

THE HIGH COURT

[2022] IEHC 674

[Record No. 2020/5796P]

BETWEEN

EWA JARMULA

PLAINTIFF

AND

DSG SOLUTIONS LIMITED

DEFENDANT

JUDGMENT of Mr Justice Coffey delivered on the 2nd day of December 2022

1. On 15th November 2022, senior counsel for the plaintiff informed this Court that her client's action had been settled and applied by consent for an order striking out the plaintiff's claim with an order directing the adjudication of the plaintiff's costs to include reserved and discovery costs in default of agreement together with an order that the plaintiff's claim for loss of earnings be limited to €16,960.00, representing fifty percent of the relevant claim which had been agreed because of a causation issue regarding the plaintiff's injury. I was informed that the causation issue arose from a disagreement between the medical experts in the case as to the extent to which the plaintiff's ongoing sequelae were related to the accident.
2. I made the order sought including a consent order apportioning liability on a 50/50 basis in respect of the claim for loss of earnings. In doing so I acknowledged

that the making of such orders has been the subject of controversy in recent jurisprudence of the High Court in which contradictory interpretations have been given to the provisions of s.343R (2) of the Social Welfare (Consolidation) Act, 2005 ('the Act of 2005') as inserted by s.13(d) of the Social Welfare and Pensions Act, 2013('the Act of 2013'). I further stated that insofar as there was a conflict in the decided cases, I preferred the logic and reasoning which underpinned the judgment of Cross J in *Matthews v Eircom* [2021] IEHC 456 to the opposing views expressed by Twomey J in a series of judgments culminating in his recent judgment in *Kuczak v Tracy Tyres (Portumna) Limited (No. 2)* delivered on 9th November 2022. I therefore acceded to the application. Although not required to do so by the Act of 2005, I further directed the defendant to give notice to the Minister for Social Protection("the Minister") so that as a party potentially affected by the order, she can apply to be joined as a party to these proceedings for the purpose of correcting any slip in the calculation of the relevant amount or for the purpose of challenging the jurisdictional basis of my order on appeal.

3. I now wish to set out my reasons for preferring the approach taken in the *Matthews* case over that taken in the recent *Kuczak* case. In summary, Cross J in the *Matthews* case expressed the view that such orders can be made whereas in the *Kuczak* case, Twomey J expressed the contrary view that they cannot.

4. It seems to me that three issues arise. First, whether prior to the commencement of s.343R of the Act of 2005 on the 1 August 2014, a court had jurisdiction to make a consent order for the apportionment of liability in a personal injury case and, if so, whether an order so made had the status of being 'an order of a court'. Secondly, whether that jurisdiction, if it existed, has been removed or in any way affected by the enactment of s.343R (2) of the Act of 2005. Thirdly, if not,

whether such a consent order can be properly made where it is sought solely for the purpose of s.343R (2) of the Act of 2005.

5. Section 343R of the Act of 2005 provides: -

“(1) Subject to subsection (2) a compensator should 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 Board in accordance with the Act of 2003, the compensator is liable only to the extent of that amount so ordered or assessed.

(3) A compensator who fails to comply with subsection (1) or otherwise fails to pay the amount of recoverable benefits due to the Minister is liable to pay on demand to the Minister that amount of recoverable benefits so due.”

6. Section 343L defines ‘relevant compensation payment’ to mean ‘any part of a compensation payment that is attributable to loss of earnings or profits of an injured person’.

7. S.13 of the Act of 2013 which inserts s.343R into the Act of 2005 was commenced by S.I. No.308 of 2014 on 1 August 2014.

Jurisdiction to make a consent order for the apportionment of liability in a personal injury case prior to the commencement of s.343R of the Act of 2005

8. An award of damages for personal injuries is a private law remedy. The function of the court in such a case is not to compel the parties to litigate that which has been agreed but rather to determine that which cannot be agreed and otherwise to make such orders as are necessary or required to reflect such agreement as there is between the parties. This applies no less to a claim for loss of earnings as to any other issue which might arise in any personal injury case whether that issue be negligence, contributory negligence, causation, the quantum of general damages or any other item of special damages that is claimed in such proceedings. Accordingly, it is the parties who primarily determine what is in issue and what can be agreed or ordered by the court. I am therefore satisfied that prior to the commencement of s.343R of the Act of 2005, the law permitted parties to a personal injury action to agree to an apportionment of liability whether in relation to a claim for loss of earnings or any other claim and that a court in such a case was entitled to make an order by consent which reflected their agreement. I am further satisfied that where such an order was made by consent it was no less ‘an order of a court’ than an order that was made after an uncontested, partially contested or fully contested hearing.

Whether the jurisdiction was removed or affected by s.343R (2) of the Act of 2005

9. By using the word ‘was’ in conjunction with the words ‘the subject of an order of a court’, s.343R (2) of the Act of 2005 does not create a new jurisdiction to make such orders but rather provides for a legal consequence that will follow where ‘an order of a court’ has already been made which determines the amount of a compensation payment which a compensator is liable to pay that is attributable to loss

of earnings or profits of an injured person. By merely giving effect to such an order, s.343R (2) of the Act of 2005 does not remove or in any way affect any existing jurisdiction to make such an order whether it is made by consent or otherwise. I am therefore satisfied that the jurisdiction to make a consent order for the apportionment of liability whether for the purpose of a claim for loss of earnings or any other claim in a personal injury action survived the enactment of s.343R (2) of the Act of 2005.

Whether a consent order for the apportionment of liability can be properly made where it is sought solely for the purpose of s.343R (2) of the Act of 2005

10. The clear intention underlying the proviso contained in s.343R (2) of the Act of 2005 is to limit the amount a compensator is obliged to pay to the Minister pursuant to s.343R (1) by reference to ‘the amount’ which the compensator is liable for the loss of earnings or profits of an injured person (‘the relevant compensation payment’). The Act of 2005 provides for the determination of the extent of that liability through the mechanism of giving legal effect to ‘the amount’ of the relevant compensation payment which has already been specified in a previous ‘assessment’ or ‘order of a court’ which relates to the claim. In so doing, the subsection extends the legal effect of the relevant ‘assessment’ or ‘order’ such that it is not merely binding on the parties to whom it applies but is also determinative of the extent of the compensator’s liability to the Minister under s.343R (1) of the Act of 2005. Critically, however, whilst extending the legal effect of such an ‘assessment’ or ‘order’, the Act of 2005 does not in any way change or seek to alter in any way the underlying arbitral process by which such an ‘assessment’ or ‘order’ can be applied for or made.

11. Unlike an ‘assessment’ which can only be made by PIAB, ‘an order of a court’ in a personal injury case can be made by consent or by determination of a judge or court after an uncontested, partially contested or fully contested hearing or appeal. There is nothing in the wording of s.343R of the Act of 2005 to suggest that the section or any of its provisions alter the private law character of personal injury litigation whereby all relevant matters can be compromised and resolved either by agreement or without contest by the parties to that litigation. The subsection does not in any way modify the arbitral process by which the relevant order can be made, for example, by obliging a compensator to notify the Minister in advance of an application for ‘an order of a court’ which potentially engages the provisions of s.343R (2) of the Act of 2005. The proviso merely gives legal effect to ‘an order of a court’ without further words of limitation to expressly provide or imply that such an order cannot be made by consent or that it can only be made after a fully contested hearing. The contrary suggestion of Twomey J in *Kuczak* that ‘an order of the court’ denotes a hearing “after hearing evidence under cross-examination in an adversarial hearing” is manifestly not provided for in the subsection. Such a reading of the Act is unwarranted by the wording of the subsection and would have the alarming consequence of requiring parties to a personal injury action to litigate for days, perhaps even weeks, cases or issues upon which they are lawfully and properly agreed. There is nothing in the words of the Act of 2005, even when considered as a whole, which requires a court to deprive litigants in a personal injury action of their entitlement to adjust their differences in relation to any claim that is made within the proceedings for less than full value and to seek an order of the court that reflects their lawful agreement (see Kelly J (as he then was) at pp 237-238 in *Director of Consumer Affairs v Bank of Ireland* [2003] 2 IR 217).

12. I am therefore satisfied that a court can make a consent order apportioning liability in a personal injury action even where it is sought solely for the purpose of s.343R (2) of the Act of 2005.

13. In this case, I was informed of the factual and legal basis on which the apportionment was agreed. Although not required by the Act of 2005, it seems to me to be desirable in the interests of transparency that legal practitioners should follow this practise when seeking such orders. In the ordinary way, when hearing an application even for a consent order, the court retains a residual discretion to refuse to make the order sought if no reason can be given for its making or where the reason given is unsatisfactory.

14. As to whether in any given case such an order is ‘an order of a court’ which has the legal effect given to it by s.343 R (2) of the Act of 2005 can only be determined when that issue is raised in appropriate proceedings to which the Minister is a party.