



**SUBMISSION OF THE LAW SOCIETY'S WORKING PARTY TO THE LEGCO
LEGAL AFFAIRS PANEL – REGARDING THE OPERATIONS OF RECOVERY
AGENTS IN HONG KONG**

1. This is a submission of the Recovery Agents Working Party of the Law Society who have been investigating the problems caused by Recovery Agents since last year.
2. Investigations have included:
 - (1) Review of the contracts used by Recovery Agents
 - (2) Legal advice on their legality
 - (3) Reports of improper conduct by Recovery agents, and the solicitors they use

RECOVERY AGENTS

3. They assist injured persons or the families of fatal accidents victims :
 - (1) To pursue claims for damages and compensation
 - (2) On a “ No Win No Fee “ basis
 - (a) They will fund the legal costs of any claim being pursued
 - (b) If the claim is dismissed – they say they agree to pay the costs awarded against their client but there is no evidence of this thus far and all suspected recovery agent plaintiffs have denied the existence of any agreement alleging funding by family instead
 - (3) In return for a percentage of the damages / compensation recovered
 - (a) Commonly between 20% and 30% of damages recovered
4. It is believed that they mainly operate to assist the victims of accidents and their families

5. It is believed that many Recovery Agents companies have close connections with certain solicitor firms and insurance companies
6. They obtain clients:
 - (1) Through advertising
 - (2) By a direct approach, commonly at places that victims of accident will attend, e.g.
 - (a) Hospitals
 - (b) TAVAS (Traffic Accidents Victim Assistance Scheme) of Social Welfare Department
 - (c) Employee's Compensation Unit of Labour Department
 - (d) Medical Assessment Boards, conducted at Public Hospitals
 - (3) By referrals
 - (a) It is suspected that staff of TAVAS have done this – and possibly other Government or Public bodies
 - (b) From existing clients
 - (c) From other sources
7. The service offered to victims of accidents, include
 - (1) They will arrange loans of money – pending receipt of damages
 - (a) Interest is commonly charged at 30% per annum – which is just within the legal limit
 - (b) The loan is made by a related company
 - (2) They will accompany the victims when they attend for medical treatment or assessments
 - (3) They will try and negotiate settlements of the claims – direct with the Insurance companies concerned initially – their modus operandi is to settle the claim as quickly as possible
 - (4) If the claim cannot be settled and is destined for trial – then they will refer the victim to a solicitor chosen by the Recovery Agent

- (5) They will arrange expert medical examinations
- (6) They will assist the victim in applying for Legal Aid – to assist in funding the claim if it is destined for trial and will assist the victim in insisting on the appointment of a solicitor connected to the recovery agent
- (7) They basically, offer a “ One Stop “ service
 - (a) That is simple
 - (b) They do not ask questions
 - (c) They provide good friendly service – e.g. will bring the victim soup when in hospital etc

ACCIDENT CLAIMS

- 8. Most claims are for persons injured:
 - (1) In traffic accidents
 - (2) Accidents at work
 - (3) Occupiers liability.
- 9. If the accident is caused by the fault of some other person, then:
 - (1) A claim for damages can be brought:
 - (2) The object of a claim for damages is

“ To place the victim, so far as money can, in the situation he would have been if there had not been an accident “.
 - (3) The damages to be awarded would include
 - (a) Loss of earnings during period of sick leave
 - (b) Loss of earnings after end of sick leave, if the victim is unable to return to the same type of job due to his accident disability, or even if he is, cannot earn as much as before the accident
 - (c) Medical and other additional expenses, incurred because of the accident

- (d) A lump sum, to compensate for the Pain, Suffering and Disability caused by the accident.
10. If the accident happened to an employee, whilst at work, then:
- (1) A claim for Employee's Compensation can be brought
 - (2) The basic compensation awarded includes:
 - (a) 80% of earnings, during period of sick leave
 - (b) Payment for medical expenses
 - (c) An award for Loss of Earning Capacity
11. If the claim succeeds, then the Defendant (Insurer) will pay all (or most) of the legal costs incurred by the victim in pursuing the claim.
12. Each type of claim:
- (1) Involves issues of law
 - (2) Requires proper investigation and preparation

THE PROBLEM

13. The main problems include:
- (1) Recovery Agents do not do a good job – and “ Under settle “ claims – in and out quickly with a minimum of expense
 - (2) Most of the victims would in fact be eligible for legal aid – and then would not have to lose a large portion of their damages paid as fees to the Recovery Agent
 - (3) The result is that the victim does not receive the proper amount of damages and/ or compensation having paid up to 30% of his damages as the fee to the recovery agent
 - (4) The standard “ No Win No Fee” agreement is illegal
 - (5) Recovery Agents often misrepresent the victims entitlement for and eligibility for legal
 - (6) Recovery Agents are not legally qualified

- (7) Recovery Agents are probably not financially sound – and could not pay any legal costs awarded against the victim, if the claim is dismissed
 - (8) They do not arrange proper or valid Legal Expense insurance – to cover the legal costs liability.
 - (9) Claims are not properly prepared or pursued – junior counsel are invariably instructed at the last minute.
14. Such problems do not arise in England, in accident claims
- (1) The Recovery Agent does not charge the victim.

They get paid by the lawyer who handles the case – by way of a referral fee
 - (2) The Recovery agents do not normally handle the claims themselves – they refer it to solicitors, so that they get paid the referral fee
 - (3) “ No Win No Fee “ agreements, are lawful in England
 - (4) Legal expense insurance is arranged for the victim.
15. Under settlement
- (1) The Recovery Agent only gets paid – if they win the case
 - (2) Therefore, they are desperate to settle the claim
 - (a) To ensure they get their fee; and
 - (b) They do not become liable to pay legal costs
 - (3) They can ensure this, by advising acceptance of any low offers that may be made by the Defendants / Insurers
 - (4) Further, they are keen to conclude the claims as soon as possible, but
 - (a) Damages are calculated in part, dependant on the degree of permanent disability
 - (b) Often, the degree of disability will not properly be known – until many years after the accident.
 - (5) It is believed that there is an added problem, in that the Defendant / Insurer, knowing that the claim is being pursued with the aid of a

Recovery Agent, utilise this to their benefit, and make offers of settlement which are well below the true value of the claim. Solicitors instructed by recovery agents will have no difficulty having all their profit costs and disbursements whether real or not, agreed by the insurers, where there has been significant under settlement of the claim. The recovery agents make money for doing nothing and the solicitors take all their profit costs without the need for taxation. The only person to lose out is the victim.

16. Do not keep all damages

- (1) Legal aid is available to victims of accidents to pursue claims for Damages and Employees Compensation, if:
 - (a) There are reasonable prospects of the claim being successful; and
 - (b) The victim – comes within the financial eligibility criteria.
- (2) If legally aided, then the victim keeps all of the damages, unless he is assisted under the Supplementary Legal Aid Scheme (SLAS) when he will have to pay a percentage of between 6% and 12% to the scheme of the damages recovered
- (3) When using Recovery Agents – they lose:
 - (a) 20% to 30% of damages
 - (b) And are required to pay high rates of interest – for any loans received
- (4) There is a public interest element
 - (a) Victims get less damages than they are entitled to
 - (b) The victim is more likely to become dependant on social welfare when their damages are prematurely exhausted
 - (c) When they find they have been undercompensated, the victims then complain and seek Legal Aid to sue recovery agents who are worth nothing – proving any malpractice against solicitors is very difficult and time consuming.

17. Illegal agreement

- (1) The agreements are illegal as being
 - (a) Champertous; and / or

- (b) Maintenance
- (2) These are both:
 - (a) Criminal offences at common law; and
 - (b) Tortious offences (i.e. a civil wrong)
- (3) Therefore, they are not legally enforceable, against the victim
- (4) Maintenance is where there has been improper interference in the conduct of litigation, without any legitimate cause or interest in that litigation
- (5) Champerty, is a form of maintenance, where the persons who maintains the legal claim, takes a reward or share of the property recovered
- (6) The agreements, are clearly champertous – as the Recovery agents take a percentage of the damages recovered
- (7) The agreements may be champertous – if the Recovery agents improperly interfere in the conduct of the claim – e.g by getting the victim to lie about how the accident occurred, or the loss they have suffered. There have been reports of recovery agents having become involved very soon after an accident arranging for victims to change their stories to the police by giving new police statements.

18. Legal aid:

- (1) There are many reports of victims being given incorrect advice on eligibility for legal aid:
 - (a) They are told they are not financially eligible
 - (b) They are told that it is too much trouble to apply for legal aid
 - (c) They are told they will be assigned incompetent lawyers
 - (d) They are told that they will not recover all their damages due to contributions they must make to the Legal Aid Department
 - (e) They are told they cannot get their money quickly as there is a first charge on the damages in favour of the Director of Legal Aid
- (2) Somewhat ironically, it is believed many Recovery Agents having signed the victim to a standard “ No Win No Fee “ agreement, do in fact not arrange for the victim to apply for legal aid:

- (a) They will accompany the victim to apply for legal aid
 - (b) The victim is told to deny any involvement of a Recovery Agent – if asked
 - (c) The victim is given the name of the solicitor – to nominate, if legal aid is granted – which the Legal Aid department are then required by the Legal Aid Ordinance to follow. The solicitor is invariably a front for the recovery agent, has connections to the recovery agency, has connections to the company making loans to the victims and has no experience of personal injuries litigation.
- (3) This is a clear abuse
- (a) The Recovery Agent gets their fee “ For Nothing “.
They are no longer liable for payment of legal costs
 - (b) There is misrepresentation in making the application for legal aid because the applicant does not disclose an alternative source of funding.

19. Not legally qualified

- (1) Recovery Agents hold themselves out as being professionals having expertise in making personal injury claims
- (2) This is not correct
- (3) They are not legally qualified
- (4) They also do not carry “ Professional Indemnity “ insurance – to cover their liability to the victim, if they fail to handle the claim properly.

Therefore, any claim against the Recovery Agent for negligent handling of the claim, if proved would nevertheless not result in the Plaintiff being able to recover any money.

20. Not financially sound

- (1) They are limited liability companies
- (2) They are generally recently created, and work with the sole object of making profit
- (3) If the claim is dismissed after trial, the legal costs can be very large

- (4) There are reports of Recovery Agents failing to pay the Defendants costs – after a claim has been dismissed – the contract cannot be enforced even if admitted. It is believed that there are thousands of cases currently being handled by recovery agents and that to-date they have been involved in damages claims worth millions of dollars. One case involving a paraplegic was settled for \$8 million. Another involving another paraplegic was settled for \$10 million. Both plaintiffs would have received legal aid.

21. Legal Expense Insurance

- (1) Most Recovery Agents do not obtain any insurance – to cover the risk of liability to pay legal costs, if the claim is dismissed
- (2) Documents have been seen, from one Recovery Agent, of a “ Insurance Policy “ covering legal costs, but
 - (a) It was not issued by an authorised insurer in Hong Kong
 - (b) It was issued by a company overseas – and is likely to be worthless

This case has been referred to the Commissioner for Insurance for investigation.

22. Claim not properly prepared / pursued

- (1) Proper preparation includes
 - (a) Full investigation of how the accident occurred
 - (i) Obtain documents from relevant parties
 - Defendants
 - Police
 - Labour Department
 - (ii) Take full instructions and prepare witness statements for the victim
 - (iii) Interview relevant witness, and take statements
 - (iv) Obtain experts opinion on liability – in complicated cases
 - (b) Full investigation of the loss
 - (i) Obtain proper medical reports from treating doctors / hospitals

- (ii) Obtain reports from suitable medical experts
 - (iii) Obtain full information and documents from employers etc, to show loss of earnings
- (c) Using properly experienced solicitors and counsel
- (2) This takes time and costs will be incurred
- (3) There are reports from lawyers, who defend claims brought by Recovery Agents, and their solicitors, that:
 - (a) Case are not properly prepared
 - Because of this – the true value of the claim cannot be established
 - (b) The experts used, particularly medical experts – have not done proper examinations or reports
 - (c) The solicitors used, are not experienced in conducting such claims
 - (d) Counsel are:
 - (i) Are not used
 - (ii) Or are very junior or inexperienced and inexpensive
 - (iii) Or are only used too late in the case
- (4) These all combine to
 - (a) The claim being dismissed
 - (b) Or more commonly, being settled at well below its true value
- (5) Further, applications for Interim Payments on account of damages are not being made
 - (a) This can be done:
 - (i) Prior to final decision on the clam – or settlement
 - (ii) If judgment has been entered or there is a strong case
 - (b) It covers the victims
 - (i) Short term needs; and

- (ii) Can ensure that proper rehabilitation is done, to maximise recovery from the accident injuries and disabilities
- (c) Its is not done
 - (i) Because the Recovery Agents make money – from the loans they arrange; and
 - (ii) The claims are settled too quickly

POSSIBLE SOLUTIONS

23. These are basically

- (1) Education of the public
- (2) Criminal enforcement against recovery agents
- (3) Disciplinary proceedings against the solicitors involved

24. Education

- (1) The Law Society is committed to making sure the public and particularly victims of accidents – learn about:
 - (a) The way to properly pursue claims; and
 - (b) The disadvantages and dangers of using Recovery Agents

And is working on preparing appropriate publicity campaigns.

- (2) It is believed the Government should also take an active role

25. Criminal Enforcement

- (1) The activities of Recovery Agents should be investigated by
 - (a) The Police
 - (b) ICAC
- (2) This will be raised with the appropriate authorities.

26. Professional Disciplinary action

- (1) The Law Society issued a Circular in May 2005 to all members warning that any solicitor knowingly acting for a client being assisted by a Recovery Agent breaches the Solicitors Conduct Rules
 - (2) There are now on going investigations
27. The continued activities of Recovery Agents will affect the proper administration of justice and bring the system into disrepute. The legal profession would be greatly assisted if LEGCO would support it in its campaign against Recovery Agents.

**The Law Society of Hong Kong
Working Party on Recovery Agents
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