PO Box 1685 CONGRESBURY Bristol BS49 5WQ
Telephone: 0117 905 5316, Fax: 0117 905 5001
Website: www.pnla.org.uk
E-mail:katy.manley@pnla.org.uk

# CIVIL JUSTICE COUNCIL REVIEW OF LITIGATION FUNDING INTERIM REPORT AND CONSULTATION ON 31 OCTOBER 2024
# RESPONSE FROM THE PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

**Submitted 24 February 2025**

This is the response from the Professional Negligence Lawyers Association ('PNLA') to the Civil Justice Council consultation which closes on **Monday 3 March 2025 at 11:59pm**.

The PNLA welcomes the Lord Chancellor's invitation for discussion of this work in Parliament during the passage of the Litigation Funding Agreements (Enforceability) Bill to consider not only third party funding but also as stated to consider access to justice, its effectiveness, and regulatory options. The PNLA do request the Civil Justice Council to make recommendations for change for the reasons set out in this response.

This report is divided into three sections Part I as set out below with an overall summary of background and consequential CJC recommendations (pages 1 – 12), Part II the cover sheet and questionnaire with responses in the format requested by the CJC (pages 13- 51) and Part III data referred to and available including PNLA survey responses (pages 51-58) – the PNLA has not carried out any statistical analysis but includes examples of available data to demonstrate that the Ministry of Justice could carry out such an exercise.

One preliminary overall point to make is that **there is no one body representing the entire group of civil litigation claimants.** The working party therefore have the challenge of noting that many types of claimant or groups will not be making a submission in this consultation and yet they are all affected if they bring a claim now or in the future by the rules and legislation in place and any reforms.

The Professional Negligence Lawyers Association Limited Registered in England Number 5206167
A company Limited by guarantee
Registered Office: Kings House, 5 Hales Mead, Hales Close, Cheltenham, GL526TE
A list of directors is available for inspection at the registered Office

**PART I – Background and consequential CJC recommendations**

The PNLA is an association set up in 2004 to improve dispute resolution in non-medical professional negligence claims. It is the only association for solicitors acting for claimants and practicing in this niche legal specialism. The association currently has 344 lawyer members and 42 specialist members throughout the UK and Ireland website: https://www.pnla.org.uk/

The PNLA was actively involved in the political debates and consultations with Lord Justice Jackson in the years leading up to the Legal Aid sentencing and Punishment of Offenders Act 2012 implemented on 1 April 2013. The PNLA opposed the changes in Part 2 which detrimentally affected ordinary people and businesses trying to bring claims against well resourced and insured professional defendants. Professional negligence is an area of practice where it is normal for insured defendants to have far greater resources than claimants.

**The Overriding Objective**

The Civil Procedure Rules require the Courts in every case to comply with CPR Rule 1.1.
Of particular relevance to this consultation and this type of dispute the overriding objective states that 'These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost' (1). The Court is required to ensure that the parties are on an equal footing and can participate fully in proceedings (2(a)) and to have regard 'to the financial position of each party' (2(c)(iv))

Imbalance in financial position is a particular feature in professional negligence & liability claims. We refer to Part III of this report as to data in relation to solicitors as an example. The Law Society states that in 2022/23 the median rate of premium for compulsory solicitors' indemnity insurance was £16,000 per practice – given that there are currently 11,725 practices this is an **annual premium income of the order of £187.6 million**. Data from the Solicitors Regulation Authority states that over a 10 year period £0.6 billion was spent on **defence legal costs - £60 million per annum**. Claimants therefore rarely, if ever, have resources to match those of such professional indemnity insurers – hence no 'equal footing'.

Whereas 'an equal footing' was approached in the previous legislation implemented after the reforms of Lord Woolf in the late 1990s – the impact of LASPO Part 2 and the wider reforms recommended by Sir Rupert Jackson in 2012 have had the effect of depriving many of the ability to bring a claim with the expectation of recovering their damages.

This result arises not from any judicial decision about the level of damages to which the parties are entitled, but from deductions from these damages to pay legal costs and litigation funding.

By this route it has been almost impossible, until recently, to explain to those unfamiliar with the technical mechanism for payment and recovery of legal costs what appalling hardship has been caused. This hardship has or has the potential to affect every individual and business within the UK. It cannot be over emphasised that every individual involved in this consultation – the Civil Justice Council members and the working parties as well as the Members of Parliament due to debate these issues – together with their friends and families - all could end up with a strong claim in the civil courts which they cannot afford to pursue.

Alan Bates and the admirable group of sub-postmasters have by their courage and bravery brought the litigation funding and civil costs situation to the general public. The drama Bates v The Post Office has caused widespread understanding about how the money works.

**The litigation funding regime in its current form results in a form of tax on claimants by reducing the damages they can recover to pay for funding.** This results in situations like the sub-postmasters where even though they won the action against the Post Office, they only recovered a small fraction of the award obtained.

It is inevitable that in future legislation most, if not all, the Members of Parliament will have this in mind alongside the House of Lords who have already had a first and second reading. Illustrations of the strength of feeling in the second reading of the Litigation Funding (Enforceability) Bill in the House of Lords on 15 April 2024 mention the Post Office case 15 times notably:

**Lord Arbuthnott** - "There will be questions about how litigation funding should work. Many of them will come up during this short Bill. For example, it is regrettable that the 555 sub-postmasters failed to recover their full costs from the Post Office. It was certainly regrettable that, out of a settlement of £57 million, after legal and litigation funding costs only £12 million found its way into the pockets of the sub-postmasters."

**Baroness Jones of Moulscoomb**: "One illustration of this is 555 sub-postmasters who were awarded compensation of £57 million against the Post Office for the Horizon scandal. It is reported that £46 million of that money was immediately payable to litigation funders. That seems an extraordinary amount: 80% of the

damages awarded. I accept that it was a probably a very difficult case, but at the same time, the sub-postmasters were left with only £20,000 each, when their damages were estimated to be well over £100,000 each. In essence, they got 20% of the £100,000 they were really owed."

**Lord Ponsonby of Shulbrede** : "The Association of Litigation Funders argues that Alan Bates, the lead claimant against the Post Office for the Horizon scandal, said that the backing of the litigation funders helped him and his colleagues to secure justice, expose the truth and clear their names and reputations. However, it seems that, based on Forward Global's briefing, the funders arguably made an excessive profit. I take the point made by the noble Lord, Lord Arbuthnot, that there was very real risk in embarking on that litigation and that he believes that they did indeed deserve their fees but, as the noble Baroness, Lady Jones, argued, the sub-postmasters themselves are left with £20,000 each—a fraction of the total award. I think it was the noble Lord, Lord Marks, who said that, on first reading, those numbers look offensive and unfair to the sub-postmasters."

**In the House of Lords debate about the Litigation Funding Bill on 29 April 2024 Lord Marks of Henley – on –Thames says:** 'I was particularly pleased to see in the terms of reference that the questions to be addressed included whether there should be regulation and how, if there is to be regulation, it should be framed. In particular, there was the question of the funder's return—this comes to the Post Office case, where such a derisory proportion of the overall damages went to the sub-postmasters—and whether there should be a cap.'

**The PNLA therefore consider that the Civil Justice Council have no alternative but to recommend that civil litigation costs are reformed** and this because it is now widespread common knowledge after the Post Office litigation that where there is an imbalance in resources between the parties, the overriding objective is not being achieved.

The working party should refer to the very recent Supreme Court judgment in *Hirachand v Hirachand & Anor [2024] UKSC 43 (18 December 2024)* URL: *http://www.bailii.org/uk/cases/UKSC/2024/43.html* .The issue in this appeal is whether Section 58A(6) of the Courts and Legal Services Act 1990 prevents a court in proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 from including the payment of a success fee as part of an order for reasonable financial provision out of a deceased person's estate. Lord Richards gave the judgment unanimously agreed that 'For the reasons set out above, I would allow the appeal and exclude from the order made in favour of the Daughter under the 1975 Act any sum for the success fee payable by her in respect of these proceedings.'

Recommendations must be made to be of assistance in the future parliamentary debates which will inevitably refer to and follow on from the first and second reading of this Bill, whether this is continued or re-submitted in a different form.

**Litigation risk – the Arithmetical Calculation**

The critical point in the civil litigation funding landscape which includes not only the type of third party funding or Damages Based Agreement used by the sub-postmasters but others and most commonly used Conditional Fee Agreements including 'success fees' on lawyers costs – After the Event ('ATE') Legal Expenses Insurance which includes payment of an insurance premium on success and now rarely available Civil Legal Aid. All involve an arithmetical calculation of litigation risk.

How does the Court ensure that the overriding objective is complied with? The Court is required to ensure that the parties are on an equal footing and can participate fully in proceedings (2(a)) and to have regard 'to the financial position of each party' (2(c)(iv))

The obligation is to look at 'an equal footing'. How can say a sub-postmaster's financial position be put onto an 'equal footing' with The Post Office'? The same situation applies frequently between individuals and businesses bring claims against insured professionals – how does the Ministry of Justice create an 'equal footing'?

Regardless of the consultations including data and research around the need for such funding, it is a fact that in every individual case solicitors are required to assist and advise their clients on the likely cost of losing as well as winning. It should be noted that the submissions in the House of Lords above all highlight the costs to the sub-postmasters of winning their case. They will have been advised about the costs risk if they had lost which is not known.

This calculation involves estimates of future costs of litigation. These can by definition never be accurate because they depend upon the conduct of parties in adversarial litigation. Disputes can arise about aspects of law, procedure, evidence and more therefore these need to be considered as well as conduct of the main issues

in the case to trial. Cases can settle, and Alternative Dispute Resolution ('ADR') and settlement negotiations can be expensive and the costs impossible to predict accurately.

Solicitors looking at a forecast of future costs have to work on the possible assumption that the case may not settle, but some costs need to be included for attempts to do so, and a full trial will be required.

Every solicitor conducting civil litigation in their day to day professional lives has to address this calculation of costs-risk- benefit. This is not only a regulatory requirement but self evidently a basic assessment needed by every potential party to make a proper informed decision[1] whether or not to pursue the case and this must be reviewed regularly as the dispute progresses. Solicitors risk a claim for professional negligence if they fail to provide this advice or if they provide over-optimistic advice.

Such claims are common and potentially can be regarded as routine whenever an unfavourable outcome is reached. The losing party will look back to try and assess where things went wrong – Did the barrister give incorrect advice on the law? Why was that last offer of settlement rejected? Why are the legal costs so much more than they were led to believe?
The PNLA members are the group who are likely to be approached for this type of claim. As such members are highly attuned not only to the need to carry out the required calculations for all types of professional negligence disputes but with this particular risk in mind.

LASPO Part 2 and the more recent introduction of the Fixed Costs Regime for claims up to £100,000 in October 2023 (all flowing from the reforms proposed by Sir Rupert Jackson) have made these calculations not only more difficult but have simply ruled out many claims – typically less than £300,000 in damages – as being an unwise financial risk - even with litigation funding –and even if the case is likely to win.

Case studies will be referred to later in this response, but every civil litigation solicitor will potentially have examples of estimates. The Courts will also have costs budgeting data which is required in most cases and has now been required before every Costs & Case Management Conference since 1 April 2013 demonstrating the

[1] Solicitors Code of Conduct Rule 8.6 You give *clients* information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.

costs incurred and future estimates compared to claim values (see for example *Mitchell MP v News Group Newspapers Ltd [2013] EWCA Civ 1537 (27 November 2013)* URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2013/1537.html* - itself a case study of a professional negligence claim in civil litigation and an example of the litigation risks for a claimant even with litigation funding protection by CFA and ATE insurance)

The National Audit Office published a report on 9 February 2024 'Government's management of legal aid' https://www.nao.org.uk/reports/governments-management-of-legal-aid/ The obligations of the Ministry of Justice were examined as to access to justice to funding for civil litigation. The findings and criticisms of the National Audit office apply equally to the management of civil litigation funding and costs for those not-eligible for legal aid – and the qualifying criteria for such funding is highly restrictive. One conclusion is as follows:

> "MoJ has set providing swift access to justice as one of its primary objectives. Theoretical eligibility for legal aid is not enough to achieve this objective if there are an insufficient number of providers willing or able to provide it. MoJ must ensure that access to legal aid, a core element of access to justice, is supported by a sustainable and resilient legal aid market, where capacity meets demand."

It could equally be said: " MoJ must ensure that access to **litigation funding**, a core element of access to justice, is supported by a sustainable and resilient **litigation funding** market where capacity meets demand' – which begs the question what investigations has the Ministry of Justice carried out to assure itself of this outcome?

Referring to this same National Audit Office report Supreme Court Judge Lady Rose has said recently in a talk dated 29 May 2024 at Paragraph 57:
https://jcpc.uk/uploads/speech_lady_rose_240529_5c493f3b59.pdf

> "…that may mean that a person cannot afford to get advice and so is not told at an early stage that their claim is hopeless. That means that more cases end up getting to court. Cases may also take up more court time and resource where the judge has in effect to do some of the work that the lawyer would otherwise have done in sorting through the documents, trying to get at the facts and trying to find and absorb the relevant statutory provisions which the litigant does not understand. Contrary to public perception, lawyers working together with judges and the court staff tend to be good at resolving disputes efficiently."

Trends therefore in litigation cases issued need to be reviewed in this background as to whether or not the inability of individuals and business to fund litigation in fact costs more in tax payers money using Court

resources rather than funding measures which allow for legal advice. The Ministry of Justice therefore have an obligation to assess the balance in this context.

**The PNLA therefore suggest that the Civil Justice Council recommends that**:

a. The Ministry of Justice must carry out assessments for litigation funding as a core element of access to justice in the same way to those set out in National Audit Office report of 9 February 2024 in relation to civil legal aid.

b. The Ministry of Justice should investigate the arithmetical calculation based on available data, including costs budgets filed since 2013, to assess the 'equal footing' of the parties as to financial resources, and the types and value of civil litigation dispute which are financially viable currently as to costs-risk-benefit. Government employs specialist analysts who could locate the available data.

c. To comply with the law, measures should be introduced to address 'David v Goliath' situations where there is not equality of financial resources as required by the 'overriding objective' (CPR 1.1). There are currently no statutory or regulatory measures in place requiring that litigation funding or costs measures apply to disputes where there is an imbalance in resources to fund the litigation. Recovery of 'success fees' and ATE premiums, abolished in LASPO-Part 2, was such a measure which approached providing equality of arms in such cases but nothing was introduced to replace it for most types of dispute (claims against medical professionals being an exception).

**Professional negligence – Medical and Non-Medical**

Pre-LASPO the Conservative Government made a policy decision to create a different civil litigation funding position for claims against medical professionals – which is much more favourable for those bringing claims – and those with claims against other types of professionals like accountants, surveyors, financial advisers, solicitors, barristers and more (all of whom are typically insured). Why such a policy distinction was ever made has been questioned ever since it first became apparent in 2011 and examples of Parliamentary submissions and the independent findings of Supreme Court Judge Lord Briggs in 2016 are set out below:

**During the Commons Scrutiny Committee debate on 13 September 2011 Andy Slaughter Shadow Minister for Justice said:**

‘Clinical negligence is a type of professional negligence. In many cases, this would exclude most professional negligence cases, including, for example against lawyers, surveyors, accountants or banks, for negligent advice or conduct. Retaining the ATE and CFAs would allow such cases to be brought.

In the case of professional negligence, we also have the issue of QOWCS. This will be a huge double whammy costs risk barrier to anyone attempting to litigate a non-personal injury case without the protection of ATE or the shield of QOWCS, such as it is…..The association states:

“Under section 41 onwards of the proposed Legal Aid Sentencing and Punishment of Offenders Bill no claimant in any civil litigation will recover any damages under the proposed system if their claim is equal to the success fees plus ATE premium. Worse the claimant could win the case and go into debt to their own solicitor and ATE insurer if their claim is less than the success fees plus the ATE premium. This formula is impossible to calculate at the outset of the case. A risk averse claimant would never bring a claim if the Bill is passed…Recovery of success fees and ATE premiums has filled the gap in Civil Legal Aid so that claimant solicitors and ATE insurers have carried the cost and risk of access to justice unless and until the case succeeds, when most of the costs can be recovered from a wrongdoing/losing defendant.”

Lest we thought that this involved was a privileged class of people, the association gives some examples in answer to the question about who brings professional negligence and liability claims:

“A surveyor negligently fails to spot subsidence in his report for first time home buyers—the property is a ‘home from hell’ and subsides—they lose all their money, as it is worth only site value, and still have to repay the mortgage…A solicitor negligently helps a dishonest nephew to get his elderly aunt to sign away her home to him—he then throws her out leaving her homeless…A barrister only reads the papers the night before the trial and forgets half the evidence so the case is lost.”

The proposed amendment was narrowly defeated by 11 votes to 9 in the Commons.

**On 21 November 2011 at the House of Lords second reading Lord Davidson of Glen Clova QC said this in reply to Lord McNally:**

‘People who have lost out to incompetent or fraudulent financial advisers, lawyers or accountants, will find that they will end up recovering less than they lost, despite having done nothing wrong. To lose 25 per cent of damages today connotes significant contributory negligence by the claimant. Under this Bill, the damaged-the blame-free-will lose out; and for what overriding public good? It would no doubt be crude sloganeering to

suggest that this is for the protection of insurance company profits, but one is left puzzled seeking to identify the clear policy objective justifying such consequences. The Minister will no doubt assist the House with an explanation beyond what we have heard thus far.'

The Ministry of Justice have never supplied an answer to Lord Davidson's question. There simply does not appear to have been a clear policy objective justifying the changes proposed.

**On 30 January 2012 in the Lords Committee debate Lord Bach said this:**

'It is only common sense that we should not seek to legislate for a system of litigation that allows professional people to prey on their impecunious and weak clients. The Committee today is full of professional people of one sort or another and the House is even more full of them when it is sitting. As we all know, being in a profession is a privilege.

When a professional takes on contractual fiduciary and moral duties to do their best to help their clients, they take on an important responsibility. We have professions in our society because we need experts who specialise, whether it is expertise in finance, in my example, the law, engineering or medicine.

They should know that society takes seriously if and when they act negligently, with malice, or breach their duty of care. Should we make it so difficult for the individual to take action and claim back their damages in full? Would that not have a corrosive impact on trust in the professions and their regulation, which is something that professions and the professionals themselves should not and do not welcome.

We think that the answer to this dilemma is to listen to what Lord Justice Jackson said and extend one-way costs shifting to all litigation, not just keep it to personal injury.'

He continued: 'Should we fail to do this, and leave the bill unamended, the perpetrators of the Payment Protection Insurance mis-selling scandal - the mortgage mis-selling scandal of the 1980s and 1990s which noble Lords will remember - and thousands of other instances when rogue professionals have abused their position of trust, will go unpunished and unheard.

Their victims will multiply in a system where those who have been wronged are dissuaded from taking action against rogues, knowing that parliament will have legislated to substantially limit their rights to redress. **It would be something of a rogues' charter.**

I end what I have to say about this amendment by citing the views of the president of the Professional Negligence Lawyers Association, who said that many litigants face the dilemma of having had their trust betrayed by one professional adviser and that their only redress by way of litigation is to risk remaining assets and perhaps insolvency by trusting another - meaning another professional adviser - to win their case. That is not a satisfactory position and we ask the government to think again.'

Lord Briggs carried out an independent review in 2016 referring to this position:
**https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/**

6.29 But a fixed or budgeted recoverable costs regime, backed by Qualified One-way Costs Shifting ("QOCS") plus uplifted damages has, in the sphere of personal injury (including clinical negligence) litigation been a powerful promoter of access to justice, in an area where the playing field is at first sight sharply tilted against the individual claimant, facing a sophisticated insurance company as the real (even if not nominal) defendant. It was the very asymmetry inherent in such litigation which led Jackson LJ to recommend such a regime for personal injuries. **He did not do so for professional negligence claims in the non-clinical sphere, even where the claimant is an individual or small business. The result is that access to justice for the pursuit of those claims lags far behind that for personal injuries, as the professional negligence bar and lawyers' associations have made clear to me.**

6.98. I was pressed by stakeholders on both sides of the non-clinical professional negligence arena to exclude all those claims from the Online Court, mainly on the grounds of their typical complexity, and their asymmetry where the claimant is an individual or small business facing an experienced professional backed by determined insurers. **This is not a type of claim where there is currently a satisfactory level of access to justice. Claimants receive none of the benefits of QOCS and the damages uplift, but they are nonetheless barred by the Jackson reforms from the advantages of ATE premium and large success fee recovery** which used to provide an (also overheated) economic model for their pursuit by lawyers.'

Lord Briggs recently on 11 November 2024 renewed that call as reported in the Law Society Gazette https://www.lawgazette.co.uk/practice-points/lord-briggs-defends-fixed-recoverable-costs-regime-for-professional-negligence-cases/5121773.article

"Back in his 2016 report, Lord Briggs noted that a similar asymmetry existed in professional negligence claims outside the clinical sphere. The lack of QOCS meant that access to justice was lagging behind for those claims. In his speech to the PNLA, which has raised similar concerns, Lord Briggs renewed that call for QOCS to be extended to non-medical professional negligence claims."

It can be assumed that in a future Parliamentary debate that these submissions and more will be referred to and therefore that the Civil Justice Council should raise the issue in their recommendations. Further it seems unjustifiable to distinguish these types of professional negligence claim as a policy decision for litigation funding purposes as the same particular features apply justifying their distinction from other areas of civil litigation.

The only initiative by the Ministry of Justice and the Master of the Rolls after implementation of LASPO Part 2 to try and address the imbalance in resources was the PNBA Adjudication Scheme https://pnba.co.uk/adjudication-scheme/.

As explained in the introduction by Mrs Justice Carr and Mr Justice Fraser (as they then were) "Adjudication has, in the construction sphere, been seen as a considerable success since its conception in 1996, helping to resolve a great many disputes without the need for the parties to become involved in litigation or arbitration. They still have the opportunity to do so, of course, but in a very large number of cases both parties are content to accept the decision of the adjudicator. They therefore have a decision much faster, and very much cheaper, than they would were they to litigate."

Currently this scheme is voluntary for professional negligence claims whereas the construction scheme is compulsory in certain types of case. The PNBA scheme has been running since February 2019 with very limited take up. If it was made compulsory like the construction adjudication scheme in the Housing Grants Construction and Regeneration Act 1996, then it has the potential to greatly reduce the number of claims which end up in Court. Comparisons with the model in construction cases can be drawn indicating that it could be just as successful for professional negligence and liability disputes.

**The PNLA invites the Civil Justice Council to recommend**:

- that there should be the same civil litigation funding for claims against medical and non-medical professionals by way of QOCS and recoverable ATE premiums.

- that pre-action adjudication should be compulsory for professional negligence and liability disputes by way of a statutory scheme in the same way as implemented for construction disputes by the Housing Grants Construction and Regeneration Act 1996.

**Part II PNLA Response to the consultations questions**

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to **CJCLitigationFundingReview@judiciary.uk**. If you have any questions about the consultation or submission process, please contact **CJC@judiciary.uk**.

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

**You must fill in the following and submit this sheet with your response:**

| | |
|---|---|
| Your response is (public/anonymous/confidential): | Public |
| First name: | Katy |
| Last name: | Manley |
| Location: | Bristol |
| Role: | Professional Negligence Lawyers Association representative |
| Job title: | President |
| Organisation: | Professional Negligence Lawyers Association www.pnla.org.uk |
| Are you responding on behalf of your organisation? | Yes |
| Your email address: | katy.manley@manleyturnbull.co.uk |

**Questions concerning '*whether and how, and if required, by whom, third party funding should be regulated*' and the relationship between third party funding and litigation costs.**

1. **To what extent, if any, does third party funding currently secure effective access to justice?**[2]

[2] When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.

According to the research on March 2024 by Queen Mary University in London for the Legal Services Board only 40 cases have been funded by litigation funders being collective proceedings under the CAT scheme (27) GLO regime (10) and representative actions (3). (page 21)

https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf

Furthermore the survey in this report included assessing the percentage rates of claims accepted by litigation funders – summarised (page 30):

Empirical feedback – rates of acceptance:
Funder #3418 – 2% of all cases pitched;
Funder #6239 – 10% of all cases pitched;
Funder #1938 – 4% of all cases pitched (of the 1,183 claims submitted over the past five years);
Funder #8421 – 3% of all cases (only about 5% of all cases itched are referred to the funder's investment committee for further scrutiny; and of those, about 66% are accepted, constituting 3% of all cases pitched);
Funder #2613 – 3% of all cases pitched; Funder #2288 – 6% of all cases pitched.

It cannot therefore be said that this type of funding is of general public interest. It is only suitable for a very few cases.

A wider view should look more generally at commonly used litigation funding options – the most common being solicitors and barristers funding by way of Conditional Fee Agreements with success fees and After the Event ('ATE') legal expense insurance where a premium is payable on success.

Evidence from a PNLA Member:

> We have an extensive professional negligence practice across our London and Oxford offices. Our lawyers regularly act in multi-million-pound claims against various types of professional, including solicitors, accountants, architects and valuers.
>
> Our group actions team have developed an industry-leading specialism pursuing solicitors connected to failed investment schemes. The team have had several reported decisions, including *Main & Ors v Giambrone* [2017] EWCA Civ 1193 and *Morris & Ors v Williams & Co* [2024] EWCA Civ 376.
>
> Our team is recognised by *The Legal 500* and *Chambers UK* legal directories as a leading practice for professional negligence. We regularly contribute to legal and national press on professional negligence matters. See this recent article in *Legal Futures*, for instance.

We have not used Third Party Funding on any of our cases yet, but would be happy to do so on appropriate matters, and where it would be in the best interests of our clients. We continue to develop professional relationships with various funders, including Bench Walk Advisors, Harbour Litigation Funding, Annecto Legal and Burford Capital.

Our clients frequently obtain After the Event insurance, particularly on our group action professional negligence matters.

On our group claims we usually act for individual claimants under a Conditional Fee Agreement (CFA). A CFA, in conjunction with ATE insurance, minimises a client's exposure to costs. This is important because many of our clients have lost significant sums as a result of failed investment schemes (see above) so their risk appetite tends to be low.

Group claim values vary but are usually in the region of £1.5m to £4m plus costs, which will vary depending on how far the claim proceeds. Sums insured across the group can be up to c£400,000 with premiums of c£175,000 to trial, plus IPT. These are approximate figures though as our claims do vary in size and nature.

**2. To what extent does third party funding promote equality of arms between parties to litigation?**

As can be seen from the figures publicized and referred to in Part I in Bates v The Post Office the inherent problem is that whilst such funding is potentially the only way for some claims to be pursued at all, the impact on litigation strategy is for well resourced defendants to drive up the legal costs and reduce the recoverable damages available to claimants. In many cases this increases the chances of the defendant obtaining agreement to a low settlement figure at an early stage because the unrecoverable legal and litigation funding costs become an increasingly significant deduction from damages as the case progresses.

Such a situation cannot therefore promote 'equality of arms' – on the contrary this produces the opposite effect by penalizing claimants who pursue their litigation to trial.

**3. Are there other benefits of third party funding? If so, what are they?**

The significant benefit is that for a small number of cases third party funding has enabled them to proceed at all – notably Bates v The Post Office.

**4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[3] If not, what improvements could be made to it?**

[3] This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

After PACCAR it appears that the stringent requirements of the Damages Based Agreements Regulations 2013 apply to third party funding agreements. The PNLA agree with submissions in the House of Lords in the first and second reading of the Litigation Funding (Enforceability) Bill that these regulations should be changed - for example debate 15 April 2024

**Lord Trevethin and Oaksey**: 'However, everyone, including the Ministry of Justice and just about every judge who has ever had to read the regulations, recognises that the 2013 regulations were badly drafted. In particular, they leave a very undesirable uncertainty about whether hybrid agreements involving an element of a damages-based agreement and an element of a more orthodox funding scheme are permissible. They leave a great deal of uncertainty as to what happens to the lawyers' entitlement to remuneration if the client terminates the agreement in the course of the relevant litigation.

That is why the ministry instigated a review of the position, which led to the preparation of significantly better draft regulations by a group including Nick Bacon KC, a colleague of mine, who is a master in this field. There is no doubt that those draft regulations would represent a major improvement. If those draft regulations from 2019 had been put in place back then, we would not be having the current debate and there would be no PACCAR problem. Nick Bacon and his team spotted the difficulty that underlies the decision of the Supreme Court in PACCAR and drafted the new regulations to remove the relevant ambiguity and took litigation funding agreements outwith the scope of the DBA Regulations.'

5. **Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:**
    a. **The nature and seriousness of the risk and harm that occurs or might occur;**
    b. **The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;**[4]
    c. **For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.**

[4] Please give full details of each possible mechanism and explain how each would work (including who any potential 'regulator' or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.

The PNLA does not attempt to answer this question as a whole which can be left to others with wider knowledge of third party funding. Nevertheless our concern is the relationship between the third party funder, clients and representatives in civil litigation.

The primary rules governing the conduct of parties to litigation are the Civil Procedure Rules https://www.justice.gov.uk/courts/procedure-rules/civil this is supplemented by guides produced by some of the High Court Divisions.

The conduct of litigation is a 'reserved activity' pursuant to S12 Legal Services Act 2007 (and Schedule 2) which can only be carried out by those subject to an approved regulator.

The Solicitors Regulation Authority is an approved regulator and typically clients instruct solicitors to conduct litigation. The conduct of solicitors is subject to the Solicitors Code of Conduct.

It is therefore essential that any regulatory regime for third party funding includes reference to the required regulations for those conducting the litigation.

The relationship between clients and their solicitors are set out clearly and the impact of a third party funder paying the legal costs has the potential to create situations where difficulties arise. Such difficulties need to be addressed and clearly delineated to ensure that there is clarity for all concerned as to the boundaries that exist taking account of the interests of all those involved in the litigation and any regulatory requirements to which they may be subject.

One can imagine that over many years the employees and owners of funders investing in litigation create close relationships with solicitors conducting the litigation – perhaps social events take place – maybe they play golf together. When an offer of settlement comes in the funder may say they want to accept it especially as they want perhaps to invest in another case with the conducting solicitors but need to recoup their profits from this case to fund it. However the clients – and it could be a group like the sub-postmasters – want to reject the offer because they will not be receiving the damages they think they are entitled to. How is such conflict of interest managed?

One obvious example of a difficulty resulting from the PACCAR judgment is that solicitors conducting the litigation may well have historically made payments to third party funders in the mistaken belief that the funding agreements were valid when in fact they infringe the Damages Based Regulations 2013. This gives rise

to potential claims against those solicitors by successful clients for negligence and/or wider legal liability for making those payments.

This situation creates a real potential conflict of interest both in such cases and if the conducting solicitors practice is running other cases with the same funder such that they may need to cease to act (a requirement of the Solicitors Code of Conduct.) The Court of Appeal has listed the following cases on the multipier issue for hearing in May and June 2025 after a stay has now ended pending the proposed legislation *Alex Neill v Sony Interactive Entertainment; Apple Inc. & Apple Distribution International Ltd v Kent*; *Commercial and Interregional Card Claims II Ltd v Visa Inc & ors*; *Commercial and Interregional Card Claims I Ltd v Mastercard; and Gutmann v Apple Inc & ors*.

https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/ Rule 6 – 6.1 You do not act if there is an *own interest conflict* or a significant risk of such a conflict. 6.2 You do not act in relation to a matter or particular aspect of it if you have a *conflict of interest* or a significant risk of such a conflict in relation to that matter or aspect of it.

6. **Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?**
    a. **If not, why not?**
    b. **If so, which types of dispute and/or form of proceedings[5] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[6]**
    c. **Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?**

The PNLA does not attempt to answer this question as a whole which can be left to others with wider knowledge of third party funding and different types of legal proceedings apart from civil litigation.

[5] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.
[6] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

Nevertheless our concern is the relationship between the third party funder, clients and representatives and we refer to our response as above as to the importance of clarity as to the boundaries taking account of the interaction with regulatory requirements for those conducting and involved with any type of dispute resolution procedure and all types of client.

7. **What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?**

The PNLA does not attempt to answer this question as a whole which can be left to others with wider knowledge of third party funding. Basic principles should be to ensure that third party funders are unable to interfere in any way with the compliance of solicitors, barristers, experts or others with their respective regulatory requirements and legal obligations in the conduct of litigation (or other types of procedure for resolving disputes).

8. **What is the relationship, if any, between third party funding and litigation costs?**

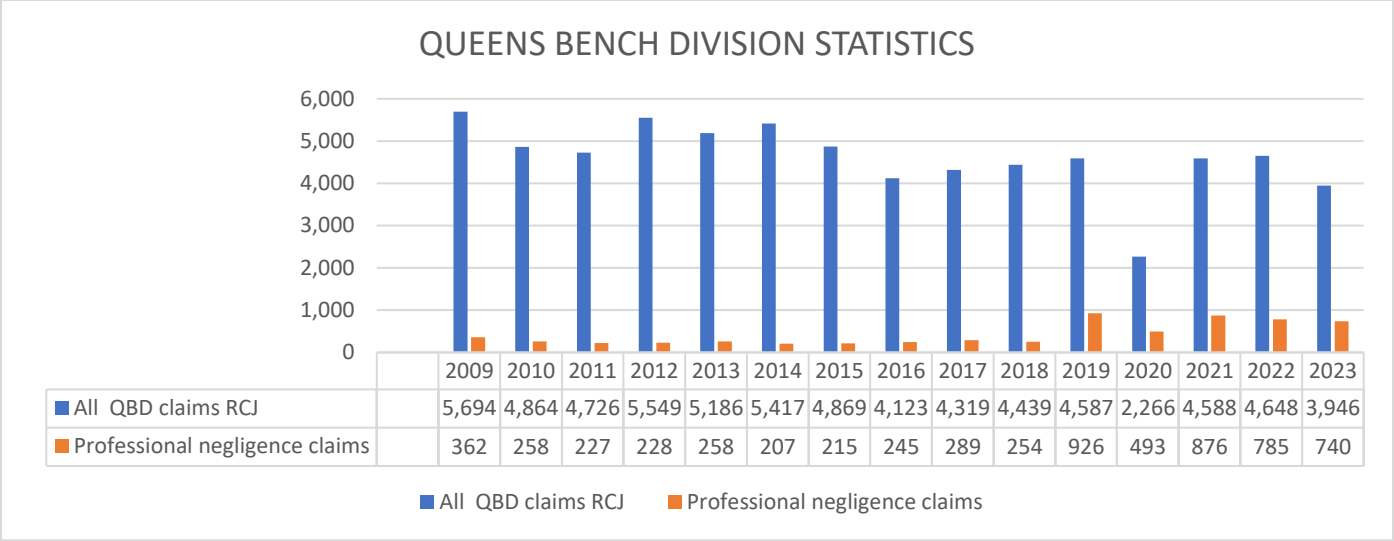
The PNLA have started with the Royal Court of Justice Annual Tables which include data from some High Court Divisions about types of claim including professional negligence https://assets.publishing.service.gov.uk/media/666094e7d470e3279dd3367d/Royal_Courts_of_Justice_Annual_Tables-_2023.ods

The Civil Justice Statistics Quarterly in June annually includes overall data of which it can be assumed that a percentage are professional negligence and liability disputes

https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2024

Figure 1 below provides an overview of issued claims in the Queens & King's Bench Division for the period 2009 to 2023 from figures in the Excel spreadsheet we were provided by the MOJ for this report.

Figure 1

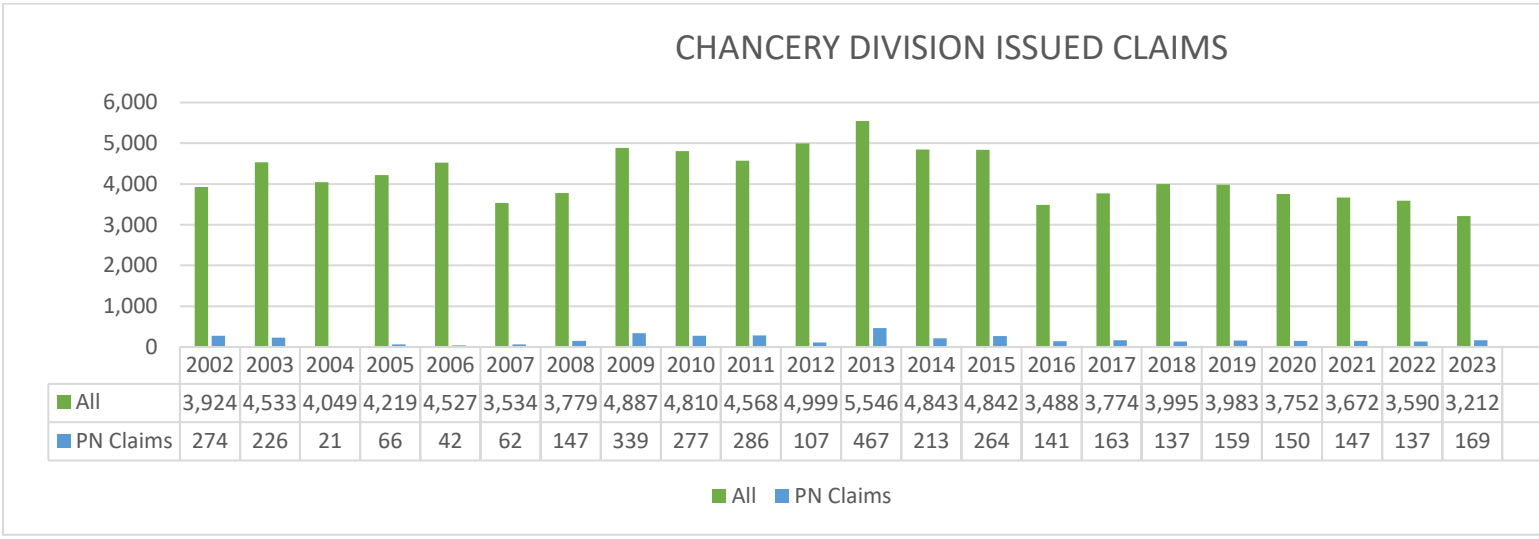



| | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| All QBD claims RCJ | 5,694 | 4,864 | 4,726 | 5,549 | 5,186 | 5,417 | 4,869 | 4,123 | 4,319 | 4,439 | 4,587 | 2,266 | 4,588 | 4,648 | 3,946 |
| Professional negligence claims | 362 | 258 | 227 | 228 | 258 | 207 | 215 | 245 | 289 | 254 | 926 | 493 | 876 | 785 | 740 |

All QBD claims RCJ  Professional negligence claims

Figure 2 below shows total issued claims as against the number of professional negligence claims.

Figure 2




| | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| All | 3,924 | 4,533 | 4,049 | 4,219 | 4,527 | 3,534 | 3,779 | 4,887 | 4,810 | 4,568 | 4,999 | 5,546 | 4,843 | 4,842 | 3,488 | 3,774 | 3,995 | 3,983 | 3,752 | 3,672 | 3,590 | 3,212 |
| PN Claims | 274 | 226 | 21 | 66 | 42 | 62 | 147 | 339 | 277 | 286 | 107 | 467 | 213 | 264 | 141 | 163 | 137 | 159 | 150 | 147 | 137 | 169 |

All  PN Claims

The PNLA were directed by the MOJ to the Technology and Construction Court Annual Reports/survey:

a. Kings College survey 2009 – 13% (page 305 LJJ Jackson Preliminary Report)
b. Annual Report 2011-2012 - 6%
c. Annual report 2013-2014 - 5%
d. Annual report 2023-2024 – 7% (page 29) https://www.kcl.ac.uk/construction-law/assets/kcl-dpsl-construction-adjudication-report-3.0-2024-update-digital-aw1.pdf

| Judicial Statistics for TTC | | **Total Received** | |
|---|---|---|---|
| 2003 | 381 | 2014 | 478 |
| 2004 | 341 | 2015 | 437 |
| 2005 | 340 | 2016 | 359 |
| 2006 | 390 | 2017 | 404 |
| 2007 | 409 | 2018 | 396 |
| 2008 | 366 | 2019 | 481 |
| 2009 | 528 | 2020 | 495 |
| 2010 | 493 | 2021 | 509 |
| 2011 | 528 | 2022 | 468 |
| 2012 | 452 | 2023 | 480 |
| 2013 | 475 | | |

**COUNTY COURT**

The Civil Justice Statistics Quarterly in June annually includes overall data of which it can be assumed that a percentage are professional negligence and liability disputes

https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2024

| **Year** | **Quarter** | Money claims | Personal Injury Claims | Other - Damages claims | **Total Damages claims** | **Total money and damages claims** |
|---|---|---|---|---|---|---|
| 2000 | | 1,438,673 | .. | .. | **113,273** | **1,551,946** |
| 2001 | | 1,301,312 | .. | .. | **129,380** | **1,430,692** |
| 2002 | | 1,201,583 | .. | .. | **142,883** | **1,344,466** |
| 2003 | | 1,153,697 | .. | .. | **151,204** | **1,304,901** |
| 2004 | | 1,185,688 | .. | .. | **143,166** | **1,328,854** |
| 2005 | | 1,429,438 | .. | .. | **147,120** | **1,576,558** |
| 2006 | | 1,570,962 | .. | .. | **145,195** | **1,716,157** |
| 2007 | | 1,408,448 | .. | .. | **144,128** | **1,552,576** |
| 2008 | | 1,426,365 | .. | .. | **160,248** | **1,586,613** |
| 2009 | | 1,281,132 | 59,963 | 119,006 | **178,969** | **1,460,101** |
| 2010 | | 1,040,598 | 84,552 | 106,030 | **190,582** | **1,231,180** |
| 2011 | | 995,879 | 110,582 | 67,652 | **178,234** | **1,174,113** |
| 2012 | | 894,822 | 146,644 | 25,943 | **172,587** | **1,067,409** |
| 2013 | | 945,197 | 146,867 | 13,391 | **160,258** | **1,105,455** |
| 2014 | | 1,136,638 | 131,441 | 8,987 | **140,428** | **1,277,066** |
| 2015 | | 1,112,241 | 142,724 | 8,115 | **150,839** | **1,263,080** |
| 2016 | | 1,374,048 | 133,882 | 7,683 | **141,565** | **1,515,613** |
| 2017 | | 1,602,038 | 142,205 | 7,720 | **149,925** | **1,751,963** |
| 2018 | | 1,667,413 | 124,105 | 8,922 | **133,027** | **1,800,440** |

| | | | | | |
|---|---|---|---|---|---|
| 2019 | 1,637,854 | 113,654 | 12,082 | **125,736** | **1,763,590** |
| 2020 | 1,034,820 | 99,757 | 19,544 | **119,301** | **1,154,121** |
| 2021 | 1,312,319 | 86,388 | 43,685 | **130,073** | **1,442,392** |
| 2022 | 1,253,327 | 81,481 | 28,372 | **109,853** | **1,363,180** |
| 2023 | 1,428,198 | 61,210 | 35,844 | **97,054** | **1,525,252** |

The PNLA has not carried out any detailed statistical analysis, albeit this should be possible by the Ministry of Justice applying specialist analysts as required, but it is apparent that of the annual number of cases issued in the High Court and County Court – potentially around 2 million a year – it can be seen from the data available that a significant percentage of cases issued in all the civil courts can be categorized as 'professional negligence'. Further data available is included in Part III below.

The impact of 40 cases which have received third party litigation funding in statistically insignificant. (cf page 13 above - According to the research on March 2024 by Queen Mary University in London for the Legal Services Board)

The missing data which is very difficult to obtain is how many clients are unable to afford to pursue claims. The only way for this to be assessed is by looking at the calculation of costs-risk-benefit referred to in Part I unless and until the Ministry of Justice carry out further investigations as required to assess access to justice as per the National Audit Office Report of February 2024 in relation to civil legal aid.

The problem for any particular client will be affected by the type and value of their claim, the Court or other procedures available to them, the complexity of the dispute and the hourly rates charged by solicitors, barristers and any experts together with the ancilliary litigation costs and disbursements. This could include Court fees, travel expenses, document collation platforms, bundle production costs, electronic disclosure requirements, transcription services and more.

It is suggested that third party funding for the 40 cases successful may have arisen because no other method of funding was available. Historically Civil Legal Aid may have been available. During the period after implementation of Conditional Fee Agreements and recoverable 'success fees' and ATE premiums and 1 April 2013 some of these cases could have been funded using this model. After the implementation of LASPO Part 2 on 1 April 2013 – third party funding may well have become the only available option whereas previously there may have been alternatives.

Further in this context:

**a. What impact, if any, have the level of litigation costs had on the development of third party funding?**

As stated above our understanding is that third party funding for the 40 cases was in relation to collective proceedings under the CAT scheme (27) GLO regime (10) and representative actions (3). The PNLA does not have information as to the level of costs for these specific types of litigation.

**b. What impact, if any, does third party funding have on the level of litigation costs?**

No comment

**c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?**

No comment

**d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[7]**

No comment

**e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?**

**i. If so, why?**

**ii. If not, why not?**

Yes because this is a measure to promote that the parties are on an equal footing as to financial resources to fund the litigation and can participate fully in proceedings in accordance with CPR 1.1 the Overriding Objective.

If claimants like the sub-postmasters are funded to pay for their legal costs then in order to have a fair procedure their recovered damages on success should not be reduced by the costs of obtaining the litigation funding.

[7] Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

As stated in Part I above the current situation creates the strategic advantage to a well resourced defendant – like The Post Office – to prolong the litigation or force a low settlement from claimants who face lower and lower damages because the costs of litigation funding increase as the case proceeds towards trial.

Lords Briggs said in November 2024 https://www.lawgazette.co.uk/practice-points/lord-briggs-defends-fixed-recoverable-costs-regime-for-professional-negligence-cases/5121773.article

“Many meritorious claims are, potentially, stifled as a result of cost risk.' Other claimants 'may be forced by the cost risk to accept a mediated settlement for much less than their claim is really worth.'

**9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.**

Access to justice is all about how the money works. In civil litigation the usual rule is that the loser pays the legal costs of the winner – it is understood that ‘adverse costs’ refers to the liability to pay the costs of the other party.

In certain special situations a client must provide security for costs – typically if the party is insolvent or based overseas. See *Rowe & Ors v Ingenious Media Holdings PLC & Ors [2021] EWCA Civ 29 (15 January 2021)* URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2021/29.html* Lord Justice Popplewell states “the balance between the article 6 rights of the claimants and defendants has been settled by the "stifling" principle, namely that where a claimant can show that ordering security would on the balance of probabilities render the pursuit of the claim unaffordable, security will not be ordered.”

Litigation funding is a potential solution whereby the client can be insured against the risk of paying the costs of the other party if they lose the case. Also insurance can provide a bond for payment of adverse costs accepted instead of a payment into Court by way of security for costs.

The PNLA response will focus on the following methods of funding in response to this question relating to the impact of adverse costs on litigation funding by ‘Qualified one way Costs Shifting’ ATE and BTE insurance.

**A. Qualified one way Costs Shifting**

We refer to Part 1. Bringing medical and non medical professional negligence claims into alignment for litigation fuding makes sense and would provide a solution to enhance parties being on an equal footing.

## B. ATE insurance

The PNLA in 2007 began the process of setting up a scheme for the provision of ATE insurance on terms negotiated by independent brokers The Judge with ATE providers. The Judge drafted a scheme with particular benefits to members in professional negligence claims and the scheme was circulated to ATE providers and interviews took place to select providers. QBE and First Assist were jointly chosen to administer and fund the ATE insurance. The scheme allowed member firms to login to an account and if a case was standard then ATE insurance could be obtained immediately. Non standard cases were referred with supporting papers for approval or rejection. The scheme launched in September 2008 and continued until around March 2013. The providers stopped the scheme before the impact on recovery of adverse costs of LASPO Part 2.

This is a stark example as to the impact of recoverability of adverse costs. The effect on the ability of PNLA members in losing this scheme to obtain funding was a direct consequence of the change in the law about recovering 'success fees' and ATE insurance premiums taken out to cover payment of adverse costs.

Since that time there are still ATE products available and sponsors for the PNLA include Temple Legal Protection and Ignite Specialty Risk. The issue for claimants is whether or not they can recover enough in damages to exceed the 'success fees' and ATE premium for the claim to be worthwhile for them to pursue.

Adverse costs, understood to mean the risk of paying the defendant professional's costs typically in this type of dispute, need to be estimated from the outset and regularly reviewed throughout the litigation for clients to make an informed decision about how to proceed. At the outset this involves estimating based on experience what the other party's costs are likely to be. After costs budgets are exchanged actual figures are available.

In every case there are always risks that adverse costs could exceed those estimated or additional costs which exceed the costs budget could be incurred. For example disputes about adequate disclosure and supplementary disclosure applications can happen which could be assessed as in addition to the budgeted figures.

One stark example is the Mitchell case (referred to above) where solicitors did not file a costs budget in time resulting in an order that only Court fees could be recovered if the client won the case instead of all the litigation costs – further (unforeseen) costs were incurred to fund an application to the Court of Appeal which was unsuccessful. The claimant's costs therefore became vastly in excess of what was predictable before the costs budget should have been filed.

In the Fixed Costs Regime whilst there is since October 2023 a notional 'cap' on the amount of recoverable incurred and adverse costs there is scope within the CPR for an application to the Court to move the case outside the scheme or award additional costs:

- **CPR 45.9.**—(1) The court may consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in Section VI, Section VII or Section VIII of this Part where there are exceptional circumstances making it appropriate to do so.
- **Also see CPR 45.**14 Costs consequences on reconsideration of track or complexity band – this means that after a Judge decides to move the case the costs are assessed 'as if the claim had been allocated to the track at the outset'

Therefore obtaining ATE insurance to cover adverse costs is in all claims a difficult matter for solicitors because they are required to advise the client on how much cover to purchase. Should it be £50,000? £100,000? or £500,000?...higher, lower or in between?

If the client loses the case and there are costs awarded as adverse costs which exceed the amount of cover, there will be a potential professional negligence claim against the solicitor (or other adviser perhaps an insurance broker or costs lawyer) for inadequate insurance.

On the other hand if a cautious high amount of cover is obtained then the ATE premium will potentially be higher. Hence on success the client will have to pay more from their damages to fund the higher premium. The client at this stage will potentially argue that the cover was much too high and they should have been advised to take out a lower amount of cover.

The recoverability of adverse costs has a direct arithmetical impact on the level of ATE insurance which should be obtained. The amount of the premium payable by a winning client also goes up the higher the amount of cover purchased.

Certain insurers may not be willing to secure higher figures of adverse costs – others may only be interested if there is a very high level of costs sought. Independent brokers specializing in litigation funding are available and can trawl the market for each individual case.

It should be noted that the PNLA ATE Scheme offered a standard amount but the scheme included additional features which were not available from other ATE insurers in the market.

## C. BTE Insurance

It is also worth noting the availability of Before the Event Legal Expenses insurance ('BTE') at this point. This is typically available to individuals in motor or home insurance policies and businesses may also have commercial legal expenses insurance.

The levels typically available are fixed to include own and adverse costs and disbursements. The difficulty can be trying to estimate whether or not this cover is sufficient to take a case to trial and if not at what stage other types of litigation funding may be needed.

This problem is also affected by the changes in the merits of the case as it is pursued – for example a barrister may assess the merits after serving particulars of claim at 60%, but change this view after seeing the Defence to 40%. ATE insurers typically require a barrister's opinion at 60% chance of success therefore failing to obtain 'top up' cover when the merits were at that level could form the basis of a negligence claim against the conducting solicitors if the claim later fails with a shortfall in adverse costs cover.

In November 2017 a detailed report by the Civil Justice Council was prepared relating to the operation of BTE insurance. See: **THE LAW AND PRACTICALITIES OF BEFORE-THE-EVENT (BTE) INSURANCE AN INFORMATION STUDY** https://www.judiciary.uk/wp-content/uploads/2017/11/cjc-bte-report.pdf

This report does not directly address whether or not those instructing professionals could use such policies in place of the pre- LASPO Part 2 funding. However this Information Study does include a detailed review of the shortcomings and widespread complaints about BTE insurance.

The Information Study at page 26 refers to typical levels of BTE cover at £50,000 to a maximum of £100,000 from various BTE insurers to cover own and opponent solicitors and Counsel, experts, ADR usually by mediation and disbursements including VAT.

**Financial Ombudsman Service – BTE -** We refer to the section of the FOS website devoted to disputes about legal expenses insurance at

https://www.financial-ombudsman.org.uk/businesses/complaints-deal/insurance/legal-expenses-insurance

FOS state 'We generally receive complaints about:

- insurers deciding not to meet the expenses of proposed legal action
- disagreements between legal professionals about the prospect of a successful outcome
- an insurer's solicitor handling a claim badly

- insurers rejecting a claim because the policyholder didn't notify them about an event that gave rise to legal proceedings
- policyholders choosing to use their own solicitors and the insurer refusing to cover the claim'

**Conclusion**

QOCS would be a way forward aligning litigation funding for medical and non-medical professional negligence claims.

ATE and BTE insurance are the types of adverse costs insurance which PNLA members most typically deal with rather than third party funding. Indeed we have made the point that it is understood from the March 2024 study by Queen Mary University in London for the Legal Services Board (Part I page 13 above) that only 40 cases have been funded by litigation funders.

There is a direct relationship between the likely amount of adverse costs payable by a client if they lose the case and the amount of insurance they need to cover that risk. The higher the amount purchased the higher the insurance premium.

When ATE premiums were recoverable this acted as a deterrent to the other side to continue with a dispute if they were likely to lose. For example a professional defendant and their insurers would have every incentive to settle a claim at an early stage if they believed they might lose.

After LASPO Part 2 the same professional defendant and their insurers know that strategically if they drive up the claimant's costs and keep the litigation going then the increasing expense of paying the ATE insurance premium (often staged to increase as the action progresses) will encourage a claimant to settle at a low figure rather than risk winning at trial but paying most of their damages to an ATE insurer and to their own lawyers in success fees and unrecovered costs.

Please note that there are examples where claims have succeeded and the winning party has had to pay not only all their damages to ATE insurers and legal costs, but have ended up in debt to them. This may well happen if the Court decides that the damages awarded are much lower than originally pleaded.

Access to justice is therefore badly hampered by the legal costs a winning claimant has to deduct from their recovered damages if they win – LASPO Part 2 has caused great hardship to many ordinary people – both individuals and businesses.

**10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?**

Initially this point that decided in *Arkin v Borchard Lines Ltd (Nos 2 and 3)* [2005] EWCA Civ 655, [2005] 1 WLR 3055 where in effect it was decided that the liability of the funder was capped at their investment in the legal costs.

This issue has been addressed by the Court of Appeal most recently in *Chapelgate Credit Opportunity Master Fund Ltd v Money & Ors [2020] EWCA Civ 246 (25 February 2020)*
URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2020/246.html*

Lord Justice Newey gave the leading judgment stating:

> 38. 'On the other hand, I do not consider that the *Arkin* approach represents a binding rule. Judges, as it seems to me, retain a discretion and, depending on the facts, may consider it appropriate to take into account matters other than the extent of the funder's funding and not to limit the funder's liability to the amount of that funding. In the case of a funder who funded only a distinct part of a claimant's costs, a judge might well decide that it should pay no larger sum towards the defendant's costs. A judge could also, however, consider the funder's potential return significant.
>
> The more a funder had stood to gain, the closer he might be thought to be to the "real party" ordinarily ordered to pay the successful party's costs in accordance with the guidance given in paragraph 25(3) of the *Dymocks* judgment (for which, see paragraph 22 above). In the case of a funder who had funded the lion's share of a claimant's costs in return for the lion's share of the potential fruits of litigation against multiple parties, it would not be surprising if the judge ordered the funder to bear at least the lion's share of the winners' costs, regardless of whether the funder's outlay on the claimant's costs had been a lesser figure.
>
> 39. In short, it seems to me that Snowden J was right to conclude that judges do not necessarily have to adopt the *Arkin* approach when determining the extent of a commercial funder's liability for costs.'

If the Civil Justice Council is minded to recommend a change in the law in this respect then this would have a considerable effect on the scope of funding likely to be available.

## Questions concerning 'whether and, if so to what extent a funder's return on any third party funding agreement should be subject to a cap.'

**11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?**

The extent of the PNLA's knowledge about the Court's control of third party funding comes from the *Chapelgate* judgment. It is understood from the Queen Mary University study (Part I page 13 above) that there have only been 40 cases using such funding (see above) and it is inferred therefore there is little, if any, statistically significant data available.

**12. Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?**

**a. If so, why?**

**b. If not, why not?**

It is clear from the submissions on the first and second reading of the Litigation Funding (Enforceability) Bill referred to in Part 1 of this response that there is likely to be political pressure after the Bates v The Post Office case (and following TV drama) for the cost of funding to be investigated and for future claimants to receive more of their damages. It apparent that there will be a strong public support for legislation to achieve this outcome.

There is however as set out above an interaction between proper advice from conducting solicitors as to the likely legal costs – both own and adverse – and the need for a specific amount of ATE insurance to cover the costs risks.

If a solicitor advises that a certain amount of cover is needed it is likely that funders in a competitive market will set a price according to their assessment of risk. This may be on an individual case basis or potentially by way of a basket of cases of a typical type perhaps.

The question therefore is in that sense rhetorical because neither legislation nor recommendations by the Civil Justice Council are likely to be able to restrict the costs. Commercial funders will simply withdraw from the market unless they consider the recovery for them is worth the risk of winning and recouping their investment at a profit as against losing and paying out.

Professional indemnity insurers for solicitors and perhaps litigation funding insurance brokers will be particularly interested in this question because if a client is inadequately funded or insured then clients will look to them for redress by way of professional negligence claims.

**13. If a cap should be applied to a funder's return:**

**a. What level should it be set at and why?**

**b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?**

**c. At which stage in proceedings should the cap be set?**

**d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?**

**e. Should there be differential caps and, if so, in what context and on what basis?**

The PNLA is aware that the Government has set a 'cap' on recovery of damages in personal injury claims by way of s58 of the Courts and Legal Services Act 1990 S4A and The Conditional Fee Agreements Order 2013.

Any cap on litigation funders' return could be invoked in a similar way by legislation. The Ministry of Justice would need to investigate the balance between the continuing availability of any funding if any such cap was introduced. The danger being that currently available funders may withdraw from the market unless they consider that they can achieve a profit taking account of the level of funding and risk.

The above method of cap is designed to protect personal injury claimants who enter into Conditional Fee Agreements. The PNLA consider this cap to be reasonable and potentially could be adopted for other types of litigation, including professional negligence claims, alongside a reversal of LASPO Part 2 for recovery of 'success fees' from losing parties and introduction of QOCS.

**Questions concerning how third party funding 'should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.'**

**14. What are the advantages or drawbacks of third party funding?**
**Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.**

The PNLA do not refer to the terms offered by third party funders which may in any event vary. Our response therefore is to repeat as stated previously that there may be situations where the only type of funding available might be third party funding because no other type will address the costs risks likely to be encountered. The Bates v The Post Office action is one example.

Further as stated in the Queen Mary University study (Part I page 13 above) it is understood that only 40 cases have every been accepted for third party funding which cannot be regarded as a significant number compared to the general volume of civil litigation claims issued – around 2 million a year (see above judicial statistics)

**15. What are the alternatives to third party funding?**

The PNLA members will potentially deal with all forms of funding – as you refer typically: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding and a 12 PNLA members currently state that they offer Legal Aid as listed using the search facility on https://www.pnla.org.uk/do-you-need-a-lawyer/

It is perhaps better to approach this question as if you are a potential party to civil litigation and every solicitor will give advice on a day to day basis about the funding options and potential costs (as explained in Part I above).

It is also worth noting that most situations have unusual features otherwise they would be resolved in reasonable communications without a party thinking that they need to apply to the Court. A study of decided cases will reveal a broad spectrum of situations (some quite bizarre) where cases have not been resolved requiring a trial before a Judge, and some go further to appeals.

Taking a common case study – we invite you to imagine that you have recently bought a new home for yourself and family for £500,000. This has involved using all your savings and obtaining a substantial mortgage requiring payments which you can just about afford and you have also recently paid for some work to be carried out to the kitchen and a small extension. During these works the builder has noticed a large crack in the wall.

The first case likely to spring to mind to your professional negligence solicitor will be Large v Hart & Anor [2021] EWCA Civ 24 (15 January 2021) URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2021/24.html*

This is the most recent authority on surveyors negligence and whilst not the same as your case gives an idea as to how hard fought and legally and factually complicated your case might be. So in trying to carry out a

calculation of the costs-risks-benefit you will be advised that your surveyor is likely to have well resourced professional indemnity insurers to fund a defence, there could be trial and may well have expensive features like contested expert evidence.

Such cases are often complicated by for example disputes with home insurance which might be expected to pay for subsidence problem and also whether the previous owners have failed to disclose any knowledge of the position. However taking a simple approach a new surveyor expert is instructed and says that your surveyor pre-purchase negligently failed to advise you about obvious signs of subsidence.

Your claim may have a range of possible claims for financial loss:

a. One possibility is this is say £75,000 as the costs of building works to underpin.
b. Another could be that the house is unsafe and you need to move out immediately and rent alternative accommodation while building works of an estimated £250,000 take place.
c. A third is that the house is about to fall down and is completely worthless needing demolition and rebuilding. You say that you would never have bought correctly advised and have lost £500,000 plus further costs and to rebuild to put you back in the position that you should have been will cost a further £500,000. Site value is currently £100,000.

The type of litigation funding available will differ depending on the value of your claim.

Claims worth up to £100,000 are subject to the Fixed Costs Regime providing a maximum costs recovery to trial of around £45,000. If you win but your costs exceed this sum then you have to pay your own legal costs as a deduction from damages. However your adverse costs risk should be limited to this sum. You may have Before the Event ('BTE') Legal Expenses Insurance of say £50,000 in your home or motor policy. Typically such insurers will direct you to instruct their panel firms as conducting solicitor and will not agree to pay the full hourly rate if you choose a different solicitor or barrister. They will pay for an experts report and a review and unless they assess the case at around 55% chance of success they will not agree to fund. (See for example the Financial Ombudsman Service comments and CJC report into BTE as to typical disputes).

Claims worth £250,000 plus say 10 months of rent at an alternative property – say £40,000 – about £390,000 will be suitable for multi track and can be issued in the High Court. The risk of the claim being defended is significant – your solicitor may well advise that a full trial could cost about £250,000 plus VAT with adverse costs risk if you lose being the similar. This is the type of case where After the Event ('ATE') Legal Expenses Insurance may be available and the premium if you win will typically be staged throughout the dispute – a

smaller premium if it settles pre-action and greater towards trial. The premium typically will only be payable by you if you win. Your solicitors and barristers might be prepared to offer you a Conditional Fee Agreement ('CFA') where they are paid 'success fees' if you win – those fees – plus the shortfall of any costs found by a costs judge not to be recoverable (often around 25-30%) – will also need to be paid by you if you win. If you lose the ATE insurer should pay your disbursements and adverse costs.

Claims worth say £1 million could attract third party funders – although some may not be interested unless the claim is for a much higher figure – perhaps £20million or so. CFA and ATE funding would also be an option perhaps. A comparison may be needed as to the costs – if the profit payable to a funder could be less than the alternative then this needs to be explored – potentially by a specialist insurance broker to advise which offers the best solution for you.

Crowdfunding - In each situation it might be possible for you to obtain some financial help to pay your costs – this could be 'crowd funding' understood to include the creation of a web post which you circulate to all your network asking for them to make a donation. It could also include say a wealthy friend or relative offering to pay all or part of your legal costs. This situation has been complicated by *Chapelgate* referred to above as it is not entirely clear what liability these funders have for adverse costs if the case is unsuccessful. This would act as a potential deterrent to all such funders correctly advised.

**Conclusion**

The above is a very brief summary of the typical day to day advice conducting solicitors will give on the options for litigation funding. None of them look attractive and all involve a lot of uncertainty between the best and worst outcomes.

Further given that you started this case already having paid your savings into the new home and with a mortgage which you can only just afford – trying to choose the best option in an already very stressful situation is going to be harrowing. This above the horrible realization that the home that you and your family dreamed of for your future is now a nightmare and all you may well want to do is to get away and put it behind you.

Most clients are in an emotionally fragile state of mind when disputes arise and the litigation funding and costs risks add to the misery – some clients end up bankrupt or suffering mental health issues – if not suicidal.

Pre-LASPO there was a far more attractive prospect when CFA success fees and ATE premiums were recoverable. This created an immediately financially attractive situation for defendant professionals and their

indemnity insurers to try to settle strong claims at an early stage – often pre-action. If they believed they could defend, insurers are wealthy enough to do so and if they succeeded then ATE insurance should cover their costs liability.

The current position is the reverse as it is financially attractive for professionals and their indemnity insurers to put forward a defence and fight the litigation. They know that the claimants are in a desperate financial position and will have to pay a substantial part of their recovered damages in legal costs and insurance premiums or to litigation funders – the closer to trial the more the claimant will have to pay. A tactical low settlement offer a few weeks before trial could well be accepted with alacrity and provide the indemnity insurer with the best financial outcome.

**a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?**

**Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.**

None of the alternatives provide an easy answer especially when faced with a claim against another party with vastly superior resources. The PNLA focus on this particular aspect as typical in professional negligence disputes.

For example the Law Society publish research on trends in professional indemnity insurance https://www.lawsociety.org.uk/topics/research/trends-in-professional-indemnity-insurance-for-law-firms-2023

At paragraph 3 this provides median cost of PII cover

- 2017/18 £12,300
- 2021/22 £14,200
- 2022/23 £16,000

The Law Society Find a Solicitor website on 28 January 2025 https://solicitors.lawsociety.org.uk/ shows 11,717 organisations (excluding in-house teams, government departments and other employers).

Taking £16,000 median premium for 11,717 practices makes an **annual premium income of £187,472,000** for solicitors' professional indemnity insurers.

Very few claimants – even if they are commercial businesses of considerable size – have resources on an equal footing with indemnity insurers taking premium income annually of this type of sum.

The question for the Civil Justice Council is what type of funding options can provide an equal footing (as required by CPR 1.1 the overriding objective) for claimants in this situation?

**b. Can other forms of litigation funding complement third party funding? Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.**

The PNLA will leave others to advise the interaction with third party funding and other forms.

**c. If so, when and how?**

As above.

**16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?**

Qualified one way costs shifting would align medical and non medical professional negligence claims as recommended by Lord Briggs and for the reasons he has stated in the 2016 review (see Part I).

Conditional Fee Agreements with 'success fees' and ATE insurance with premiums paid on success. If LASPO Part 2 was reversed allowing success fees and ATE to be recoverable from losing opponents this would make this type of funding more financially attractive all round even in situations like Bates v The Post Office. The complex high value claims are a significant risk for solicitors and barristers undertaking them on 'no win no fee' due to cash flow restrictions and potentially many years of work going unpaid.

Since 1 April 2013 post LASPO many have stopped or significantly reduced the number of cases they are willing to take on as Conditional Fee Agreements. Solicitors typically have very stringent criteria and in-house monitoring to ensure they do not accept too many and restrict their cash flow too much. The more hours and the longer the case proceeds – the greater the success fees based on an uplift per hour – it is therefore counter

intuitive for solicitors and barristers because the higher the success fee the less their clients will recover. This also creates a risk of costs being disputed by the client.

Strong claims against well-resourced defendants are attractive to solicitors and barristers for Conditional Fee Agreements but only if they provide sufficient financial incentive. Further solicitors and barristers prefer their clients to be protected against adverse costs and typically ATE insurance is coupled with this type of funding. The level of premiums payable by clients however acts as a disincentive. If premiums were recoverable and LASPO Part 2 reversed then this too would enhance litigation funding using the two forms CFA and ATE together.

Other options are open to potential challenge:

- Third party funding because of the PACCAR decision and they may well be further challenges and regulatory uncertainty in future – further this is only available for a very small number of cases (understood to be 40 ever).
- Damages Based Agreements due to their uncertainty as to validity unless and until the regulations are amended as proposed in 2019 by Nick Bacon KC (cf Lord Trevethin and Oaksey in Part I page15) or otherwise
- Crowdfunding (including friends and family donations) because of the uncertainties from *Chapelgate* as to the extent of their liability for adverse costs.
- BTE - both the CJC and Financial Ombudsman Service have set out the problems many face with BTE insurance (see above)
- Civil Legal Aid could be expanded to be more accessible for more cases potentially as another option which has been established for many years.
- Trade Union funding is presumably only for members in limited situations.

**17. Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?**

We refer to Part I and the proposal to amend the Damages Based Agreements Regulations and we agree with Lord Trevethin & Oaksey (page 15) as stated and as to the proposals from Nick Bacon KC in 2019. Clearly PACCAR is one example of the type of challenges to validity that this form of agreement faces.

The PNLA does not recommend changing the Conditional Fee Agreements regime which has now been well established and challenges as to validity are infrequent.

CFA and DBA are inherently different. Lower value claims will not be attractive for DBA. Solicitors and barristers would potentially welcome having the option to choose in particular cases CFA or DBA if they are equally unlikely to be challenged as to validity.

**18. Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?**

ATE insurance with insurance premiums recoverable from losing defendants would be a change which would positively enhance claims especially against very well resourced defendants like professionals and their indemnity insurers. Reversing LASPO Part 2 would be beneficial.

The PNLA does not comment on a public mandatory legal expenses insurance scheme. It probably would face the same problems that existing BTE insurance has – see the CJC report and FOS comments above.

**19. What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?**

ATE insurance relates to the adverse costs risk and usually covers own disbursements. It is commonly used with CFAs but not always. If the lawyers consider a case is very strong indeed they may advise a client not to take it out either at all or perhaps only do so at a late stage in the litigation.

The PNLA does not comment on the relationship with third party funding.

**20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?**

Careful review should be made of the Court of Appeal decision in Chapelgate Credit Opportunity Master Fund Ltd v Money & Ors [2020] EWCA Civ 246 (25 February 2020)
URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2020/246.html*

It is not satisfactory for those donating costs by direct payments like family and friends or via crowd funding websites to be uncertain about their liability to contribute towards the adverse costs if the case loses. Reforms would be a positive step to clarify this and if desired to encourage donations.

**21. Are there any reforms to portfolio that you consider necessary? If so, what are they and why?**

No comment

**22. Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?**

Please see above – introduce Qualified one way Costs Shifting to align medical and non medical professional negligence claims – reversal of LASPO Part 2 as to recovery of CFA success fees and ATE premiums from losing well resourced opponents.

Those mechanisms are particularly appropriate to give effect to CPR 1.1 the overriding objective when there is an imbalance in resources between the parties typical in professional negligence claims against insured professionals to put the parties on an 'equal footing'.

**Questions concerning the role that should be played by 'rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.'**

**23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?**

The PNLA will not attempt any comprehensive response. The Civil Procedure Rules as applied before LASPO Part 2 could be reinstated if ATE premiums and CFA success fees were to become recoverable requiring notice

to be provide to the other party in particular. If QOCS was applied to non-medical and medical professional negligence claims then the applicable

**24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?**

As above.

**25. Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?**

As per 6.51 of the interim report as also cited in the Court of Appeal in *Rowe* the Access to Justice Act 1999 provided that the costs of funding litigation by way of ATE premiums should be recoverable. The PNLA invites the Civil Justice Council to recommend the Government restore this position reversing the S58C of the Courts and Legal Services Act 1990 introduced by S46(1) of LASPO Part 2.

*Rowe & Ors v Ingenious Media Holdings PLC & Ors [2021] EWCA Civ 29 (15 January 2021)*
URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2021/29.html*

The PNLA is interested to see the reference to the arbitration decision in *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd [2016]* where HHJ Waksman QC upheld the arbitrator's award which required the defendant Essar to pay the funder's return which had been calculated at 3x the funding provided and the proposed reforms for general civil litigation to recover the costs of funding as proposed by Professor Rachel Mulheron KC (Hon). If such a reform effectively allowed for the claimants funding costs including ATE premiums as well as third party funding and potentially CFA 'success fees' then this would be welcomed.

**26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?**

The Court has responsibilities for case management and in this response we have emphasized the duties of the parties and the Court in CPR 1.1 the overriding objective and in particular the requirements to have regard to the parties being on an 'equal footing' and the relative financial resources. (see Part I above).

Much more could be done by the Courts to specifically ensure in case management that costly steps are paid for by the wealthier party. Examples include:

d. Disclosure – if a well resourced party has substantial disclosure then they should be required to provide this in a form accessible to the Court and the other party – for example documents individually listed in date order with duplicates removed and key documents identified. This is particularly important in lower value claims especially those where the Fixed Costs Regime applies.

e. Electronic disclosure platforms – a well resourced party should be tasked with the expense of setting up a disclosure platform for disclosed documents to which all the parties, their solicitors, barristers and the Judge can access. This would reduce the usual expensive costs of preparing agreed bundles for hearings and the trial and streamline the references for all concerned. Many Judges prefer bundles to be provided in electronic form. The Courts routinely require claimants to prepare bundles yet they are ill equipped to do so if struggling to fund the claim. Many lack the technical expertise and experience. Indemnity insurers and their panel solicitors notably deal with many thousands of claims annually and should have technical support available to provide such electronic disclosure platforms. Examples available include:

   i. Thomson Reuters Case Centre https://legalsolutions.thomsonreuters.co.uk/en/products-services/case-center.html
   ii. Relativity software available with various suppliers for example https://www.relativity.com/partners/idiscoverysolutions/

f. Transcripts – wealthier parties should be ordered to fund live transcripts at trials and obtaining judgments from official Court transcribers.

g. Court bundles – instead of claimants always having the obligation to prepare Court bundles for hearings – this should be assessed according to the resources of the parties in every case – the onus of preparing the draft bundle for agreement and filing should be directed at the party who can more readily afford it.

It should and could be part of the assessment process by the Courts of the resources of the parties if they have the support of funding by third party funders or insurers. This should influence the Courts to direct the case management to ensure as far as possible the proceedings are conducted on an 'equal footing'.

The Civil Justice Council has recently provided recommendations as to reforms for pre-action protocols enforcement of which by the Courts should, of course, comply in the same way with the overriding objective.

**27. To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?**

Taking the typical professional negligence claim where there is an individual claimant undertaking their only litigation ever and with resources potentially less than £100,000 against an insured professional – solicitors' indemnity insurers are reported as spending around £0.6bn defending multiple claims (see Part III below).

Providing information to the other party and the Court as to the resources and funding is already potentially a requirement under CPR 1.1 the overriding objective. In practice this does not seem to be routinely addressed and yet clearly it should be in every case and the Court are obliged to case manage litigation taking the imbalance in resources into account.

Disclosure of resources, including funding obtained, would assist the Court and the parties to conduct litigation in line with the existing obligations which should potentially be enhanced to ensure that the costs are incurred by the party best able to afford the expense. However this should not stifle access to justice nor inhibit parties from being able to pursue their cases towards a reasonable recovery in the event of success whether by way of damages or costs.

**Questions concerning provision to protect claimants.**

**28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?**

Typically both standard CFA as well as BTE and ATE legal expenses insurance include terms enabling termination if the merits of the claim fall below a certain percentage chance of success as well as provisions requiring co-operation of the funded party. By doing so they inherently include an element of 'control' albeit a party can act as a litigant in person even if their advisers and funders cease to act. Civil Legal Aid is also understood to operate in a similar way.

Further it is typical that BTE and ATE insurers are notified of all offers of settlement and consent to rejection. It is routine therefore that they are in close contact with funded parties during mediations for example. Should they disagree with the party receiving an offer they can decide to cease funding the case if an offer is rejected without their consent. CFA agreements may well also in effect have similar provisions.

The PNLA cannot comment on third party funding agreements which may vary between providers, as indeed can the terms of CFA, BTE and ATE policies. Nevertheless it would be extremely unlikely that 'control' in this sense is absent entirely in any such funding agreement.

This situation should also be assessed by way of the lien solicitors have over legal costs on litigation recoveries described by Lord Briggs as 'a security interest, in the nature of an equitable charge' – see paras 36 and 37 *Gavin Edmondson Solicitors Ltd v Haven Insurance Company Ltd [2018] UKSC 21 (18 April 2018)*
URL: *http://www.bailii.org/uk/cases/UKSC/2018/21.htm*

It is therefore an inevitable part of any litigation for represented parties and funders to have in reality an element of 'control' if they have a financial interest in the proceeds of the litigation. This is not simply an issue of claimants with third party funding or CFA/ATE but all parties in situations where there are funders – whether for example family and friends with an adverse costs risk – or insurers who have a financial interest in the outcome.

The Government and the Courts need to strike a balance within any proposed changes between ensuring access to justice and the ability to fund with the commercial reality that parties may well have to have regard to insurers or funders in decisions as to whether or not cases settle or are discontinued or pursued to trial.

**29. What effect do different funding mechanisms have on the settlement of proceedings?**

Please refer to the response to qu 57. Above.

**30. Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?**

There does not seem to be any purpose in Court approval when the parties make the decision to settle a dispute. There may well be commercial pressures on both parties taking account of incurred and future legal costs. A Court could not potentially assist especially if say funders or lawyers on CFA have approved the settlement and

may not agree to advise or act further even if the Court decide that the settlement is not approved on a strictly legal basis.

**31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?**

No comment

**32. What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?**

The PNLA has previously referred to legislation that was implemented to cap recoveries of personal injury claimants to 25 % of damages. If similar legislation was introduced for third party funding – or other types of funding – then a market for products could develop on this basis.( see s58 of the Courts and Legal Services Act 1990 S4A and The Conditional Fee Agreements Order 2013.)

**33. To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?**

The PNLA refers to the study by Queen Mary University (Part I page 13 above) which states that only 40 cases have been funded by third party funding and that many cases are turned down by funders. If there is a very limited market then the only way to promote choice and comparison would be to implement attractive legislation to encourage more providers.

If ATE premiums were recoverable as per the Access to Justice Act 1999 this successfully developed an active market in ATE insurance. Such insurers could also develop third party funding products if they had a profitable and successful basket of cases. Between 199 and 2013 recovery of premiums from the losing party encouraged many claimants to take out ATE insurance as they were insured against losing and the loser paid the premium. Defendants had the option to fight cases and their adverse costs were insured or to settle strong clams at an early stage.

Thus the Government achieved access to justice – encouraged pre-action settlements – and without costing the tax payer. This is a tried and tested way of attracting multiple funders into the market for comparison purposes by claimants. We refer as above the PNLA ATE Scheme which was terminated in anticipation of LASPO Part 2 on 1 April 2013 and immediately restricted the market in ATE providers.

**34. To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?**

Please refer to the response to question 5 above. It is not possible for solicitors to act if there is a conflict of interest https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/ Rule 6 – 6.1 You do not act if there is an *own interest conflict* or a significant risk of such a conflict. 6.2 You do not act in relation to a matter or particular aspect of it if you have a *conflict of interest* or a significant risk of such a conflict in relation to that matter or aspect of it.

The restricted basis for allowing agreements based on 'no win no fee' is helpfully summarized in the recent Court of Appeal decision of Mr Justice Stuart-Smith as follows:

*Diag Human SE & Anor v Volterra Fietta (Re Assessment Under Part III Solicitors Act 1974) [2023] EWCA Civ 1107 (04 October 2023)* URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2023/1107.html*

16. "Historically, maintenance and champerty were crimes and could give rise to civil liability. That changed in 1967 when section 13(1)(a) of the Criminal Law Act 1967 abolished the criminal offences of maintenance and champerty and section 14(1) provided that no person should be liable in tort for any conduct on account of its being maintenance or champerty. Section 14(2), however, provided that the abolition of criminal and civil liability for maintenance and champerty did not affect any rule of law as to the cases in which a contract was to be treated as "contrary to public policy or otherwise illegal."

17. Until 1990 it was axiomatic that contingency fee agreements entered into by lawyers with their clients were illegal and contrary to public policy, because they gave lawyers an interest in the outcome of the litigation that could create conflicts between the lawyer's interests and those of their client. That axiomatic position was authoritatively restated by Buckley LJ in *Wallersteiner v Moir (No 2)* [1975] 1QB 373 at 401D-E.

18. Because one of the foundations for the public policy rule was the need to avoid conflicts of interest, what is prohibited at common law is not merely entering into an agreement tainted by maintenance or champerty but also acting in accordance with such an agreement. "If anything is against public policy it is the solicitor undertaking *or continuing to act* for a party in litigation in circumstances where the solicitor stands to gain more from the action if it is won than if it is lost.": see *Awwad v Geraghty & Co* [2001] QB 570, 594B-C per Schiemann LJ (emphasis added).

19. Section 58 of the 1990 Act prevents a limited class of agreements from being unenforceable."

As far as reform is concerned the Civil Justice Council might consider recommending a change as referred to at paragraph 21.:…Dyson LJ giving the judgment of the Court in *Garrett v Halton BC* [2006] EWCA Civ 1017, [2007] 1 WLR 554 at [27]-[30] where he said:

> "27. … The starting point must be the language of section 58(1) and (3) of the 1990 Act. It is clear and uncompromising: if one or more of the applicable conditions is not satisfied, then the CFA is unenforceable. **Parliament could have adopted a different model. It could, for example, have**

**provided that where an applicable condition is not satisfied, the CFA will only be enforceable with the permission of the court or upon such terms as the court thinks fit.** There is nothing inherently improbable in a statutory scheme which provides that, if the applicable conditions are not satisfied, the CFA shall be unenforceable with the consequence that the solicitor will not be entitled to payment for his services.

Such a change for both CFAs and DBAs may well promote more confidence in solicitors entering into such agreements because if a mistake is made and the retainer is unenforceable as a DBA or CFA then at least they can hope to receive payment subject to a Court order should a Judge consider this to be appropriate.

As things stand any such defect results in solicitors not being paid at all for work which has potentially been carried out properly and in the clients' best interests. This disastrous outcome acts as a deterrent to many solicitors firms to act for impecunious clients needing this type of funding against wealthy clients able to "pay as they go" on the traditional basis of funding.

The question of reform would necessarily also be an issue for the Solicitors Regulation Authority to the Solicitors Code of Conduct. Similarly any regulation of third party funders would need to address their ability to act in situations of conflict of interest.

The issue of situations where the form of DBAs and CFAs comply with the regulations or can be challenged is complex legally. The PNLA do not seek to provide a complete review of the technical issues but note that expert costs barrister Nicholas Bacon KC (who won the appeal in *Diag*) is a CJC Working Group Member in this consultation and who will be able to provide guidance in exceptional depth.

Nicholas Bacon KC has also recommended changes to the DBA regulations as supported in the House of Lords debate on the Litigation Funding (Enforceability) Bill – cf submission of Lord Trevethin and Oaksey set out above Part I page 15.

**35. Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.**

Uncertainty and the risks of widespread challenge to the enforceability of third party funding agreements as has been found notably in *PACCAR* undermines the policy reasons for allowing this type of funding as a means of access to justice for those otherwise unable to afford to bring claims – like the Bates v The Post Office group action.

Relaxing the regulatory framework as suggested by Lord Dyson in *Garrett* set out above would potentially allow for judicial discretion to be a way forward if, as seems inevitable, challenges by way of technical arguments on enforceability of agreements are raised in the future. This could promote greater confidence and encourage more funders to enter the market giving more choice for clients.

**Questions concerning the encouragement of litigation.**

**36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:**

**a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?**

Litigation is adversarial and therefore this question should take into account the relative resources of those with a dispute which may result in litigation (as required in CPR1.1 the overriding objective).

Tax payers funds for Court proceedings are directly related to the ability of parties to obtain pre-action settlements or the use of alternative dispute resolution.

If the parties are not on 'an equal footing' then the wealthier party may decide to refuse to settle because by driving up the legal costs of litigation they can hope for a lower settlement – or expect that claimants will not issue proceedings at all – even if the other party's claim is meritorious.

See for example *Findcharm Ltd v Churchill Group Ltd [2017] EWHC 1108 (TCC) (12 May 2017)*
URL: *http://www.bailii.org/ew/cases/EWHC/TCC/2017/1108.html*

The Hon. Mr Justice Coulson (as he then was) at paragraph 5:

"In contrast to Findcharm's detailed pleaded claim, Churchill's defence could not be more basic. It is a combination of bare denials and non-admissions of the kind that the Civil Procedure Rules was designed to sweep away. It is, bluntly, an insurer's defence straight out of the 1970's."

The PNLA members have experience recently that insurers are taking this type of approach. Tactically they can afford to do so – many insurers have solicitors working to defend professionals on lower 'panel rates' together with a budget for legal costs which is a tiny fraction of the premium income received annually for professional indemnity insurance. (see Part I page 2 and Part II).

It is only by promoting a finding regime on an 'equal footing' that the Government can encourage even meritorious claims to be settled based on the merits of each individual claim – rather than the overriding factor being the costs risks – and encourage pre-action settlements and alternative dispute resolution.

The Access to Justice Act 1999 regime allowing for recovery of CFA 'success fees' and ATE premiums did promote settlements pre-action and alternative dispute resolution. They deterred wealthy defendants from defending meritorious claims and tactically promoted early resolution of disputes because of merit. In contrast

LASPO Part 2 has revered this by tactically encouraging strong defences to meritorious claims to deter claims being brought either at all or driving claimants to accept low offers of settlement due to the costs risks including the ever increasing reduction in their damages by paying 'success fees' and ATE premiums out of their damages as the case approaches trial.

**b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?**

No. All forms of litigation funding require an assessment of the percentage chances of success. The Queen Mary University study for the Legal Services Board (Part I page 13 above) supplies data about the number of cases provided to third party funders and the percentage rejected one important factor being the merits.

Solicitors typically have rigorous internal procedures before offering funding by way of Conditional Fee Agreements or Damages Based Agreements. A key factor will be examination of the merits. Further as stated above clients must be provided with information to make informed decisions about their options (Solicitors Code 8.6) and a costs –risk – benefit analysis including an arithmetical calculation (see Part I) provided for this purpose will include the merits as a major factor.

ATE insurers typically require a barrister's opinion at 60% chance of success before offering cover.

This natural filtration will make it virtually impossible for vexatious litigants or those without merit to obtain litigation funding.

**( c) Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so? When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.**

The drama Bates v The Post office covered the stage where the solicitors advised Alan Bates that to obtain funding he needed to find 500 sub-postmasters to bring a claim. This is an onerous task for any claimant to bring about.

Few such claims obtain third party funding (40 claims of all types including group actions ever funded as stated in the Queen Mary University study of March 2024 Part I page 13).

Indeed far from encouraging such claims it seems more likely that only the strongest feelings of injustice could bring about groups willing to bring such actions and on the basis – as for the sub-postmasters. The drama indicates their reasons were to find out the truth rather than profit from the litigation.

The financial recovery for the claimants in all such actions would be limited because the damages would be reduced to pay litigation funders. (see Part I). This would apply whichever litigation funding type was available and used.

**37. To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.**

Litigation funding is likely to encourage cases where there is a significant chance of financial recovery for cases with strong merits.

Reforms should be in place to allow such cases to proceed based on a reasonable costs-risk –benefit calculation to promote recovery of damages which reflect the financial loss even after deduction of litigation funding costs.

The Access to Justice 1999 regime did largely achieve this objective by way of recoverable CFA ‘success fees’ and ATE premiums.

**38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?**

An individual trying to find a solicitor to act with litigation funding may well have difficulty even if they are sufficiently skilled to carry out extensive internet searches.

The PNLA have a ‘browse members’ function on the website https://www.pnla.org.uk/do-you-need-a-lawyer/

allowing for searches targeting likely solicitors with expertise and also to those offering Legal Aid or discounted fees – the latter including CFA and DBA potentially albeit many will charge some fees for an initial review. There is an information section on this webpage for those who cannot afford lawyers.

Much more information could be made available by the Ministry of Justice to assist those looking for representation.

- Following up the drama Bates v The Post office and enhance understanding and training about costs risks, litigation funding and the types of cases and information/evidence needed to comply with the Civil Procedure Rules.
- Discounted fee and pro bono – creation of a central register showing areas of expertise for solicitors and barristers offering discounted fees or pro bono representation would be helpful.
- Improved information support and referrals by:
    - County and High Court staff
    - Members of Parliament in their constituencies – and to encourage interaction with local solicitors and barristers offering such services.
    - Ombudsmen, Regulators and tribunal staff
- Civil Legal Aid financial limits should be easily available to assess own financial eligibility.
- Civil Legal Aid – direct contact details to franchised solicitors with the right areas of expertise could be made more accessible.

## General Issues

**39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?[8]**

**Complexity of the Civil Procedure Rules** favours wealthier parties. The White Book is only available to experienced and well resources parties. Wholesale reform to simplify the procedure and reduce legal costs should be considered. One key example is the Disclosure Pilot Practice Direction 57AD in the Business & Property Courts which is exceptionally complicated in practice and is widely unpopular and should be reviewed.

[8] Please note that the Working Party is not considering civil legal aid.

Simplifying Court procedures would make the Courts more accessible to litigants in person who cannot afford representation as well as potentially reduce the legal costs facilitating more representation we refer to the comments of Lady Rose in Part I page 7.

**Online assistance** – the High Court Ce-filing system has been a huge benefit to reduce costs and increase accessibility. It also has the very useful public search facility.

By contrast the County Court MyHMCTS system is difficult to access and appears impossible by litigants in person – stating "Currently only legal representative organisations registered with MyHMCTS and that have agreed to accept email notifications can use the online service."

For professionals negligence claims typically they are not for a fixed sum of money and the money claims portal is therefore not suitable – but this service may also not be helpful or even possible unless the other side's solicitors are registered as well. It also does not have a public search facility to access the Court file which would be particularly helpful if a litigant in person seeks representation after proceedings are issued - https://www.gov.uk/government/publications/myhmcts-how-to-make-a-damages-claim-online/issue-a-claim-for-damages-with-myhmcts

## Part III DATA including PNLA survey responses

Data is difficult to obtain on the number of professional negligence claims generally. There is no data about claims which are simply turned away or fail the costs–risk-benefit calculation. The PNLA has not attempted a statistical analysis which is potentially possible by the Ministry of Justice based on this and more data – notably filed costs budgets. However the following facts can be ascertained:

**Judicial statistics – referred to in Part II**

https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2024
https://assets.publishing.service.gov.uk/media/666094e7d470e3279dd3367d/Royal_Courts_of_Justice_Annual_Tables-_2023.ods

**Law Society – Find a Solicitor – tracking expertise in professional negligence:**

| Date | Professional Negligence | Clinical Negligence | Total Solicitors |
|---|---|---|---|
| 30 August 2018 | 5318 | 4006 | 169,561 |
| 4 February 2025 | 5159 | 3988 | 204,654 |

As at 4 February 2025 there are 11,725 practices listed (excluding in-house teams, government departments and other employers)

**Law Society Annual Review of Market Trends in Professional Indemnity Insurance**

Annual data is published by the Law Society. The review of 2022/2023 is at this link:

file:///C:/Users/MTASUS/Downloads/latest-trends-in-pii-for-law-firms-key-summary-july-2023%20(1).pdf

Notable extracts:

"For the last three years, the professional indemnity insurance (PII) market in England and Wales and globally has been hardening at a rate not seen since 2001/02. Capacity has reduced, competition is limited, premium rates and excesses have been increasing, with insurers taking a highly selective approach to the risks they choose to cover. Insurance rates have continuously risen over the past few years, at a time when solicitors and law firms have faced the twin challenges of the COVID-19 pandemic and the economic impact of the war in Ukraine. Fortunately, we are starting to see signs that market stability and confidence is returning – although the challenge is not over yet."

Point 3: "Cost of compulsory PII (by size of firm)

Median cost of compulsory cover increased the most for firms with 5-10 partners up 23% on the previous years' costs and for sole practices, an increase of 15%. Overall, the median cost increased by 12%:

- 2017/18 median cost of compulsory insurance cover £12,300*
- 2021/22 medial cost of compulsory cover £14,200
- 2022/23 median cost of compulsory cover £16,000"

The median premium therefore at £16,000 for 11,725 solicitors practices amounts to an annual premium for 2022/23 of £187,600,000 to professional indemnity insurers for solicitors.

**Solicitors Regulation Authority "Reflecting on Solicitors Professional Indemnity Insurance (PII): market trends and analysis of historic claims data"**

https://www.sra.org.uk/globalassets/documents/sra/consultations/indemnity-insurance-claims-data.pdf?version=494800

This includes an analysis of historic claims data from 2004 to 2014. Data provided includes that 1 in 5 claims resulted in indemnity payments, 98% of claims were settled for less than £580,000 and that over a 10 year period £0.6bn was incurred by solicitors' indemnity insurers in legal costs defending claims (page 28) – this amounts to £60 million per annum.

**Lockton – The Art of Underwriting**

https://www.locktonsolicitors.co.uk/cmsUploads/news/files/The_Art_of_Underwriting.pdf

This is a review of solicitors professional indemnity insurance from a leading insurance broker including claims trends from 2013 to 2017 see page 2 for a breakdown of claims as to area of law – 35% being the highest for 'Conveyancing-Residential' and the graph showing a sharp decline in claims since the introduction of LASPO Part 2 on 1 April 2013.

This data is understood to come from insurers and includes claims which were not issued in Court.

**PNLA Surveys Post LASPO Part 2**

The PNLA have carried out two surveys concluding on 24 August 2018 and 3 February 2025 using similar questions to try and obtain some data about the changes in the volume of claims pursued and cases turned away. The 2025 survey includes an additional question about recovery of ATE premiums.

Copies are attached.

Responses to PNLA survey Question 10

Showing 14 responses

LASPO has had a major adverse impact on the economics of the average professional claim especially for individuals and SMEs, making many commercially unviable. david.bailey@healys.com 1991

8/23/2018 12:11 PMView respondent's answers

LASPO Part 2 has resulted in a large number of claims, particularly those valued in the hundreds of thousands to low millions not being capable of being brought due to the cost of ATE in the market.

8/22/2018 2:24 PMView respondent's answers

It is increasingly difficult to run lower value cases, by which I mean say £30k-£100k cases, but they are very important to the client. ATE premiums and albeit limited success fees eat into damages considerably at this level of quantum. now often having to charge zero success fee but counsel does not understand this. Court fees also an issue for the already financially damaged private client. Chris Cooney Campbell Courtney and Cooney chris@ccc-law.co.uk 1985 qualified

8/21/2018 5:27 PMView respondent's answers

LASPO has, and continues, to massively restrict access to justice which is a right that should be enjoyed by all people; individuals and businesses alike. The pendulum has swung too far in favour of the Defendant and Claimant lawyers are left either having to take much reduced success fees in order to remain competitive, or have to turn away what otherwise may be a viable claim on account of the various risks associated with this complex area of law. Whilst not a direct result of LASPO, the increase in issue fees means that Defendants often do not consider pre-action settlement and instead wait to see whether the Claimant will actually make good and issue proceedings - however, LASPO has affected such decisions on account of the increase in ATE premiums and additional success fee which would become due as a result of issuing.

8/21/2018 2:56 PM

Inability to afford ATE cover for claims sub £150k has a huge deterrent effect on professional indemnity claims. Claimants with claims of this order generally cannot afford to lose claims and having to pay the ATE premium to provide protection makes these claims prohibitively expensive to run. PI Insurers are now taking a much tougher line as a result and not bothering to settle claims but to see if the claimant has the resource/nerve to commence proceedings. Michael Lent ml@lexentpartners.com Lexent Partners Ltd 1978

8/21/2018 9:10 AMView respondent's answers

It’s very hard to find a fair system on costs that achieves fairness proportionality and access to Justine and I personally think this might be the best option
8/20/2018 4:42 PMView respondent's answers

The funding of the claims is more challenging and hence less claims get off the ground
8/20/2018 2:29 PMView respondent's answers

The biggest problem for Prof Neg clients is that they get all of the negatives (ie non-recoverability of additional liabilities and liability for adverse costs) with none of the positives such as QOCS or increased damages. Seems manifestly unfair. David Wingate david.wingate@wesolicitors.com we solicitors llp 1999
8/20/2018 2:04 PMView respondent's answers

claimants have less access to justice if they cannot afford litigation and who can?
8/20/2018 11:18 AMView respondent's answers

There has been a dramatic reduction in access to justice since the introduction of Laspo Part 2. The withdrawal of the recoverability of ATE premiums has been devastating. Because of the potential adverse costs of £200,000 or more for most Professional Negligence cases there are no actions which do not require ATE insurance. However the cost of the ATE insurance means that we have got to the stage where there is often little economic sense in proceeding with cases with a less than £500,000 value. Furthermore the non recoverability of success fees combined with the non recoverability of ATE policies combined with the issue of proportionality of costs may mean that a successful Claimant only recovers say £200,000 to £250,000 of a £500,000 claim and even less with smaller claims
8/9/2018 1:40 PMView respondent's answers

My experience as a defence lawyer is that more claims are settling or being abandoned at the protocol stage, which would previously have been litigated. I assume this is down to lack of funding, combined with higher court fees.
8/9/2018 10:43 AMView respondent's answers

There is no doubt that LASPO has affected professional negligence claims. As a claimant lawyer I have seen LASPO directly impact in two separate areas: 1. the inability of claimants to pursue genuine claims where the value of the claim is below circa £50-75,000 given the (a) the inability to fund the claim via CFA (in particular the impact of the success fee on any damages recovered) and the risk of paying the defendant's costs particularly where ATE premiums and/or 3rd party funders fees remain excessive; 2. That Defendant lawyers force claimants to now issue proceedings much more than previously as they know that many claimants with good but low value claims are unlikely to want to issue and serve proceedings given the financial burden.
8/9/2018 10:27 AMView respondent's answers

Please comment on the current position & any suggestions for change or alternatives - The current system rewards professional negligence and litigation funders and ATE insurance providers but undercompensates all claimants. In addition to not recovering all their costs (the current approach to assessing costs does not need to be changed), all claimants other than the super-rich lose out because they have to pay ATE premiums and either success fees to their lawyers or multiples of funding to litigation funders. Given that almost all claims settle for a percentage of damages, the net recovery for claimants is limited whilst the defendants and their insurers get away with paying out less than 100% of the claim value.
David McIlroydmcilroy@forumchambers.com Forum Chambers

The vast majority of cases I see range from £25k to £250k . Of these cases a large proportion range from £25k to £100k. It is almost now impossible to get these cases off the ground given the likely costs (of both sides) - this is the case even if a CFA is offered to the Claimant. Secondly it is highly improbable that ATE insurance is cost effective meaning any damages awarded are heavily impacted as a result of ATE premiums and success fees.
I also think that defendants/their PII/panel solicitors are actively slowing matters down, taking unnecessary points with a view to increasing claimant's costs in the hope that cases are dropped. Whilst I appreciate this can be a legitimate tactic there are no longer parity of arms in prof neg disputes meaning claimants are more likely to either not bring a claim or give up after receipt of a letter of claim.
Happy to discuss further. Dan Brumpton daniel.brumpton@nelsonslaw.co.uk
Head of Commercial Litigation and Professional Negligence

Please comment on the current position & any suggestions for change or alternatives - Premiums should not be recoverable pre-action, but if D is simply playing games, they have plenty of opportunity to settle pre-action. So ATE should then become applicable post issue, to level the playing field

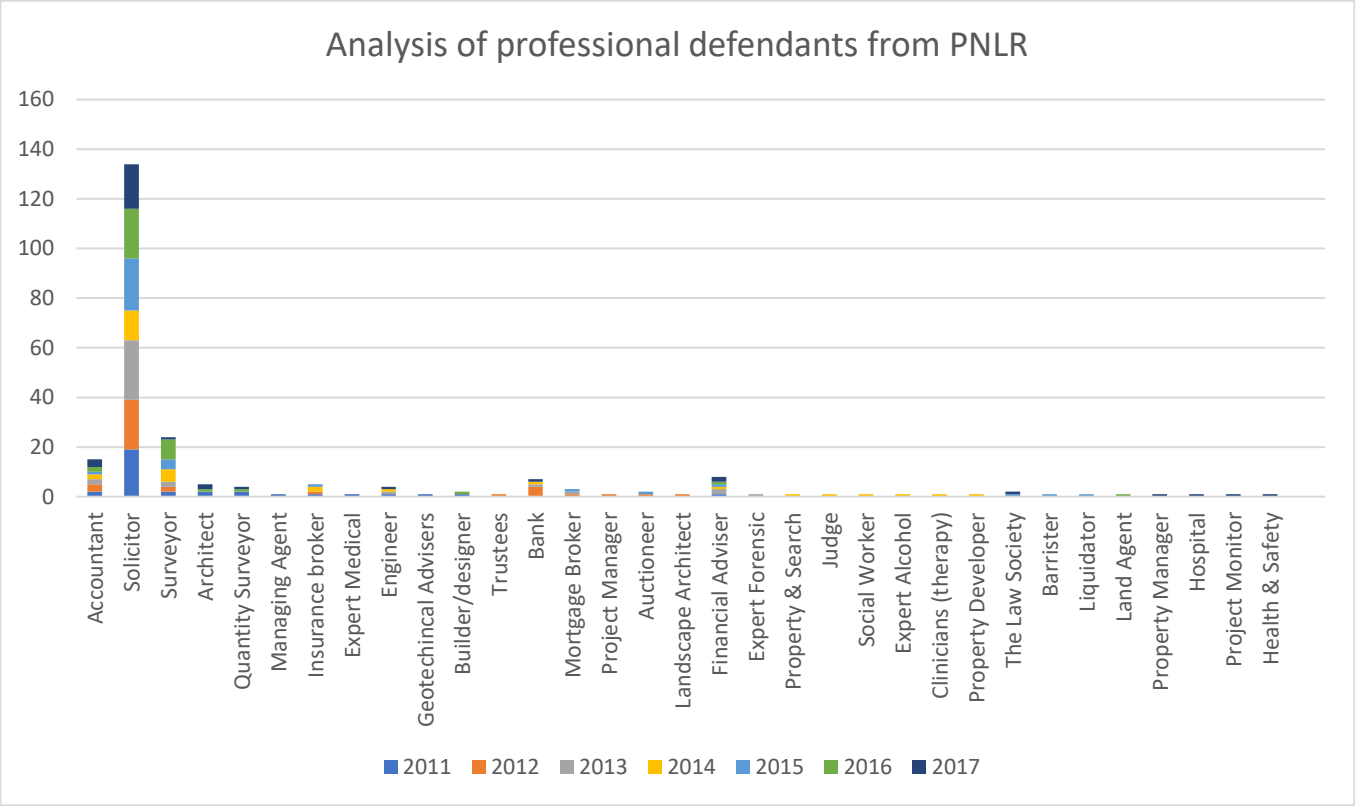
It has swung the pendulum too far in favour of Ds who are already well resourced - when by definition, a C has lost something already. Balance needs to be re-introduced.

Mark Osgood, Trethowans, mark.osgood@trethowans.com

**THE PROFESSIONAL NEGLIGENCE LAW REPORTS (PNLR)**

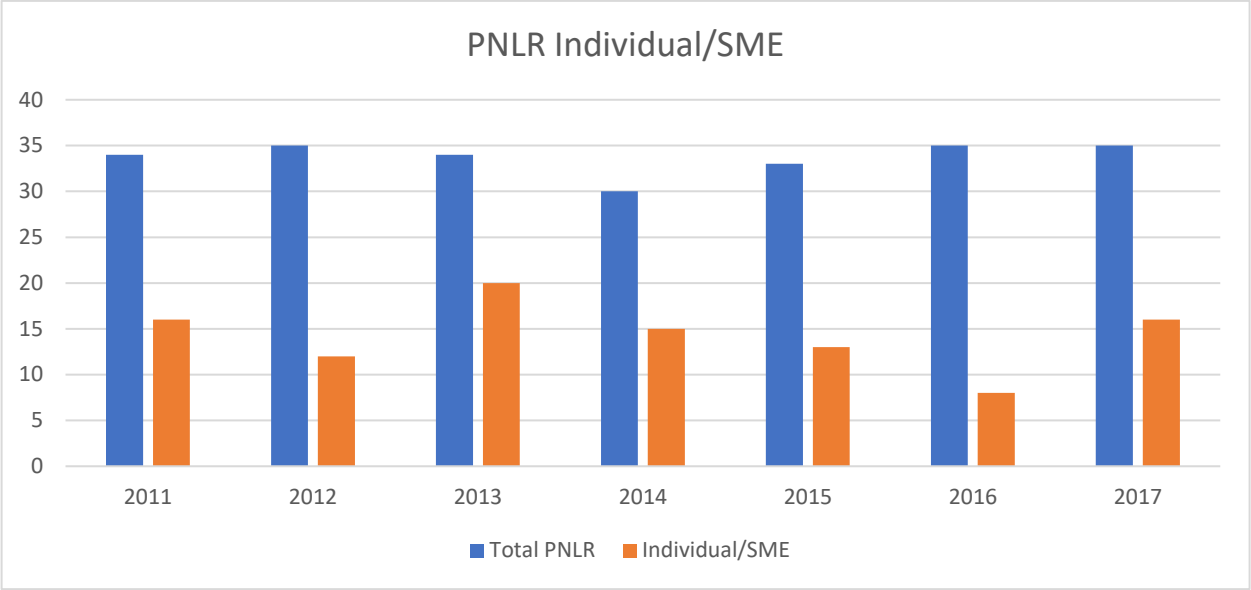
These reports are publicly reported judgments after trial. They are a useful resource both as to the type of claims arising as well as the complexity and diversity of the factual and legal issues. It is also worth noting that there are potentially other resources for law reports about this type of action including specifically BAILLI https://www.bailii.org/ where further and different data could be obtained for further analysis.

Data has been extracted from the annual volumes of the PNLR for the years 2011 to 2017




We refer to the chart below which is an analysis of the PNLR as the type of claimant. Lord Justice Briggs in the 2016 report The Civil Courts Structure Review states that this is the group with inadequate access to justice.

It should be noted that a reasonable assessment was made from reading the judgment about whether a party was an individual or SME. Group actions for individuals have been included as one party. Further some are representatives of say a deceased or bankrupt individual

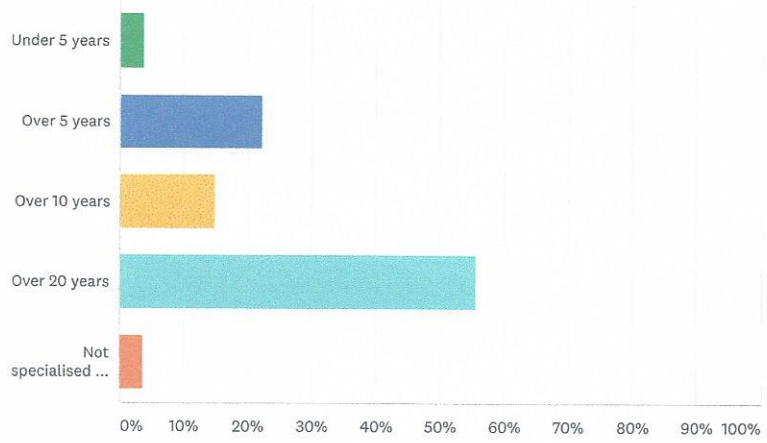

PNLR Individual/SME
40
35
30
25
20
15
10
5
0
2011
2012
2013
2014
2015
2016
2017
Total PNLR
Individual/SME

# Review of 'LASPO' PART 2

Q1

## Specialisation in professional negligence, if yes

Answered: 27 Skipped: 0

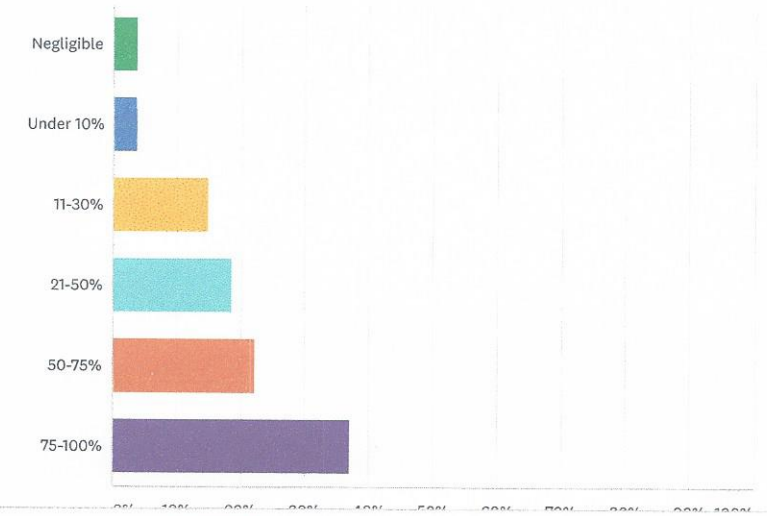



| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Under 5 years | 3.70% | 1 |
| Over 5 years | 22.22% | 6 |
| Over 10 years | 14.81% | 4 |
| Over 20 years | 55.56% | 15 |
| Not specialised in Professional Negligence | 3.70% | 1 |
| TOTAL | | 27 |

Q2

## Professional negligence and liability estimated percentage of your practice for the 5 years before and after LASPO came into force on 1 April 2013 - PERCENTAGE OF YOUR PRACTICE PRE LASPO

Answered: 27 Skipped: 0





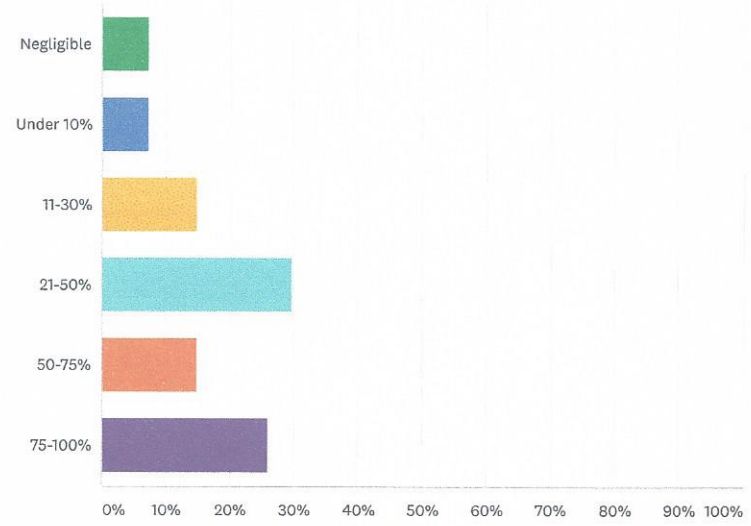

27 responses

| | | |
|---|---|---|
| Negligible | 3.70% | 1 |
| Under 10% | 3.70% | 1 |
| 11-30% | 14.81% | 4 |
| 21-50% | 18.52% | 5 |
| 50-75% | 22.22% | 6 |
| 75-100% | 37.04% | 10 |
| **TOTAL** | | **27** |

**Q3**

## Professional negligence and liability estimated percentage of your practice for the 5 years before and after LASPO came into force on 1 April 2013 - PERCENTAGE OF YOUR PRACTICE POST LASPO

Answered: 27 Skipped: 0

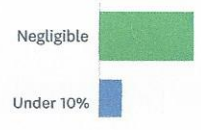


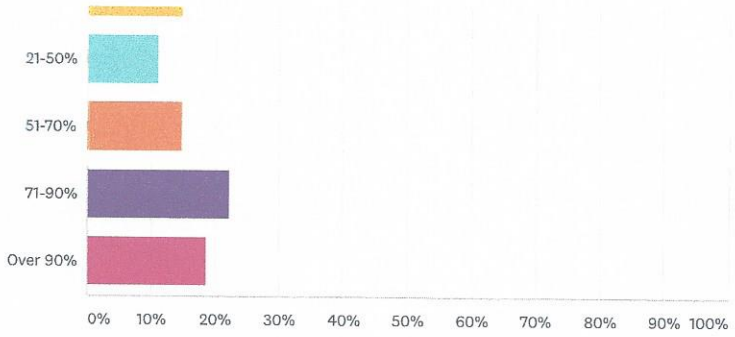

| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Negligible | 7.41% | 2 |
| Under 10% | 7.41% | 2 |
| 11-30% | 14.81% | 4 |
| 21-50% | 29.63% | 8 |
| 50-75% | 14.81% | 4 |
| 75-100% | 25.93% | 7 |
| **TOTAL** | | **27** |

**Q4**

## Are fewer cases settled under the protocol pre-action after LASPO? Please provide your estimated percentage of the number of claims settled pre-action in the 5 years before and after LASPO came into force on 1 April 2013 - SETTLED PRE ACTION "PRE" LASPO

Answered: 27 Skipped: 0



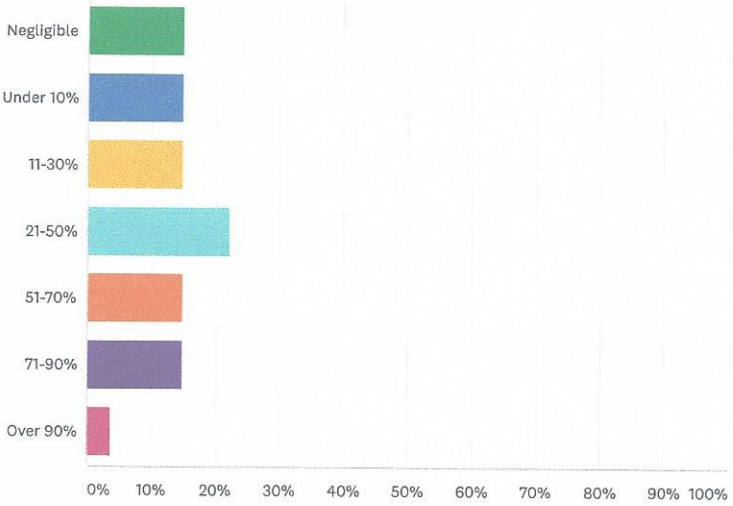



| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Negligible | 14.81% | 4 |
| Under 10% | 3.70% | 1 |
| 11-30% | 14.81% | 4 |
| 21-50% | 11.11% | 3 |
| 51-70% | 14.81% | 4 |
| 71-90% | 22.22% | 6 |
| Over 90% | 18.52% | 5 |
| TOTAL | | 27 |

Q5

## Are fewer cases settled under the protocol pre-action after LASPO? Please provide your estimated percentage of the number of claims settled pre-action in the 5 years before and after LASPO came into force on 1 April 2013 - SETTLED PRE ACTION "AFTER" LASPO

Answered: 27 Skipped: 0

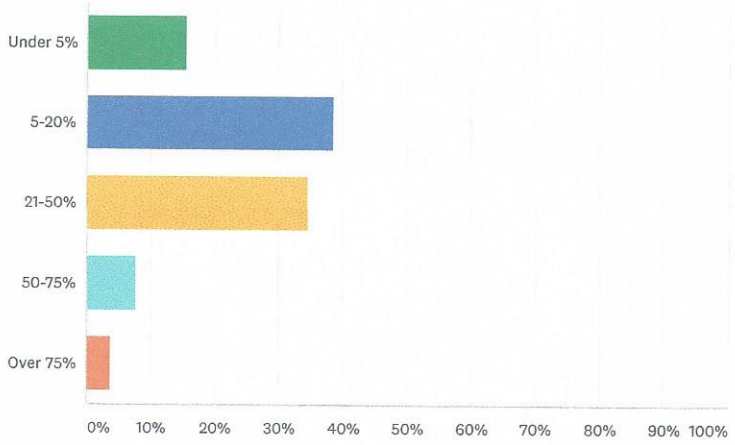



| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Negligible | 14.81% | 4 |
| Under 10% | 14.81% | 4 |
| 11-30% | 14.81% | 4 |
| 21-50% | 22.22% | 6 |
| 51-70% | 14.81% | 4 |
| 71-90% | 14.81% | 4 |
| Over 90% | 3.70% | 1 |

## Q6

### Are more cases turned away post LASPO by claimant lawyers? Please provide your estimated percentage difference between claims which you accepted to proceed in the 5 years before and after 1 April 2013 - REJECTED CLAIMS "PRE" LASPO

Answered: 26 Skipped: 1

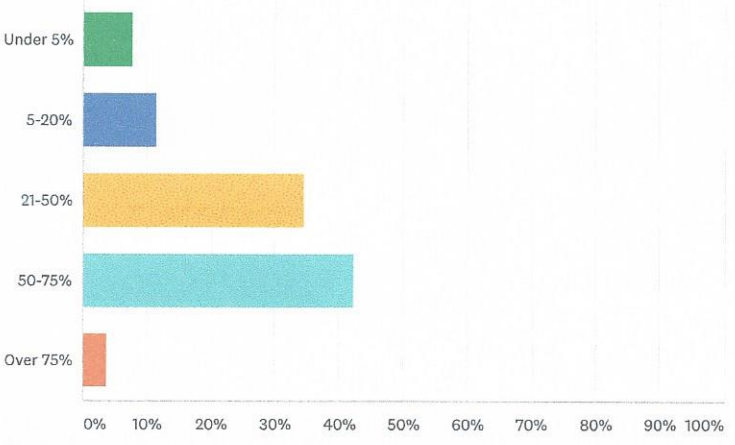



| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Under 5% | 15.38% | 4 |
| 5-20% | 38.46% | 10 |
| 21-50% | 34.62% | 9 |
| 50-75% | 7.69% | 2 |
| Over 75% | 3.85% | 1 |
| TOTAL | | 26 |

## Q7

### Are more cases turned away post LASPO by claimant lawyers? Please provide your estimated percentage difference between claims which you accepted to proceed in the 5 years before and after 1 April 2013 - REJECTED CLAIMS "AFTER" LASPO

Answered: 26 Skipped: 1

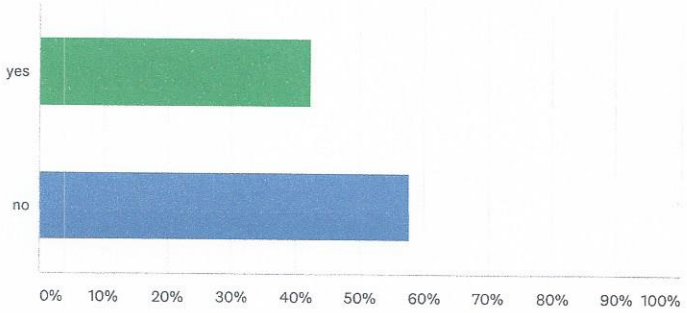


| | | |
|---|---|---|
| Under 5% | 7.69% | 2 |
| 5-20% | 11.54% | 3 |
| 21-50% | 34.62% | 9 |
| 50-75% | 42.31% | 11 |
| Over 75% | 3.85% | 1 |
| TOTAL | | 26 |

Q8

## If Qualified One Way Costs Shifting was introduced (as for claims against medical professionals) do you think financial limits should apply to claimants? - Individuals and SMEs

Answered: 26 Skipped: 1

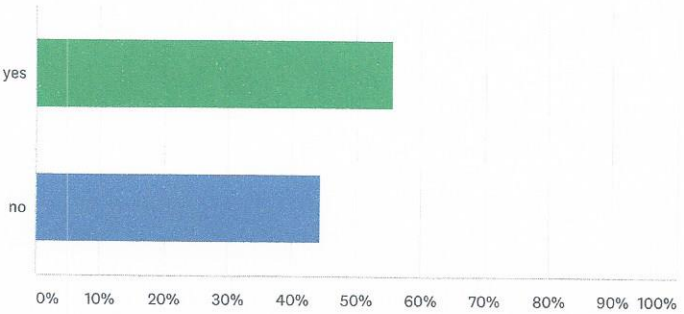



| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| yes | 42.31% | 11 |
| no | 57.69% | 15 |
| TOTAL | | 26 |

Q9

## If Qualified One Way Costs Shifting was introduced (as for claims against medical professionals) do you think financial limits should apply to claimants? - Other types of claimant

Answered: 27 Skipped: 0




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| yes | 55.56% | 15 |
| no | 44.44% | 12 |
| TOTAL | | 27 |

Q10

Please explain your views as to the impact of LASPO Part 2 in relation the changes in the percentages referred to above or otherwise. (Please also add Name, Email, Practice and Year of qualification here – so we can get in touch with any supplemental questions).

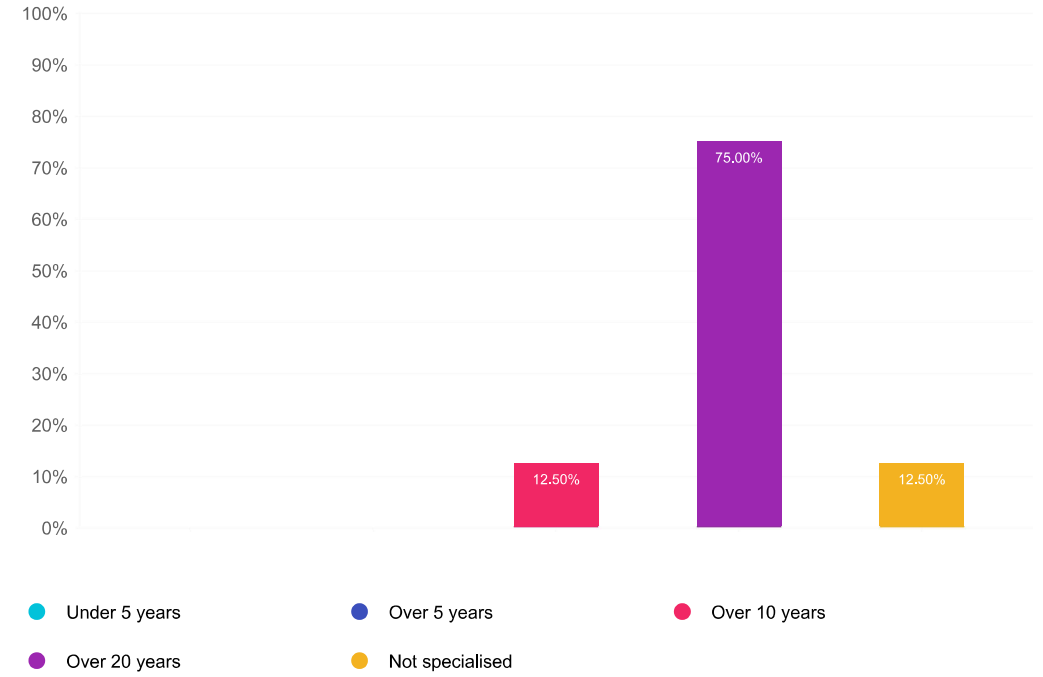
Answered: 14 Skipped: 13

## Response Statistics

| 8 | 8 | 0 |
|---|---|---|
| Total Responses | Completed Responses | Partial Responses |

Q1

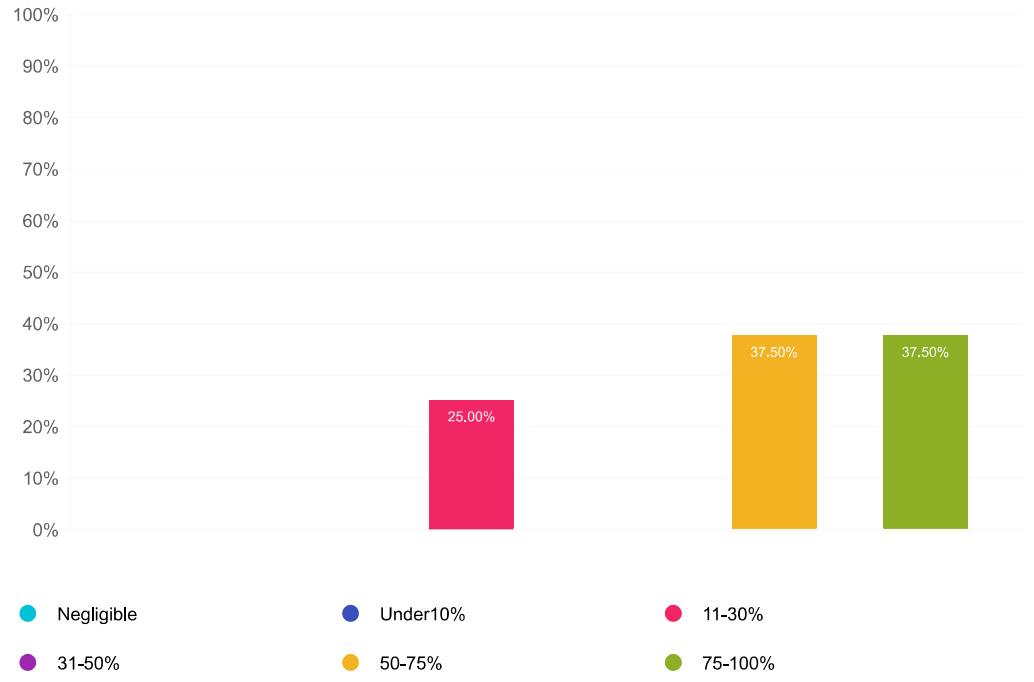
## 1) Specialisation in Professional Negligence law?




| Choices | Response percent | Response count |
|---|---|---|
| Under 5 years | 0.00% | 0 |
| Over 5 years | 0.00% | 0 |
| Over 10 years | 12.50% | 1 |
| Over 20 years | 75.00% | 6 |
| Not specialised | 12.50% | 1 |

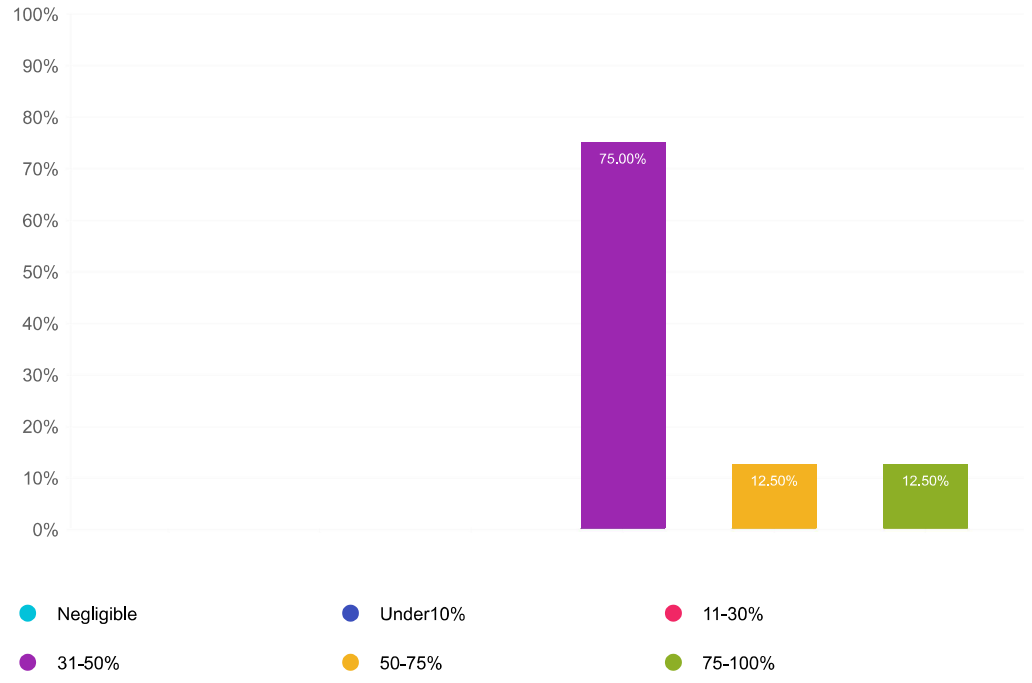
Q2

2) LASPO came into force on 1 April 2013 - % OF YOUR PRACTICE 5 years PRE LASPO



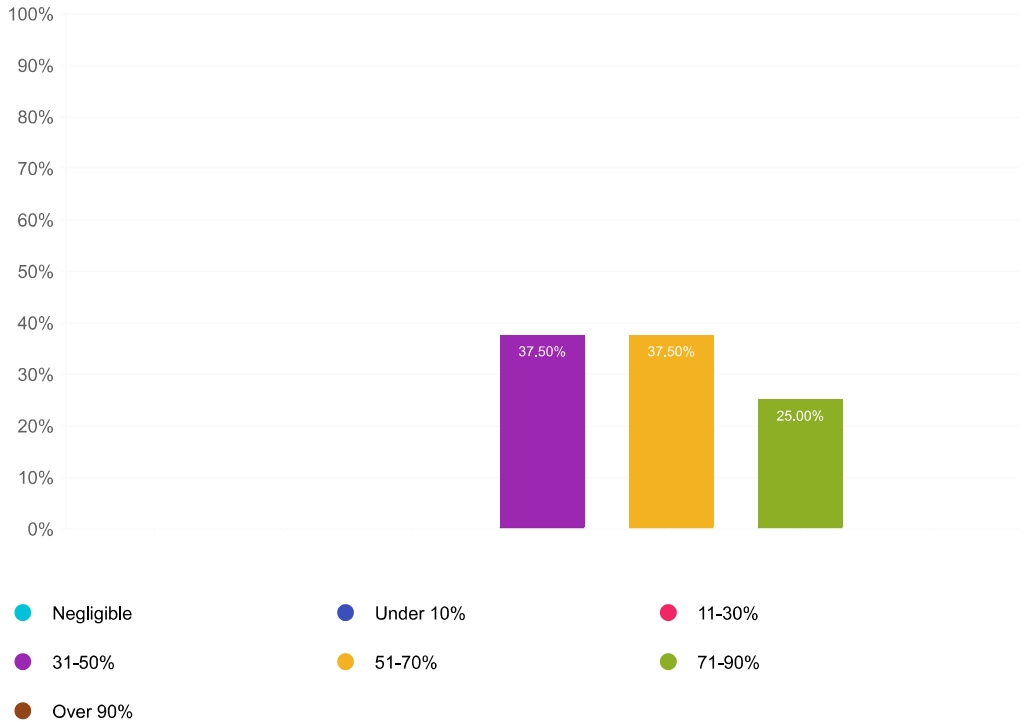
Q3

3) LASPO came into force on 1 April 2013 - % OF YOUR PRACTICE POST LASPO



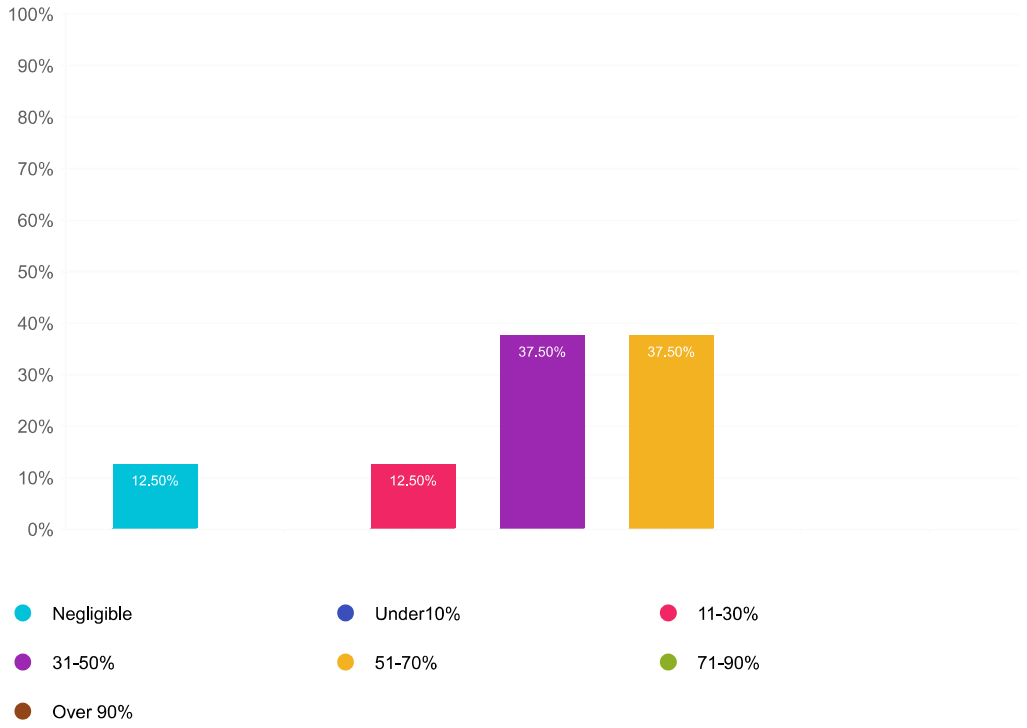
Q4

4) Are fewer cases settled under the protocol pre-action after LASPO? Estimated % of the number of claims settled pre-action in the 5 years before (1 April 2013)



Q5

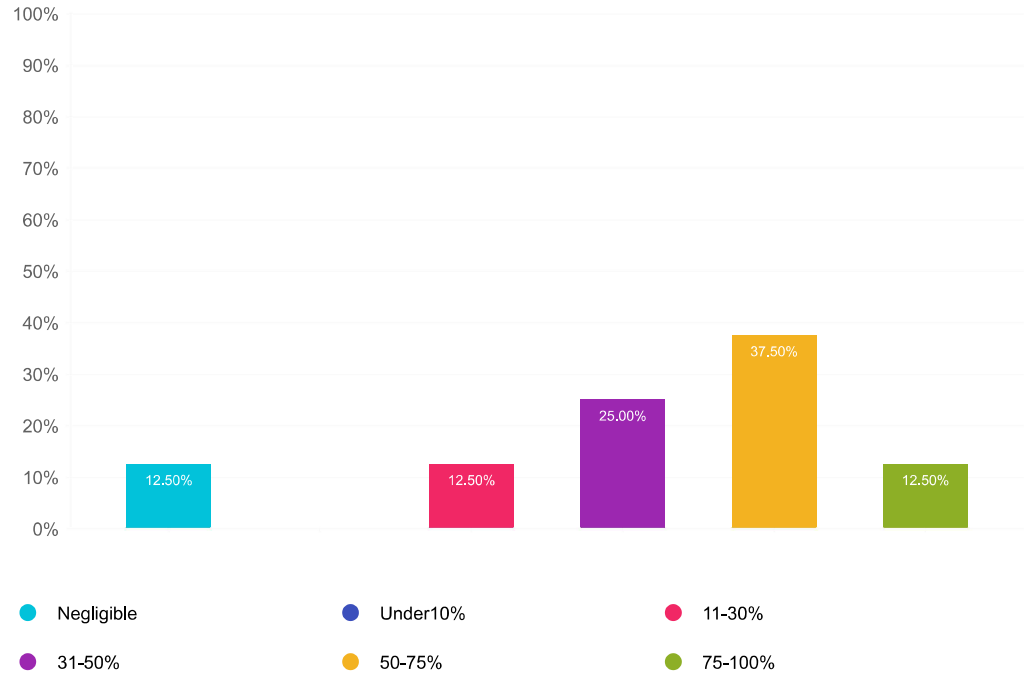
5) Are fewer cases settled under the protocol pre-action after LASPO? Estimated % of the number of claims settled pre-action after LASPO (1 April 2013)



Q6

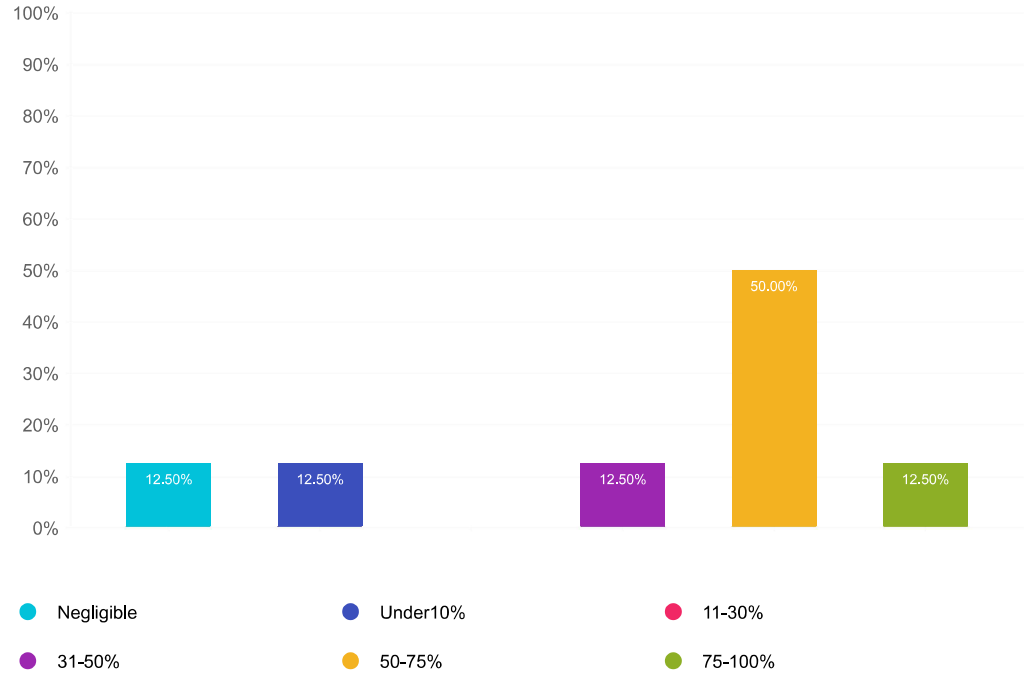
6) Are more cases turned away post LASPO by claimant

lawyers? Please provide your estimated % difference between claims which you accepted to proceed in the 5 years before



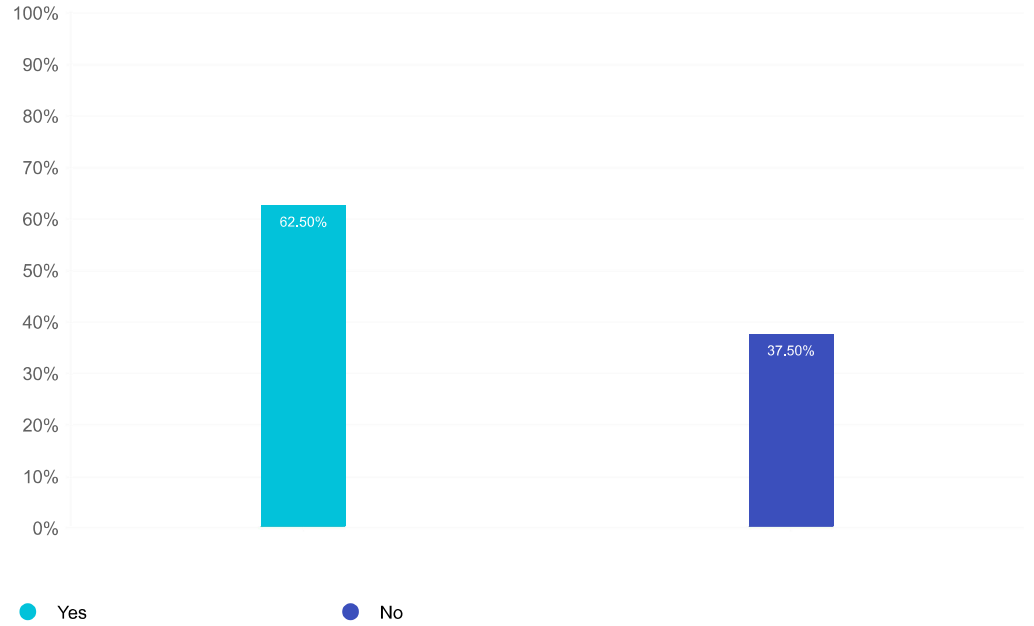
Q7

7) Are more cases turned away post LASPO by claimant lawyers? Please provide your estimated percentage difference between claims which you accepted to proceed after (LASPO) 1 April 2013



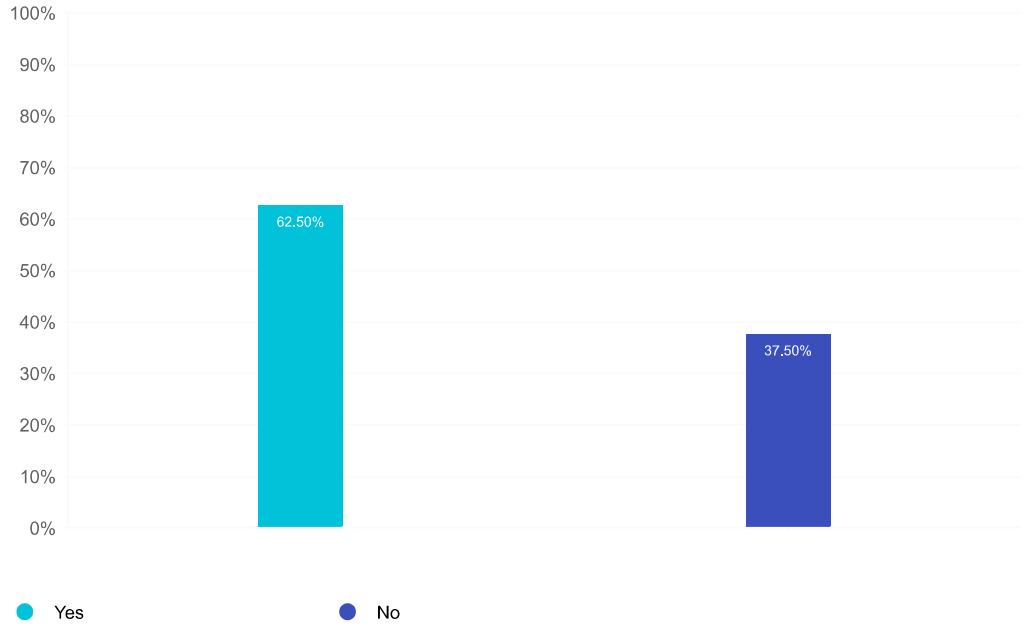
Q8

8) If Qualified One Way Costs Shifting was introduced (as for claims against medical professionals) do you think financial limits should apply to claimants? - Individuals and SMEs



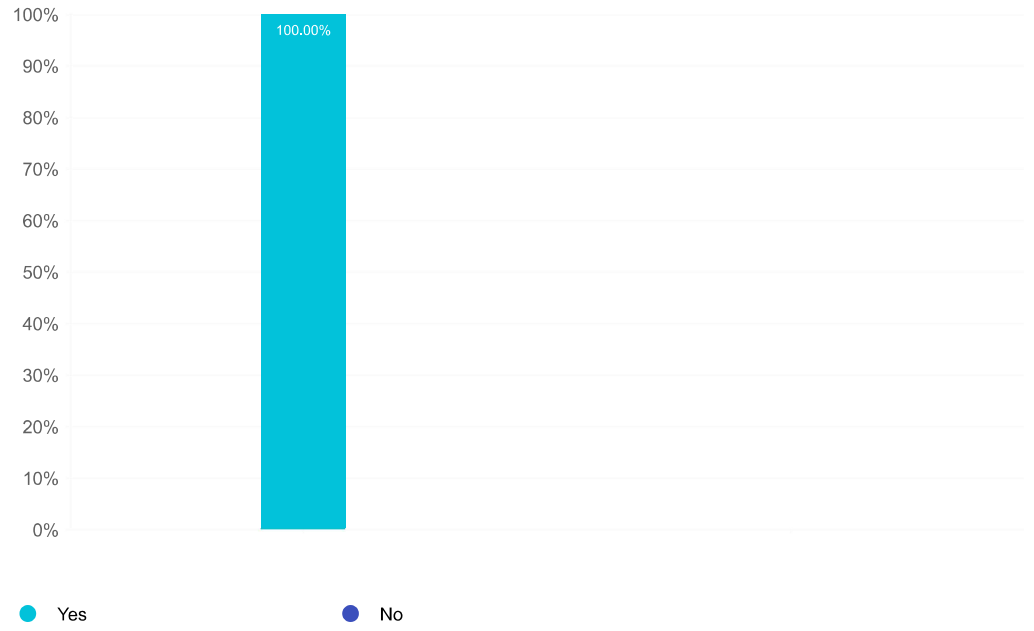
Q9

9) If Qualified One Way Costs Shifting was introduced (as for claims against medical professionals) do you think financial limits should apply to claimants? - Other types of claimant



Q10

10) Do you think that ATE premiums should be recoverable from losing opponents?



Q11

11) Please explain your views as to the impact of LASPO Part 2 in relation the changes in the percentages referred to above or otherwise. (Please also add Name, Email, Practice and Year of qualification here - so we can get in touch with any supplemental questions).

1. LASPO reduced the chances of settlement. Katy Manley BPE Katy.manley@bpe.co.uk BPE Solicitors LLP 1989
2. It has swung the pendulum too far in favour of Ds who are already well resourced - when by definition, a C has lost something already. Balance needs to be re-introduced. Mark Osgood, Trethowans, mark.osgood@trethowans.com,
3. The vast majority of cases I see range from £25k to £250k . Of these cases a large proportion range from £25k to £100k. It is almost now impossible to get these cases off the ground given the likely costs (of both sides) - this is the case even if a CFA is offered to the Claimant. Secondly it is highly improbable that ATE insurance is cost effective meaning any damages awarded are heavily impacted as a result of ATE premiums and success fees. I also think that defendants/their PII/panel solicitors are actively slowing matters down, taking unnecessary points with a view to increasing claimant's costs in the hope that cases are dropped. Whilst I appreciate this can be a legitimate tactic there are no longer parity of arms in prof neg disputes meaning claimants are more likely to either not bring a claim or give up after receipt of a letter of claim. Happy to discuss further. Dan Brumpton daniel.brumpton@nelsonslaw.co.uk Head of Commercial Litigation and Professional Negligence Qualified 2004
4. David McIlroy dmcilroy@forumchambers.com Forum Chambers 1995