

THE **LAW SOCIETY**  
OF NORTHERN IRELAND



Report into  
**Third Party Capture**



[www.lawsoc-ni.org](http://www.lawsoc-ni.org)

## About The Law Society of Northern Ireland

The Law Society of Northern Ireland is the professional body which has the authority to discipline, educate and regulate practising solicitors in Northern Ireland.

Since its establishment in 1922 under Royal Charter, The Law Society of Northern Ireland has played a positive and contributory role in helping to shape the legal system within Northern Ireland.

Under the Solicitors' (Northern Ireland) Order 1976, the Law Society acts as the regulatory authority governing the education, accounts, discipline and professional conduct of solicitors in order to maintain the independence, ethical standards, professional competence and quality of services offered to the public.

It carries out these functions to ensure that solicitors receive the highest level of support and that their clients receive the required standard of work.

## Membership of the Law Society of Northern Ireland

The Law Society of Northern Ireland represents over 2400 solicitors.

The Society is composed of an elected Council of 30 members, all practising solicitors, who serve on a voluntary basis.

The Council is guided by the Presidential team which consists of the **President, Senior Vice President and Junior President.**

Each member of the Presidential team is elected to office and serves a year in each of the three positions.

A list of current Council members and the Presidential team of The Law Society of Northern Ireland is available for download from [www.lawsoc-ni.org](http://www.lawsoc-ni.org)

## Membership of the Litigation Action Group (LAG)

The Litigation Action Group (LAG) was established in October 2008 to examine developing practices within the claims handling process, which are impacting detrimentally upon parties' ability to access justice.

Membership of the LAG group is composed of practising solicitors serviced by the Law Society Secretariat.

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## Foreword

For a number of years the Law Society has been aware of a practice being developed by a small number of insurers which has as its object the 'capture' of injured parties, settling their claims for compensation before they are able to consult with a solicitor or to obtain medical evidence detailing the full extent of their injuries. This practice, where applied, appears to be having a significant impact on the level of compensation an injured party receives. The tactics of third party capture, which are described in this report, can have a particularly detrimental effect when applied against injured people at a time when they are vulnerable or when applied to minors or foreign nationals who are not familiar with the Northern Ireland legal system.

Whilst there is growing awareness of this practice throughout the legal profession, the Society has been concerned at the lack of awareness of this practice and its implications amongst the general public. It has therefore produced this report with a view to providing a general overview to interested parties of the detrimental effects third party capture is having upon members of the public seeking compensation for personal injury.

In this report, the Society makes a number of recommendations, which have as their aim the empowerment of injured parties who are seeking compensation. The Society hopes the publication of this report will initiate broader discussion within Government, and amongst MLAs, local Councillors, those supporting the interests of consumers and the general public, as to what initiatives are required to secure access to justice for those seeking compensation for personal injury.

**Rory McShane**

*Chairman*

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## Executive Summary

- A.** Third party capture is a practice that may be employed by a liability insurer in negotiating the quantum of damages payable to a party negligently injured by one of their policy holders. The practice includes a number of tactics which appear to have as their object the under settlement of the injured party's claim and minimisation of costs.
- B.** Following on from the receipt of a number of reports from practitioners of consumer detriment generated by the practice of third party capture, the Law Society of Northern Ireland issued a call for evidence to practitioners asking for evidence of the impact the practice of third party capture has had upon injured parties.
- C.** The Society received written submissions from twenty firms of solicitors and for the purposes of its report has focussed on forty cases provided in which insurers engaged in the practice of third party capture. Evidence received highlighted a number of tactics insurers, engaging in third party capture, adopt to induce injured parties to settle their claim for compensation.
- D.** The results evidenced:
  - I. injured parties settling cases in a confused state without having a full understanding of the nature of the settlement. The fact that injured parties were often approached by insurance claims managers in the immediate aftermath of their accident, without being afforded ample time to consider offers of settlement, contributed to this confusion and in cases led to injured parties under-settling their claims.*
  - II. that compensation claims are being settled in Northern Ireland in the absence of medical reports and in a number of cases insurers have encouraged this. The cases reported evidenced that the absence of a medical report significantly disadvantages injured parties in their negotiations with insurers, resulting in significantly reduced compensation payments.*
  - III. that injured parties, when negotiating with insurers engaging in the practice of third party capture, are actively discouraged from seeking legal advice and representation. This can be to the significant detriment of the injured party as they will remain unaware of and are vulnerable to being misinformed as to their legal rights, with the result that cases may be under-settled.*
  - IV. that the practice of third party capture as well as leading to reduced compensation payments to injured parties, may be resulting in the loss*



*of public funds through the non-registration of compensation payments by insurers engaging in third party capture.*

V. *that the practice of third party capture can have particularly disturbing consequences when applied to the vulnerable. Injured parties with language problems, who are easily confused or who are in a weakened state are particularly at risk of succumbing to undue pressure.*

**E.** On the basis of the results of its evidence gathering exercise the Society makes a number of recommendations:

**I. *The Society recommends that the Northern Ireland Executive requests that a full investigation into the impact of third party capture be carried out by the Financial Services Authority. This investigation should have a particular focus on the vulnerable and their ability to access justice.***

**II. *The Society recommends that consideration be given to introducing measures to protect against the settlement of a claim for compensation without a medical report, where the injured party has suffered significant injuries.***

**III. *The Society recommends that compensators be placed under a legal obligation to inform injured parties in writing of their right to consult with and be represented by an independent legal representative of their own choosing.***

**IV. *The Society recommends that compensators be placed under a legal obligation not to initiate direct contact with an injured party until ten working days following an accident.***

**V. *The Society recommends that once a compensator has made an offer of settlement to an injured party they should be prohibited from initiating contact with the injured party for five working days from the date of the offer.***

**VI. *The Society recommends that special measures be introduced to ensure protection for minors who suffer personal injury.***

**VII. *The Society recommends that a review of current levels of compliance with recoverable benefit and Health Service cost legislation be undertaken and that the Compensation Recovery Unit (CRU) be empowered with greater enforcement and investigatory powers. A failure by a compensator to comply should be punishable by criminal sanction.***

## S1 Introduction

### 1.1.1

Third party capture is a practice that may be employed by a liability insurer in negotiating the quantum of damages payable to a party negligently injured by one of their policy holders. The practice includes a number of tactics which appear to have as their object the under-settlement of the injured parties' claim and the minimisation of costs to the insurer.

### 1.1.2

Insurers engaging in third party capture will approach an injured party shortly after an accident, in some cases disregarding the fact the injured party wishes to be represented by a solicitor, in others without allowing them the opportunity to seek a legal opinion or to obtain a full medical report and will make the injured party an offer in full and final settlement. Insurers will apply pressure in constant calling, visiting the home and implicitly threatening that a failure to settle immediately will result in a greatly reduced settlement. The result is that cases are often under-settled, as victims only discover the full extent of their injuries and their legal rights after a settlement has been made.

### 1.1.3

It appears that in certain circumstances some insurers may also be settling claims in this informal manner without informing the Government, who as discussed below can recover certain public funds expended in treating and assisting the injured party.

### 1.1.4

The practice of third party capture side steps the traditional methods of protection for those seeking compensation for personal injury; a medical report and a legal adviser. A model personal injury claim which describes the role of the solicitor and the medical report is provided below.

## Model Personal Injury Claim

### 1.2.1

In the usual course of a personal injury case, an injured party will consult with a solicitor following an accident. At the initial consultation the solicitor will inform the injured party of their legal rights. The solicitor will write to the insurer of the liable party informing them that their client is seeking compensation, putting forward the facts of the case and asking that they accept liability.

### 1.2.2

Where the injured party has suffered physical injuries the solicitor will ensure that they obtain a full medical report before entering into substantive negotiations. This is likely to include medical history from the injured party's doctor, hospital reports, x-rays and any specialist reports. It may also include any follow up report monitoring the development of any injuries. The purpose of collecting medical reports from various sources over a period of time is to allow the solicitor to assess how the injured party is recovering, whether there will be permanent or temporary medical effects from the accident and to consider other consequences such as time off work or loss of earnings.

### 1.2.3

In the majority of cases liability is clear and the insurer will wish to negotiate. Negotiations will then begin on the amount of damages the insurer is obliged to pay on their policy holder's behalf to the injured party. The purpose of compensation is to restore the injured party to the position they would have been in had they never suffered the injury. In determining such the solicitor will refer to the medical report and to guidelines provided by the Judicial Studies Board, which contain suggested compensation levels for various forms of bodily injury<sup>1</sup>. Where the injured party's motor vehicle has been damaged this will include the cost of repairs, the depreciation of the motor vehicle and the cost of hiring a substitute vehicle.

### 1.2.4

The solicitor, in discussion with the injured parties, will determine the amount of compensation they consider to be satisfactory and will request this figure from the insurer on behalf of their client. There will likely then be some negotiation with the insurer in relation to what is the appropriate level of compensation. The majority of cases are settled without the need for recourse to the courts. Once a case has been settled the injured party's solicitor will forward a bill of costs to the at fault party's insurer.

### 1.2.5

In addition to providing compensation to the injured party, an insurer shall also provide compensation to Government for expenses incurred in caring for the injured party. On receipt of a claim for compensation an insurer should inform the Social Security Agency's Compensation Recovery Unit (CRU). On receipt of this the CRU will calculate any health service costs incurred treating the injured party and any benefits paid to the injured party as a result of the accident. The insurer will inform the CRU when the claim is about to be settled so that the CRU can calculate the full extent of public funds the insurer must repay. These costs should then be paid by the insurer and the compensation payment to the individual may in certain circumstances be reduced to compensate for this.

<sup>1</sup>The Judicial Studies Board for Northern Ireland  
'Guidelines for the Assessment of General Damages  
in Personal Injury Cases in Northern Ireland' 3rd  
edition 2008

### **1.2.6**

In cases of third party capture the solicitor, the traditional method of protection for an injured party, is removed and the injured party is left to negotiate with an experienced insurance claims manager without knowledge of their legal rights and in many cases without a medical report explaining the full extent of their injuries.

### **1.2.7**

In the next chapter the legal framework governing the handling of claims by insurers will be considered. Chapter 3 will provide background to the report and elaborate on the methodology. A synopsis of evidence received will be provided in Chapter 4. Evidence will then be analysed in Chapter 5 and Chapter 6 will make a number of recommendations.

**S2****The Legal Framework  
Governing Insurer's  
Handling of Claimants'  
Cases****Protection of consumer's interest****2.1.1**

The legal framework which regulates insurers engaging in the practice of third party capture in Northern Ireland is extremely limited. In England and Wales the Compensation Act 2006 regulates the provision of claims management services. However, the standards set do not apply to insurers engaging in third party capture.

**2.1.2**

At the time of the introduction of the 2006 Act a strong case was made by trade unions, consumer groups, claimant solicitors and the Law Society of England and Wales that insurers engaging in the practice of third party capture should be required to comply with the provisions of the Act governing claims management services. The Department for Constitutional Affairs decided that as dealings with third parties who have a claim against a policy holder fall within the remit of the Financial Services Authority (FSA) this matter should be referred to the FSA for consideration. The FSA undertook to investigate whether a case for additional rules existed. Their investigation is ongoing.

**2.1.3**

This policy decision has meant that a gap in consumer protection has remained. Whilst dealings with third parties are included within the remit of the FSA, there are no specific Regulations governing dealings of insurers with third parties. As third parties are not the insurer's policy holder insurers are merely bound by the general Principles of Businesses contained in the FSA's Handbook. Consumer groups, trade unions and the Association of Personal Injury Lawyers in England and Wales consider the current regulatory framework to be inadequate and have presented a dossier of cases exemplifying the consumer detriment generated by third party capture to the FSA. The FSA are currently reviewing this evidence and considering whether to introduce specific Regulations governing third party capture.

**2.1.4**

The FSA is responsible for the regulation of insurers in Northern Ireland. Consumers in Northern Ireland therefore are in a similarly disadvantaged position to those in England and Wales. Indeed consumers in Northern Ireland may be considered to be at a greater disadvantage as there is not only no regulation of insurers engaging in third party capture but there are no Regulations governing the provision of claims management services, as the relevant sections of the Compensation Act 2006 do not extend to Northern Ireland.

## Protection for Minors

### 2.2.1

Under the general law of contract a minor has limited power to bind himself by agreement. The law as to minors is contained partly in case law and partly in Order 80 of the Supreme Court Rules (NI) 1980, which at Rule 8 states:

*“Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person’s claim be valid without the approval of the Court”*

### 2.2.2

This provision is intended to protect minors by requiring the settlement of a claim for compensation to be approved by the Court. This provision is however limited to circumstances where proceedings have been issued. This protection therefore can be subverted by settling a minor’s claim prior to proceedings being commenced. However where proceedings are not issued, protection can be provided by the involvement of the minor’s legal representative and legal guardians.

## Protection of Public Funds

### 2.3.1

As discussed above, a legal regime exists for the recouping of benefits paid to injured persons and/or health service costs incurred by injured parties who have been the victims of a negligent accident. Insurers, as with any compensator, are obligated under the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997 and the Recovery of Health Services Charges (Northern Ireland) Order 2006 to notify the CRU, when a claim for personal injury compensation is made. On notification the CRU will calculate health service costs incurred in treating the injured party and issue a Certificate of Health Service costs. On settling the claim the insurer will apply for a Certificate of Recoverable Benefit from the CRU. The CRU will then inform the insurer of the amount of recoverable benefit which must be repaid (the insurer may in certain circumstances reduce the payment to the injured party to take account of this payment). The insurer on settling the case must repay all recoverable benefit payments and health service costs.

### 2.3.2

This regime is entirely dependent upon the insurer requesting Certificates of Recoverable Benefit and Health Service costs from the CRU. Whilst insurers are under a statutory obligation to do so, there are concerns that the lack of criminal sanction for non-compliance may have encouraged non-compliance.

**S3****Background to the Report****3.1.1**

This report has been prepared by the Law Society of Northern Ireland. The Law Society is the professional body established by Royal Charter and invested with statutory functions in relation to solicitors (primarily under the Solicitors (NI) Order 1976, as amended). The functions of the Society are to regulate responsibly, and in the public interest, the solicitor profession in Northern Ireland and to represent the views of the profession.

**3.1.2**

The Society represents over 2,400 solicitors working in some 550 firms based in over 74 geographical locations throughout Northern Ireland. Members of the Society represent private clients in legal matters. Given the unique role played by solicitors, the Society considers itself uniquely placed to inform policy and law reform discourse relating to justice issues. In doing so the Society represents the public interest.

**3.1.3**

As it contributes to policy and law reform discourse, the Society endeavours to ensure adequate regard is given to human rights and equality considerations and to the need to ensure justice is accessible for those who seek it. Where the Society identifies a matter of public interest which presents a case for reform it will raise awareness of this within Government and advocate for reform.

**3.1.4**

In this report the Society is highlighting a growing practice which presents an impediment to accessing justice for those who have suffered a personal injury. It is a practice which appears to be leading to injured parties in Northern Ireland receiving significantly reduced compensation payments for injuries they have suffered and furthermore has the potential to lead to a loss of public monies. This reduces budgets available to hospitals and the Social Security Agency.

**3.1.5**

The Society commissioned this report, which has been compiled by its policy team, to provide a snap shot of the effect the growing practice of third party capture is having upon the consumer and the public purse. The report provides a summary of the present tactics of liability insurers engaging in third party capture and their impact on the injured parties' right to compensation and ability to access justice. The Society hopes that it will provide an impetus for further research and action by Government to ensure the public and consumer interest is properly protected.

## Methodology

### 3.2.1

The objective of the Society's evidence gathering exercise was to survey present practices of liability insurers in the capturing of injured parties' claims and their impact on the injured parties' right to compensation and ability to access justice.

### 3.2.2

The Society established a specialised Committee of interested legal practitioners in August 2008, with a remit to identify factors inhibiting the consumer's right to access justice and factors inhibiting access to legal advice and representation. Along with a number of other inhibitors the practice of third party capture was identified as a practice which not only inhibited access to justice but which had a significant detrimental effect upon injured parties and upon potentially the public purse.

### 3.2.3

Having initially collected evidence from the practitioners represented on its specialised Committee, the Society decided to undertake an evidence gathering exercise throughout its membership. This was restricted to the membership to ensure the integrity of evidence received. The Society considers that Government may wish to conduct a more full public consultation on this issue before taking forward any reform initiative and would be more than willing to assist it in doing so.

### 3.2.4

The Society announced that it was seeking evidence from its members on 21st of October 2008, via its e-publication, the e-nformer. Members of the profession were reminded of the call via an article in the Writ, the Society's periodical journal, and through word of mouth. The Society produced an interim report and distributed this to members who had made written submissions, at that stage, and to the Consumer Council for Northern Ireland.

### 3.2.5

The Society would highlight that as its evidence gathering exercise has focused on solicitors, the results received inevitably relate to cases where an injured party has received the assistance of a solicitor at some point during negotiations with an insurer. As it is inevitable that consumer detriment will be greater in cases where the client has not received the assistance of a solicitor further research is required into such cases.



## S4 Results

### 4.1.1

The Society received written submissions from twenty firms of solicitors and for the purposes of its report has focussed on forty cases provided in which insurers engaged in the practice of third party capture.

### 4.1.2

In each case the injured party had at some point consulted with a solicitor to seek an opinion as to their legal rights. In a number of cases the injured party had visited the solicitor's office for an initial consultation. However following this the insurer made direct contact with the injured party and agreed a settlement with them directly, in most cases in the absence of a medical report or a certificate of recoverable of benefit. In a number of cases the injured party visited the solicitor's office having signed a 'Discharge Agreement form' in return for a sum of money that the insurer claimed was paid in full and final settlement of the case. In these cases the solicitor re-opened negotiations with the insurer successfully challenging the legality of the Discharge Agreement form.

### 4.1.3

What follows is a written synopsis of the evidence received. It is arranged into sub-sections according to the various aspects of the practice engaged in.

## Misleading Injured Parties

### 4.2.1

The Society has received reports of a number of cases where insurers have misled injured parties as to the nature of a Discharge Agreement form which they have requested the injured party to sign. These include cases where injured parties have been led to believe their signing of a Discharge Agreement form relates solely to an interim payment or to damage to their motor vehicle.

### 4.2.2

An example of this is the case of a female driver who was involved in a collision at a roundabout in Strabane. The lorry driver and his insurers accepted liability. Two days following the accident the injured party was approached by the lorry driver's insurers and offered £500 for what was described as "the inconvenience of having her vehicle damaged". At no point was it discussed with her whether she would be making any further claim. The injured party accepted the claim on the understanding that it was solely for the damage to her motor vehicle. The insurers then made a direct payment to the car repair company.

### 4.2.3

Around six weeks later the injured party consulted with her solicitor regarding her injuries. When her solicitor wrote to the insurer regarding this issue, a claims manager telephoned their office to inform them their client had agreed to accept £500 in full and final settlement. The claims manager was in general uncooperative and became particularly hostile when the solicitor asked if the injured party had been asked whether she required compensation for any further injuries when she accepted the £500. The insurer stated that the injured party had signed a Discharge Agreement form accepting £500 in full and final settlement. When the solicitor requested a copy of the signed agreement the insurer faxed him through a copy of a Discharge Agreement form with the claims manager's signature on it. It was then alleged that the document was signed with the consent and on behalf of the injured party. The injured party denied giving the claims manager any authority to sign on her behalf. The injured party's solicitor put it to the insurer that no authority whatsoever had been given and informed them that the issue would be brought to the attention of the court. Due to the efforts of her solicitor, the injured party's claim then progressed in the normal manner. The case eventually settled at £2,500 for soft tissue injury.

### 4.2.4

The insurer therefore clearly misled the injured party firstly in relation to the nature of the £500 compensation payment and secondly in relation to the agreement and her signing thereof. In addition they initially attempted to mislead the solicitor. The cumulative effects of the insurer's actions could have been a grossly under-settled claim, with the injured party receiving 16.7% of what she was rightfully entitled to receive. In this case the assistance of the solicitor ensured the injured party was not misled to her detriment by the actions of the insurer.

## **Approaching Injured Parties when they are in a vulnerable position**

### 4.3.1

A key feature of third party capture is that an approach will be made to the injured party, immediately following the accident that has led to their injuries. At this stage injured parties will be offered disproportionately low offers to settle their case. Whilst with the benefit of a full medical report and a legal opinion injured parties would rarely accept such an offer in the absence of these sources of protection vulnerable individuals may accept such payments in full and final settlement, drastically under settling their claim.

#### **4.3.2**

A number of cases have been brought to the Society's attention where an injured party has settled their claim in the immediate aftermath of their accident for a payment of damages significantly less than their legal entitlement.

#### **4.3.3**

An example of this is the case of a young Lithuanian female who was involved in a road traffic accident, in which she received an injury to her knee which included sutures along with an injury to her lower back. The day following the accident, which occurred on the 30th December 2007 and prior to a full medical report being prepared, an insurance company claims manager approached the Lithuanian injured party and offered her £500 for her injuries in full and final settlement. The Lithuanian injured party, who did not have English as her first language, accepted this offer. A further payment of £500 for damage to her car was made at a later date. The injured party then consulted with a solicitor who wrote to the insurer requesting that they enter into negotiations. The insurer initially stated that the case had been settled by way of the previous payments. However when her solicitor issued a Civil Bill against the insurer they re-entered negotiations. The case was eventually settled for £8,250.

#### **4.3.4**

In the immediate aftermath of an accident injured parties may be in a confused state, unable to take full cognizance of their situation. They are therefore particularly vulnerable to abuse from those wishing to under settle their claims.

### **Impacting on an individual's right to legal representation**

#### **4.4.1**

The tactics of insurers engaging in third party capture will often inhibit the injured party from accessing legal advice and representation. In their emphasis on settling the claim at the earliest possible stage insurers will often not afford the injured party an opportunity to consult with a solicitor.

#### **4.4.2**

The Society has received evidence of a number of cases in which the insurer has emphasised to the injured party that they have no need for legal representation and that they can provide them with sufficient legal advice. The insurer, despite their obvious conflict of interest, will present themselves as being on the side of the injured party. The attitude of the insurance claims manager however appears to quickly change when, or if, the injured party attempts to consult with a solicitor. In two cases reported to the Society, one of which is detailed below, the insurer threatened the

injured party that if they were to consult with a solicitor they would refuse to engage in bona fide negotiations, delaying the processing of the injured party's claim and ultimately reducing the level of damages.

#### **4.4.3**

The Society has also received reports of a significant number of cases in which despite the fact the injured party instructed a solicitor to represent them in handling their claim, and informed the insurer of such, the insurer refused to negotiate with the solicitor and attempted to negotiate directly with the injured party.

#### **4.4.4**

Negotiating directly with the injured party may seem a more direct and effective method of negotiation. However many people, particularly the vulnerable, find it extremely difficult to negotiate with experienced insurance claims managers who are well versed in the law and practice of compensation claims. In the absence of legal advice injured parties may be misinformed as to their legal rights which may result in their claim being under settled.

#### **4.4.5**

The Society received a report of a case involving an injured female party with a history of depression and anxiety who was under the care of a clinical psychologist. She was involved in an accident and on the same night was approached by an insurance claims manager in relation to her claim. Following on from an initial offer of £1,000 the injured party was phoned several times per day pressing her to accept the offer. The injured party initially negotiated with the insurer without the assistance of a solicitor, having been informed by the insurer that if she were to seek the assistance of a solicitor this would jeopardise her claim and result in her receiving a reduced payment. The injured party eventually instructed a firm of solicitors to represent her and the solicitor duly informed the insurer of such. Despite this the insurer continued to contact the injured party directly attempting to negotiate a settlement. The insurer eventually agreed to negotiate with the solicitor, who on her behalf obtained a settlement for £4,500.

#### **4.4.6**

In another case reported to the Society an injured party who had been the victim of an accident at work instructed a solicitor to represent him in his claim. However when the solicitor wrote to his employer's insurers they simply ignored his correspondence and refused to enter into negotiations. The injured party was then called to his employer's headquarters, where he was met with his employer's insurers. The solicitor was not informed of the meeting. During the meeting his employer emphasised that they wished him to "continue working for them". The injured party felt a strong

undertone that his continued employment was dependent on the outcome of the negotiations. The injured party informed his solicitor that he had decided to sign a Discharge Agreement form as he did not want to lose his job and was anxious to have the matter resolved without any trouble.

#### **4.4.7**

These two cases exemplify how in the absence of legal advice and representation the vulnerable may be taken advantage of. In the first case a vulnerable injured party suffering from anxiety could have settled her case for a fraction of its worth and in the second case a injured party appears to have been pressurised into settling, in the absence of his chosen legal representative.

#### **4.4.8**

As highlighted above the absence of an impartial legal adviser to advise the injured party of their legal rights may lead to an injured party being misinformed as to the extent of their legal rights.

#### **4.4.9**

In a case reported to the Society a injured party who had suffered injuries in a previous accident, where the “at fault” party was insured by the same insurer as the “at fault” party in the second accident, was informed that as he had already received a compensation payment for the first accident earlier in the year he was not entitled to receive a second compensation payment in the same year. The insurer informed the injured party that “The law states you are only allowed one claim per year”. Fortunately the injured party consulted with a solicitor who rightly informed him that this was a complete fabrication of the law. Once the insurer became aware the injured party had sought legal representation, they offered him £4,000 for damage to his vehicle and his personal injuries but only if he agreed to discharge his solicitor. Again this was an obvious attempt to deprive the injured party of the benefit of legal representation. The injured party refused and with the assistance of his solicitor received £6,300 in settlement of his claim.

#### **4.4.10**

Without the assistance of a legal representative injured parties are at risk of having their vulnerabilities exploited and to being misinformed of their legal rights. In the two cases where the injured party sought the assistance of a solicitor their compensation payments were significantly higher than that offered when the injured party was not legally represented, evidencing the importance of independent legal advice and representation.

## **Undermining the importance of Medical Evidence**

### **4.5.1**

The main basis upon which the level of compensation for an injured party is set is by reference to medical evidence with regard to the injuries of the injured party. However the Society has received reports of a number of cases where insurers have captured an injured party settling their case prior to a full medical report being prepared and considered. The Society has been provided with copies of correspondence from insurers that are critical of injured parties for not engaging in what are described as 'pre medical negotiations'. Cases have also been reported to the Society where the insurer has emphasised that their offer is inflated due to the fact a full medical report has not been completed.

### **4.5.2**

In a recent case brought to the Society's attention a couple were involved in a road traffic accident with a young driver. The male was driving and the female was in the passenger seat. Following the accident the police were called and the young driver and his insurer accepted liability.

### **4.5.3**

The driver had sustained minor whiplash and the passenger felt that she may also have sustained whiplash. Within days the young driver's insurers made direct contact with the injured parties, offering to settle their claims and to pay for damages to their car. This was prior to any medical evidence into the parties injuries being obtained. The driver decided to settle his claim for £2,000. The passenger was offered £3,000 for her injuries in full and final settlement. She however decided to take the advice of her solicitor and obtain a full medical report, to identify the extent of her injuries.

### **4.5.4**

The passenger has reported to her solicitor that the insurer whilst remaining friendly has been critical of her choice to consult with a solicitor and obtain medical evidence, highlighting that in doing so she will delay payment and will have to engage in lengthy court proceedings.

### **4.5.5**

As a result of her injuries the injured passenger has now been unable work for nearly a month and is to undergo a MRI scan to determine the full extent of her injuries. It appears therefore that her injuries are much more significant than initially thought.

**4.5.6**

This case exemplifies the importance of obtaining a full medical report, to enable a determination of the appropriate level of damages which an injured party is entitled to. In this case if the injured passenger had accepted the initial offer she would have been left significantly under compensated.

**4.5.7**

A full medical report is the essential basis upon which a payment for compensation should be made. Injured parties who do not have the benefit of a full medical report are vulnerable to being misled as to the extent of their injuries. The Society has received reports of insurers misinforming injured parties as to the extent of their injuries.

**4.5.8**

In one case brought to the Society's attention an eighteen year old male who was the victim of a road traffic accident was hospitalised for four/ five weeks to treat his injuries, which included a fracture to his wrist and a broken leg. On the day following his release from hospital, he was approached by an insurance claims manager who stated that he had spoken with the hospital and that he was likely to be back to work in a few weeks. Therefore a full and final settlement of £14,000 was appropriate.

**4.5.9**

The insurance claims manager had of course not received any information from the hospital as this would be a breach of confidentiality. Furthermore the information provided was completely inaccurate. The eighteen year old was in fact unable to return to work for four months and the case was eventually settled, following the advice and instruction of a solicitor, for £50,000.

**4.5.10**

The Society believes that the settling of personal injury claims in the absence of a full medical report into the extent of the injured parties' injuries is not in the public interest.

**Approaches to Minors****4.6.1**

The Society has received a number of reports of the tactics of third party capture being applied in cases involving minors. Settlement in this way not only subverts Order 80 of the Supreme Court Rules (NI) 1980, denying the minor the protection of the court, but also it denies the minor the protection of their legal guardians and their legal representation. (See Chapter 2).

**4.6.2**

This leaves the minor in a position where they can easily be the victim of abuse. Minors are more susceptible to misrepresentation and to undue pressure being applied against them, particularly when applied by an experienced insurance claims manager.

**4.6.3**

The legal guardians of a minor are responsible for ensuring protection of the minor's interests. However in a number of cases the involvement of the minor's legal guardians may not be sufficient to ensure protection for the injured party. In one case reported to the Society the parents of a seventeen year old settled their daughter's claim without informing her or obtaining a medical report to identify the full extent of her injuries. It now appears that a sum of £800 of the girl's moneys has been misappropriated and the minor has sought legal assistance. This case exemplifies the need for the introduction of special measures to protect minors.

**Compensation Recovery****4.7.1**

In response to its call for evidence and indeed over the last number of years the Society has received evidence of a number of cases which have been settled in the absence of a Certificate of Recoverable Benefit and/or a Certificate of Health Service costs. Whilst solicitors are not required to inform the CRU of compensation claims, a number of solicitors in Northern Ireland routinely inform the CRU when they are aware of an injured party who has been the victim of third party capture. Solicitors will write to the CRU with the name of the client and their national insurance number, informing them of the case and asking if a Certificate of Recoverable Benefit has been requested. In a surprising number of cases the CRU respond informing the solicitor that no Certificate has been requested. The solicitor will then assist the CRU in their investigations.

**4.7.2**

The Society has met with representatives of the CRU to highlight the need for further investigation to identify current levels of compliance and to consider what measures could be taken to ensure greater levels of compliance.



**S5****Analysis of Results****5.1**

By way of summation, the results suggest that insurers engaging in third party capture are exerting undue pressure on injured parties to settle their claim before they are able to identify the full extent of their injuries and their legal entitlement to compensation. The consequence of this is that claims are being under settled and injured parties are left uncompensated for what can be serious injuries, with long term effects on the employment potential and the fullness of life for the injured party.

**5.2**

The results evidenced injured parties settling cases in a confused state without having a full understanding of the nature of the settlement. The fact that injured parties were approached in the immediate aftermath of their accident and were not afforded ample time to consider offers made by insurers contributed to this confusion and in cases led to injured parties under settling their claims.

**5.3**

The cases reported to the Society clearly evidenced that compensation claims are being settled in Northern Ireland in the absence of medical reports. The cases reported evidenced that the absence of a medical report significantly disadvantages injured parties when negotiating with insurers resulting in significantly reduced compensation payments.

**5.4**

The cases reported to the Society evidenced that injured parties, when negotiating with insurers engaging in the practice of third party capture, are inhibited from seeking legal advice and representation. This can be to the significant detriment of the injured party as they will remain unaware of and are vulnerable to being misinformed as to their legal rights, with the result that cases may be under settled.

**5.5**

The cases reported evidenced that the practice of third party capture, as well as leading to reduced compensation payments to injured parties, may be resulting in the loss of public funds through the practice of non-registration of compensation payments by insurers.

**5.6**

The cases evidenced that third party capture can have particularly disturbing consequences when applied to the vulnerable. Where the tactics of third party capture were applied against individuals who had language problems, were easily confused or were in a weakened state they could have a significantly detrimental impact upon the level of compensation received had it not been for the assistance of a solicitor.

### **5.7**

The cases evidenced that injured parties who sought legal advice and representation were able to negotiate with the insurer on a more even basis than those who did not. The benefits of legal representation ensured the injured party was properly informed of their legal rights, obtained a medical report and was not subjected to undue pressure to settle their claim at a premature stage.

## S6

# Conclusions and Recommendations

### 6.1.1

The Society considers that the results of its evidence gathering exercise clearly shows a need for the Northern Ireland Executive to consider how to protect against third party capture.

#### Address Consumer Detriment

### 6.1.2

The Society considers a number of factors contribute to the extent of consumer detriment in any case, these include:

- a. the settlement of a case in the absence of a full medical report:
- b. the individual being misinformed as to the full extent of their legal rights: or
- c. where the injured party is particularly vulnerable and unable to take full cognisance of their situation.

#### Address the Detriment to the Public Purse

### 6.1.3

The Society considers that public monies may be being lost due to non-compliance with the Compensation Recovery Unit. The efficiency of the regime for the recovery of compensation payments and the recovery of health service charges is reliant upon the co-operation of insurers. It appears that current enforcement powers and procedures may be failing to ensure full compliance. The need for more rigorous legal obligations on compensators, in particular the introduction of a clear criminal sanction for non-compliance, is self evident.

#### Recommendations

### 6.2.1

The Society considers that further research into the impact of third party capture is required.

- 1. The Society recommends that the Northern Ireland Executive requests that a full investigation into the impact of third party capture be carried out by the Financial Services Authority. This investigation should have a particular focus on the vulnerable and their ability to access justice.**

### 6.2.2

The Society considers that a personal injury case should never be settled in the absence of a medical report detailing the full extent of the injured party's injuries. Encouraging injured parties to settle their claims for

compensation without them knowing the full extent of their injuries is an abhorrent practice which will result in the under settlement of cases.

- 2. The Society recommends that consideration be given to introducing measures to protect against the settlement of a claim for compensation without a medical report, where the injured party has suffered significant injuries.**

### 6.2.3

The Society considers the assistance of an independent legal adviser provides injured parties with a significant advantage in their negotiations with insurers. Parties without legal representation are more likely to succumb to undue pressure to under settle their claim and are vulnerable to being misinformed as to the extent of their legal rights. Solicitors are officers of the court and must act in the best interests of their clients. Their role in personal injury cases is to ensure their client receives the compensation that they are legally entitled to. The Society considers provision must be made to ensure injured parties are able to access a legal representative of their own choosing.

- 3. The Society recommends that compensators be placed under a legal obligation to inform injured parties in writing of their right to consult with and be represented by an independent legal representative of their own choosing.**

### 6.2.4

Immediately following an accident injured parties are in a vulnerable position and need time to take cognisance of what has occurred, obtain medical assistance and seek legal advice. In this period particularly for those who have been seriously injured there are many matters such as their recovery which they must turn their attention to. At this busy and confused time injured parties are vulnerable to being subjected to undue pressure to settle their claim for less than they are legally entitled to.

- 4. The Society recommends that compensators be placed under a legal obligation not to initiate direct contact with an injured party until ten working days following an accident.**

### 6.2.5

The continuous calling and exertion of undue pressure on an injured party can lead to injured parties under settling their claim. As they are not afforded an opportunity to consider their position or to seek appropriate advice. Injured parties must be given time to consider a compensation offer to ensure they are fully informed before settling their claim.

- 5. The Society recommends that once a compensator has made an offer of settlement to an injured party they should be prohibited from initiating contact with the injured party for five working days from the date of the offer.**

#### **6.2.6**

Minors are particularly at risk of being victimised by the practice of third party capture. Minors are likely not to fully understand the extent of their legal rights and are particularly susceptible to undue pressure from adults.

- 6. The Society recommends that special measures be introduced to ensure protection for minors who suffer personal injury.**

#### **6.2.7**

The current legislation governing the recovery of benefits and health service costs is inadequate. The legal framework does not provide an effective deterrent to ensure compliance with the CRU. As a result there is a potential for significant public funds to be lost.

- 7. The Society recommends that a review of current levels of compliance with recoverable benefit and health service cost legislation be undertaken and that the CRU be empowered with greater enforcement and investigatory powers. A failure by a compensator to comply should be punishable by criminal sanction.**

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