Don`t under any circumstances Settle your Personal Injury Claim until you talk to a Solicitor

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You have been involved in a road traffic accident, sustaining personal injury. You weren`t at fault for the accident. You are given the contact details of the other driver`s Insurance Company, so that you can arrange for them to inspect and repair your vehicle. While in contact with the Insurer they invite you to settle your Personal Injury Claim. Not realizing that your injuries are so serious you settle your Claim by signing a Compromise Agreement. You do so without consulting a Solicitor. You don`t see the need to incur legal fees. You subsequently realize some months later that your injuries are much more serious than you realized when you settled your Claim.

Surely you can renegotiate with the Insurer or set aside your agreement?

You regret settling your Personal Injury Claim.

Surely it was an unfair (improvident) transaction, where there was inequality of bargaining? Should you not have been given the opportunity to talk to a solicitor first? Surely the Insurance Company had an obligation to "keep you right", bearing in mind its duties under the Central Bank's *Consumer Protection Code of Conduct*? Not necessarily so; as one accident victim has since learned.

Early Offer of Compensation

This issue is covered in some detail on a webpage on the Morgan McManus website, titled "*Third Party Capture*" where the Law Societies of England/Wales and of Northern Ireland some years ago had expressed their concern in various Studies on the issue of "*Third Party Capture*", which was described then as a relatively new tactic employed by some insurers to offer Claimants a financial settlement for compensation before they are able to consult with a solicitor or obtain medical evidence detailing the full extent of their injuries.

'Don't get mugged by an insurer – use a solicitor'

In June 2013 the Law Society of England & Wales promoted a campaign with the strap-line '*Don't get mugged by an insurer – use a solicitor'*. The campaign advertisements showed an injured victim, but it wasn`t clear whether his current injuries were as a result of the accident in which he had been involved or whether they were as a result, in the words of the Law Society, of having been mugged by the Third Party Insurer. While this was a bold campaign, there was also a serious note to it. The Society said the campaign "*deliberately takes a bold, humorous and memorable approach to convey an important message*".	

Don`t accept the first offer of compensation from Insurers

The key message of the campaign was to urge consumers to not just accept the first offer of compensation from insurers. It was pointed out that research from the UK Financial Services Authority, following a Freedom of Information challenge, "*revealed personal injury claimants who turn down an insurer's initial offer and take legal advice from a solicitor get on average three times more compensation*".

Irish Road Traffic Victim learns not to accept first offer

This very issue was covered by Ms Justice Baker in the High Court case of ***Eileen Ryan v Bridget Leonard & Denis Leonard*** [2017] IEHC 566 in a Decision issued on the 5th October 2017. The matter was brought before the Judge by way of an Interlocutory Hearing where the Judge was asked to deal with a Preliminary Issue by way of evidence tendered on Affidavits. The Plaintiff Ms Ryan had sought an order for damages and compensation agai**n**st the defendants for personal injuries suffered in a motor vehicle accident. The

defendants contended that the Plaintiff had already been paid the Claim by way of settlement and thus, the Claim of the Plaintiff had been the subject of a prior accord and satisfaction. That is, she was bound by contract by the agreement she had previously made.

The Injuries suffered by the Plaintiff

The accident occurred on the 5th June 2013. The Plaintiff suffered back and neck injuries. Despite the fact that she was continuing to suffer and was still off work as a result of her injuries, the Insurance Company AXA arranged for their Representative to call with the Plaintiff at her home on the 14th June, just 9 days after the accident. After some further communication the Plaintiff settled her claim just fourteen days after the accident. She accepted the sum of €4,000 in full settlement. The sum of €4,000 was broken down as to €3,500 in respect of general damages and €500 in respect of out of pocket expenses.

In her Affidavit to the Court, the Plaintiff stated that the offer made by AXA`s Representative was on a "*take it or leave it*" basis and she understood that no further negotiation would occur and that no further offer would be forthcoming. She stated that she: "…*trusted that AXA Insurance were providing an appropriate sum and settlement of (her) claim*." She also stated that she did inform the Representative on 14th June, 2013 that she was still in pain, had ongoing symptoms and, albeit she had improved a little, "*there was no clear prognosis available*."

Good deal for the Insurer or for the Plaintiff?

The Insurers must have been rubbing their hands with glee! The Plaintiff subsequently realized to her horror that the compensation paid was not sufficient. The Plaintiff subsequently issued Civil Proceedings on the 15th September 2015; over 2 years after her accident. In an Affidavit sworn on the 22nd February 2016 the Plaintiff swore that she was still suffering in February 2016. Noting her injuries, Ms Justice Baker commented that she considered "*that the compensation figure of €4,000 paid to the plaintiff in respect of the injuries incurred in the … accident did not represent the value of the claim, and indeed, fell far short of its value*". The Judge was not however in a position to actually adjudicate on the value of the injuries as the application had only been brought before her by way of Affidavit and not by way of Plenary Hearing (by this, I mean that this was merely an interim application before the Judge, seeking her opinion on a particular issue).

The Plaintiff`s state of mind at the time of Negotiations

The Plaintiff contended that she was physically vulnerable at the time of the negotiations and thus was not able to make an informed decision. The issue also arose as to the validity of the letter issued by the Insurance Company to the Plaintiff prior to settlement with respect to the requirement of the Insurance Company to honour the Central Bank`s *Consumer Protection Code of Conduct*.

The fact that the Plaintiff had believed at the time that her injuries would clear up .....

The defendants argued that the previous settlement made was a legally binding contract. The Judge stated that the defendants had correctly argued that the fact that the Plaintiff believed her injuries would clear up when, in truth, they now appeared not to have, did not in itself make the bargain unfair. Also, the defendants correctly argued that the fact that the Plaintiff did not have legal advice prior to entering into the compromise was not fatal to the creation of a binding contract.

The letter issued by the Insurance Company was inadequate

AXA sent a letter to the plaintiff dated 6th June, 2013, the day after the accident, in performance of its obligation under the Code. In that letter, AXA set out the options by which the plaintiff could process her claim for compensation for personal injuries and loss. The three options were set out as follows:

(a) The negotiation of a "fair and reasonable settlement" with AXA directly;
(b) An application through the Injuries Board, and a copy of the one page guide published by the Injuries Board setting out the nature of its process was enclosed; or
(c) A settlement to be negotiated through a solicitor.

The letter contained the following concluding paragraphs: "*You should be aware that any costs of appointing a Solicitor or legal representative are not covered under the IB* (Injuries Board) *process and must be paid by you. The IB will only award costs in exceptional circumstances. You can also appoint a motor assessor to assess any damage to your vehicle but this would also be at your own expense. It is our preference to deal with you directly as in our experience, claims are settled faster this way*."

The Judge noted however that what was missing from the letter was any reference to a fourth option, one which is engaged by very many Plaintiffs: the rejection of an offer from the Injuries Board and the commencement of a Claim for damages for personal injuries through the courts. In those circumstances, the Judge noted, a Plaintiff who successfully processes a Claim and achieves a damages award in excess of that offered through the Injuries Board process would almost never be fixed with the costs of the litigation, and would have his or her costs paid in addition to the damages. That fourth option is a real one, and was not identified in the letter.

Was the Plaintiff was misled by the Insurer?

The Code requires that an insurer or insurance intermediary make a person aware of his or her options prior to entering a compromise, and the Judge noted that the letter setting out the relevant information sent by AXA was incomplete and, in her mind, potentially misleading. It set out three options, only one of which would be cost neutral from the point of view of the Plaintiff. The absence of full information could have tainted the negotiation and meant that at the time the Plaintiff negotiated with the Insurer`s Representative, she was not fully informed of her options.

Having regard to the uncontroverted evidence of the Plaintiff that the negotiation with the Representative was done on the basis that AXA had made its best offer on a "*take it or leave it*" basis, the Plaintiff found herself negotiating in circumstances where, if she did not accept the offer, she believed she would find herself pursuing one of the other two options identified, both of which would have meant that she incurred legal costs, and where costs would be deducted from any settlement figure.

The Judge considered that the letter sent by AXA on 6th June, 2013 did not fully inform the Plaintiff of the options available to her to deal with her Claim, and she noted that the letter was expressly given in purported compliance with a requirement of the relevant Code. The contract by which the Claim was compromised might, she stated, be avoided on account of the fact that the Plaintiff was not fully informed of matters AXA was required to explain and identify.

Returned for Trial

Ms Justice Baker concluded that she could not at an interlocutory stage, and solely on the Affidavits submitted to her, make a determination on the

preliminary point of law. The matter must fall to be determined at a Plenary Hearing at which a Trial Judge would assess the evidence, and hear more complete argument with regard to the role of the Code, the accuracy or completeness of the letter sent in purported compliance with the Code, and whether as a matter of fact and law the deficiency she had identified was capable of rendering void the compromise by the plaintiff of her claim.

What if the Plaintiff`s Plenary Hearing is dismissed?

What if the Plaintiff fails to convince the Judge at the Plenary Hearing to set aside the compromise agreement? What if, despite the inadequacy of the letter, the Judge still holds that she is bound by the agreement? Then, not only will she have been inadequately compensated for her injuries, but the Insurance Company will also be entitled to seek Costs of Dismissal against her, which will run into thousands of euro. This may appear unfair, but this is what will happen.

What if the Insurer`s letter had contained all the options?

One cannot predict what decision would be made in those circumstances. Every case differs on its own circumstances. What we can however state for definite is that, just because you may have been vulnerable after the accident, just because you genuinely thought your injuries were recovering and just because you did not have the opportunity to take legal advice prior to settling your Claim does not mean that you will be able to subsequently set aside a Settlement Agreement unwisely made.

Wouldn`t it have been much wiser to take legal advice in the first instance?

Was the Plaintiff mugged?

You may have an opinion on this and you may want my view, but in the words of Sir Humphrey Appleby, the Cabinet Secretary in the 1980s sitcom "*Yes Prime Minister*" to Prime Minister Jim Hacker, I will conclude by stating: "*You may very well believe so, but I couldn`t possibly comment!*".

WEB LINKS:

Ryan v Leonard:

http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/63422a365817aa9b802581c50038adca?OpenDocument

Central Bank Consumer Protection Code 2012/2015:

https://www.centralbank.ie/docs/default-source/Regulation/consumer-protection/other-codes-of-conduct/4-gns-4-2-7-cp-code-2012.pdf?sfvrsn=4

Morgan McManus Third Party Capture:

https://www.morganmcmanus.com/index.php/3rd-party-capture/