THE HIGH COURT

[2021] IEHC 456

[2019 No. 6301 P]

BETWEEN

MAURICE MATTHEWS

PLAINTIFF

AND

EIRCOM

DEFENDANTS

JUDGMENT of Mr. Justice Kevin Cross delivered on the 2nd day of July, 2021.

1. Counsel in this matter has requested that I rule on consent the instant proceedings on the basis of the case being struck out with an order for costs to the plaintiff to be adjudicated in default of agreement to include any reserved or discovery costs and that I make a determination that the proceedings have been settled on a 50/50 basis.

2. This judgment concerned orders made on consent of the parties given the provisions of s. 343R of the Social Welfare (Consolidation) Act, 2005.

3. Section 343R of the Social Welfare Consolidation Act, 2005 was inserted by s. 30 of the Social Welfare and Pensions Act, 2013 and creates a system of "recoverable benefits" whereby in summary the Minister produces a statement of recoverable benefits i.e. of certain social welfare payments made to persons injured in various accidents and at the conclusion of the case the tortfeasor (or "compensator" as referred to in the section) pays to the Minister the amount of recoverable benefits specified.

4. This requirement is subject to one important proviso.

5. Section 343R of the 2005 Act states:

> *"(1) Subject to subsection (2), a compensator shall pay to the Minister the amount of recoverable benefits specified in the relevant statement of recoverable benefits before making any compensation payment to, or in respect of, an injured person.*
>
> *(2) Where the recoverable benefits specified in the statement of recoverable benefits exceed the amount of the relevant compensation payment and* ***that relevant compensation payment was the subject of an order of a court*** *or assessment by the (Personal Injuries Assessment Board) in accordance with the Act of 2003, the compensator is liable only to the extent of that amount so ordered or assessed." (emphasis added).*

6. The import of subsection 2 is that for example if €10,000 of recoverable benefits were paid to the injured party but the compensator, or tortfeasor, were held liable for only say 50% of the damages then the compensator would only be obliged to pay 50% of the recoverable benefits.

7. Since the introduction of the recoverable benefits scheme in 2014 this court and indeed to my knowledge all of my colleagues in the personal injury list have made orders on consent with determinations either as to the liability of the parties or the amount of

recoverable benefits paid. This court has also pronounced on a number of occasions that it has jurisdiction under the provisions of s. 343R and at law to make such determinations. One of the duties of a judge is to solve problems and not to create them. Certainly it is not the function of a judge to cause problems where none exist.

8. In an academic article entitled "*Friends with Collateral Benefits? Consent recitals on the loss of earnings in order striking out settled personal injury actions and the recovery of State benefits from tort damages*", Mr. Justice David Keane wrote in Irish Judicial Studies Journal Vol. 4 (2) and he questioned what was to occur in relation to cases which settled and were ruled by an Order "striking out the proceedings" noting that the practice had developed since the introduction of recoverable benefits in cases which are compromised at less than there full value of the judge being notified of that fact and asked to make a determination say that liability was decided on a 50/50 basis or that for other reasons the recoverable benefits due to the accident only lasted for a defined period of time.

9. In his learned article which ranged far and wide dealing with the treatment the law makes in relation to "collateral benefits" Mr. Justice David Keane stated that the issue of settled cases has never been determined judicially.

10. In that Mr. Justice Keane was incorrect as this court which rules the vast majority of orders in personal injury actions has not only made determinations dealing with the provisions of s. 343R in consent matters, but has stated that such determinations are compatible with the Act. It is correct that no written judgment had been given on this point but the universal practice in personal injuries cases was that in consent cases the agreement of the parties as to what the position was in relation to the RBA was accepted by the judges. Indeed, this court had previously stated extempore that to give a different interpretation would be absurd and that the court had jurisdiction to make declarations in settled cases.

11. In an extempore judgment delivered on the 29th June, 2021 in two cases *Aileen Condon plaintiff and the Health Service Executive defendant [2015] 10070 P and Monika Szwasc plaintiff and Hanford Commercials Ltd trading as Maldron Hotel Wexford defendant* [2018] 9268 P Mr. Justice Twomey, *ab urbe* delivered a judgment which was then perfected in written form and considered the provisions of s. 343R.

12. It is unfortunate that Twomey J. was not advised of the universal practice of the personal injury courts or of the fact that this court has expressly found that it had jurisdiction to make declarations sufficient to satisfy s. 343R on consent. Rather Twomey J. was under the mistaken impression that some judges had different opinions and, more importantly, as stated Twomey J. was under the impression that this matter had never been judicially determined even if only ex tempore. I have no doubt that had Twomey J. been aware of the correct position the judgment in his two cases would not have been made.

13. Accordingly, given that misapprehension as to previous decisions and the fact that these decisions were made *ab urbe* I am not bound by the usual provisions of *stare decisi*s in relation to the decisions of Twomey J. in the above matters.

14. Twomey J. states:

> *"In both these cases an application is being made for a court to make an order (based on the terms of a settlement reached between the parties), the effect of which will be to deprive the department/tax payer of any (or full) reimbursement to which it would otherwise be entitled. The reason why this court refuses these applications is because it is being asked to do so, not just without hearing evidence that has been tested, but crucially without hearing from the party (the Minister/Department) whose reimbursement rights are being prejudiced by the court order sought."*

15. Twomey J. stated that if one were dealing with a private citizen rather than the Department or tax payer that orders would not be made without hearing such a private citizen and he went on to state:

> *"The position should be no different just because one is dealing with the money of the Department/tax payer, rather than that of a private citizen, and so it seems to this court that orders sought should only be granted if there was evidence that the party prejudice, the Department was also consenting to those terms being made an Order of the court.*
>
> *There is no such evidence and on this basis the applications are refused".*

16. Twomey J. then went on to interpret the provisions of s. 343R insofar as it deals with "Order" and he stated:

> *"That proviso (s. 343R (2)) is that there must be a "court order" regarding the loss of earning element of the compensation before the insurance companies is relieved in full or partly from reimbursing the tax payer."*

And he went on to say:

> *"Thus the term court order in the context of s. 343R in this court's view, amounts to the requirement of an independent and mutual determination of the evidence which was subject to cross examination or other testing during an adversarial process at a time when the defendants' and the plaintiffs' interests were not aligned."*

It is the view of this court as has been previously specified and unfortunately not it seems brought to the attention of the learned trial judge that such an interpretation is, as stated incorrect.

17. It is important to know that a court order is what is says, a court order. Section 343R (2) does not give any limitation as to the type of court order. It is expressly does not stipulate that this court order must only be an order made after a hearing of evidence or even of any hearing of particular submissions. Every day of the week the court makes

orders in personal injury actions on consent and these are just as much "orders" as an order which resulted from days or weeks of trial and evidence and a reserved judgment.

18. Had the legislature intended that "order" in this sense only meant an order as a result of a hearing it would have said so. Accordingly, the general principle of interpretation applies and that the word "order" includes all orders. I disagree with the view of Twomey J. on this point. Normal interpretation of the English language leads me to this decision and I do not need to rely on any interpretation which would be required to avoid absurdities.

19. Accordingly, where a court orders that for example liability is assessed at 50/50 that is just as much a court order if the same was as a result of the consent of the parties as if the same was pronounced by the judge in a written judgment.

20. I hold that the absence of a hearing as to the evidence and the absence of a formal judgment, does not invalidate a "order" pursuant to s. 343R. The word "order" is not limited in any way.

21. Of course any judge hearing the court might decide themselves of their own motion that they do not accept the word of counsel and that in effect plaintiffs and defendants are engaged in a fraud against the public. Such an alarming conclusion as to the honesty and integrity of counsel and solicitors is not one that has been in any way validated by any experience I have had either as a barrister or as a judge. But if a judge wants in a particular case which is being settled to embark upon a hearing again and indulge in an appalling waste of judicial time and court expenses then that is a matter for the particular judge.

22. While the gravamen of Twomey J.'s decision was that the making of determinations by a court in consent matters is improper as it is done without the participation of the Minister (and I will deal with this below) it should be pointed out that even in cases in which the court pronounces a judgment after a hearing the Minister is not heard either. Accordingly, the issue of the making of the order by a judge on consent is in that sense absolutely no different from the making of an order after hearing all the evidence. If Twomey J. is correct and there is an entitlement on the Minister to be put on notice, then he must be put on notice not just in consent matters but in all hearings as the Minister may have a view on liability and may make submissions to the court and even adduce evidence.

23. Section 343R makes no provision for the joining of the Minister. And accordingly, if the making of such determinations as had been the practice in the courts since 2014 without the involvement of the Minister is bad in consent matters it is also bad in orders made after trial. Twomey J. makes the point that after a trial and judgment by a court parties may have more confidence that the apportionment is fair. That may be so but the Minister might object and say that the court was wrong to make the determination in his absence and that he should be heard and that rather than 50/50 that the case should have been ruled 60/40 or whatever.

24. Section 343R does not create any right for the Minister to be a notice party. The Act provides a niche administrative mechanism to reimburse the Minister for certain payments that have been made to victims of tort. Though the Minister is clearly affected by a decision of the court as to whether a case is to be decided in full in favour of the plaintiff or full in favour of a defendant or whether there is to be apportionment of liability that of itself does not create an automatic right to the Minister to be heard or to be put on notice.

25. I now turn to the issue, irrespective of the Act, whether it is contrary to the principles of fair procedure not to put the Minister on notice. As pointed out above the section does not contemplate the Minister having notice of any cases in the personal injury list. If the logic of the decisions by Twomey J. were followed it would seem that the Minister would have to engage counsel or probably a number of counsel in the personal injury list to supervise each case and to be informed as to each settlement to ascertain whether or not a fraud on the Revenue was being perpetrated by any of the parties. In particular cases then the Minister's counsel could ask to be heard and the matter addressed.

26. It is the view of this court that such a result would be even more absurd than the court itself embarking after settlement on a rehearing to ascertain the basis of the settlement.

27. It is possible that in any particular case the Minister could ask to be heard as to the settlement and make observations. That would be a matter for the trial judge. Before the Minister went to such expense he would be well advised to ascertain as to whether or not the practice in the personal injury list did result in a general defrauding of the Department/tax payer.

28. As the purpose of s. 343R is to create an administrative platform in which the Minister is reimbursed for certain payments that he has made then there is no engagement of any legal right to be heard. The Minister is paid the recoverable benefits as a consequence of a court order which regulates the rights of the parties to the case.

29. Over 90% of cases in the personal injury list settle. If this were not so the demands on judicial time, the costs to insurance companies including the State which is the largest paymaster in the personal injuries list would be enormous. There would be no point in settling a case for say 50/50 if after the settlement the judge were then to embark upon the case to decide that in fact, it should have been 60/40 or 70/30 or that the plaintiff's case should be dismissed rather than the 50/50 apportionment as agreed between the parties. The practical consequences in the expenditure of court time and resources being a further burden on paymasters such as insurance companies and the State are such that that fact alone should in the case of any doubt as to the meaning of s. 343R result in the current practice being preferred. It is my view however that there is no ambiguity and the Act is quite clear.

30. The practicalities of personal injury litigation are such that what to a plaintiff might appear to be a 50/50 settlement might to a defendant appear to be a 60/40 settlement and it is not possible to be definitive. Indeed, one judge hearing the same case might

decide it on a 50/50 basis and another on a 60/40 basis. The law of torts, no more than life itself, is not decided on mathematical formula. There is a legal presumption against fraud. If courts are being deceived by legal practitioners that is of course fraud but there is absolutely no evidence for it. Whatever about the short term interest of the parties to convince a court that a case which should have been resolved on a 60/40 basis in favour of the plaintiff was in fact settled on a 50/50 basis, it is clearly in the mid and long term interest of the legal profession not to deceive the courts as if deception were found out the reputational damage to those deceiving would be irreparable.

31. The provisions of s. 343R (2) are clear in relation to the definition of "order". The Act clearly makes no provision itself for any requirement that the Minister be put on notice of all cases. There is absolutely no evidence of any fraud even if, as pointed out by Twomey J., after settlement there is an identity of interest between the plaintiff and the defendant. This court is of the view that insofar as the cases were decided by Twomey J. on the basis that orders "*should only be granted if there was evidence that the party prejudiced, the department was also consenting to the terms being made an order of the court*" and insofar as the cases were decided that in the particular circumstances the term "order" could not include orders by consent, this court respectfully disagrees with the *ab urbe* judgment in the cited cases by Twomey J. and will continue with its former universal practice.

32. Of course if any judge believes that he cannot trust the counsel or solicitors in front of him and requires to embark upon a hearing of settled actions or requires to have the Minister put on notice to engage counsel or solicitors to represent the State that is a decision in any particular case that any judge may make. Clearly however there is no legal obligation that a judge should take such extraordinary a step and it is the opinion of this court that such a step, absent compelling reasons, would be most unwise.

Signed:

Mr. Justice Kevin Cross.

2nd July, 2021.

No Further Redactions Required.