in the provision of legal services in the UK, and is in part, a call to arms.

II. Liability Insurance Contracts: Looking Beyond the Contract

On occasion, English law treats a liability insurance contract as just another contract of insurance. There are two parties- the insured and the underwriter- and the object of the policy is the protection of the insured's financial position. Where the insured is a corporate entity, and this is very common, it is the protection of the corporate entity, whether captured by book position or share value. This perspective stresses the contract as the fundamental component, and is commonly referred to as a contractarian model.

There is a conflicting vision of the liability insurance policy as a fundamental part of the compensation scheme, as inherently bundled within the civil justice regime. In this model, which is the standard account in socio-legal models, the liability insurance policy is more than a contract, it is a mechanism (and often **the** mechanism) for compensating the victims of negligent acts, and beyond. In this account, the insurance contract is simply a device to make real the promise of compensation within the tort system. The empirical picture of personal injury claims supports this view of liability insurance, where made compulsory, as a key factor in compensating the victims of accidents. Using data derived from government exposure to personal injury losses (where the State has provided healthcare services or benefits to the injured person), we can see that the two major areas of compulsory liability insurance (motor and employers' liability) constitute around 75-80% of the total compensation recovered. Once claims for clinical negligence are accounted for, which are mostly against the State, we can see the role of compulsory liability insurance as fundamental to the recovery of personal injury compensation. Pecuniary losses, which will be the vast majority of claims against lawyers, are not captured in this data set, and the precise relationship between the mandated limits of cover and compensation awarded needs to be established independently.

Year	Clinical negligen	Employer	Motor	Other	Public	Liability not known	Total		%
2017/18	£18,466,404.68	£67,745,014.91	£29,563,561.43	£1,393,013.54	£6,352,690.96	£59,823.54	£123,580,509.06		78.74
2016/17	£18,127,873.28	£68,824,913.42	£30,063,642.68	£1,350,643.56	£7,621,284.35	£38,017.81	£126,026,375.10		78.47
2015/16	£15,628,754.03	£69,766,631.33	£31,261,593.92	£1,112,025.06	£7,921,893.96	£67,776.73	£125,758,675.03		80.33
2014/15	£14,043,706.35	£73,719,340.95	£32,280,370.93	£1,137,645.58	£8,510,389.92	£28,726.62	£129,720,180.35		81.71
2013/14	£12,959,073.92	£74,417,163.07	£36,056,513.55	£1,057,788.86	£9,828,792.82	£118,179.85	£134,437,512.07		82.17
2012/13	£14,756,267.61	£71,336,357.06	£36,165,277.90	£1,009,172.47	£9,614,093.86	£54,175.86	£132,935,344.76		80.87
2011/12	£13,851,502.19	£75,245,271.28	£38,120,831.98	£946,957.54	£10,459,138.84	£76,062.31	£138,699,764.14		81.73
2010/11	£11,355,690.97	£75,834,759.13	£41,072,611.98	£909,794.54	£10,606,832.81	£68,343.40	£139,848,032.83		83.60

This sense of a complex product, capable of diverse and mutually incompatible policy goals is replicated in the approaches undertaken by appellate judges. The judicial conception of liability insurance contracts shifts to some degree when they are made compulsory, but this transformation is not always complete. This conflict between contractarian and deterrence/compensatory modes is best demonstrated by some recent appellate case law in the British courts, and in particular in the area of compulsory liability insurance.

The Court of Appeal and Supreme Court were faced with circumstances where employers had failed to arrange effective insurance cover. In such cases, no action could be brought by the

injured worker against the underwriter, as it was not contractually obliged to indemnify.[8] Moreover, the corporate entity that had failed to arrange cover would often be insolvent. This would leave the injured worker without compensation unless it was able to bring a civil claim against the directors of the company for failing to insure. This would require a court to 'pierce the corporate veil' and allocate personal responsibility to directors for the failings of the corporate entity. In refusing to extend personal liability in this fashion, the courts made explicit their vision of statutory compulsion to insure, and the interrelationship with core principles of private and commercial law.

Until recently, the lead authority was the Court of Appeal decision in *Richardson* v *Pitt-Stanley*.[9] This held that the directors were not personally liable in tort for the failure to ensure that insurance cover was in place. The approach of Stuart-Smith LJ for the majority was a classic contractarian approach:

> 'Insurance is normally taken out for the protection of the insured, so that by paying a relatively small premium he may be protected against a heavy claim or loss. A small, or even medium sized, employer may be faced with disastrous consequences for his business, with adverse consequences for his other employees, if he is faced with a large claim by an injured workman, which will make large inroads into his resources. Although these consequences may not be so catastrophic as they are for a seriously injured employee who cannot enforce his judgment, they are likely to be serious, more widespread and more frequent, since it is only in those cases where the assets of the employer are insufficient to meet the claim that the employee is affected'.[10]

By contrast, the dissent by Megaw LJ, dismisses entirely this vision of the contract as undertaken for the benefit of the contracting parties, and imagines it as entirely for the benefit of third parties:

> 'The obligation to insure against bodily injury or disease sustained by employees was imposed by Parliament for one purpose, and one purpose only. The purpose was to give protection to a particular class of individuals, the employees, to eliminate, or, at least, reduce, the risk to an injured employee of finding that he was deprived of his lawful compensation because of the financial position of the employer. I am confident that it

---

[8] Third-parties are otherwise able to claim the benefit of liability policies by direct action against the underwriter where the insured is insolvent, under the Third Party (Rights Against Insurers) Act 1930 and the equivalent 2010 Act (in force from 2016).

[9] [1995] QB 123.

[10] Above, n 9, at 131 per Stuart-Smith LJ.

> was no part of the purpose or intention of Parliament in enacting this legislation to confer a benefit or protection on the employer. It might or might not be in the employer's interest, on its own account, to have insurance against this risk. But that would depend on various factors, such as the relationship of the amount of the premium, as compared with its assessment of the risk. The purpose of Parliament's enactment was the protection of the employees'.[11]

This issue was raised before the Supreme Court in the *Campbell Joiners* case,[12] which originated in the Scottish courts, but was dealt with on the basis of UK law more generally. The facts of *Campbell Joiners* are typical of the issues faced within a compulsory insurance regime. The defendant company had purchased employer's liability insurance, but it contained an exclusion. This was crucial and meant that the underwriter was not liable for any losses caused by electrical woodworking tools. Given that the business was a joinery, the use of power tools for working wood was a fundamental part of its business. The claimant was severely injured whilst using a circular saw. In light of the claims for the negligent infliction of serious personal injury, the company became insolvent. It was also in breach of its corporate duty to arrange appropriate insurance under the Employers Liability (Compulsory Insurance) Act 1969. With no action possible against the insurer (as it was relieved from liability by the exclusion) and none possible against the company (it having become insolvent), an action was started against the primary company director. In the circumstances described, the director would have personal criminal liability for the failure to arrange suitable insurance cover. The question for the court was whether the director was also subject to civil liability.

The majority position took an orthodox approach to the private law relationships. The insurance contract was limited in its terms, this was the fault of the corporate insured, and there was no express provision in the 1969 Act which imposed liability on the director. That this left the insured without an effective means of compensation was unfortunate, but unavoidable. Even on this basis, the majority were prepared to accept that the purpose of the liability contract was to protect the innocent injured third party (citing the approach of Megaw LJ above).[13] The question for the court was whether this wider policy objective justified the imposition of civil liability. The majority found, on a close reading of the text, that the 1969 statute as interpreted

---

[11] [1995] QB 123, 135.

[12] [2016] AC 1513.

[13] At [12]: 'I would also proceed on the basis (agreeing in this respect with Sir John Megaw in Richardson's case that the duty of the employer under section 1of the 1969 Act was imposed for the benefit of the employees, in the sense indicated by Lord Diplock'.

did not fall within the test in *Lonhro v Shell Petroleum*: 'where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation'.[14] The two judges in the minority, Lord Toulson and Lady Hale, were both Law Commissioners, and intimately involved in the design of legislation in that role. I suspect this helped shape their conception of the relationship between legislation and contract. Lord Toulson criticised the majority for an unduly formalist approach to the statute, concentrating almost exclusively on the language used. He preferred to look at 'at the function and substantive effect of the deeming provision in real terms. The present context is legislation for the protection of a vulnerable group, a company's employees. In that context I regard the functional approach as more appropriate'.[15]

To repurpose one of the most successful slogans of all time, this is 'mes que un contracte'. It is a mechanism for the delivery of compensation to injured parties, it is a fundamental part of our tort scheme and its compensatory norms. How, precisely, it delivers those public goods is bound up in the terms of the contract, and the way in which it is negotiated.

III. The Professional Negligence Insurance System for Lawyers: For Whose Benefit?

The mechanism for imposing standardised terms for solicitor's professional liability has proved consistently controversial. Its legal basis is relatively simple. Initially the Law Society (alone) was empowered by the Solicitors Act 1974 to set minimum standards of indemnity insurance cover for professional liabilities. Under s. 37(2), it was permitted to use any combination of 3 distinct mechanisms to ensure cover on standard indemnity terms:

- By the creation of a fund of its own;
- By maintaining insurance (on behalf of law firms) with authorised insurers;
- By requiring solicitors to maintain insurance with authorised insurers;

The Law Society chose option 2. It also made use of its powers under s. 37(3) to stipulate:

- the terms and conditions on which indemnity is to be available, and any circumstances in which the right to it is to be excluded or modified; and
- that solicitors make payments by way of premium on any insurance policy maintained by the Society by virtue of subsection (2)(b);

---

[14] *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 185 per Lord Diplock.
[15] Above, n 12, at [30].

In its original form, the Law Society negotiated a standard form 'master policy' that was the basis for all solicitors acting within the jurisdiction. They then paid individual premiums in exchange for cover. The Law Society received a percentage of the premium paid by individual solicitors in commission. The precise relationship between the Law Society and the underwriters of the policy was subject to challenge in the highest court in *Swain* v *The Law Society*.[16] It arose as part of a campaign by disaffected members of the profession against the creation of the scheme. In essence, the argument was that the Law Society was acting in breach of its private law duties in accepting a share of the premium payable for exercising its power under the statutory scheme. The arguments on the limits of fiduciary duties (and the doctrine of privity of contract) are interesting, but need not delay us here. We are concerned with the statements made on the nature of the scheme, and the extent to which it was for the benefit of wider society, rather than the legal profession directly.

As Lord Diplock noted, when the Law Society acted under its statutory duties, the consequences bound all solicitors, and not only members of the society. This reinforced the view that it was acting in a capacity divorced from its private duty to represent only the best interest of its members. As he had it:

> 'In exercising its statutory functions the duty of the Council is to act in what it believes to be the best interests of that section of the public, [that may be in need of legal advice, assistance or representation] even in the event (unlikely though this may be on any long-term view) that those public interests should conflict with the special interests of members of the Society or of members of the solicitors' profession as a whole'.[17]

The limits of the 'Master Policy' agreed needed to reflect the interests of clients and not solicitors, or investors in legal practice. The scheme required solicitors to purchase insurance, and for subscribing insurers to insure those risks on the terms agreed. This is collective bargaining, imposed by statute, and not the product of market choice. Indeed, as Lord Brightman noted, the litigation stemmed from the desire of some solicitors to be able to exercise choice of insurer, and cover.[18]

In light of hard market conditions in the mid-1980s, the profession moved to a fund operated by the Law Society (option 1 above), known as the Solicitors Indemnity Fund (SIF). As the market softened, there were concerns that it was failing to utilise risk reflective pricing

---

[16] [1983] 1 AC 598.
[17] Above, n 16, at 608.
[18] Above, n 16, at 614.

appropriately and that some sectors of the market were unfairly subsidising others.[19] This saw a move to open market cover (option 3, on minimum terms) from 2000. This remains in place today, with some minor changes to the process. Solicitors are no longer required to all seek renewals on the same day of the year, to the relief of all concerned.

One important change is the reshaping of the Law Society's prior role as both representative and regulator of solicitors. The Solicitors Regulatory Authority now holds a contributory role in setting minimum terms and conditions of liability cover. Recent years have also seen the closure of a central fund and a move to cover being offered on the open market. This was reported as giving rise to substantial premium savings.[20]

In *AIG Europe Ltd* v *Woodman*,[21] the Supreme Court revisited the scheme, now operating on the basis of market cover on certain terms, set under the title of the Law Society's Minimum Terms and Conditions for Professional Indemnity Insurance (MTC). Lord Toulson's opening remarks stated that the power under s. 37 (as per *Swain*) 'is intended to be for the protection of the public as well as the premium-paying solicitor'.[22] I would suggest that this somewhat oversimplifies Lord Diplock's version of events. Rather, it is for the protection of the public (as the overriding concern) and then for the protection of the insured solicitor, insofar as not incompatible with the interests of the public. In *Woodman*, the question was how to interpret the 'aggregation' clause, which determines what failures by the insured law firm might be considered as a single claim against the underwriter.[23] It reads as follows:

> 'The insurance may provide that, when considering what may be regarded as one claim
> … (a) all claims against any one or more insured arising from:
> (i) one act or omission;
> (ii) one series of related acts or omissions;
> (iii) the same act or omission in a series of related matters or transactions;
> (iv) similar acts or omissions in a series of related matters or transactions
> … will be regarded as one claim.'

On the facts litigated, this clause operated for the benefit of the insurer, as it wished to rely on the agreed cap on liability for any one claim set at £3m. The fewer the number of 'claims', the

---

[19] https://www.lawgazette.co.uk/news/searching-for-balance-the-law-society-consultation-paper-on-ensuring-indemnity-contributions-are-fair-/20203.article

[20] *Howden Market Report: Solicitors' Professional Indemnity Insurance* (2017).

[21] [2017] 1 WLR 1168.

[22] Above, n 21, at [1].

[23] Other elements of this clause (particularly clause (ii)) were interpreted in *Lloyds TSB General Insurance Holdings Ltd* v *Lloyds Bank Group Insurance Co Ltd* [2003] 4 All ER 43.

lower the overall liability of the underwriter. The litigation concerned actions from 214 individual litigants, all seeking compensation for failures of the solicitors in the operation of two overseas property developments, a total potential liability in excess of £10m. The insurers claimed that these losses were all 'similar acts or omissions in a series of related matters or transactions' so that a single aggregated claim existed, with a limit on its liability of £3m. The claimant investors argued that none of the claims fell within the aggregation clause, so that the underwriter was liable for the total loss.

The English court's approach to interpretation of commercial contacts has proved to be a highly charged affair, with notable divisions between those favouring a more contextual approach (led by Lord Hoffman) and those favouring a more literal approach. Lord Toulson made clear that the purposive model was relevant to this contract as:

> 'The Law Society is not in a position comparable to an insurer proffering an insurance policy. It is a regulator, setting the minimum terms of cover which firms of solicitors must maintain. In doing so it has to balance the need for reasonable protection of the public with considerations of the cost and availability of obtaining professional indemnity insurance'.[24]

Ultimately, the Supreme Court held that the investments in each development were sufficiently related to constitute a single claim, but there was no equivalent link between the two distinct development scheme. On this basis, the underwriters' liability was limited to £6m (£3m per claim). This is one of the clearest examples of how the compulsory insurance regime fails to fully indemnify third parties, as the aggregation clause provides a significant limit on the underwriter's liability where losses are above the minimum levels set.

Modern Limits on Cover

We have good judicial authority, as described above, that the scheme, whilst contractual as between law firm and underwriter, is considerably altered by its statutory roots. The current position, as captured by the 2012 MIT Rules, retains this character. This is more than a simple contract; it is a statutory mechanism for giving effect to consumer protection. The protection is limited, but the minimum level of protection is considerable in the majority of circumstances. The standard terms also limit the underwriters' ability to restrict or deny cover in a wide variety of ways that are less familiar to standard liability insurance markets.

Under clause 4.1, the underwriter must waive the entirety of its rights under the pre-contractual duties of fair presentation and misrepresentation. this waiver is said to be effective even where

[24] At [14].

the non-disclosure of misrepresentation was fraudulent, even though judicial authority suggests this would be ineffective as a matter of public policy.[25] Under 4.2, the underwriter is not entitled to limit or deny liability for any claim due to non-compliance with policy conditions, except those listed in clause 6. This is a substantial reduction on freedom of contract, and not replicated in all statutory schemes (see eg the protection of workers under the employers' liability regime discussed above). To avoid disputes between this self-denying ordinance and any express contractual provisions, a paramount clause must be inserted (as per clause 4.12):

> 'The insurance must provide that:
>
> (a) the insurance is to be construed or rectified so as to comply with the requirements of these MTC (including any amendment pursuant to clause 4.11); and
>
> (b) any provision which is inconsistent with these MTC (including any amendment pursuant to clause 4.11) is to be severed or rectified to comply'.

The 'clause 6' permitted exceptions relate primarily to certain types of losses and certain types of dispute. For the most part this is limiting the kinds of disputes that will be seen as falling within a professional indemnity policy and 6.2 – 6.11 exclude the following causes of loss from cover:

6.1 [Those falling under] prior cover
6.2 Death or bodily injury
6.3 Property damage
6.4 Partnership disputes
6.5 Employment breaches, discrimination, etc
6.6 Debts and trading liabilities
…
6.9 Directors' or officers' liability
6.10 War and terrorism, and asbestos

Clauses 6.7 and 6.11 are different in nature and exclude certain types of loss, and in particular, non-compensatory claims related to breach of regulatory standards and/or the consequences of international sanctions.

[25] See J Davey, 'Utmost good faith, freedom of contract and the Insurance Act 2015' (2016) ?? Insurance Law Journal 247.

Clause 6.8 requires a little more attention, as it permits exclusion of indemnifying the consequences of fraudulent conduct by any insured, but the underwriter must nonetheless respond to the potential liability of any other insured, and restricts the imputation of fraudulent conduct to corporate insureds.

As a whole, these terms are significantly more generous to the insured and the likely ultimate beneficiaries of the insurance than standard market terms. Generally speaking, this will increase the unit cost of providing insurance on this basis. We are a long way from Stuart-Smith J's contractarian assertion that compulsory liability insurance is for the benefit of the insured.

The Immediate Future of Minimum Indemnity Rules

At this point in time, all 'reserved' activity by solicitors requires the application of the full indemnity rules, including the £3m limit.[26] This is the delivery of regulatory goals- as confirmed by the appellate courts- by contractual means. This does not scale with the size of the entity, and the risk of regulatory arbitrage has seen the limits removed or reduced significantly. Sole practitioners were seen reregistering as barristers and carrying our equivalent work. This has led to the creation of the class of 'freelance solicitor' who will not be required to have any professional indemnity insurance for unreserved work and only 'adequate and appropriate' cover for reserved work. This moves the position closer to some US states, where insurance cover is linked to the use of limited liability corporate vehicles. A full review is beyond the scope of this paper, but the shift is towards greater deregulation.

IV. Pictures of Liability Insurance as Governance in the Legal Services Market

The Variation Between Levels of Mandatory Cover

The level of mandatory cover and the permissible limits on recovery vary extraordinarily from jurisdiction to jurisdiction. As an exercise in political choice, all is local. The position also varies over time. In 1996, Davis described the considerable disparity between US States in this regard: 'In some states, such as Oregon, this already is an absolute and general requirement; in others, such as California and Colorado, it is being proposed as a limited requirement upon practitioners who wish to avail themselves of limited liability entity structures as their chosen

[26] Reserved activities can only be carried out by those regulated by the Legal Services Board and consist of six core legal activities (appearance before a court, conducting legal proceedings, creation of certain documents (especially those related to property transactions), probate, notarial and oaths) https://www.legalservicesboard.org.uk/enquiries/frequently-asked-questions/reserved-legal-activities. Giving legal advice (eg in employment or family matters) is often an unregulated activity.

commercial vehicle for engaging in law practice'.[27] By 2013, the picture had shifted, with an increased use of the regulatory technique of mandating disclosure of the level of cover held.[28] Within England & Wales,[29] there is a longstanding requirement of professional liability cover, and often on the basis of standard terms. Unlike in the United States, where there has been a more permissive regime, the English system has been the subject of collective bargaining, at least in respect of certain risks and minimum standards. This is slowly being unpicked, with variable levels of mandatory cover being a key feature of the creation of a category of 'freelance solicitors.[30] Reducing the minimum level (and extent) of compulsory professional liability insurance cover is a key act of deregulation, and is likely to be a source of regulatory arbitrage. Given that the extent of mandatory liability insurance varies between jurisdiction, we might usefully ask: what effect it has on the management of legal practice? This is a focus on the issue at the heart of this panel: the governance effect of contractual relationships on behaviour within market economies. In assessing the likely governance effects, I draw upon both theoretical and empirical perspectives from within the 'insurance as governance' literature.

The Governance Effects of Mandatory Insurance Cover

We move at this point in the paper beyond identifying the substance of the liability insurance policy in legal practice to its likely governance effects. There are four competing accounts that deserve our attention: those of Davis, Talesh, Ben-Shahar & Logue and Baker/Swedloff. Whilst this are essentially contradictory in respect of the effects on legal practice of insurance, this does not mean that they are incommensurate. Rather, all agree that insurers have mechanisms for influencing the management of law firms, and that these are routinely implemented. In some circumstances, this has a beneficial effect on the level of harm caused to third-parties and is socially beneficial. In other circumstances, these mechanisms fail to produce a significant benefit. The technology- insurance as governance- is not automatically effective and its influences can be swamped by other pressures. Finally, the governance role of insurers can be perverted, so that rather than promoting risk-mitigation outcomes it generates loss-reducing techniques that are socially harmful. In our 'legal practice' scenario, this would not be incentivising lawyers to act more professionally, but to evade the reach of professional ethics

[27] Anthony E Davis, 'Professional Liability Insurers as Regulators of Law Practice' (1996) 65 Fordham L Rev 209, 210.

[28] Tom Baker and Rick Swedloff, 'Regulation by Liability Insurance: From Auto to Lawyers Professional Liability' (2013) 60 UCLA L Rev 1412, 1438.

[29] For reasons of space, I ignore in this paper the position under the law of Scotland and Northern Ireland, as the regulatory position differs significantly.

[30] https://www.sra.org.uk/sra/policy/future/looking-future (accessed 19/09/19).

or corporate social responsibility. In the search for a 'best fit' for English practice, I will sort these studies by method, and in particular, the theoretical from the empirical.

It must be noted, before we progress, that these contractual incentives and pressures will not be felt equally by all legal practitioners. The directive effect of collective bargaining might produce socially benign effects for medium-sized firms, be a substantial barrier to entry to small firms and have no governance effect on large firms. Law firms are not homogenous.

The Davis Model: Insurance as Governance 1.0

To the best of my knowledge, Davis' paper represents the first detailed study of the effects of liability insurance on legal practice. He wrote it as a legal practitioner, but one involved in teaching law as an adjunct professor, and as part of a special issue on the regulation of lawyers. It is largely anecdotal, but derives its force from describing formal and informal practices by which insurers influenced managerial decisions within law firms.

He divided the practice of liability insurance underwriters when negotiating terms with law forms into three main categories:

1. Those that fit alongside existing professional ethics restrictions, by supplementing or clarifying ethics codes;
2. Additional restrictions on practice;
3. Development of risk management strategies;

The first two categories relate to denial of practices that the insurer is not prepared to insure. The third is the provision of additional services to mitigate the risk (and ultimate cost) of practices that remain insured. These actions are often mutually beneficial, as insurance rarely covers all the costs of liability, and insurance is more profitable when the level of expected losses is reduced.

In addition to these policy restrictions, there is the possibility of differential pricing to give effect to categories 1 and 2, where insurers are prepared to cover certain activities but only where an additional premium is paid.

Davis charts the rise of insurers' operating these governance techniques to shifting patterns of litigation and risk:

> 'Lawyers were exempt from the risk management imperative until very recently for a variety of reasons. First, until the late 1970s there were few claims, and the area was highly profitable for Insurers, even at premiums that were relatively low when compared to today's premiums. Second, even when the claims started to appear with any severity or frequency, lawyers tended to react with arrogant assertions that nothing

> could or would happen at their firms. Third, with the exception of relatively short periods in the 1980s, the market for lawyers' professional liability insurance has been "soft," that is, there has been greater capacity than demand, keeping premiums highly competitive, even as they have generally risen in response to the growing claims experience'.[31]

We heard a similar cyclical pattern in respect of the UK position, as the shift towards open market cover, albeit on minimum terms. The nature of insurance has changed over the decades, with insurers supplementing their direct premium income with 'insurance as risk management' services. Insurers, often for further payment, develop an internal culture of risk mitigation with legal practices by running education classes for management, by conducting (or arranging) risk audits and by supporting internal management developments. He gave examples of the kinds of restrictions imposed by underwriters, with coverage denied for situations in which the lawyer has any extrinsic interest in the commercial venture under advice. These are crude versions of rules limiting potential conflicts of interest, which would be present in any professional ethics code. What matters, in Davis' claim, is the efficacy of the mechanism; the ability of insurers to capture the attention of management in ways that ethics codes failed to do:

> 'If these predictions are correct, I submit that Insurers will accomplish what decades of drafting and redrafting ethics codes have failed to achieve, namely the effective elimination of conflicts of interest from the practice of law, and the reassertion of the principles of fiduciary obligation over personal expediency'.[32]

This is not because insurers have an interest in the ethicality of legal practice *per se*. It is because the community of interest that flows from the transfer of risk from legal practice to insurer provides a direct financial interest in the underwriter limiting the occurrence of insured events. The regulatory impulse comes from the protection of its own financial interest and not from any desire to improve the world. Nonetheless, Davis suggests that in the US system, this may have greater traction than administrative controls imposed by regulators.

O Ben-Shahar & K Logue, Outsourcing Regulation

The largely positive vision of insurers as a form of effective, low cost private regulator of standards is now well-represented in the literature. The vision of insurers as moderators of risk views them as acting for reasons that are selfish but which produce public benefits. This reflects

---

[31] At 220.
[32] At 226.

the informational superiority of insurers with any substantial experience of markets where risk mitigation can occur:

> 'Insurance is a business that specializes in risk management. Insurers assemble large actuarial databases and use them both ex ante in underwriting (that is, in classifying and pricing) the risks they insure and ex post in verifying claims by separating valid from frivolous ones'.[33]

This vision is largely based on assumptions of how markets operate in the face of imperfect information, but the analysis does not depend on extraordinary behaviour from market participants. Largely, it only requires relatively limited levels of economic rationality. This is broadly consistent with a Hayekian vision of markets, that government and regulators are constrained by a lack of information:

> 'We contend that private insurance markets can and sometimes do out-perform the government in regulating conduct because of both superior information and competition. In many areas, insurance markets are fiercely competitive, especially with respect to price. Insurers that can offer more coverage at lower premiums will attract customers, even when they require customers to modify their conduct in a costly way. As long as the standards imposed by the insurers are efficient, customers should be lured by the discounts. Moreover, insurers' concern with affordability- increasing the pool of its clientele- is another force pushing for increased conduct regulation. Safe behavior by insureds reduces the cost of premiums and increases the size of the insurers' market'.[34]

The long-term effect of insurers within markets- if this is invariably accurate- is to incentivise rational precautions against insured risks, and to decrease the number of claims. This is a version of the claims of the effects of tort liability and the like. But this is within a two-party relationship, where the underwriter and insured have a community of interest to rationally protect against insured losses, where savings can be generated. Where the terms of the insurance, and indeed the insurance product itself, are the product of compulsion, then the loss-reducing measures may not be rational from the perspective of the insured. In compulsory liability insurance, the interests of the prospective third-party claimant are also brought into the picture. The relative benefits of indemnifying losses and undertaking costly risk mitigation can no longer be reduced to a simple equation. We have to resolve the costs and the effects along

---

[33] Omri Ben-Shahar and Kyle D Logue, 'Outsourcing Regulation: How Insurance Reduces Moral Hazard' (2012) 111 Mich L Rev 197, 199.
[34] At 201.

multiple axes. Take a simple example from the case law: the value to the investors in *Woodman* of preventing harm is greater than the value to the insurer (or the insured solicitor) because the aggregation clause caps the exposure of the underwriter to £3m per claim. These clauses skew the point at which a rational insurer would offer discounted insurance on the promise of costly risk mitigation by the insured. In a multi-dimensional relationship like the English legal practice market, the social benefits that are expected to flow from 'insurance as governance' techniques are not simply the product of the negation between law form and underwriter, but also between representatives of the legal services market and the corresponding insurance market in setting minimum terms.

Talesh, The Good, the Bad, and the Ugly (and maybe, A Fistful of Dollars)

Of the current literature, Talesh best captures this more complex picture in a series of papers on insurance as corporate governance. For reasons of time, we focus on the most pertinent, an empirical study of the governance effects of insurance across US legal practice markets. The kinds of questions that he asks align with my research agenda in respect of the UK legal services market:

> 'How do insurers as risk regulators work in action?
>
> Does it always work?
>
> Under what conditions does insurance as a form of regulation work?'

His qualitative study identified a wide variety of directive effects, ranging across the Spaghetti Western canon:

> '… [I]nsurers are using their risk management tools and services to influence how corporations comply with laws. This Article argues that insurance company interventions range from positive (good) to negative (bad) to downright ugly (i.e., insurer interventions have unappealing impacts on the way organizations understand their legal obligations)'.[35]

What Talesh so helpfully documents is that these influences are felt much less at the coalface, as lawyers decide how to handle individual cases, and much more strongly in the boardroom. These are an important component in the managerial process of determining the commercial direction of the firm. It influences what acquisitions will be made, what areas of law will be practiced and what levels of risk the firm can accommodate. Similar accounts are beginning to emerge in the United Kingdom. My conversations with management level partners suggests

[35] Shauhin A Talesh, 'Insurance Companies as Corporate Regulators: The Good, the Bad, and the Ugly' (2017) 66 DePaul L Rev 463, 466.

that the cost of professional indemnity insurance was a deal breaker in many run-off cases, where partners sought to sell legal practices as going concerns before retirement.

Talesh undertook three discrete case studies, using qualitative methods. The cyber-insurance study showed substantial engagement with insurers to mitigate risk, with the level of exposure driven down by rational investment on mitigation technologies:

> 'Insurance companies and institutions, through cyber liability insurance, do not simply pool and transfer an insured's risk to an insurance company or provide defense and indemnification services to an insured. In addition to transferring risk, my empirical research suggests that cyber insurance provides a series of risk management services that actively shape the way an organization's various departments tasked with dealing with data breach, such as in-house counsel, information technology, compliance, public relations, and other organizational units, respond to data breach. Cyber insurers are acting as compliance regulators and trying to prevent, detect, and respond to data breaches and help organizations comply with various privacy laws'.[36]

This happy picture, matching the predictions of Ben Shahar and Logue, is in reaction to an emergent risk, and one which requires technical non-legal skills to control. This, I suggest, may be significant when we come to discuss why not all of Talesh's result match this prediction.

His second case study concerned the influences that insurers bring to bear to manage the risk of shareholder litigation. Underwriters are exposed to these risks through the provision of D&O liability insurance, but Talesh discovered that their influence on corporate behaviour in this field was severely limited 'although D&O insurers have an opportunity to influence the behavior of directors and officers and discourage wrongful and even illegal behavior by acting as regulatory intermediaries, they rarely do so.'[37]

This matched the findings of others,[38] that the existence of insurance here did not reduce moral hazard effects, rather insurers isolated directors from the consequences of their actions. This is not because risk mitigation is not possible, nor in the economic interest of underwriters. As Talesh reminds us, earlier studies have found that 'none of the underwriters or brokers they interviewed could recall a single situation in which a publicly traded corporation changed a

---

[36] At 475.
[37] At 486-87.
[38] Tom Baker & Sean Griffith, *Ensuring Corporate Misconduct: How Liability Insurance Undermines Shareholder Litigation* (2010).

business practice in response to a governance concern raised by a D&O insurer'.[39] The problem here is one of persuasion. Corporate entities are not prepared to assume that insurers have an information advantage on how to best manage businesses in an economically rational manner. Corporate entities appear as resistant to some forms of private governance as they are to forms of public regulation. I would suggest that the nature of the risk matters here: directors are prepared to accept that the knowledge is limited in respect of cyber-risks, but less so in areas that fall more closely within their filed of competence. A little knowledge may be a dangerous thing. This, at first sight, looks like the triumph of anecdotal experience over actuarial modelling. Differential pricing, we are told, failed to take hold in these markets as insurers were prepared to price on the basis that 'loss-prevention requirements' were risk neutral (and therefore optional).

Thus far, Talesh had identified that the efficacy of private forms of regulation is also constrained by the extent to which it can persuasively claim to be effective. Behavioural change is not simply a matter of having answers, but of persuading those that these answers are valuable, and that adopting them is rational. In the cyber-risk scenario, he identified a sense of partnership in responding to an extrinsic threat, of shared interest in risk mitigation. This is perhaps different in nature from the sense of regulation as constraint, as 'business killer' that might be found in other situations.

The final example presents an even less optimistic vision of private regulation through insurance. In respect of claims against corporate entities for employment related discrimination, insurers appeared to be complicit in managing down the levels of claims in ways that were inconsistent with the broader social aims of regulation. In short, insurers provided mechanisms for reducing the level of litigation and/or cost rather than reducing the incidences of discrimination in the workplace. Here, the claim (central to Ben Shahar and Logue) that there is a convergence of the private interests of the commercial parties and the wider aims of the regulation break down. The possibility of gaming systems to minimise the deterrence effects of claims on human resource management is one such example. Talesh documents how insurers circumvented regulatory measures intended to prevent punitive or exemplary damages from being covered by insurance.[40] These losses are then smoothed- by the nature of risk pooling- to reduce the deterrent effect on any form made subject to those kinds of losses.

---

[39] At 487.
[40] At 493-94.

The Baker/Swedloff Conjecture

The findings of Baker & Swedloff are broadly consistent with those above, but they add useful additional caveats.[41] First, the US market was often segmented by size of the firm. They described three markets: 1. Small & sole practitioners; 2. Firms of 35-50 lawyers; 3. Large firms. Not all insurers covered all sectors. Second, the level of negotiation and tailoring of products scaled in proportion to the size of the firm. Some law firms are targeted for additional 'risk management' services and others are not. This is driven by commercial pressures, but it means that the regulatory effects of insurance are more nuanced than sometimes suggested. This is important for our discussion below of the regulatory effects of insurers.

Concluding Thoughts

Overall, what we see is a highly context-specific form of private regulation by insurers. This suggests that generalising the position in English markets from data gained in the United States would be suspect, and I do not propose to do so. Rather, I take the lesson that the effects of private regulation vary considerably, and need to be assessed empirically. When we move to legal practice, we have significant variation in the size of the entity providing legal advice. It would be extraordinary if the governance effects on a sole practitioner mapped perfectly on to those felt by a major multi-national firm. With that in mind, I start to build a tentative hypothesis of what is happening in UK markets, based on some early reviews of empirical sources and the literature. This is meant to frame empirical work to follow, and any and all advice is welcome at this stage.

V. Building the Hypothesis: How does Standard Form, Compulsory Liability Insurance Regulate the Legal Services Industry?

In building this hypothesis, we need to recognise the salient features of the legal services industry. First, it is a multipartite relationship, even if only two parties are contractually bound. To our grid, we add the role of the Association of British Insurers, its equivalent trade bodies representing solicitors (and brokers). We have regulators, primarily the Solicitors Regulation Authority, but with likely input from government and financial services regulation. This differs from the empirical picture that can be drawn from the United States, where the natural variation between States lies in the existence and/or extent of compulsion. Second, it is an industry that often provides a public good, such that pure risk management techniques might push firms

[41] Tom Baker and Rick Swedloff, 'Regulation by Liability Insurance: From Auto to Lawyers Professional Liability' (2013) 60 UCLA L Rev 1412.

towards kinds of work or managerial controls that are lower risk rather than developing effective techniques to mitigate the risks in socially useful work.[42] An analogy might be drawn here with public and private health care. In the public sphere, where coverage is universal, limiting risk by not undertaking necessary but higher risk activities is not a legitimate technique. In the private sector, it is a valid, profit-maximising approach to seek to dominate fields of activity where the rate of return more than compensates for the insurance cost, and to leave other ares of high-risk but necessary work to the State.

Overall, the question is not whether the design and negotiation of the minimum terms for cover for solicitors and barristers is deliberately regulatory- it must be- but whether the regulatory agenda is appropriately shaped by assumptions and/or prejudices that tend to create invisible barriers to entry.

Before we continue, a caveat. This paper builds a hypothesis, drawn from empirical and theoretical work in neighbouring jurisdictions. It remains untested. The purpose of this paper is to establish a model to be tested empirically. Any suggestion that there is limited empirical evidence to support the hypothesis misses the point. At present, the insurance as governance literature has not been applied to the UK legal services industry, and yet it is a potentially fruitful basis for explaining the intentional and unintentional regulatory pressures described by market actors.

What is the Current Evidence for the State of Legal Services Regulation?

The central line of enquiry here is about barriers to market entry, and the skewing effect away from sole practitioners. This is a current hot topic in legal services as the proposed deregulation for some form of activity is mid-implementation.

Do Insurers Influence the Delivery of Legal Services in the UK?

There is a simple answer: yes. None of the practitioners to whom I have spoken considered it to be in any way controversial to state that the likely costs of Professional Indemnity Insurance on mandatory terms influences in meaningful ways commercial and corporate decisions. These extend naturally to those on the acquisition of competitors, the hiring of lawyers and the decision to leave the market.

Take one simple example: solicitors are required to hold run-off cover, normally for 6 years, and this is commonly priced at around 50% of active risk. On that basis, 6 years run-off is the equivalent of 3 years normal premium. This must normally be paid as a lump sum. Someone

[42] S Graham & S Marvin 'Cherry picking and social dumping: Utilities in the 1990s' (1994) 4 Utilities Policy 119.

must pay this, and it represent a substantial figure in the liability column of the value of a legal practice. Where the firm has experienced a poor claims history prior to the decision to leave the market, the figure is likely to be high, and may wipe out much of the residual value in the practice.

Is Governance by Contract Equivalent to Governance by Public Regulators?

The collective effect of insurance: by differential pricing, by risk management services, and so on is to incentivise risk reduction (insofar as is rationally reflected in reduced premium costs). There will always be a degree of residual risk, the influence of insurance is to drive risk downwards towards this level. But this assumes a monolithic approach which is not matched by the empirical evidence. Unless there is a fundamentally restrictive approach, we should assume conditions of extreme regulatory arbitrage. Indeed, this is perhaps the real attraction for some. In these markets, 'regulators' compete to present the most persuasive combined model of risk management and risk mitigation. To me, this strikes me as much more representative of regulation as persuasion than as the threat of punishment.[43] This is an idea which will require more space to flesh out than is possible in this paper, but there is a stream of regulatory theory literature that is directly applicable here.

When we move to a system of mandatory liability insurance, the picture changes. The consequences of failing to agree insurance are potentially severe. There are- in the professional liability insurance cases- serious professional sanctions, including the striking off of senior staff. Other consequences may also follow, including personal criminal liability (motor and employer's liability) and liability in tort to those left uncompensated. The addition of compulsory minimum terms restricts both sides. In essence, it makes insurers more regulatory in nature. There is no legitimate basis for proposing cover below the minimum standards. Recall the 'paramount clause' which makes clear that the indemnity rules override conflicting contractual provisions. In these markets, insurers have a licensing function in that cover is mandatory, and the terms are fixed. This makes differential pricing and risk management crucial. This is the deliberate combination of market forces and statutory regulation. But the standards set are the product of negotiated settlements between those who represent and regulate lawyers and those who represent insurers. These are not the product of individual but of collective bargaining. And the factors that shape them are likely to represent a considerable degree of compromise and assumption. Given the layered nature of law firms noted by Baker

[43] Thanks to Professor Lindsay Stirton for directing me to John Braithwaite's work, especially: John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety*, (State Univ of NY Press, 1985).

& Swedloff (and generally present also with England), we are setting a standard for all firms which will have differentiated effects. [Link]

Has it Skewed the Average Size of Law Firms?

The development of the 2019 model for solicitors, which includes the new pathway of freelance solicitors, is designed to reduce the skewing effect that the previous rules had on the legal services market. This is a broadly deregulatory agenda: 'outdated rules constrain firms and add costs'.[44] This reduces substantially the regulatory effect of liability insurance rules in these markets. We return to the broadly 'regulatory arbitrage' model of simple liability insurance. There will be an overall pressure to reduce claims to the level of residual risk, but underwriters will be in competition with each other to do so in a manner which matches the business case of the insured freelance solicitor. Of course, insurers will retain that commercial interest to discover mechanisms to reduce risk, and to co-opt insureds into implementing those measures, but it will be within standard commercial parameters. This brings us back to Talesh's mixed picture of regulatory intervention. Insurers may generate positive regulatory effects which reduce the level of risk in a rational manner, towards the residual risk. But, equally, insureds may refuse to accept the professional guidance of underwriters, in areas in which they have considerable expertise of their own: providing legal services. Recall that the effects observed by Talesh in respect of D&O liability was minimal. Insureds listened most carefully where the risk law outside their formal expertise- such as cyber risks. Telling lawyers how to prevent risks to clients might face similar issues. Moreover, Talesh also discovered creative non-compliance with the broader public interest in respect of limiting discriminatory claims within corporate entities. The imposition of minimum terms, and the paramount clause, make it much harder to insureds and underwriters to avoid the regulatory impulse. Obligations to insure are fixed in terms of monetary limits and aggregation. The nature of insurance as regulation shifts as terms are harmonised. Insurers become less involved in the design of contractual incentives to minimise risk. The single tool left in the bag is price differentiation. But insurers are hard pressed to design contractual provisions to enforce promises of improved risk mitigation. This is not an argument on favour of deregulation. But it does make explicit that the smoothing effects of centrally agreed terms will mean that some degree of innovation will be lost.

[44] https://www.sra.org.uk/sra/policy/future/looking-future (accessed 19/09/19).

Some Tentative Conclusions and an Action Plan

It would be useful to test the regulatory effects of professional liability insurance on the provision of legal services. There is little doubt that effects would be found, and in the majority of markets. Initial conversations suggest that this is uncontroversial. However, the existing empirical evidence (albeit from the very different dynamic at play United States) suggests that the assumed effect of insurance is not consistently achieved. Indeed, the evidence of where it fails most closely aligns to much of the PII market in the UK. The cost of insurance will have effects on market conduct, but it is less certain that the 'risk reduction' technique will align with wider regulatory goals. Moreover, the development of a de-regulatory agenda in the creation of 'freelance' solicitors may spread. Serious proposals were made to reduce the level of mandatory cover per claim from £3m to £500k, cap run-off insurance cover at £1,.5m and to remove the duty to insure where acting for large commercial clients.[45] This was supported by loss data showing that 98% of claims fell under the proposed £500k cap (£1m for conveyancing). It was not disclosed how many of those larger claims would have exhausted the £3m cap, or would represent additional unrecoverable losses.

At this point it would appear that predictions based on rational conduct in competitive markets has taken us as far as it can go. A study akin to the Talesh empirical work could add substantial value to the design and maintenance of SRA norms on liability insurance cover. Moreover, this would provide useful information on the utility of insurance beyond the immediate effect on compensation at the point at which norms as to what 'adequate and appropriate' insurance means are meant to emerge. What will make this more important, but is a further complication, is the Baker & Swedloff insight into the structural nature of the legal services market.

On that basis, I invite feedback on the following empirical agenda:

1. Identification of quantitative data on the provision of legal services in England & Wales in discrete bands of 'firm size';
2. A series of semi-structured interviews and the review of guidance materials in each area to provide qualitative data on the effect of mandatory PII cover (in general); mandatory policy limits (claims); mandatory policy limits (legal defence costs); alongside (expected) comparative effects of £500k and/or 'appropriate and adequate' insurance models.

---

[45] https://www.insurancetimes.co.uk/solicitors-to-cut-professional-indemnity-limits-and-get-cheaper-prices-under-new-plans/1426709.article