

**Report to Scottish Legal Complaints Commission  
on the Master Policy and Guarantee Fund  
Research**

**Frank H Stephen  
Angela Melville**

**Institute for Law, Economy and Global Governance  
School of Law  
University of Manchester**

**30<sup>th</sup> June 2009**

## Executive Summary

1. This project was commissioned by the Scottish Legal Complaints Commission and is aimed at providing an understanding of the purpose and functioning of The Law Society of Scotland's Master Policy and Guarantee Fund. This understanding involves comparing the perceptions of members of the legal profession with the perceptions of members of the public.
2. The research was commissioned to commence on 1st April 2009 for completion by 30<sup>th</sup> June 2009. It has been carried out by Professor Frank H Stephen and Dr Angela Melville of the Institute for Law, Economy and Global Governance in the School of Law at the University of Manchester.
3. The short time scale (13 weeks) and limited budget means that the research can only be exploratory in nature. This has been understood by both those commissioning the research and the research team from the project's inception. These considerations have meant that it has not been possible to seek the views of a random sample of claimants nor a random sample of solicitors on how they perceive the Master Policy and Guarantee Fund to operate.
4. The Law Society of Scotland is required by legislation to maintain professional indemnity insurance arrangements for all practising solicitors in Scotland. It has chosen to do this by means of a Master Policy negotiated with Marsh Limited an insurance broker. The legislation also requires the Law Society to have a Guarantee Fund from which it makes grants to persons who suffer pecuniary losses due to the dishonesty of solicitors.
5. This research has examined the aims and operation of the Master Policy from the perspectives of claimants, solicitors and consumer organisations through interviews with solicitors and claimants and focus groups with representatives of the Law Society of Scotland and its pursuers' panel. It was intended to consider these perceptions in the light of data supplied to us by Marsh Limited through the Law Society of Scotland. A review of the literature on lawyers' professional indemnity insurance in a limited number of other jurisdictions was also undertaken.
6. The perceptions of the purposes of the Master Policy differed between the claimants and solicitors whom we interviewed. Solicitors saw the primary purpose of the Master Policy to be the provision of professional indemnity insurance for solicitors. In their view the reassurance that this provided to clients and potential clients was a by-product of this. Claimants saw the effective function of the Master Policy to be the protection of solicitors when it *should* be the protection of clients.
7. The representatives of the Law Society of Scotland who took part in the research expressed the view that the Master Policy's primary purpose is not to protect consumers but is as professional indemnity insurance. It is our

view that material on the Law Society's website raises claimants' expectations as to the purpose of the Master Policy.

- 8.** It is clear that under the Master Policy (or any professional indemnity insurance) claimants must prove the solicitor's liability for the losses which the claimant has suffered. What professional indemnity insurance (including the Master Policy) does is to ensure that if liability is proved compensation will be paid. However, it is an empirical question whether the existence of professional indemnity insurance makes it more difficult to prove liability.
- 9.** Members of the Faculty of Advocates are also required to have professional indemnity insurance. Whilst the Faculty of Advocates negotiates the terms of such insurance with a single broker, individual advocates are not required to take this policy and may make their own arrangements. However, minimum and maximum levels of cover are laid down by the Faculty.
- 10.** The Guarantee Fund is a fund of last resort and payments from it are wholly at the discretion of the Council of the Law Society of Scotland. Claimants against the Fund must have exhausted all alternative means of recovering their loss. We have formed the view that the use of the term 'Guarantee Fund' raises the expectations of potential claimants given the discretionary nature of the fund.
- 11.** The claimants against the Master Policy who we were able to interview had long standing unresolved claims against the Fund. Their perceptions of the operation of the Fund were in stark contrast to how its operation was described to us by representatives of the Law Society and other members of the profession we were able to interview. These claimants had all ended up being party litigants even although they had begun their claim by seeking a solicitor to act on their behalf. They report what they perceived as long delays in their claims being dealt with by their own solicitors and had formed the view that solicitors were 'colluding' to ensure that payouts from the Master Policy were low.
- 12.** On the other hand the solicitors whom we interviewed suggested that the problem may lie in claims lacking merit or claimants overvaluing their claims. It was argued that the Law Society's requirement since 2005 for all firms to have Client Relations Partners and the introduction of a Pursuers' Panel of solicitors to advise claimants had improved the process. None of the claimants we interviewed were aware of the existence of the Pursuers' Panel.
- 13.** We had hoped that some perspective on the differing views of claimants and members of the profession would be obtained by considering data on the operation of the Master Policy over a number of years and such data was requested from the Law Society of Scotland. A formal request for this data was made on 21<sup>st</sup> May. Data was provided to us on the 29<sup>th</sup> of June. Not only was this too late for its analysis to be incorporated in this Report but the Law Society of Scotland and its broker March attached conditions on its use which were unacceptable to us and to the Chief Executive of SLCC.

- 14.** It is our view that further research needs to be undertaken on a timescale which would enable a representative sample of claimants' and solicitors' views to be obtained and objective data on the claims and payments history of the Master Policy to be obtained on reasonable conditions of use.

## 1. Introduction

This project is aimed at providing an understanding of the purpose and functioning of The Law Society of Scotland's Master Policy and Guarantee Fund. This understanding will involve comparing the perceptions of the members of the legal profession (both solicitors and advocates) as to the purpose and functioning of the Master Policy and Guarantee Fund against the perceptions of the public. The Master Policy essentially provides professional indemnity insurance for solicitors. The Guarantee Fund exists to compensate members of the public who are unable to recover a loss arising from the dishonesty of a member of the Law Society of Scotland.

This research is funded by a grant from the Scottish Legal Complaints Commission (SLCC) to the Institute for Law, Economy and Global Governance (InLEGG) of the School of Law of the University of Manchester. It has been carried out by Professor Frank H Stephen and Dr Angela Melville. SLCC had announced on its establishment that it would investigate the operation of the Master Policy and Guarantee Fund during its first year of operation following public concern about the operation of the Master Policy and Guarantee Fund, for instance from *Which*, OFT.

The authors of this Report wish to make clear the limitations imposed on the work we have been able to undertake. When we submitted our tender to SLCC we made it clear that the timescale required for completion of the project and the level of funding which was available implied that the study would be severely limited. In particular, the very short time allowed from commissioning to submission of the report means that it is impossible to recruit and interview a representative sample members of the public who had experience of making a claim against the Master Policy or Guarantee Fund and satisfying the ethical requirements for the conduct of such research.

### 1.1 Background to the Master Policy and Guarantee Fund

#### 1.1.1 Master Policy

Since 1978, all solicitors in Scotland have been required to have professional indemnity insurance as a condition of practice. Section 44(1) of the Solicitors (Scotland) Act 1980 and pursuant to Solicitors (Scotland) Professional Indemnity Insurance Rules 1995, the Law Society of Scotland is required to maintain professional indemnity insurance arrangements. The Act specifically states that the purpose of the professional indemnity insurance arrangements is to provide "indemnity for solicitors and incorporated practices and former solicitors against any class of professional indemnity" (Section 44, part 1).

The exact nature of the professional indemnity insurance arrangements is not specified in the Act. The Law Society of Scotland elected to put in place professional indemnity insurance arrangements known as the 'Master Policy'. The policy is negotiated by the Law Society of Scotland with a single insurance broker, currently Marsh Limited, who then provide for insurance cover through several insurers, the chief of which is currently Royal Sun

Alliance. The Law Society does not have a direct role in the handling of individual claims, however, it has an Insurance Committee which approves the Claims Handling Philosophy and negotiates and approves the terms and conditions of the Master Policy.

The broker, Marsh, arranges for the Master Policy to be underwritten by insurers, monitors the performance of insurers, accepts notification of Master Policy claims, refers claims to insurers, and investigates any complaints concerning insurers' conduct of claims. Marsh also does not have a direct role in the handling of individual claims. Individual claims are allocated to insurers, who handle claims according to the Master Policy Claims Handling Philosophy.

### *1.1.2 Guarantee Fund*

Section 43 of the *Solicitors (Scotland) Act 1980* requires the establishment of "The Scottish Solicitors Guarantee Fund", controlled and managed by the Council of the Law Society of Scotland. The aim of the Guarantee Fund is to make grants "in order to compensate persons who in the opinion of the Council suffer pecuniary loss by reason of dishonesty on the part of" solicitors. The Guarantee Fund is a 'last resort fund'. This is expressed in the Act (Sect 43, part 3), "No grant may be made under this section a) in respect of the loss made good otherwise". In addition, the fund is discretionary, with the Council having the right to refuse a grant or make only a partial grant if they feel that negligence is wholly or partly the responsibility of the applicant "or of any person for whom he is responsible". There is no right of appeal, and the "decision of the Council with respect to any application for a grant shall be final" (sect 43, part 4).

The protection of clients in the *Solicitors (Scotland) Act 1980* is covered in Sections 45 and 46, which refer to provisions in relation to the practice of a solicitors whose name is struck off the roll or who is suspended from practice as a solicitor. Monies due to the client which should be held in a client account are, in principle, protected by the Guarantee Fund.

## **1.2 Method**

Our study attempts to achieve its aims by looking at the aims and operation of the Master Policy and Guarantee Fund from a number of different perspectives. We conducted semi-structured interviews with claimants, key stakeholders and members of the legal profession. We had been initially asked to conduct focus groups with some key stakeholders. However as we discuss below, we were only successful in conducting a limited number of focus groups. We addressed this problem by conducting additional individual interviews to those originally planned. Interviews and focus groups are useful in gaining perceptions of the Master Policy and Guarantee Fund, however, they do not provide 'objective data'. We intended to test these perceptions using statistical data obtained from Marsh, the broker for the Master Policy, and data concerning the Guarantee Fund from the Law Society of Scotland. The time available for us to do this has been limited. We made a formal

request to access data held by Marsh on 21<sup>st</sup> May 2009. It had to be considered by the Law Society of Scotland's Insurance Committee. The Committee agreed to our request and their decision was communicated to us on 12th June. The data was received on 29<sup>th</sup> June 2009 but conditions on its use imposed by Marsh Ltd and the Law Society of Scotland were unacceptable to us and to the Chief Executive of SLCC.

As there is very little published research on the operation of professional indemnity insurance schemes, not only in Scotland but also other jurisdictions, we have used a 'grounded' approach. This means that while we have obviously a preconceived a set of aims, we largely followed up issues as they emerged from the research. This is an appropriate approach in a study that is essentially exploratory and focuses on issues that have received little previous attention.

The main limitation of this study is that it is very small scale, and we have had to work to a limited timeframe. Consequently, we have not been able to access a representative sample of either claimants or members of the legal profession. Therefore, it is very likely that the sample we have is biased. Ideally, we would have contacted a sample of claimants randomly selected from all people who have made a claim against the Master Policy and the Guarantee Fund. This sample should have been large enough to facilitate an examination of the full range of claims, including people who resolved their claim at different stages from early settlement up to litigation, those who have claims for a relative small amount up to those with high-value claims, and claims that were resolved through a range of resolution mechanisms, including withdrawal up to court-imposed judgment. Such an approach would have allowed us to fully explore the complexity of the Master Policy and Guarantee Fund. However this approach takes a considerable amount of time and resources which have not been available in this instance.

In addition, an ideal approach would have also allowed us to access longitudinal data, and this would have allowed us to investigate the impact of important changes upon Master Policy and Guarantee Fund claims, including the implementation of the SLCC. None of the claimants or members of the legal profession that we spoke to had had any direct experience with the SLCC, and presumably it will take time before the effect of the new Commission becomes clear. While our research reveals that the claimants we interviewed raised a number of serious concerns about the operation of the Master Policy in particular, it is difficult without further data to pinpoint whether these problems are persistent, and therefore endemic to the current scheme, or whether recent changes, such as the development of increasingly sophisticated case management regimes, have reduced the problems.

### *1.2.1 Interviews with claimants*

We used two main methods for contacting claimants. First, the SLCC placed a notice on their webpage asking claimants, and other people with a view on the Master Policy and Guarantee Fund, to contact the researchers. This method elicited a few responses; one of these claimants eventually declined to

provide us with information, and two others had not pursued either a Master Policy or Guarantee Fund claim, but wished to express a general view about the role of the Law Society of Scotland in the Scottish legal system. Second, we encouraged claimant interest groups to 'spread the word' that we wanted to talk to claimants. This elicited a much greater number of responses, and it became clear that almost all of the claimants that we spoke to knew each other quite well. There appears to be a strong network of such claimants in Scotland, and it seems that we were successful in tapping into this network.

Our method of contacting claimants has meant that it is highly unlikely that we have succeeded in obtaining a representative sample of claimants. The use of interest group networks to contact claimants means that we have used a 'snowball' sampling technique to locate potential interviewees. Snowball sampling is a useful technique for locating hard to reach populations, especially when the parameters of the population are unknown. For our study, we chose this method as it allowed us to contact claimants very quickly. Snowballing, however, has its disadvantages, the chief being that it produces a non-random group of respondents<sup>1</sup>.

It was also evident that many of the claimants were regularly discussing the research among themselves. Such communication can produce the problem of 'diffusion', where research results become homogenised<sup>2</sup>. Narrative interviews have been criticised for producing 'familiar cultural tales' rather than collecting 'authentic accounts.'<sup>3</sup> It may be that the homogeneity of narratives told by claimants reflects similar experiences, but it may also be the case that participant interaction has meant that claimants relate their experiences in a similar manner. We tried to counter this problem by focusing as much as possible on the specifics of the claimant's case, prior to discussing their explanations for their experiences.

It was suggested to us by claimants that we should contact other specific individuals. However, such proactive contact can be problematic. It would further bias the sample and might influence the responses received. We have eschewed its use. It also creates a specific relationship between the researcher and the interviewee which imposes constraints which do not arise when the interviewee contacts the researcher.

The claimants that we spoke to had some striking similarities. They were all involved in long-running legal proceedings, all involving Master Policy claims although most had involvement in other legal cases as well; most claims involved an initial problem with a conveyancing matter or the disposal of a will; all claimants reported having considerable problems finding a solicitor to take on their case against the Master Policy and Guarantee Fund or their former solicitor, and eventually all of these claimants had become party litigants; all had experience of a solicitor withdrawing from their case quite close (or even

---

<sup>1</sup> Fuagier, J. and Sargeant, M. "Sampling hard to reach populations" *Journal of Advanced Nursing*, 26(4), 790-797.

<sup>2</sup> Creswell, J. W. (2009) *Research Design: Qualitative, Quantitative and Mixed Methods Approaches*. London: Sage, pg 163.

<sup>3</sup> Silverman, D. (2001) *Interpreting Qualitative Data*. London: Sage.



during) proof; and all felt that their case had become the most important issue in their life. All of the claimants that we spoke to discussed the very serious and negative consequences of their experiences in the Scottish legal system, most notably having to pay substantial costs and endure long-term stress which has taken a significant toll on their mental health. Claimants stressed that there is 'a pattern' to Master Policy claims, and while there were obvious common features in all of the cases that were discussed, it was not clear whether these cases are, indeed, representative of Master Policy claims.

A further commonality was that all of the claimants had claims that were initiated quite a number of years ago (the oldest claim related to an event in the early 1970s). Thus, it was not entirely clear whether the problems that these claimants had faced were issues that were currently affecting the Master Policy and Guarantee Fund, or whether they reflected problems that have now been addressed. In addition, almost all of the claimants had pursued a Master Policy claim, and we only spoke to one claimant who had attempted to make a claim against the Guarantee Fund.

For the most part, interviews were conducted over the telephone, and this method was chosen largely because of convenience. Arguably, telephone interviewing does not allow for the same development of rapport as face-to-face interviewing, however several claimants stated that they felt that they were able to express their views over the telephone, and they made it clear that they did not consider developing rapport with the interviewer to be a problem. Some interviews were also conducted face-to-face. This method was used when the claimant felt that their case involved issues that were so sensitive or confidential that a telephone discussion did not seem appropriate. We attempted to conduct most of these interviews in public places that offered a degree of privacy. One interviewee declined to participate as we would not arrange a face-to-face interview in his home. While we acknowledge interviewees' concerns about confidentiality, our research is constrained by the need to follow good research practice, which includes fulfilling a duty of care towards researchers. The University of Manchester's Ethics Committee insisted that face-to-face interviews in an interviewee's home must only be conducted where there is not a viable alternative, and where the interviewer's safety can be guaranteed. In this instance, the University of Manchester Ethics Committee considered that viable alternative venues existed. Consequently, the Committee declined to approve the interview in the interviewee's home. The interviewee declined to be interviewed away from his home.

Interview duration ranged from two to six hours. Such lengthy interviews reflect that, for many of the claimants, their experiences with the Scottish legal system have come to dominate their lives. It did not seem appropriate to attempt to shorten the interviews, and instead we felt that it was important that claimants were given a full opportunity to discuss their experiences. Interviews followed the life of the claim, and for some claimants, this meant going back to an initial incident which occurred over thirty years ago. Claimants stressed that it was important to them that we appreciated the overall context of their Master Policy claim, and some claimants had been

involved in multiple claims, as well as other legal proceedings, and so their experiences with the Scottish legal system was often long-term and highly complex. We also received a substantial amount of written material from claimants, and we are conscious that some claimants have spent a considerable amount of their time to assist the research.

A final issue relating to our study concerns claimants' perceptions of the aims of our research. We explained to claimants that we would be unable to comment on the merits of individual cases, and while claimants appeared to understand this, we are still concerned that claimants' feel that their sense of being treated unfairly will be alleviated by this study. This report does not discuss any individual claim, and much of the material that we were provided with can only be used to inform our background understanding of the Master Policy and Guarantee Fund and particularly how claims were initiated prior to the establishment of SLCC.

In total we interviewed 11 claimants. Three further claimants provided us with written submissions but were not interviewed.

### *1.2.2 Interviews with members of legal profession*

We conducted focus groups with officers and officials of the Law Society of Scotland and their pursuer's panel. We had hoped to conduct further focus groups with members of the legal profession. However these groups proved impossible to set up in the time available to us. We attempted to contact a number of randomly selected solicitors, however, we did not receive any replies to our invitations to participate. While we can only speculate, it seems likely that a number of reasons may account for this problem. First, focus groups do not offer the same level of confidentiality as individual interviews, and it may be that solicitors were reluctant to discuss negligence claims within this forum. Second, as our findings show, it seems that solicitors may not be aware of, or particularly concerned with, the operation of the Master Policy and Guarantee Fund, and it may be that solicitors with busy schedules may not be interested in participating in a study which they do not consider to be important or relevant to them.

We extended the number of our individual interviews with members of the legal profession. We spoke to two Client Relations Partners (small firm/large firm), two members of the Master Policy panel and a representative of the Faculty of Advocates. All of these interviews were conducted over the telephone. In addition, one solicitor contacted us in order to express concerns about the operation of the Master Policy.

The main limitation of this research is that we have mainly spoken to members of the legal profession with a direct role in the operation of the Master Policy and the Guarantee Fund. While this is appropriate, in that we spoke to practitioners with direct experience of the schemes, we have not spoken to a representative cross-section of practitioners. There are some issues that may be important, such as how well do practitioners understand

the schemes, their involvement in risk management education activities, pricing of premiums, the involvement of non-specialists in representing Master Policy claims, that we could not examine in-depth.

In summary, we conducted a focus group with four officials/officers of the Law Society of Scotland and one with three members of the pursuers' panel. Interviews were conducted by telephone with two Client Relations partners of firms of solicitors, two members of the Master Policy panel and a representative of the Faculty of Advocates.

### 1.2.3 Interviews with consumer groups

We conducted interviews with representatives from key consumer groups who were identified by the SLCC: the Office of Fair Trading; *Which*; *Consumer Focus Scotland*; and *Scotland Against Crooked Lawyers*. Representatives from these groups all seemed keen to be involved in the research and readily responded to inquiries about participation.

These interviews also have some limitations. Several consumer groups reported that they had been contacted by various claimants concerning the Master Policy. However, they were unable to report on whether these claimants were representative of Master Policy claimants generally. They reported on receiving only a small number of approaches from claimants, although it was stressed that this should not detract from the impact of problems upon claimants' lives. They were also unsure about whether concerns were current or whether changes over the last few years had addressed some of the problems, although several groups stated that it had been several years since fresh concerns about the scheme had been raised<sup>4</sup>.

*Scotland Against Crooked Lawyers* has paid considerable attention to the Master Policy and Guarantee Fund<sup>5</sup>. The OFT concluded a limited investigation of the Master Policy in 2004, but for the other groups, the Master Policy and Guarantee Fund has been less central. In May 2004, the Office of Fair Trading initiated an investigation of whether the Law Society of Scotland's requirement that all solicitors purchase professional indemnity insurance through the Master Policy was contrary to the Competition Act 1998.

The OFT's main concerns were whether restricted competition meant that solicitors could not choose their own professional indemnity insurance provider and potential professional indemnity insurance on better terms than that offered by the Master Policy. The OFT reported that claimants had repeatedly raised the problem that solicitors were refusing to provide representation, and that this refusal was based on the mutual interest of Scottish solicitors in avoiding Master Policy claims. The OFT also investigated whether alternative models may be more appropriate.

---

<sup>4</sup> Although one claimant told us that he intended to raise a new complaint with the OFT.

<sup>5</sup> <http://sacl.info/>

The OFT concluded that there was not compelling evidence that the Master Policy appreciably restricted competition. As the Master Policy was not found to prevent or distort competition, it was also concluded that an alternative model was not required. The OFT, however, did find evidence suggesting that some potential clients had experienced difficulty in obtaining legal services, but considered this to be an access to justice rather than a competition issue. They also reported that there was consumer mistrust of the operation of the Master Policy, and of complaints handling and consumer redress more generally. The OFT decided not to proceed with the investigation and closed the case in 2005. The OFT stressed that their decision not to proceed does not necessarily mean that they are fully satisfied with the operation of the Master Policy, and in particular, there are still concerns about whether the Master Policy is supported by public confidence<sup>6</sup>.

In May 2007, *Which* launched a 'super-complaint' with the OFT into the regulation of legal services in Scotland. The OFT concluded that there is scope for greater liberalisation of legal service markets in Scotland. The Cabinet Secretary for Justice responded by initiating a consultation process. A Bill reference Group is currently considering draft legislation.

*Consumer Focus Scotland*<sup>7</sup> has not specifically considered either the Master Policy or the Guarantee Fund, although it did state that professional indemnity insurance arrangements and complaints procedures needed to be put in place in order to facilitate the alternative business structures within the legal market<sup>8</sup>. In 1999, *Consumer Focus Scotland* conducted a study on Complaints about Solicitors, which surveyed over 1200 people who had used the Law Society of Scotland's complaints procedure during a one year period. During this research, *Consumer Focus Scotland* was contacted by a number of claimants who raised concerns about the Master Policy. However, they have not been contacted by any new claimants (other than those who contacted the researchers in 1999) since that study.

*Consumer Focus* in 2003 and 2004 wished to carry out desk-based research on the Master Policy. They sought the co-operation of the LSS of Scotland which was refused. Consequently the research was not undertaken.

#### 1.2.4 Statistical analysis

We understand from SLCC that according to the briefings given to the SLCC by the Law Society in 2008, the LSS meets with Marsh monthly and receives audit, monitoring, review reports, feedback on the use of the claims handling philosophy, information on satisfaction surveys, and data from an 'after the event' questionnaire (currently being piloted). They also receive 'an annual report card' from Marsh which contains: results of a Marsh audit, results of a co-insurer audit, results of an independent audit of the panel solicitors,

<sup>6</sup> [http://www.of.gov.uk/shared\\_of/about\\_of/IAT-FOIA-46908.pdf](http://www.of.gov.uk/shared_of/about_of/IAT-FOIA-46908.pdf)

<sup>7</sup> Previously known as Scottish Consumer Council.

<sup>8</sup> Consumer Focus Scotland (2009) "Wider choice and better protection: a consultation paper on the regulation of legal services in Scotland", Glasgow, pg 5.

complaints against insurers/panel solicitors and satisfaction surveys. SLCC have not seen any examples of these annual reports but they are said by the Law Society to help the LSS manage risk and they receive advice, from Marsh, on remedial action that the LSS can take to manage down risk of future claims.

The Royal Sun Alliance, at their meeting with the SLCC Board in July 2008, confirmed that they have the following information on the use of the Master Policy: trend statistics, customer survey information, information on claims and other statistical data; all are given regularly to the LSS. RSA offer mediation to 'suitable' cases; the solicitor pays costs of a settlement. They stated that they have a legal duty to pay out quickly where they are liable and the majority of claims of £5000 or less are settled in 6 months; 90% of claims are resolved within one year and only 10% of cases result in instructions to solicitors with only 1% going to proof. RSA stated that they sent out 107 customer surveys to claimants and only four came back with negative comments. They expressed a willingness to share information about the claims handling process, and the rationales for settlement decisions but would need to check on any commercial sensitivities.

Although not an essential part of our tender for this project, it was agreed at our project inception meeting that we should try to obtain information on the claims history of the Master Policy. To this end we *formally* requested information from the Law Society of Scotland on 21<sup>st</sup> May. We were told by an official of the Society that this information was only available through their brokers Marsh and the decision on whether our request be passed to Marsh would require to be put to the Society's Insurance Committee. On 12<sup>th</sup> June we were informed by the Law Society that the Insurance Committee had approved our request and that it would be passed to Marsh. On 23<sup>rd</sup> June we asked when we could expect to receive the data and were told on 24<sup>th</sup> June that the Law Society expected to receive the information on 26<sup>th</sup> June. It would then be forwarded to us.

In fact, at 2.08 pm on 29<sup>th</sup> June an email was received from the Law Society of Scotland forwarding to us information from Marsh which they had received that morning. Accompanying this information was a letter from Marsh setting out the conditions under which they were prepared to release the information to the research team. The email from the Law Society confirmed that the Law Society was in agreement with these conditions. This covering letter is reproduced in the Appendix to this Report. Principal among the conditions was that the information supplied could not be communicated to anyone or contained in our report to SLCC. Since this condition implies that we cannot use the data to justify any conclusion which we might make on the actual operation of the Master Policy, after consultation with the Chief Executive of SLCC, we are unable to accept the conditions. Consequently, we have destroyed the electronic files sent to us by the Law Society of Scotland.

We also asked the Law Society earlier for information on claims on the Guarantee Fund. We were told that the information could be found in the Annual Report which was available on the Law Society's web site. This web

site is not the easiest to navigate but we have located Annual Reports (though not for many years) which did not contain all of the information which we requested.

#### *1.2.5 Comparative literature review*

Finally, we have also drawn on insights concerning the aims and operation of professional indemnity insurance from other jurisdictions, in particular England and Wales, Ontario, New South Wales, Hong Kong and Northern Ireland. This comparison also has some limitations. Solicitors' professional indemnity insurance is not only under-researched in Scotland, but also the research that has been done in other jurisdictions is also underdeveloped. In Ontario, details about the Law Society of Upper Canada's professional indemnity insurance scheme are readily available from annual reports of LAWPRO, however, in the other jurisdictions information is restricted. There have been some formal reviews of other schemes, for instance, the Clementi Report in England and Wales touched on professional indemnity insurance, and the National Competition Policy Review of the Legal Professional Act 1989 in New South Wales also paid some attention to professional indemnity insurance, however solicitors' professional indemnity insurance schemes have not been a central focus.

In addition, while it is possible to extract some detailed information concerning different schemes, the way in which this information is reported makes direct comparisons very difficult. For instance, while it is possible to find some data concerning average base premium rates, a direct comparison of rates across jurisdictions is quite difficult. Premium rates are set through actuarial calculations based on variables such as size of the firm, number of partners, types of law practice and claim history, and so comparing simple average premium rates is a very crude measure. It was also not possible to locate this data for some jurisdictions, or if it is provided it is given as a percentage of a firm's income and not as a monetary figure.

## 2 Purpose of the Master Policy and Guarantee Fund

In this part of the Report we consider the aims of the Master Policy and the Guarantee Fund as stated in the legislation, the way in which these schemes are presented by the Law Society, and how they are perceived by claimants and solicitors.

### 2.1 Purpose of the Master Policy

Section 44(1) of the *Solicitors Scotland Act 1980* and the pursuant *Solicitors (Scotland) Professional Indemnity Insurance Rules 1995* clearly require the Law Society of Scotland to provide professional indemnity insurance for practising and former solicitors. The Law Society decided to provide professional indemnity insurance in the form of a Master Policy which exists to indemnify solicitors when a claim is made against them by a client for professional negligence. What is striking is that there is no mention of protection of interests of solicitors' clients in Section 44 of the *Solicitors Scotland Act 1980*. Thus, the Master Policy is essentially an insurance scheme intended to provide professional indemnity insurance coverage for solicitors. This aim was clearly understood by some legal practitioners to whom we spoke:

The purpose of the Master Policy, the simple answer is to allow solicitors to sleep at night. It provides professional indemnity insurance cover for firms. Lawyers have to insure against risks that arise from potential negligence. This statement about the Master Policy's aim has been consistent from the Law Society. The purpose of the Master Policy is to provide consumer protection, but that is secondary, that is a by-product. Its *primary* purpose is to protect the profession.

The Master Policy serves two functions. The primary function is to provide insurance for the profession. Second, it provides reassurance for clients, and it ensures that there is a proactive insurer who will deal with clients in a knowledgeable fashion. The Master Policy also suits the profession, for example, we have run off cover, which may not be the case for many other professions.

This primary purpose of the Master Policy is not, however, as apparent to solicitors' clients. Claimants concurred that the Master Policy acted as a professional indemnity insurance scheme for solicitors, although they appeared to feel that this should *not* be the purpose of the Master Policy. Claimants appeared to consider that the purpose of the Master Policy should be to protect legal services clients who have suffered loss as a result of a solicitor's negligence, and that this purpose has become distorted. This distortion, or in the terms expressed by several claimants "corruption", of the Master Policy was explained as a result of collusion, or a conflation of interests, between the Master Policy, solicitors and the Law Society of Scotland.

For claimants, the Master Policy has served only to deceive legal services clients and the primary reason, according to claimants, for this deception is that solicitors do not wish to have their premiums increased following successful claims:

Why do solicitors not act – it is because for every successful claim on the Master Policy all of the professions' premiums go up the following year, is it because Scottish solicitors do not wish to establish Case Law in relation to legal profession negligence, or is it because those to be pursued are members of the same professional body, and whilst the Law Society, the profession, and RSA deny these events, I can assure you I do have the firm and absolute evidence to the contrary.

For some claimants, the operation of the Master Policy, and indeed the Law Society of Scotland, is motivated solely by self-interest:

The aim of the Master Policy and Guarantee Fund should be to compensate clients to the penny what solicitors have either stolen, embezzled, or lost through negligent legal service. There is no excuse, no justification for one penny of clients' funds being lost by a solicitor.... [T]he Master Policy and Guarantee Fund have never achieved this aim, and in their current set up, never will. These failures are not accidental, they are by design as the legal profession does not want to pay back clients' money which has been taken or lost by their members.

For some solicitors, the consequence of having their premium increased should a claim be proved against them was considered to be an incentive to ensure that they work was of a good standard. Although, several solicitors also acknowledged that the Master Policy did not necessary drive out solicitors with bad track records. Nevertheless, this disadvantage was generally seen to be outweighed by the benefits:

The Master Policy may not be ideal, but it is the best bad option we have got. If you have a good claim record, then you are subsidising those that don't, but there are lots of positives. There is the focus on risk management, the risk management roadshows. There is a consistent approach to resolving claims, and the insurers have a committed team, they have good technical claims handling people. They only ask proper questions and give real instructions. We have, at least I think we have, the single biggest insurance premium placed in Scotland. If I was insured with another insurer, I would have to deal with a claims handler based in London, I would have to travel, I would have to explain my claim to someone who didn't understand it, then they wouldn't have the expertise.

Another problem that was raised by a number of solicitors was the lack of transparency in how premiums were set:

I don't really understand the black art of setting premiums, premiums are not really broken down by insurers, they are not necessarily transparent.



My firm is a high street firm, and so if premiums are high because I have to cover bad lawyers, then I have to pass this onto the clients. It would be a lesser fee if I didn't have to cover bad lawyers. I never realised this. I saw it as a maximum discount, but it isn't, it's a capped discount. So it also isn't a benefit for the client or the profession... The problems with the MP became clear to me only when I, having practiced for ... years without a claim, and then I have a claim made against me. The insurers put a reserve on the claim. The claim does go ahead, but the MP works so that the reserve is treated as a finalised claim. So my premium then goes up.

These comments suggest that solicitors' views on the Master Policy are not clear-cut, however, without a larger and representative sample of solicitors, it is not possible to tease these issues out further.

The Law Society of Scotland, and several solicitors that we spoke to, seemed aware that claimants do not necessarily appreciate the fundamental purpose of the Master Policy, and that this misconception underlies public dissatisfaction with the scheme:

There is a misconception from the public, and possibly even from the profession, that it primarily protects consumers, but it is in fact an insurance policy. Clients can feel that there is a guarantee if they go to see a solicitor that nothing will go wrong. Clients feel that they must be indemnified, and that the Master Policy is a no fault scheme. But it isn't. As an insurance policy, if your solicitor is negligent and you make a claim, you will get compensation. So it does protect the public. But the client thinks, 'I have used a solicitor, something has gone wrong. I can go to the Master Policy'.

While the Law Society explained that it has always provided clear and unambiguous information about the purpose of the Master Policy, an examination of current material on the Society's website suggests that this is not necessarily the case. The main public webpage concerning the Master Policy consists of an Information Sheet on the Master Policy for Professional Indemnity Insurance<sup>9</sup>. This sheet states that:

If you feel that your solicitor or a member of their staff may have been negligent in the way they have handled your case, then you may have a claim against them.

The Sheet then goes on to discuss the process by which claims are resolved, before defining professional indemnity insurance and the Master Policy. The statement concerning professional indemnity insurance states that:

---

<sup>9</sup> Reproduced in the Appendix to this Report.

Scottish solicitors working in private practice have Professional Indemnity Insurance cover for claims against them. This insurance means that, if you establish a valid claim for negligence against a solicitor, that claim will be paid - even if the solicitor is no longer in practice, no longer solvent or cannot be traced.

At the end of the information sheet the purpose of the Master Policy is indeed clarified, with the Master Policy described as:

...the compulsory Professional Indemnity Insurance arrangement which covers all Scottish solicitors working in private practice. The Society arranges the Master Policy for Professional Indemnity Insurance. Claims are handled by the Master Policy insurers. The insurance provides cover of up to £2 million for any one claim.

However, the overall impression given to the public seems to be that the Master Policy protects the interests of legal services clients, when, in fact, it protects the interests of solicitors.

This lack of clarity concerning the real purpose of the Master Policy becomes even more evident when compared to the Master Policy's equivalent in Ontario, which is operated by LawPro. LawPro's mission statement states:

Lawyers' Professional Indemnity Company (LAWPRO) is an insurance company licensed to provide professional liability insurance and title insurance in jurisdictions across Canada. Formerly known as LPIC, the company has been commonly known as LAWPRO since 2002.

LAWPRO provides liability insurance to about 22,000 lawyers in private practice in Ontario. Through its TitlePLUS program, LAWPRO also provides comprehensive title insurance and legal services coverage for residential purchase and mortgage-only/refinance transactions handled by lawyers across Canada. LAWPRO also works with provincial regulatory agencies to distribute TitlePLUS title insurance through insurance brokers to lawyers' clients, as required in certain provinces.

Incorporated in 1990 by the Law Society of Upper Canada, LAWPRO operates independently with its own management and board of directors.

LAWPRO operates in a commercially viable and responsible manner in accordance with the regulations of the Ontario Insurance Act, the Ontario Corporations Act, and other applicable legislation. LAWPRO is headquartered in Toronto, Ontario<sup>10</sup>.

This mission statement not only makes the purpose of LawPro clear, it also makes transparent the governance structure and regulation of LawPro.

---

<sup>10</sup> [http://www.lawpro.ca/news/LAWPRO\\_FactSheet.asp](http://www.lawpro.ca/news/LAWPRO_FactSheet.asp)

The uncertainty about the purpose of the Law Society of Scotland's Master Policy does not appear to be limited to claimants. Solicitors with a strong direct involvement in the Master Policy explained that other legal practitioners whose involvement in the Master Policy was limited to simply knowing that they were protected should a negligence claim be made, were possibly also unaware of the Master Policy's purpose. It appears that some solicitors also conceive the Master Policy as primarily protecting claimant's interests, rather than those of the legal profession:

...practitioners also don't know a lot about the Master Policy, or even their obligation to intimate a claim. There has been a growing churlishness towards the public, with some practitioners wanting to know why should the Master Policy protect the interests of clients. The Law Society is seen by some to be acting more for clients than for the profession. I would rather work with the Master Policy than without it.

This last quotation in many respects crystallises the major issue facing this research: who gains from the Master Policy – clients or practitioners? The Law Society of Scotland in many fora has argued that clients benefit – at least that is the implication drawn from statements concerning clients of possible MDPs involving non-solicitors losing the benefits of the Master Policy<sup>11</sup>. It is, perhaps, not unsurprising that those outside the legal profession might be confused as to the fundamental purpose of the Master Policy.

However, the question to be asked is what benefits do clients (and potential clients) of solicitors in Scotland derive from the existence of the Master Policy which they do not obtain under the law of delict in the absence of the provisions of Section 44(1) of the *Solicitors Scotland Act 1980* and *Solicitors (Scotland) Professional Indemnity Insurance Rules 1995*.

In the absence of professional negligence insurance taken out by the solicitor a client would have to pursue an action in delict under which the client would have to prove that the solicitor owed the client a duty of care, that duty had been breached and that the breach had caused harm to the client. Of course, settlement may occur before the matter goes to proof. To simplify the position: the process is the same with or without the solicitor having professional indemnity insurance up to the point of settlement or proof.

However, without professional indemnity insurance a successful pursuer in such a case may not be able to recover the loss if the quantum is greater than the solicitor's assets or the solicitor is no longer traceable<sup>12</sup>. Thus one benefit of professional indemnity insurance for the client is certainty of recovery should he be successful. However, the likelihood of the client prevailing may

---

<sup>11</sup> See for example Annex E (Review of Multi-disciplinary Practices) of *Report by Research Working Group on the Legal Service Market in Scotland*, Scottish Executive, 2006, referring to the report of the Law Society's Working Party on Multi-Disciplinary Practice. One of the authors of the present Report was a member of the Research Working Group.

<sup>12</sup> It should be noted that according to the Information Sheet on the Master Policy for Professional Indemnity Insurance if a claim is valid payment will be received 'even if the solicitor is no longer in practice, no longer solvent or cannot be traced'.

not be independent of the solicitor having professional indemnity insurance. We do not propose to provide an economic analysis of the costs and benefits of professional indemnity insurance (whether through a master policy or otherwise) but merely to point out that with or without such a policy liability needs to be determined<sup>13</sup>.

Our interviews with members of the pursuers' panel and the Master Policy panel suggest that determination of liability is often a major stumbling block in professional negligence cases. There are other factors which influence the net benefit to client and solicitor of professional negligence insurance but they are difficult to quantify and beyond the scope of the present project. The point we wish to make here is that unless a system of no fault compensation is established the nub of most professional negligence cases will be establishing liability. For clients as a group to be worse off with professional negligence insurance than without it the probability of succeeding in proving liability would have to be significantly lower given that the defender is no longer judgement proof.

## *2.2 Professional indemnity insurance arrangements for advocates*

The Faculty of Advocates have very different professional indemnity insurance arrangements relative to the Law Society of Scotland, although there are some similarities. Advocates, as with solicitors, are required to hold professional indemnity insurance as a requirement of practice. However, the key difference is that individual advocates are free to negotiate their own arrangements, meaning that the Faculty of Advocates do not hold a Master Policy.

While in theory this means that each advocate negotiates individually with an insurer, in practice, the Faculty of Advocates has produced a standard set of terms, and that these terms have been negotiated with a single broker. This broker, as with the Law Society of Scotland, is Marsh. Some advocates, although they appear to be small minority, make their own arrangements. One possible scenario for this occurring is for advocates who practice primarily in England and Wales, but do so work in Scotland. These advocates need to show that they have appropriate cover that will extend to their work in Scotland.

The Faculty of Advocates have also negotiated a standard scale of levels of cover, although individual advocates then choose their own level of cover within the limits of defined by minimum and maximum cover.

While it may appear that advocates' professional indemnity insurance arrangements are not all that different from solicitors, the ability for advocates to choose their own arrangements was seen to be very important:

---

<sup>13</sup> It would be relatively straightforward to construct a theoretical economic model of professional negligence insurance. However, it is likely that any evaluation of the balance between public and private benefits of this will depend on the relative magnitudes of model parameters which could only, if at all, be established through extensive empirical research.

There has to be an element of choice, advocates must be allowed to have control. You cannot force an advocate, as advocates are self-employed.

The Faculty of Advocates did not feel that the absence of a Master Policy (at least in theory) had caused a problem with advocates obtaining cover, or that cover was prohibitively costly.

The Faculty of Advocates also explained that while they are aware of when a claim has been intimidated against an advocate, they do not follow or intervene in the progress of individual claims.

Negligence cases were described as being very varied, but obviously many relate to claimant's expectations of litigation, for instance, that a case has settled too low. There are limits on taking out negligence claims against advocates, and these limits were raised by several claimants as being significant barriers. It should be noted that some of advocates' traditional immunity against suit has been eroded in recent years, although most of our interviewees claims had been intimidated prior to changes<sup>14</sup>.

### 2.3 *Purpose of the Guarantee Fund*

The primary purpose of the Guarantee Fund is to act as a last resort fund for claimants when they have suffered a loss due to a solicitor's dishonesty. There does not appear to be any great uncertainty, either from claimants or solicitors, about the Guarantee Fund's purpose, although the details of the scheme's operation appeared unclear to most interviewees.

The main concern raised by claimants and others was whether the operation of the Guarantee Fund, as a last resort fund, was too harsh.

The Guarantee Fund is a discretionary fund. This may not made sufficiently clear to clients. Indeed, it appears to us that the title 'Guarantee Fund' is itself misleading. It is not surprising that some claimants feel misled when the Law Society of Scotland gives such prominence to something called the Guarantee Fund in its publicity and follows this by text which appears to be saying proudly that the Law Society of Scotland will protect all clients against incompetent or fraudulent solicitors. However, it is still the case that a claimant has to prove that the loss was wholly due to the solicitor's dishonesty and that the claimant could not have mitigated the loss and all alternative means of recovery have been exhausted before the Law Society will exercise its discretion in favour of the client.

---

<sup>14</sup> In 2002, *Arthur JS Hall & Co v Simons*, the English House of Lords unanimously decided that advocates' immunity should no longer be recognised for civil advocacy, and it was also decided on a majority vote that immunity should not longer be recognised for criminal advocacy. *Arthur JS Hall & Co v Simons* [2002] AC 615. Also see Gordon, G. (2007) "Not yet dead: *Wright v Paton Farrell* and advocates' immunity in Scotland" *Modern Law Review*, 70, 3, 471-483.

There is no equivalent to the Guarantee Fund for members of the Faculty of Advocates, as advocates cannot be directly instructed (for the most part<sup>15</sup>) and do not collect fees directly from the client. Instead, fees are collected by the solicitor from the client in the form of disbursements. Members of the Faculty do not hold other monies on the behalf of clients.

---

<sup>15</sup> There are some exceptions, mainly legal professionals and public authorities, as well as some other professional groups and a range of individuals including voluntary organisations and recognised charities, public limited companies regulated by the London Stock Exchange. See The Report of Research Working Group on the Legal Services Market in Scotland (2006).

### 3. Operation of the Master Policy and Guarantee Fund

#### 3.1 *Process of making a Master Policy claim*

The Master Policy is best understood as one component of a larger system of addressing complaints against legal practitioners. The Master Policy is arguably the final step in claimants' efforts to resolve problems with their solicitor, although several claimants that we spoke to used a Master Policy as a first resort.

One of the features of the narratives that we heard from claimants was that they had initially trusted their solicitor. Clients' referred to a profound sense of shock following their discovery that their solicitor had appeared to be negligent:

Something happened to me that afternoon. After receiving that shock from him, and the devastation of what had been going on for 6 and a bit years, I left his office, but for the next 5 or 6 hours I didn't know where I went. I remember arriving back at my car at about half past seven in the evening in the supermarket carpark, but I don't know where I had been for the 5 hours.

Most people do not have experience of legal service, they are not experienced consumers of legal services, and so they go to see a solicitor with quite a lot of concern. They know that the law is highly specialised, and they trust a lawyer. Then it goes wrong, and as they had such initial high expectations of the profession, they are completely shocked, horrified.

Although research has consistently shown that there is a deep sense of public cynicism about the trustworthiness of the legal profession<sup>16</sup>, it appears that this scepticism applies to an abstract view of practitioners. Clients still develop a relationship with their own solicitor that is primarily based on trust, and it is relatively rare for clients, especially individual clients, to express dissatisfaction with the solicitor who represented them. The Law Society of Scotland also appears to have tried to tackle public cynicism of the legal profession. For instance, their information statement concerning the Master Policy begins by stating:

Solicitors in Scotland have an excellent reputation and the vast majority of clients are happy with the services they provide.

It would appear that solicitors in Scotland are generally trusted and respected, and thus, claimants who experience problems seem to feel betrayed. Several solicitors described Master Policy claimants as having quite an emotional investment in their claims, and considering their sense of being let down, this is not too surprising.

---

<sup>16</sup> Galanter, M. (2006) *Lowering the Bar: Lawyer Jokes and Legal Culture*; Tyler, T. R. (1997) "Public mistrust of the law: a political perspective", *U. Cin. L. Rev.* 66, 847.

The first step for most claimants was to try and resolve the case by speaking to the most senior partner in the firm. None of the claimants that we spoke to felt that the firm made any effort to address their concerns. Instead, they all described being met by partners who were aggressive, and this attitude also appeared to add to their sense of shock:

So I phoned up the senior partner of the firm. He then started up investigations, and I made an appointment to see the senior partner. When I went in to see the senior partner, after having a brief conversation with him, he looked at me across the desk, and he sat back in his chair, and he folded his arms, and he said "I'm now your opponent."

Since June 2005, the Law Society of Scotland has required all firms to have a named Client Relations Partner (CRP). The role of CRPs is to try to resolve problems raised by clients. They are required to keep a central record of all written complaints and the way they are dealt with. Firms must have a written procedure for handling complaints. None of the claimants to whom we spoke mentioned having spoken to the CRP, although there are several possible explanations. First, most of the claimants that we spoke to had cases that were initiated with a problem that occurred well before 2005<sup>17</sup>. We only talked to one person (not a Master Policy claimant) with a very recent problem, and this had occurred within a firm with only two partners. This client's problems also do not appear to have been addressed in the first instance:

I asked to see the sale file. I asked three times, and he refused. I said I own the file as I am the executor. Only then did he show me the file... He was reluctant to let me see it.

In contrast, the CRPs that we spoke to explained that they try to resolve issues as soon as they are raised. As one explained:

We talk to the person, we try to find out what the problem is. If it is an issue to do with a clash of personality, then the office is big enough, that you can find a change of solicitor. With other complaints, we then to take a view that if you try to reduce the fees, if that is what the problem is about, then that might solve the issue. We try to avoid confrontation. It is too time consuming, and ultimately too costly, to do otherwise. The bulk of problems get settled. Some, where there is a genuine complaint, some I would just settle. I am not here to deny complaints, I need to look at the issue from the client's point of view.

If a complaint cannot be resolved by the CRP, the second step is to refer the complaint.

---

<sup>17</sup> Consumer Focus Scotland's (1999) research found that 89% of survey respondents stated that when they had first tried to raise their complaint with their solicitor, they were not told what to do if they were unhappy with the service they were provided. However, many of the recommendations made in this report have now been implemented by the Law Society of Scotland, and without further research, it is not possible to determine the impact of these changes.



The Law Society of Scotland explained that they have a clear process for dealing with people who feel that they may have a negligence claim against a solicitor. First, someone will invariably ring. There is need to decide whether it is suitable for a complaint or claim under the Master Policy. It depends on costs. This has changed with SLCC, which operates almost as a small claims court. Claims if over threshold of money, will result in claimant being referred to pursuers' panel website. Information will be sent out. Potential claims are not dealt with by the Law Society.

Complainants to the Law Society generally deal with the complaint themselves, and are not encouraged to seek legal advice. It was suggested to us that there is a problem of expectation – there is no-one helping people who make a complaint. Previous research has shown that one of the major roles of a solicitor is to shape expectations<sup>18</sup>. It is suggested that complainants often over value their claims.

The claimants to whom we spoke provided a long list of problems that they faced when trying to have their complaint heard by the Law Society of Scotland. Some felt that the final report did not resemble their case, the process lacked transparency, and that the Law Society deliberately delayed complaints being resolved in an effort to stall negligence claims:

Additionally, from the time my claim was made, the Law Society of Scotland, who were still considering complaints made against the solicitor... constantly halted their investigations, putting forward excuses they could not investigate matters while I was raising a claim for negligence against the Master Policy. This stop-start investigation policy continued for well over a year and it was obvious there was an intentional go-slow on the part of the Law Society of Scotland in their investigations to prevent me from obtaining evidence from their investigations to put into my claim to the Master Policy against the solicitor.

The time limit for complaints to be made to the Law Society of Scotland, which currently stands at 12 months, was also criticised. Similarly, the SLCCs' time limit of 12 months to raise a complaint was also seen to be too restrictive.

In return, the Law Society of Scotland explained that there is a clear process under which both lawyers and non-lawyers are involved in report writing, and the time limit ensures that memories are fresh. They also explained that claimants have the right to appeal decisions to the Legal Services Ombudsman, and that the Ombudsman can ask for complaints to be reopened. One claimant, however, asserted that the Law Society had ignored this instruction.

If a claim involves potential negligence, then claimants contact Marsh directly, or go to a solicitor, who contacts Marsh. Claimants without a solicitor were

---

<sup>18</sup> Eg Melville, A. and Laing, K. (2008) "Personal action plans: evaluating self-management initiatives in family law" *International Journal of the Legal Profession*, 4, 149-167.

told by Marsh that they should seek legal advice. Marsh then allocates the claim to an insurer. Most claims are allocated to Royal Sun Alliance.

The Law Society of Scotland explained that they do not get involved in the management of claims. This assertion was disputed by several people who contacted us, who pointed to an exchange between the then Chief Executive of the Law Society, Douglas Mill, and John Swinney (MSP) during the Justice 2 Committee hearing in May 2006. Swinney had asked Mill a question in relation to a memorandum addressed from Mill and relating to a claimant with a Master Policy claim. Swinney states:

I am interested in what the President of the Law Society has just said about the fact that the Law Society has nothing to do with the arrangements for handling negligence claims. Because I have in front of me, a memorandum which was issued by Mr Mill in connection with a case of one of my constituents on the 5<sup>th</sup> July, 2001... Certainly, in the terms of Mr Mill's memo, it is a memo to the then President of the Law Society, Mr McAllister, it also involves reference to the brokers of the Master Policy. It suggests that it will be good if we all got together, and I quote Mr Mill 'and have a summit meeting to discuss how to dispose of my constituents' several valid claims.' Now I find that, Mr Mill and I have discussed at length over the years, but I do find that a strange memo to sit comfortably with the statement that the President has just made.

Mill replies by stating:

I would actually say that it goes a long way to proving that we don't dabble in individual claims. I will go on oath and on record and swear on my granny's grave that never once have I or any member of my staff, or even indeed any office bearer, ever dabbled in a claim. What I am saying is that there are various parties. If you take Anne to be the Law Society, she in turn tenders the Master Policy brokerage on a five year rolling programme with Phillip, who is the broker, Marsh. He in turn buys it on the market from me, RSA, as the lead insurer and the other insurers each year. And where necessary they would instruct Caroline, as the panel solicitor. Now this is the sharp end of claims being dealt with. The layer of insulation between the Law Society and claims handling is Marsh the broker. Our President then, Martin McAllister, got a letter from Mr Swinney's constituent. And I think the Committee probably will accept that many letters that our President gets are perhaps not with the same foundation that Mr MacKenzie's issues have been. I was asked to give a briefing, and I quite properly inquired of Marsh, and I said that I am seeking an assurance that these complaints, these claims are being progress quickly. And that's what I get.

We were also directed to a letter written by Mr Pritchard (then Secretary of the Law Society of Scotland), which was referred to by Swinney during the LPLA Debate in December 2006. This letter was also described as showing the Law Society's interference in claims. Swinney states:

I can also cite to you extracts from a petition that was made to the Court of Session for Judicial Review, in which there is a quote from a letter from a Mr Pritchard who was the Secretary of the Law Society of Scotland in which he writes to a firm of solicitors: "I am anxious that you should protect your back in this matter, because every solicitor who has acted for this particular person has ended up with a claim against them." You will appreciate that this is a private and confidential letter, not to be shown to Mr Macintyre, the sole purpose of which is to give what I hope is helpful advice to protect both you and your firm". So really quite active encouragement from an official of the Law Society of Scotland for a practitioner not to act and deliver legal representation to an individual concerned.

Another claimant also expressed dissatisfaction that the Law Society had directly intervened in their claim:

Not content with slowing my case and claim against the solicitor, the Law Society of Scotland... directly intervened in my claim by letter and instructed my solicitor... not to take instructions from me... The Law Society, not content with intervening with my solicitors directly, proceeded to obstruct and cancel my Civil Legal Aid I had been trying to obtain for my case...

For the most part, claims appear to be dealt with directly by insurer's claims handlers. Claims handlers were described as being very experienced in dealing with claims, and it seems that for the most part they deal with claims in house. We were also told that claims handlers often had legal qualifications, and that this may mean that solicitors may be more willing and comfortable discussing issues, and that they have a good grasp of relevant aspects of a case, such as causation. Insurers have a list of defendant solicitors, those on the Master Policy panel, who are used largely for complicated cases. These cases were described as being those that go on to litigation, but also they may be high value claims or involve particularly complex issues.

One pursuers' panel member explained that sometimes dealing with cases that are quite complex, but have low value, can be difficult. In these cases, the insured solicitor may wish the case to be progressed in order to protect their reputation, but ultimately the client is the insurer, then the costs of investigation may be prohibitive to running the case. In such an instance, panel solicitors need to be careful to manage the expectations of the insured solicitor:

At the end of the day, you have to get costs within a limit. Sometimes you have to run a defence simply because you have to. But you have to look at financial implications. It can be quite difficult to manage the expectations of the insured. You have solicitors who are generally intelligent, that have a view, and so you have to be careful. You are instructed after all by the insurer, but the insured have expectations, and so do claimants.

Problems arise when cases of very complex, but low value. In addition, we were informed that solicitors are expected to intimate any 'circumstance' to the broker immediately. Not all 'circumstances' become claims. This should be part of the role of CRP. This was identified as a source of delay in processing cases.

There have been many other changes in this field – rise of risk management, file auditing, complaints handling within individual firms, legal aid auditing, decline of self regulation, management of client expectations. There have also been changes with the self-regulation by the Law Society of Scotland – new regulations (CRP + regulations about fee reporting, use of letters of engagement etc.).

Solicitors explained that the vast majority of claims settle. For claimants, many of these settlements were simply too low, and the offer to settle was another tactic used by the solicitors to protect their own interests:

I know of some small settlements, but then you get a gagging clause. This stops other people from suing.

### *3.1.2 Problems in obtaining a solicitor*

One concern that was common to all of the claimants that we spoke to was that they struggled to find a solicitor willing to take on a claim against the Master Policy.

I struggled to find a solicitor. And then when I found a solicitor, I would telephone, and he wouldn't see me. Finally, I had to sit in his waiting room and stay there, refuse to move, until I saw him. I stayed there for 5 hours. And then this solicitor said that I wouldn't win. So I started looking for another solicitor.

I trailed all over Scotland to try and find a solicitor. I went to 28 solicitor firms. And none would take me on. They gave no reason, they just said no. They give no reason as don't have to. I received no reply at all from 17 solicitors. Only a small number replied and said no.

For some, the only plausible explanation is that the Law Society is out against them personally:

Solicitors all the way down the line, they have been stopping me. Solicitors never ring back. They have got me marked. Anyone who can show them up. An ex-solicitor told me that word is going around about me - that I'm a trouble maker.

The problem of finding a solicitor willing to take on a case is much worse for claimants who cannot afford to pay for their case, and so are reliant on public funding. As one claimant stated:

I tried about 15 solicitors, but I couldn't get anyone to help... solicitors didn't want to get involved. I would ask them if they do legal aid. But they would say that they did not do civil legal aid, and then that they didn't do housing legal aid. Solicitors don't like complex cases... They will do easy cases, and then charge the legal aid board lots of money.

These claimants described an additional hurdle, in that the Scottish Legal Aid Board required an independent solicitor to evaluate the merits of the case prior to providing a grant of aid. Also claimants who lived outside of Edinburgh, claimed that when the case proceeded to the Court of Session, they needed to find an agent prepared to represent the case at court.

This concern was also raised by all of the consumer interests groups to whom we spoke. One representative described ringing around herself asking if solicitor would take on a case. No-one would take it.

The problem of claimants being unable to find a solicitor was acknowledged by the Law Society of Scotland, as well as solicitors to whom we spoke. They offered, however, a number of alternative explanations. First, solicitors explained that claimants often did not appreciate that their case did not have merit. In order for a claim to have merit it needs to satisfy the legal criteria for negligence, i.e. it must be shown that the solicitor owed a duty of care and that the solicitor breached that duty of care. In addition, claimants must establish the precise loss caused by the breach of duty of care.

Solicitors explained that it was sometimes very difficult to explain to someone who believed they had a claim that their case did not have merit. They felt that there were several sources of misconception. Sometimes people did not appreciate that the problem was caused by the other party, rather than by their own solicitor. It was suggested to us that clients had a large emotional investment in their claim and consequently were unwilling to accept that it did not have merit.

It is quite likely then that claimants will continue to shop around. They will eventually find someone who will take on the case – but not, necessarily, someone who will do the case well.

All of the claimants that we spoke to insisted that their Master Policy claim had strong merits. Several provided evidence which they claimed showed its merit. Some claimed they had documentation about lawyer against which the claim is being made having admitted liability and they had a grant of aid. Yet, these claimants still struggled to find a solicitor to take on their case.

Research suggests that solicitors may be reluctant to take a case if it doesn't have merit, and this is especially true for contingency fee cases (no-win, no fee) (Kritzer 2002). Many negligence claims are run on such a basis. Several of our claimants felt that their case had merit.

Full contingency fees are not permitted in Scotland. Speculative fees are, and some might argue this limits the ability of claimants who are unable to pay fees upfront to be able to afford access to justice.

It has been suggested that professional negligence is a highly specialised area of law. This it is argued might make solicitors reluctant to take a case on in this field or where non-specialists do they may eventually drop the case. Scotland still has greater generalised practitioners than in England and Wales, reflecting nature of a relatively small jurisdiction. On the other hand it has been put to us by members of the Master Policy panel that all that is required is to be a skilled litigator. There may also be the problem that where we have a dispersed population such as in Scotland solicitors in a rural area may be unwilling to take professional negligence cases against other solicitors in their locally with whom they have to interact frequently.

### 3.1.3 *Party Litigants*

The claimants to whom we spoke all ended up, eventually, as party litigants, although all of the claimants had initially engaged a solicitor, and several of the claimants had used the services of a number of solicitors, before ending up as a party litigant. In some cases, the claimants had sacked their solicitors. In these instances, the claimant had been unhappy that their solicitor had not taken any action, and had 'sat' on the case until it was very close to being time barred, or the action that they had taken was not 'strong' enough. Some claimants felt that their solicitor was not following their instructions, had underestimated quantum, and was not protecting their interests.

Most solicitors that we spoke to explained that one of the major areas of claimant dissatisfaction in master policy claims, and indeed in other areas such as personal injury work, was in relation to the claim's worth. They explained that claimants sometimes feel that the value of their claim is unrealistic, and that, as claimants, they often have a large emotional investment in their claims, that it can be difficult to shape the client's expectations. Several solicitors explained that possibly the greatest advantage of having legal representation is that there is someone who can give the client realistic advice, and while claimant's expectations may be over inflated, that nevertheless a good solicitor will be able to get most clients to take this advice.

The solicitors also explained that not all clients are willing to take advice. They explained that for some claimants, a lower estimate of their claim's worth or the receipt of an expert opinion indicating that the case is without merit, will be interpreted to mean that solicitors protect their collective interests. In these instances, the claimant may be likely to seek the services of another solicitor or to continue as a party litigant. Solicitors, and several of the consumer groups, described these claimants as being 'vexatious' and 'obsessed', and

explained that there was very little that could be done to resolved their problems<sup>19</sup>:

Claimants don't take that well. They take it less well if there is an expert opinion that says that there isn't negligence. Then you will hear that all solicitors will say that there isn't negligence, that solicitors are closing ranks.

Some just don't go away. You think that they have gone away, but then years later they reappear. Some get obsessed, there is no other word for it. These people are very hard to deal with, but there will always be people like this.

There is a range of complainers, and eventually you end up acting for all of them. There are complainers who complain about 4 or 5 firms, and they continuing harass firms, sometimes for years. They never give up. They are vexatious.

It is often very hard to reason with party litigants. Their claim starts to consume their life.

For solicitors, a lack of legal representation means that party litigants have no-one to test the merits of their claim, and this makes it very difficult to attempt to reach any settlement:

In professional negligence claims, the claimants have a good deal of emotion. It is very difficult to persuade the claimant that they might lose, and that they may face horrendous costs. If you try to settle with a party litigant, then they think that you are pulling out, and they will want to take it to proof, so you really can't try to settle with them. There are not many, but some. And invariably they have gone through 2 or 3 solicitors. Solicitors have immense value in cases, especially to deal with the claimant's emotions. Otherwise, the claimant has no-one else to speak to, to point out the flaws in their case.

The party litigants seemed very aware of the ways in which they may be portrayed, and felt that solicitors used the construction of them as vexatious claimants as yet another tactic to minimise claims made against the Master Policy. Some claimants acknowledged that they are now determined to be a "thorn in the side" of the Law Society of Scotland. These claimants also insisted that this was not their initial motivation for bringing a claim, and that they had become embroiled in a Master Policy claim after seeing a solicitor about a rather innocuous issue. Representatives from consumer interest groups also acknowledged that while some claimants could be classified as "vexatious" they also felt that there were very genuine problems with the

---

<sup>19</sup> For more on this in other contexts see Dewar, J., Banks, C. and Smith, B. W. (2000) Litigants in person in the family court of Australia. Research Report No. 20, Family Court of Australia: Canberra, Moorhead, R., and Sefton, M. (2005), Litigants in Person: Unrepresented Litigants in First Instance Proceedings. Department for Constitutional Affairs: London

Master Policy. We were told that ending up having to fight a Master Policy claim without legal representation “could happen to any of us”. It was stressed that most Master Policy claimants who have ended up as party litigants are “ordinary people” who have been “abandoned by the system.”

We acknowledge that the limitations on our research means that we are unable to establish the representativeness of the claimants to whom we have spoken. Only people who are very “articulate and determined” will continue as party litigants, and that even if people have “difficult personalities” everyone is entitled to legal representation.

The claimants that we interviewed felt strongly that their claims had very clear merits, and pointed towards evidence of this. In some instances, they explained that their initial complaints had been upheld by the Law Society, that the defendant had admitted liability, or that they had received legal aid funding for their case. We received a large amount of written material from claimants, and much of this material seems to have been provided in an effort by claimants to persuade us of the clear-cut merit of their cases.

The party litigants that we spoke to clearly felt very frustrated that they had been unable to have the merits of their case accepted. For some, it seemed that if they simply hung on, then despite all of the problems and setbacks that they faced, that eventually justice must be done:

...I had no choice, I had to keep going, I always knew that in the end I would win. I had to win in the end because my initial contract was right. I should have been watertight. I knew that justice would prevail. If only I could break this cycle of criminality.

These claimants explained that after discovering that the legal system was not necessarily going to provide a route to justice, that they had attempted to try other avenues to get their cases resolved. They had campaigned for their cause to various consumer interest groups, had approached their MSPs, participated in Government inquiries, turned to the newspaper, and yet they felt that these efforts had met with little avail. For some, this failure provided further evidence of the deep ‘corruption’ and influence of the Law Society:

A lot of people have tried to say that the Master Policy is corrupt, Which, OFT, Consumer Focus, they have all tried. But nothing. The Law Society is too strong. The same thing happened to the reporters for the *Scotsman* and the *Glasgow Herald*. There was one... he wrote some good stories, and then suddenly he moved South. He had been given the job of editor of the *Legal Times* in England, they had given him that in order to persuade him to shut up. The *Scotsman* used to write a page a week, and also there were stories in the *Glasgow Herald*, but they are all written by lawyers. The Law Society has been buying up advertising in the newspapers. They wouldn't publish our letters. Everything was one-sided. We can't get our voices heard in the media. Lawyers pay for the advertising, it must have cost them millions.



Some had taken to using less orthodox methods, such as publishing their stories on the internet, producing newsletters and even putting up placards and signs on backs of their car, in an effort to get their voices heard.

The experiences of the party litigants that we spoke to had obviously been very difficult and stressful. We were told of the sense of intimidation that party litigants faced when they walked into the court, the problems they had dealing with legal documentation and procedures<sup>20</sup>, and their determination to try and stand up to these difficulties and battle through:

To be a party litigant is very, very difficult. The procedures are a nightmare, the terminology is awful. The people sitting at the desks at court will tell that that isn't the right form, or that isn't in the right format, but then they won't tell you what the right format is. Every place you can fall down, there are so many traps. It is important for the party litigant to have courage, you must have courage, be articulate, determined. You must have the courage to find strength when your mind is almost completely destroyed.

A couple of solicitors felt that party litigants received preferential treatment in courts, however, while several claimants spoke of receiving a supportive statement from a Judge, none gave any indication that they had been treated preferentially<sup>21</sup>. They described being intimidated, being forced to settle rather than try to run a hearing without legal support, and all felt that their claims' outcomes were not fair. Some claimants felt that they should have received more support, and that this lack was further evidence of actors within the legal system being "against" Master Policy claimants. Judges were described as being "former solicitors", members of the Law Society – and thus, against claimants. Some described judges and other judicial officers as being very hostile to party litigants.

The potential outcomes for party litigants also appeared to be very harsh. Party litigants explained the stress that they had experienced, often over a period of years, and it was obvious that discussing the emotional toll of their claims was difficult. Several claimants said that they had been diagnosed with depression; that they had high blood pressure; and several had their marriages fail due to their claim. Some had lost a lot of money, their homes, and we were told that one party litigant had committed suicide. As one claimant stated:

I keep fighting cases, and they keep coming at me, and now I have become ill. But they still keep coming at me. They threw me out onto the street, I couldn't get my medication, I've got nothing, I was homeless, ill, sleeping in the car. Now I am appealing. But I can't get a solicitor. They are just shutting me down.... My health has been damaged, they kill you off. It's a proven fact. All of us have stress related problems after years and years of stress.

---

<sup>20</sup> The problems faced by party litigants are echoed in other studies. Party litigants often feel intimidated, they defend cases less intensely, are more likely to make mistakes relative to represented litigants, and are less likely to settle (Moorhead and Sefton 2005, Dewar et al 2000).

<sup>21</sup> See also Dewar et al (2000:2), Moorhead.

There are a number of empirical studies which also show that being a party litigant is very difficult. Unrepresented litigants are not that unusual in civil and family law proceedings (Dewar et al 2000; Moorhead and Sefton 2005). In many civil matters, the main reason for non-representation is that party litigants are defendants who are not required to participate (Moorhead and Sefton 2005). In addition, litigants end up representing themselves because they cannot afford a solicitor and do not qualify for public funding (Dewar et al 2000).

The claimants that we spoke to, however, appear to have another reason. They can't find a solicitor to take their case on. They don't *choose* to become party litigants, and in one case, explained that they had secured a grant of legal aid, but still couldn't find a solicitor prepared to represent. Dewar et al (2000:35) acknowledges that there are some party litigants "by default", ie litigants who have had no time to get a solicitor due to short notice of court appearance, but these are only a small group.

Previous research also suggests that a small minority of party litigants choose to participate and to represent themselves. Dewar et al (2000:34) describes a small group of these litigants as "dysfunctional 'serial' litigants", who are emotionally disturbed, mentally ill, and vexatious. Similarly, Moorhead and Sefton (2005) claim that "a very small minority" of party litigants are "obsessive" and "difficult". Dewar et al (2000) found that a small proportion of party litigants who chose to represent themselves largely do so because they do not trust solicitors, or the legal profession more generally. We also found a profound lack of trust in the profession, and this was expressed by all of our claimant interviewees. However, the claimants we interviewed seemed to have initially trusted solicitors, and a central theme to their stories was their growing awareness of the legal profession's deception against claimants. They moved from being naive to awareness, seeing "the truth". Some claimants described the moment in which they felt that they had discovered that the legal profession was "corrupt." All had gone to see an initial solicitor believing that the solicitor would do the work etc. None appeared to express strong feelings against this initial solicitor. However, after not being able to obtain a solicitor willing to pursue their claim, or having a solicitor initially take on the case, but then withdraw at a later date, left claimants feeling strongly disillusioned.

Consumer interest groups described claimants as starting out as being naive, generally first-time consumers of legal services who trust lawyers.

The problems faced by party litigants is echoed in other studies. Dewar et al (2000:1) describes party litigants as having:

...a wide range of needs: for information (eg, about relevant support services, court procedures, the stages of the litigation process); for advice (eg, on form-filling, court etiquette, the preparation of documents, the formulation of legal argument, the rules of evidence); and support (both emotional and practical).

Party litigants often feel intimidated, they defend cases less intensely, are more likely to make mistakes relative to represented litigants, and are less likely to settle (Moorhead and Sefton 2005, Dewar et al 2000). Party litigants' ability to cope without legal representation, however, is somewhat mitigated by their level of confidence, nature of the matter, use of support services including receiving support from the court.

Previous research has found that party litigants are generally in family law cases, and while arguably these cases are very emotional and stressful for the parties involved, it would seem that there are additional stresses for professional indemnity insurance claimants. The long-tail nature of the cases means that they go on for years. There appears to be a lack of Alternative Dispute Resolution – there was some mention of efforts of other side to hold a meeting, but only when case very close to proof. There is condensing of time towards proof. It is at this point that solicitors may drop out. Impact on claimant's lives is often great – loss of home, mental illness such as depression, sense of the risks they are taking, on families' lives, separation and divorce, even, it was reported to us, suicide.

Dewar et al (2000:2) also found that some judges and judicial personal felt that party litigants receive preferential treatment in court. Several claimants spoke of receiving a supportive statement from a Judge, but none gave any indication that they had been treated preferentially. They described being intimidated, being forced to settle rather than try to run a hearing without legal support, all felt that outcomes were not fair. Some claimants felt that they should have received more support, and that this lack was further evidence of actors within the legal system being “against” Master Policy claimants. Judges were described as being “former solicitors”, members of the Law Society – and thus, against claimants. Some described judges and other judicial officers as being very hostile to party litigants.

The effects of party litigants are not just upon the litigants' themselves. The judiciary are meant to remain neutral, and to give additional support to an unrepresented party undermines this neutrality (Mason 1994:2). Research with judicial officers and registry staff has shown that the presence of high numbers of party litigants in courts results in high levels of stress and frustration for court personnel. Judges and Registrar reported feeling that their role is compromised by the need to balance judicial impartiality and helping out a party litigant who is obviously struggling against a represented party (Dewar et al 2000, Moorhead and Sefton 2005).

If one party is unrepresented and the other party has representation (which is generally the case), this raises serious issues about fairness. In an adversarial system, the unrepresented party is at a distinct disadvantage (Moorhead). System is based on assumption that there is a contest between equally represented parties, and thus the system is stacked against party litigants (Mason 1994:2).

### 3.1.4 *Scottish Legal Complaints Commission*

Attitudes towards the SLCC appear somewhat mixed. For some respondents, especially solicitors and several consumer interest groups, the SLCC seemed very welcome. In particular, its independence from the Law Society and the raised level of compensation were seen to be positive features. Several interviewees described the SLCC as being akin to a small claims tribunal, and felt that its approach towards the early resolution of claims should be useful.

In contrast, some other respondents were a bit more wary, and felt that it was too early as yet to see with the SLCC was going to be effective. For most claimants, however, the SLCC was seen to be an extension of the Law Society, and therefore it would continue the protection of the interests of solicitors:

The SLCC is made up of people with jobs connected to the 'Law Society Inc.'. It is not independent. That is what we wanted. The Law Society is a law unto their own, they are protected. And the SLCC is part of that.

The new SLCC won't help me... From October to now, how they exercise their remit, there is a cosy relationship between the SLCC and the Law Society... They are supposed to be at arm's length. But documents released under FOI, these documents show that they aren't.

### 3.1.5 *Pursuers Panel*

In 2002, the Law Society of Scotland established the Pursuers Panel, which consists of solicitors who are specialised in negligence claims against solicitors. The Law Society explained that should a client contact the Society seeking advice on a negligence claim, then they would either be directed to the webpage listing the details of the panel members, or the list could be posted out. Initially, four panel members were appointed for a period of three years, although this number has now been expanded to six. Of the current six pursuers' panel members three are located in Edinburgh, one in Glasgow, one in Dumfries and one in Livingston. Of the six only two are believed to be willing to take legally aided cases.

None of the claimants that we spoke to were aware of the Pursuers Panel, and several seemed quite puzzled by our question about the panel:

I don't know about the Pursuers Panel. Perhaps there is a system. The Law Society, if you ask them, they say that they won't help. Even if you are on legal aid, they won't help.

For the most part, these claimants had cases that were initiated before the panel was set up, and one claimant mentioned having received advice from the Troubleshooter. Troubleshooters were senior solicitors located all over Scotland who would offer potential claimants two free interviews. The Law Society of Scotland explained that they had stopped the scheme for two

reasons. First, if a troubleshooter felt that the client did not have a case, then some clients would interpret this decision to mean that the Law Society was stopping their case because the Law Society was paying for the Troubleshooter. Second, if the Law Society (or any solicitor making a referral) suggested that a client see a Troubleshooter, then the client's expectations could be raised. If the Troubleshooter then concluded that the client did not have a case, then the client would be left feeling aggrieved.

One of the consumer interest groups stated that they had rung the Law Society of Scotland and were not referred. They rang around but could not get a solicitor who would take on a case against another solicitor.

### 3.1.6 Sources of delay

A further problem concerning the Master Policy related to delay in resolving cases. For claimants, this delay had a number of sources. First, solicitors were seen to deny liability. Second, we were told of instances when claimants had eventually found a solicitor to take on their case, only to discover that this solicitor had not actually done any work on their file. Several claimants explained that this was a deliberate tactic on the behalf of solicitors, whereby solicitors deliberately 'string along' their client until the case is either very close to the limitation data, or is about to go to proof, and the solicitor withdraws. In these instances, the claimant is left with very few options other than try to find another solicitor prepared to take on the case at short notice, which is highly unlikely, try to continue to resolve the case without legal representation, accept a settlement that is well below their view of the value of the claim, or withdraw.

The solicitors wrote backwards and forwards. The solicitors met, had a chat.... The claim had a 5 year limit, and then we reached the limit, and that was that.

Well, to try and cut a very long story short, one year passed, and I would be at them. And I would get "yes, I've sent letters and I've heard back from them. I'm just waiting to hear back from them again." So another year went past, and I got the same stories, and then another year went past, and I got the same stories again. Well, by the time that I got to 6 years, or close to 6 years, I knew that 6 years was the time limit in a claim. Right? Now, during the 6<sup>th</sup> year when he didn't return my phone calls to his office, or I could not get appointments with him, I thought the only way to find this chap is to go to court where he worked every day and walk up to him. So when I did that, and surprised him, he got into this very stumbling speech and said "yes, yes, it's alright, I'm just waiting to hear from them", etc. But it reached a point in time where, I knew that going by the date that I had put in the claim originally, that on this September or Octoberish time, I said to myself "this is going to get time barred."

I was contacted by about 50 people who had all experienced negligence committed by a solicitor, but then couldn't find a solicitor to take them on, they couldn't find a solicitor who would act on a Master Policy claim. These

people had experienced one tactic that the solicitor would act for so long, get the claim to a certain stage, where it was raised in court, and then dump the claim just before the first court action. At this stage, it is almost impossible for a lay person to deal with it. So they just stopped, there isn't anything else they could do.

A further grievance that was consistently raised by claimants consisted of their perception that their claim had been undervalued. Many of the claimants that we spoke to were clearly opposed to the legal advice that they had received – thought that the quantum had not be advised correctly (with an advocate's report to say so). These are common problems in negligence cases. This client view was also mentioned by the solicitors whom we interviewed.

While claimants felt that defendant solicitors delayed cases maliciously, Master Policy panel solicitors explained that insurers insisted that claims were dealt with as efficiently and as quickly as possible. This was part of claims handling philosophy and made good business sense.

Several solicitors also explained that establishing liability in solicitor professional indemnity insurance cases is usually not difficult, and if liability is clear then it is usually accepted early on in a case. They explained that the difficult issues in these cases involved establishing causation and then quantifying loss, and that it is at this stage that delay may be met.

It is also argued that it is easier for experienced practitioners to establish liability, or at least get a sense of it, due to experience as a solicitor. It is easier to understand than in another field, as they are solicitor themselves. There may be delay at this stage, for a number of reasons. For defendant solicitors it depends on the presentation of the file. This could mean wading through convoluted details to work out the facts. Perhaps there would be a need to get an opinion. Wait for legal aid to be granted or extended, SLAB requirement of an external opinion.

Other delays can arise because of solicitors sitting on files and not intimating a problem.

Major delays are involved in establishing causation, and then quantifying liability. This may mean waiting for another action to take place (eg divorce) in order to establish loss, thus the claim is put 'on ice'. There is sometimes the need to obtain further opinions.

It was felt by most of the solicitors who had direct experience of working with Master Policy claims that one of the main advantage of the Master Policy was that it allowed for the efficient resolution of claims.

Claimants' descriptions of negotiation strategies generally consisted of delaying the claim:

It took around three years for my... solicitor to consider the issues and actually lodge my claim and serve papers on the solicitor, a matter I considered a farce. Numerous bungled attempts were made to serve the claim, then unexplained delays cropped up, where my solicitor had allegedly 'forgot' to include particular issues of my claim in the papers to be served.

Several claimants explained that very little occurred on their file other than the exchanges of letters between solicitors, until the claim approached the proof and the solicitor withdraw.

In contrast, interviews with solicitors revealed a number of negotiation strategies, which they claimed to use quite regularly, in order to settle a claim, and in fact, no solicitor discussed using an exchange of letters as a means of resolving a case. Solicitors discussed strategies such as simply telephoning and talking to the solicitor on the other side. One solicitor described using informal meetings as a successful method of resolving a case:

I have used joint consultation, where the parties are in different rooms. It has proved to be very effective. It makes the client feel part of it. They are in a room and spoken to by their team. This has got some Master Policy claims resolved.

Several solicitors also explained that the use of mediation could speed up resolution. Mediation was described as being useful for allowing clients to get issues 'off their chest'. As one solicitor explained:

Mediation can be useful, but it has to have its place. It is not a general panacea. But it is useful in some cases, where you have an individual client who needs to feel as if they have to have their say, to have their day in court without going to court.

One panel solicitor explained that insurers expect them to consider mediation, and in their regular reports on a claim's progress, which they have to provide to insurers, they have to comment on whether a case may be suitable for mediation. Mediation was not seen as a regularly used option as there were other avenues, such as simply talking to the other solicitor, that were cheaper and readily available in a relatively small jurisdiction.

It was suggested to us that very few cases go to proof. Members of the Master Policy panel suggested only large cases that are high value and complex are litigated. Perhaps, only 1% go to proof, and 10% go to court. Some claimants have clearly interpreted this statistics to mean that the system is corrupt, evidence that claims are being withdrawn, whereas for solicitors, this was evidence that cases were being settled out of court.

### *3.2 Operation of the Guarantee Fund*

We contacted the Law Society of Scotland regarding statistics on the Guarantee Fund and were referred to Annual Reports on the web site. There it is reported that

Grants of £77,000 were admitted for payment in the year (2006/07: £315,000). The Guarantee Fund is a discretionary fund. Claims are assessed, recorded at the value given by the claimant and then fully investigated. Investigation will include whether there are any factors, such as contributory negligence, that should be taken into account. Adjustments to the recorded claim value are made depending on the results of investigations. The total of claims intimated but not admitted at 31 October 2008 was £2,128,000, representing 18 separate claims made against eight firms (2007: £3,777,000/42 claims/13 firms). After further investigation, it has been possible to reduce some claim reserves. (Law Society Annual Report, 2007/8)

It can be seen that whilst there are a relatively small number of claims they are of high value. However as can be seen payouts are relatively modest.

In our focus group with the Law Society of Scotland it was pointed out that many calls on the Guarantee Fund arise from firms where a Judicial Factor is already in place, often as a result of suspicion that the firm not operating the Society's financial compliance rules. Clients may be unaware that they have a potential claim on the Guarantee Fund until it is picked up by the Judicial Factor. It was also pointed out most claims on the Guarantee Fund are less than £10,000. Increasingly the largest part of claims on the Fund are from lending institutions



#### 4. Alternative models

A comparison of professional indemnity insurance schemes operating in other jurisdictions reveals a number of potential alternative models. It must be stressed, however, that there is little critical analysis or evaluation of these schemes, and for the most part, the main issue that has been considered is whether having a limited range of insurers, or indeed a single 'Master Policy', is anti-competitive.

Some professions do not mandate their practitioners to hold professional indemnity insurance, instead leaving the strong incentive that professional indemnity insurance protects professionals from potentially large payouts. However, there has been an increasing trend for professional indemnity insurance to be a condition of having a practicing certificate or be mandated by legislation. This trend started in the medical profession and has spread into other professions, including the legal profession. Compulsory professional indemnity insurance is intended to ensure that consumers can obtain redress in situations in which professional negligence or incompetence has been proven and harm suffered (Deighton et al 2001:10). Currently, a number of jurisdictions have compulsory professional indemnity insurance for legal professionals (all Australian states, Scotland, Ontario including government, in-house, legal aid clinic lawyers etc), although some only require voluntary cover (eg New Zealand).

It is possible to identify advantages and disadvantages for mandated schemes. Public benefits of having a compulsory professional indemnity insurance scheme include:

- Minimising problems of information for consumers;
- Ensuring that consumers who have suffered harm receive adequate compensation;
- Ensuring the practitioners bear the costs of negligence;
- Ensure other practitioners are not driven out of business due to large award damages;
- Reduce the costs of insurance by increasing the size of the risk pool;
- Improve public confidence in the profession;
- Exclude uninsured practitioners from practicing (Deighton et al 2001:11).

Potential disadvantages include:

- Professionals may be excluded from the market if they are unable to afford the costs of insurance premiums, in turn reducing access to the profession, which reduces competition and increases price.
- The actions of insurers can effectively determine who can, and who cannot, practise.
- Costs of insurance premiums are passed onto consumers, which increases the costs of services.

- As compulsory professional indemnity insurance schemes provide for cross-subsidisation, individual professions do not have to directly bear the full costs of any successful claims, and hence the incentives for 'bad' practitioners to exit the profession are reduced (Deighton et al 2001:11).

A second issue concerns whether the provision of professional indemnity insurance should be through a legislated monopoly, or whether policies should be purchased on a competitive market. There seem to be three main approaches:

1. Professional bodies offer their own professional indemnity insurance schemes as a pre-requisite of membership

Mandatory schemes run through Law Societies include LawPro in Ontario, LawCover in New South Wales, and in Northern Ireland.

In 1990, the Law Society of Upper Canada set up LawPro. In 1995, LawPro began to operate independently of the Law Society with its own Board of Directors.

In NSW, professional indemnity insurance is offered by Law Cover Pty Ltd which is a wholly owned subsidiary of the Law Society of NSW. The current insurance policy was negotiated by insurers and LawCover, and approved by the Attorney General. The Bar Council has negotiated a policy on the behalf of barristers. Law Cover took over professional indemnity insurance coverage in 1987, after some solicitors found that they insurers would not offer premiums.

2. Practitioners purchase professional indemnity insurance from a restricted competitive market. Eg Hong Kong and England.

Prior to 2006, professional indemnity insurance claims in Hong Kong were handled by Hong Kong Solicitors Indemnity Fund Limited (SIF), a company limited by guarantee formed for the sole purpose of dealing with solicitors' professional indemnity insurance claims. The SIF was replaced with a scheme whereby one or more Qualifying Insurers (QIF) handle claims. This change was due to "dissatisfaction with the fact that under SIF solicitors were in effect insurers for each other and also insurers of last resort, because of their statutory obligation to "maintain" the Fund"<sup>22</sup>

If firms cannot find insurance from a qualifying insurer, then they can go to the Assigned Risk Pool (ARP). Premiums under ARP are very high (27.5% of firm's gross income), a firm cannot stay with the ARP for more than 2 years within a 5 year period. If a firm is then unable to find an insurer and has exceeded the allowable period within the ARP then they will have to foreclose.

---

<sup>22</sup> (pg 1-2)

<http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0327cb2-1559-1e-scan.pdf>

Concern expressed by Law Society over the punitive and deterrent effect of the ARP.

3. Practitioners purchase professional indemnity insurance from an unrestricted competitive market (mutual organisations, commercial businesses).

There are advantages and disadvantages to the provision of professional indemnity insurance through legislated monopolies. In relation to advantages, monopolies ensure that insurance is available to all practitioners, including high risk practitioners who may otherwise be unable to find insurance (which is why the NSW scheme moved to a monopoly provider in 1987), meaning that they would be forced out of practice and clients who be unable to access services in high-risk areas of law. On the other hand, monopolies prevent lawyers from obtaining insurance that best suits their individual needs. Monopolies may also prevent 'bad' practitioners from being driven out of the market due to increased premium costs and provides little incentive to reduce negligence practice (Deighton et al 2001:11).

The National Competition Commission considered the issue of choice of insurer in NSW. Currently, there is only one provider of professional indemnity insurance for lawyers (LawCover). However, professional indemnity insurance is widely available and fidelity cover may be provided by insurers. The Law Society of NSW has indicated that it is looking at the possibility of opening up professional indemnity insurance to competition, which may decrease the costs of premiums. However, the NCC highlighted several issues that would also need to be considered. Insurance would need to cover practitioners who have ceased to practice or operate, whereas insurers frequently do not offer 'run-off' cover. The NCC expressed concern about whether and how insurers should be screened, and if the number of insurers should be limited. This becomes an issue as the legal profession has several special features, such as capital adequacy and reinsurance.

Most of the solicitors that we interviewed felt that there was no advantage to opening up the market. This also appears to be the conclusion of the OFT in its 2004 investigation. Interviewees identified a number of advantages of the Master Policy as it stands, and felt that these advantages easily outweighed the problems.

Advantages are: work with an experienced insurer, everyone is covered

Disadvantage: potential lack of choice of insurance provider. However, opening up the market would not be attractive. Another disadvantage is that the Master Policy does not act against 'bad' solicitors.

It has not been possible in the time available to us to provide a comprehensive comparison of these alternative schemes. The information which we were able to access was patchy and in some cases dated.

## 5. Conclusion

This present study must be seen as a preliminary one given the short timescale and resources available to us. It has not been possible to interview a representative sample of claimants with experience of the Master Policy. We have had to restrict our interviews of claimants to those who have approached us. This has meant that many of the claims we have been informed of are long standing ones. However, we have been able to interview representatives of consumer bodies in addition to solicitors and representatives of the profession.

What has clearly come through these interviews has been the very divergent views of solicitors and claimants/consumer groups as to the primary function of the Master Policy. The former tend to see it as simply a professional negligence insurance designed to protect individual members of the profession. The latter see that its primary purpose should be to protect the public against incompetent members of the profession. Whilst these are not incompatible aims we have come to the view that the rhetoric of the Law Society of Scotland encourages the latter perception but practice is more inclined to the former. In other jurisdictions there is a more explicit statement that it is the former.

It is clear that establishing a valid claim under the Master Policy requires either an admission of liability on the part of the solicitor or an action to be taken by the claimant to establish liability. It is our view that the Law Society of Scotland raises the expectations of potential claimants by emphasising the Master Policy's public protection role. It is perhaps more accurate to say that policy ensures that those with a *proven* claim will be able to recover.

Those claimants to whom we spoke were very much of the opinion that it was difficult to establish liability of a solicitor for professional negligence. It would be desirable to test this claim by looking at the record of the Master Policy in terms of claims and compensation paid. Data which would have allowed us to do this was requested from the Law Society of Scotland but was only made available the day before this Report was due to be submitted. Furthermore the Law Society of Scotland and Marsh put conditions on the use of the data in this Report which were unacceptable to us and to the Chief Executive of SLCC.

The limited data which we have seen on the Guarantee Fund suggests that there is a considerable difference between the value of claims and the sums paid out by the Fund. We have not been able to establish whether this is a result of the discretionary nature of the fund or simply a large divergence between parties in assessing the sums lost.

Because those claimants to whom we have spoken have longstanding cases which predate the setting up of the pursuers' panel we are unable to judge whether establishing a claim is currently as difficult as these claimants have found it to be. This might only be possible to establish through a much wider sampling of claimants whose names could only be provided by the Master Policy's broker providing names of claimants.

We would recommend that the Scottish Legal Complaints Commission undertake a longer term research project which will allow researchers to examine the experiences of a representative sample of claimants and solicitors as well as analyse data on claims provided by the Master Policy's broker under reasonable conditions of use.

## Appendix

### Information Sheet on the Master Policy For Professional Indemnity Insurance

Solicitors in Scotland have an excellent reputation and the vast majority of clients are happy with the services they provide.

If you feel that your solicitor or a member of their staff may have been negligent in the way they have handled your case, then you may have a claim against them.

#### 1. Do I have a case ?

Before considering making a claim, you should ensure that you have a case. It is not enough just to be dissatisfied with the outcome of a particular transaction, court case etc. To establish that your solicitor was negligent and that you have a valid claim, the law requires you to be able to show: -

- (a) that your solicitor owed you a duty of care;
- (b) in what way your solicitor breached that duty of care; and
- (c) the precise loss to you resulting from that breach of care.

#### 2. Making a claim

Making a claim and proving negligence can be complicated and you may need to ask a solicitor for assistance. Many claims are resolved by negotiation. Where negotiations fail, you may need to raise court proceedings in which case the court will decide the outcome of your claim.

There are time limits that apply to claims for negligence. After the expiry of those time limits, you may be unable to make a claim.

#### 3. Pursuers' Panel

The Pursuers' Panel is a group of solicitors who have expertise in professional negligence to assist members of the public with advice about negligence claims against solicitors. Follow the link for more information: [Pursuers' Panel](#).

#### 4. Professional Indemnity Insurance

Scottish solicitors working in private practice have Professional Indemnity Insurance cover for claims against them. This insurance means that, if you establish a valid claim for negligence against a solicitor, that claim will be paid - even if the solicitor is no longer in practice, no longer solvent or cannot be traced.

#### 5. What is the master policy?

The Master Policy is the compulsory Professional Indemnity Insurance arrangement which covers all Scottish solicitors working in private practice. The Society arranges the Master Policy for Professional Indemnity Insurance. Claims are handled by the Master Policy insurers. The insurance provides cover of up to £2 million for any one claim.

## 6. How does it work?

In a summary, if you make a claim against your solicitor, your solicitor is entitled to make a claim for indemnity from the Master Policy insurers. Provided it is established that you have a valid claim, the Master Policy insurers will meet the solicitor's liability to you to meet your claim.

Not every claim will involve the insurers. Whether or not the Master Policy insurers become involved you still have to establish that your solicitor was negligent.

Depending on the circumstances, you may find that the Master Policy insurers (or solicitors instructed by them) become involved in responding to your claim. Where that happens, you will be sent a copy of the Master Policy Claims Handling Philosophy which is a statement of how the insurers seek to resolve claims.

Further information on the Master Policy may be obtained by [emailing David Cullen at the Law Society of Scotland](#).

# MARSH

 **MARSH MERCER KROLL**  
GUY CARPENTER OLIVER WYMAN

Marsh Ltd  
Orchard Brae House  
30 Queensferry Road  
Edinburgh, EH4 2HS  
DX 539940 Edinburgh - 19  
LP - 1 Edinburgh - 15  
0131 311 4283 Fax 0131 311 4268  
alistair.j.sim@marsh.com  
www.marsh.com

29 June 2009

**Subject:** The Law Society of Scotland Master Policy for Professional Indemnity Insurance  
Manchester University Research Project – Master Policy  
Provision of Master Policy-related documentation

Please note that the consent of Marsh and Royal & Sun Alliance plc to the production of the enclosed documents is conditional on the research team agreeing not to quote from the documents, or any part of them, whether text or figures, in the report to the Scottish Legal Complaints Commission.

The documents which are produced are confidential and are commercially sensitive. They are provided to the research team only and neither the documents nor copies should be provided to any other party nor should the content of the documents be disclosed to anyone outside the research team. At the conclusion of the research project, the documents should be returned with confirmation that foregoing conditions have been complied with and that no copies have been retained.

If the research team is unable to agree to the foregoing conditions, the documents should be returned forthwith along with confirmation that no copies have been retained.

Yours faithfully



**Alistair J Sim, ACII**  
Director, Finpro National Practice

*Enclosures:*

- The Master Policy Annual Report 2009
- Master Policy for Professional Indemnity Insurance, Statistical Review at November 2008
- 10 year triangulation (claims statistics) as at 28 February 2009
- Royal & Sun Alliance plc - Stewardship Report 2008

Registered in England Number: 1507274, Registered Office:  
1 Tower Place West Tower Place London EC3R 5BU  
Marsh Ltd is authorised and regulated by the Financial Services Authority.  
Marsh Ltd conducts its general insurance activities on terms that are set out in the document "Our Business Principles and Practices". This may be viewed on our website  
<http://www.marsh.co.uk/aboutMarsh/principles.html>