FRIENDS WITH COLLATERAL BENEFITS? CONSENT RECITALS ON LOSS OF EARNINGS IN ORDERS STRIKING OUT SETTLED PERSONAL INJURIES ACTIONS AND THE RECOVERY OF STATE BENEFITS FROM TORT DAMAGES[1]

Abstract: This paper examines the law's treatment of collateral benefits – and, more specifically, social welfare benefits – in the assessment of damages for personal injury. In particular, it looks at the operation of s 343R(2) of the Social Welfare (Consolidation) Act 2005, as amended, and the widespread practice that has emerged of the defendant in a settled personal injuries action applying on consent or unopposed for the inclusion in the order striking out the proceedings of a recital addressing the nature or extent of plaintiff's loss of earnings. This is done for the purpose of limiting or eliminating the entitlement of the Minister for Employment Affairs and Social Protection to reimbursement from the defendant of the social welfare benefits paid to the plaintiff in connection with that injury.

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Introduction

In Ireland, as in the United Kingdom,[2] there are broadly three systems of accident compensation. The first, provided through the commercial marketplace, is personal (or 'first-party') insurance, although such insurance against personal injury is unusual. The second, provided through the courts, is the personal injuries action. Though widely criticised,[3] fault-based tort liability is both deeply embedded in our law and ever more closely entwined – if not, by now, inextricably bound up – with the 'third-party' insurance market. The third, provided by the State, is social protection (or social security). By any measure, it is the most equitable of the three and the one most widely relied upon, although it is not, of course, the most comprehensive in its potential scope.

The complex interrelationship between these different systems raises difficult issues. It informs the argument that the tort liability system lacks any coherent theoretical justification in modern society.[4] For Professor Atiyah,[5] it contributes to the need for 'a good hard look' at the whole system of compensation for personal injuries.[6] Such fundamental debates, though plainly of great importance, are beyond the scope of this article.

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[1] Eoin Hennessy made an early contribution to the research for this article.

[2] Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018), 10-11.

[3] ibid, ch 18.

[4] Professor Steve Hedley, 'The Unacknowledged Revolution in Liability for Negligence' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2018) 99.

[5] Who, sadly, died on 30 March 2018.

[6] Patrick Selim Atiyah, *The Damages Lottery* (Hart Publishing 1997) 173. Although, in the first edition of *Accidents, Compensation and the Law* (Weidenfeld and Nicolson 1970), Professor Atiyah had argued that the tort system should be abolished and replaced by the social welfare system, by 1997 he had changed his mind and, while still advocating the abolition of the tort system, suggested its replacement with a no-fault insurance scheme for road accidents, run by the private insurance industry, leaving compensation for all other accidents to the 'first-party'

The discussion that follows is directed to the practical question of how the law treats the receipt of collateral benefits by a person seeking damages from a tortfeasor for personal injuries and, more specifically, how it treats certain social welfare payments made to an injured person in determining the damages that the tortfeasor must pay to that person and the social welfare payments that the tortfeasor must refund to the State. In particular, it looks at the operation of s 343R(2) of the Social Welfare (Consolidation) Act 2005, as amended. Under that provision, if an injured person's loss of earnings or profits is the subject of an order of the court or an assessment by the Personal Injuries Assessment Board and the amount so ordered or assessed is less than that of the relevant social welfare payments received by the injured person, then the compensator (almost always an insurer) need only repay to the State the lesser amount.

Although they receive very little attention, such issues are not unimportant. As Professor Lewis has commented on the lack of academic interest in the equivalent UK legislation, the Social Security (Recovery of Benefits) Act 1997:

> [A] wider point can be made here about the partiality of tort scholarship: it concentrates excessively upon issues of liability as opposed to damages. This bias is a remarkable one as far as practitioners are concerned. They are bemused by the preoccupation of academics with rules on fault and cause. This is because they are aware that, in practice, defendants and their insurers rarely challenge liability. The issue is raised in less than 20 per cent of personal injuries cases. By contrast, the amount of compensation is almost always open to some negotiation.[7]

Collateral Benefits and Tort Damages

When a person is injured in an accident, he or she may receive benefits and assistance from a variety of sources, such as an employer, an insurer, a family member, a benefactor, a charity or, most obviously, the State. Any benefit or assistance obtained from one or more of these sources exists quite apart from – or collateral to – any damages obtained from a responsible tortfeasor. As Professor Lewis notes,[8] this gives rise to two basic policy questions in the tort system. First, to what extent should the damages payable by a tortfeasor be reduced to take account of benefits or assistance received from other sources? And second, to what extent, if any, should a person who provides some benefit or assistance to an injured person be reimbursed by the tortfeasor? There are three possible solutions to those two questions.

The first solution is cumulation. Cumulation is the accepted term for the policy that there should be no reduction in damages to take account of benefits or assistance received from other sources. It might be said to represent the traditional position and has been embraced most notably in the United States of America, where it is referred to as 'the collateral source rule', formulated in the US Restatement of Torts as: 'Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability,

insurance marketplace, rendered affordable for all by the removal of 'all the wasteful legal and administrative costs associated with claims for damages and third party liability', 185 – 193.

[7] Professor Richard Lewis, 'Recovery of State Benefits from Tort Damages' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature* (Hart Publishing 2013) (footnotes omitted) 285, 286.

[8] ibid, 289.

although they cover all or a part of the harm for which the tortfeasor is liable.'[9] While cumulation prevents a tortfeasor from receiving undue credit for benefits received by an injured person from other sources, it does, on one view, over-compensate or 'double compensate' the injured person to the extent of those collateral benefits, subject to any obligation that person may have to repay them out of the damages paid by the tortfeasor.

The second possible solution is reduction (often referred to as deduction). In the present context, that term denotes the opposing policy that the damages payable to an injured person should be reduced by the amount of the benefits or assistance received by that person from other sources. Reduction avoids the risk of double compensation but provides a tortfeasor (or a tortfeasor's insurer) with a windfall subsidy from each benefit provider (whether commercial operator, good Samaritan or the State). This not only seems inequitable but also reduces the deterrent effect of the tort liability system.

The third possible solution is recoupment (or recovery). This is a refinement of the policy of reduction whereby the damages payable by the tortfeasor are reduced by the value of the collateral benefits received by the injured person, subject to the entitlement of the providers of such benefits to obtain reimbursement for them from the tortfeasor.

The tension between these competing policy choices has come into sharper focus in recent decades due to the rapid and simultaneous growth of personal injuries litigation; the third-party insurance market; and the welfare state.

Tort Damages and Social Welfare Benefits in Ireland Before 2013

On social welfare payments as they relate to tort damages, Ireland first enacted a general policy of cumulation, then gradually created a series of statutory exceptions to that policy by requiring the deduction of various specified forms of benefit in the assessment of damages for certain specific categories of claim, before ultimately completing an about turn by adopting a broad statutory policy of deduction and recovery, subject to limited exceptions.

Section 2(1) of the Civil Liability (Amendment) Act 1964 provides in relevant part that, in assessing damages for non-fatal personal injuries, account is not to be taken of 'any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury.' It is generally accepted that this section renders all social welfare payments non-deductible.[10]

Subsequent enactments then carved out exceptions to the application of that general policy. Section 96 of the Act of 2005, re-enacting s 75 of the Social Welfare (Consolidation) Act 1993, provided that, notwithstanding s 2 of the Act of 1964, in occupational injury claims the value of any injury benefit or disablement benefit that the injured person received for up to five years from the date of the accident must be set off against that person's claim for loss

[9] American Law Institute, Restatement (Second) of Torts § 920A (1979), 513. It should, perhaps, be noted that the ALI Restatements, which are essentially codifications of the common law in the United States formulated by practising and academic lawyers and judges, constitute only secondary authority. They are, however, generally considered to be highly persuasive.

[10] Anthony Kerr, *The Civil Liability Acts* (3rd edn, Thomson Round Hall 2005) 87.

of earnings or profits.[11] Section 286 of the same Act, re-enacting s 237 of the Act of 1993, stated that, notwithstanding s 2 of the Act of 1964, in motor vehicle accident claims, the value of any disability benefit or invalidity pension that the injured person received for up to five years from the date of the accident must be set off against the damages generally, without taking account of any reduction under the law of contributory negligence or any limitation under statute.[12] To the opposite effect, s 285(2) of the Act of 2005, which remains in force, provides for a number of specific benefits that are not to be taken into account in assessing, among other forms of compensation, the damages payable in a personal injuries action.[13]

Statutorily required deductions of the kind just described are, in effect, a subsidy from the State to the responsible tortfeasor (or, more often, that tortfeasor's insurer) with the ostensible aim of preventing the over-compensation of the injured person. In *O'Loughlin v Teeling*,[14] having noted that s 12(1) of the Social Welfare Act 1984, the forerunner of s 237 of the Act of 1993, required the deduction not only of disability benefit already received by the injured person but also of that likely to be received by him for up to five years from the date of the accident; that the deduction was to be made not only from the injured person's loss of profits and earnings but also from his general damages; and that, in receiving disability payment, an injured person who had paid into the social insurance fund was, to that extent, simply getting his or her own money back,[15] Mackenzie J, speaking *obiter*, described the section as 'such a dramatic and such an unfair piece of legislation as to be contrary to natural justice'. [16] The policy underpinning the section was evidently informed by the recommendation of the Prices Advisory Committee (Motor Insurance) in its *Report of Enquiry into the Cost and Methods of Providing Motor Insurance* (1982) that one of the ways in which motor insurance premiums might be reduced would be to allow a defendant to offset the damages payable by reference to social welfare payments received by the injured plaintiff.[17]

Before turning to the State's adoption in 2013 of a statutory policy of reduction and recoverability, it is useful to consider briefly, first, the prior development of the equivalent law in the UK and, second, the proposals of the Law Reform Commission that appear to have been the catalyst for that change.

Tort Damages and Social Welfare Benefits in the United Kingdom

[11] Section 75 of the Act of 1993 had re-enacted s 39 of the Social Welfare (Occupational Injuries) Act 1966, which in turn was influenced by the analogous English provision, s 2(1) of the Law Reform (Personal Injuries) Act 1948. Section 96 of the Act of 2005 was repealed by s 13(e) of the Social Welfare and Pensions Act 2013.
[12] Section 286 of the Act of 2005 was also repealed by s 13(3) of the Act of 2013.
[13] They include 'any benefit under Part 2'. Part 2 includes illness benefit, partial capacity benefit, injury benefit, invalidity pension and any increase in disablement pension on account of incapacity (all of which, confusingly, if not paradoxically, are then listed as recoverable – and, hence, deductible – benefits under s 343O of the Act of 2005). They also include widows', widowers' and surviving civil partner's (non-contributory) pensions, guardian's (non-contributory) payment, and child benefit. It is difficult to see how s 285(2) is not, in any event, superfluous in view of the existing broad rule against deductibility under s 2 of the Act of 1964.
[14] [1988] ILRM 617.
[15] In endorsing a general policy of reduction, the Law Reform Commission in its *Report on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits from Awards of Damages* (LRC 68 – 2002), 93-100, was unpersuaded by the argument that an injured person has directly or indirectly 'paid for' the relevant social welfare benefits, such that the principle of 'no double compensation' should not apply. The basis for that scepticism is that social insurance contributions are, in reality, a tax, rather than insurance premium payments. See also, Cane and Goudkamp (n 2) 372.
[16] (n 14) 618-9.
[17] Kerr (n 10) 87-8.

As McGregor explains,[18] the law in the United Kingdom on how far monetary social security benefits are to be taken into account in the assessment of damages for loss of earning capacity has had a long and chequered history. Under the pre-war workers' compensation system, an injured worker had to elect between a tort action and a workman's compensation claim. Given the current position of the personal injuries action at the forefront of public debate about the operation of the Irish legal system, it is interesting to note that William Beveridge, the architect of the modern welfare state, apparently favoured the complete abolition of the occupational injuries action and its replacement by a more comprehensive social security system.[19] Instead, the Monckton Committee recommended the retention of the occupational injuries action, the abolition of the election requirement and the deduction of relevant social security benefits in full from tort damages.[20] In what was effectively a political compromise,[21] s 2(1) of the Law Reform (Personal Injuries) Act 1948 provided for the deduction from damages for loss of earnings of one half of the value of certain specified social welfare benefits over a maximum five year period. As other kinds of social security benefit connected with loss of earnings were introduced in subsequent years, the initial tendency in the jurisprudence was to disregard them in assessing damages,[22] but that tendency was later supplanted by a trend towards deduction.[23] In 1978, the Pearson Commission Report[24] recommended that social security should be recognised as the principal means of compensation for personal injury and that double compensation should be avoided by offsetting the full value of benefits received against damages awarded

A fundamental change ultimately occurred when the Social Security Act 1989, subsequently re-enacted as Part IV of the Social Security Administration Act 1992, introduced a reduction and recovery scheme, whereby tortfeasors (or their insurers) could now deduct the whole value of a very wide range of social security benefits if the damages due to an injured person exceeded £2,500 but must then account for the entire value of those benefits to the Secretary of State for Social Security (now Work and Pensions). That recovery scheme was re-enacted, with amendments, by the Social Security (Recovery of Benefits) Act 1997.[25] One amendment abolished the £2,500 damages threshold for the deduction and recovery of benefits. Another amendment cured a significant defect in the original legislation, under which benefits were to be deducted from the damages as a whole, by substituting a provision categorising the recoverable benefits under three identified heads (lost earnings, cost of care, and loss of mobility, respectively) and making the benefits under each head deductible only from that part of the damages covered by it.[26] That amendment had the practical effect of ring-fencing from recovery both general damages and any special damages not falling under one of those three heads.

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[18] Harvey McGregor QC, *McGregor on Damages* (18th edn, Sweet and Maxwell 2009) para 35-163.
[19] Kane and Goudkamp (n 2) 370.
[20] ibid 371.
[21] ibid. See also, McGregor (n 18) 35-163.
[22] See the decision of the House of Lords in *Parry v Cleaver* [1970] AC 1 (on the non-deductibility of a disability pension in an occupational injuries case).
[23] See *Nabi v British Leyland (UK)* [1980] 1 WLR 529 CA (deductibility of unemployment benefit); *Lincoln v Hayman* [1982] 1 WLR 488 CA (deductibility of income support); and *Gaskill v Preston* [1981] 3 All ER 427 (deductibility of family income supplement).
[24] Lord Pearson, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Cmnd 7054, 1978) (*Pearson Report*) vol 1, ch 13, para 541.
[25] As amended by the Social Security Act 1998, the Child Maintenance and Other Payments Act 2008 and the Mesothelioma Act 2014.
[26] Section 8 and Schedule 2 of the Act of 1997.

However, and this is a crucial distinction between the UK legislation and our own, even where there are no damages under any of the identified heads (or, differently put, where the only damages ordered or agreed[27] are general damages, such as those for pain and suffering and special damages not falling under any of the three identified heads), the compensator remains liable to pay the Secretary of State an amount equal to the total of the recoverable benefits.[28] Of course, it could be argued that this is unfair on the basis that, if a compensator has not agreed, or been found liable, to compensate an injured person for any loss of earnings, cost of care, or loss of mobility, then why should that compensator have to repay the social security benefits provided to the injured person under each of those heads? That criticism was anticipated by the Social Security Committee of the House of Commons in its 1995 report *Compensation Recovery*, which acknowledged that this would result in increased insurance premiums, but expressed the hope that it might act as an incentive to prompt settlements, having first stated:

> If the taxpayer is protected and the individual gains, then the money in this financial equation must come from somewhere. *We believe that it is right that the compensator and insurer bear the cost of reimbursing the taxpayer for benefits paid to claimants as the result of accidents or injury or disease.*[29]

The proposals for reform that led to the introduction of the UK damages reduction and benefit recovery scheme in 1989 met with a level of opposition that, according to Professor Lewis,[30] is difficult to exaggerate. Only the National Audit Office and the Public Accounts Committee supported them. The Law Society and the Association of British Insurers criticised them strongly, while Lord Griffiths, a sitting Law Lord, speaking in a debate in the House of Lords,[31] expressed the view that they might make settlements harder to achieve. Both the Confederation of British Industry and the Trades Union Congress expressed concern. An editorial[32] in *Legal Action* excoriated the proposals as 'fiscal opportunism riding on the back of inadequate analysis'.

And yet, as Professor Lewis goes on to explain, soon after the scheme was set up it became widely accepted that the problems feared had not materialised:

> Litigation was not impeded, settlements were not delayed, and there were only limited additional administrative costs. Although there had been a very poor track record of computerisation of information in the public sector, the new national database of social security payments worked surprisingly well. The [Compensation Recovery Unit ('CRU') of the Department of Social Security (later Work and Pensions)] also proved very efficient in producing the relevant certificates on time and communicating with the litigating parties. Practitioners became used to the new procedure and compliance rates were high. As acknowledged by the British Association of Insurers in 1995, the anticipated

[27] Under s 1(3) of the Act of 1997, the compensation payments covered are those made 'voluntarily, or in pursuance of a court order or an agreement, or otherwise'.
[28] Section 6(1) of the Act of 1997.
[29] Social Security Committee, *Compensation Recovery* (HC 1994-95, 196) para 77 (emphasis in original).
[30] Lewis (n 7) 293-4.
[31] HL Deb 29 June 1988, vol 509, col 934.
[32] Editorial, *Legal Action*, May 1988, 3.

> 'bureaucratic nightmare' did not materialise. Money began to flow into the public purse.[33]

The total of benefits recovered annually (that is, from 1 April to 31 March) by the CRU in the UK (excluding Northern Ireland) has been trending downwards over the last number of years,[34] from almost £140 million in 2010/2011 to just under £120 million in 2018/2019.[35] The UK Act of 1997 is effectively replicated in Northern Ireland by the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997.[36] In 2017/2018, the total of benefits recovered in Northern Ireland was £4.64 million.[37]

The Law Reform Commission Report on Collateral Benefits

On 12 December 1997, the Attorney-General requested the Law Reform Commission to review s 2 of the Act of 1964 under terms of reference that required the Commission to consider its repeal or amendment 'with a view to ensuring that a plaintiff does not receive double compensation for the same loss.'[38] Thus, the Commission was required to approach the exercise on the basis that the role of the tort liability system in the provision of accident compensation was not in issue and that, in keeping with the modern trend in that sphere, the general policy of the government on the treatment of collateral benefits was that there should be an equivalent reduction of damages. Hence, both the 1999 Consultation Paper and the 2002 Report[39] repeatedly emphasise that, in the words of Earl Jowitt in *British Transport Commission v Gourley*, '[t]he broad general principle which should govern the assessment of damages ... is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been if he had not sustained the injuries',[40] thus, in the Commission's view, establishing the imperative need to deduct collateral benefits to avoid leaving an injured party in a better position than he or she had been in before the injury.

After an extensive and thorough review of the status of collateral benefits both under the law of the State and in comparative law, the Commission produced a comprehensive set of recommendations for reform. On the question of the relationship between social welfare benefits and tort damages, the Commission's recommendations included: that the principle of 'no double compensation' should apply across the board to social welfare payments;[41] that

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[33] Lewis (n 7) 294 (footnotes omitted).
[34] This has been attributed, at least in part, to a marked decline in work accidents. See Professor Richard Lewis, 'Structural Factors Affecting the Number and Cost of Personal Injury Claims in the Tort System' in Eoin Quill and Raymond J Friel (eds), *Damages and Compensation Culture – Comparative Perspectives* (Hart Publishing 2016) 37, 53.
[35] 'Transparency data: Compensation Recovery Unit performance data' (Department for Work & Pensions, 17 July 2020) <www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data> accessed 12 August 2020.
[36] SI 1997/1183 (N.I. 12).
[37] 'Compensation Recovery Scheme: Benefit and Health Service Recoveries' (OpenDataNI, 5 November 2018) <https://www.opendatani.gov.uk/dataset/compensation-recovery-scheme-benefit-and-health-service-recoveries> accessed 12 August 2020.
[38] The Law Reform Commission, *Consultation Paper on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits from Awards of Damages* (LRC – CP15 – 1999) 1.
[39] The Law Reform Commission, *Report on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits from Awards of Damages* (LRC 68 – 2002).
[40] [1956] AC 184, 197.
[41] (n 38) para 5.032.

any social welfare payment, including a health allowance, should be deductible, if it amounts to a collateral source of compensation;[42] that all social welfare payments that arise in consequence of injury and compensate for loss of earnings or profits should be deducted but only from damages for loss of earnings or profits;[43] and that, although the rule limiting the deduction of social welfare payments to those received within a period of no more than five years from the date of the injury was an arbitrary compromise, it should be retained, at least for the present.[44]

On the issue of a benefits recovery – or, in the Commission's words 'reimbursement' – scheme, its Report stated

> 5.108 To state a straightforward principle: it seems to the Commission to be wrong for the Department [of Social and Family Affairs, now Employment Affairs and Social Protection] (and beyond it, the taxpayers) to have to foot the bill for what might be regarded as a business expense of the insurance companies who have taken premiums to insure a negligent defendant. There seems to us to be no practical or other reason not to require the insurance company to shoulder its own business expense.
> 5.109 The practical design of a system of reimbursement is very much a matter of specialised public administration to be settled by the Department, in consultation with the insurance companies, bearing in mind both the British model and the sophisticated information technology which is now in use in both the insurance industry and the Department. Accordingly, we say nothing further about the design of the reimbursement system.
> 5.110 *The Commission recommends that the Department give consideration to the setting up of a reimbursement system under which the amount by which a compensation award had been reduced, by virtue of the payment of social welfare payments, including health allowance, should be reimbursed by the defendant to the [Department] or a Health Board, as appropriate.*[45]

The RBA Scheme

Part 11B (ss 343L to 343X) 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, constitutes the legislative framework for the *Recoverable Benefits and Assistance Scheme* ('the RBA Scheme'), which commenced operation on 1 August 2014. The RBA Scheme enables the Minister for Employment Affairs and Social Protection to recover certain benefits and assistance paid by the Minister's department to an injured person because of that injury during a specified period[46] from a person (described as 'a compensator') who is, or is alleged to be, liable for that injury[47] and who pays compensation for it.

[42] ibid, para 5.050.
[43] ibid, para 5.054.
[44] ibid, para 5.067.
[45] ibid, 125.
[46] The specified period is that from the date of entitlement to a specified benefit to whichever is the earliest of the expiration of five years from that date, the date of the compensation payment in final discharge of the claim, or the date on which an agreement is made to treat an earlier payment as having been made in final discharge of the claim. See s 343N of the Act of 2005.
[47] The RBA Scheme applies only in respect of non-fatal injuries. See s 343M(1)(a) of the Act of 2005.

In broad outline, the RBA Scheme works like this. Before making any compensation payment,[48] a compensator must apply to the Minister for a statement of recoverable benefits.[49] The Personal Injuries Assessment Board must do likewise before issuing an order to pay.[50] The benefits that may be recovered are the following: illness benefit; partial capacity benefit; injury benefit; any increase in disablement pension where the injured person is, and is likely to permanently remain, incapable of work; invalidity pension; disability allowance; and supplementary welfare allowance.[51] Within 25 working days from the receipt of that application, the Minister must issue that statement to the compensator (or the Board, as the case may be) and the injured person.[52] Alternatively, the Minister may issue a recoverable benefits statement where a compensator has not applied for one but has made a compensation payment to an injured person (or where the Board has not applied for one but has issued an order to pay).[53] In any such case, the Minister may issue a revised statement of recoverable benefits where a later decision has been made to award or vary a specified benefit.[54]

Section 343R of the Act of 2005 is the central provision in the RBA Scheme. It imposes an obligation on the compensator to pay the Minister the amount of the recoverable benefits specified in the statement before making any compensation payment to the injured person or, if in breach of that obligation, to do so on demand.

The Qualification on Recovery under Section 343R(2)

Section 343R(2) of the Act of 2005 qualifies the compensator's payment obligation where the recoverable benefits exceed the amount of the 'relevant compensation payment'. Under s 343L(1), 'relevant compensation payment' means any part of a compensation payment that is attributable to the loss of earnings or profits of an injured person. Where the recoverable benefits exceed the amount of that loss and it was the subject of an order of a court or assessment by the Board, then s 343R(2) stipulates that the compensator is liable only to the extent of the loss so ordered or assessed.

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[48] Compensation payments made under certain specified statutory schemes and any other scheme prescribed by the Minister are excluded. See s 343M (2) and (3) of the Act of 2005.

[49] S 343P(1) of the Act of 2005. The information to be provided by a compensator or injured person to enable the Minister to issue a statement of recoverable benefits, as prescribed by the Minister under s. 343P(5) or 343PA(5) of the Act of 2005. See Part 9A of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007), as inserted by the Social Welfare (Consolidated Claims, Payments and Control) (Amendment)(No. 2) Regulations 2014, and amended by the Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 5) (Recovery of Certain Benefits and Assistance) Regulations 2014 (S.I. No. 497 of 2014) and the Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 1) (Recovery of Certain Benefits and Assistance) Regulations 2015 (S.I. No. 177 of 2015). An application form (RBA01) is available on the department website: <https://www.gov.ie/en/service/9f50f5-recovery-of-benefits-assistance-rba-scheme/> Accessed 5 October 2020

[50] S 343P(2) of the Act of 2005. Under s 38 of the Personal Injuries Assessment Board Act 2003, the Board is required to issue an order to pay to a respondent or respondents within one month after an assessment of damages becomes binding.

[51] S 343O of the Act of 2005, as amended by s 17 of the Social Welfare (No. 2) Act 2019.

[52] S 343P(3) of the Act of 2005, as amended by s 17 of the Social Welfare (No. 2) Act 2019.

[53] S 343PA(1) of the Act of 2005, as inserted by s. 12(1)(e) of the Social Welfare (Miscellaneous Provisions) Act 2015.

[54] S 343PA(2) of the Act of 2005.

For reasons that will become apparent later, it is important to note that there is no provision under the Personal Injuries Assessment Board Act 2003, as amended ('the PIAB Act'), that permits an agreement between the claimant and respondent to be substituted for either the Board's assessment of the damages to which an injured person is entitled overall or, more particularly, its assessment of that person's loss of earnings or profits.[55] Indeed, under s 38 of the Personal Injuries Assessment Board Act 2003, as amended,[56] the Board's order to pay must recite the amount that the compensator is liable to pay the Minister in accordance with the Act of 2005 as well as the amount that the compensator is liable to pay the injured person (being the Board's assessment of the amount of damages, less the amount the compensator is liable to pay to the Minister).

A compensator who pays the amount of the recoverable benefits to the Minister is entitled to reduce the loss of earnings or profits part of the compensation payment due to the injured person by that amount but must notify the injured person accordingly.[57] However, where the amount of the recoverable benefits exceeds the compensation due for loss of earnings or profits, the compensator can only reduce the compensation due to the injured person in the latter amount.[58] The injured person's compensation claim is deemed discharged to the extent of the payment made by the compensator to the Minister.[59] Provision is made to refund the compensator for any payments not made by the Minister to the injured person within the specified period in respect of certain specified benefits.[60] Provision is also made for a rebate from, or supplemental payment to, the Minister, as the case may be, following the determination of an appeal[61] on any question of whether a benefit or any assistance specified in a statement of recoverable benefits is a recoverable benefit within the meaning of Part 11B.[62] Where two or more compensators are liable for recoverable benefits for the same injury, the principles contained in Part III of the Civil Liability Act 1961 apply, and their liability is joint and several.[63]

Where s 343R(2) of the Act of 2005 applies, it operates as a subvention from the State (or taxpayer) to the compensator (or the compensator's insurer) in respect of the cost of the injured person's injuries. Remember, under s. 343L, recoverable benefits are already limited to those paid to an injured person directly as a result of the injury. If a person alleged to be liable for that injury is making a compensation payment, thus triggering the requirement under s 343R(1) to reimburse the Minister in the amount of those benefits, then the concession under s 343R(2) that reimbursement need only be made in the amount of the injured person's loss of earnings or profits, where – for whatever reason – it is less, means that the State (or taxpayer) makes up the difference. As we have seen, no analogous

[55] Of course, a claimant and respondent can compromise a personal injuries claim at any time before, during or after the PIAB process but the point here is that there is no mechanism within that process whereby the terms of any compromise between the parties can be substituted for, or incorporated into, the independent assessment statutorily required under s 20 of the PIAB Act. As we shall see, this contrasts with what it is suggested may be done by court order under one interpretation of the proper construction of s 343R(2).
[56] By s 14 of the Social Welfare and Pensions Act 2013 and s 17 of the Social Welfare (Miscellaneous Provisions) Act 2015.
[57] S 343S(1) of the Act of 2005.
[58] S 343S(2) of the Act of 2005.
[59] S 343T of the Act of 2005.
[60] S 343U of the Act of 2005.
[61] To an appeals officer, under s 311 of the Act of 2005, as amended. Thereafter, under ss 327 and ss 327A, a further appeal lies to the High Court on a question of law. Section 311(4) provides that no appeal may be made until the recoverable benefits have been paid.
[62] S 343V of the Act of 2005.
[63] S 343W of the Act of 2005.

concession exists under the equivalent UK legislation and no such concession was suggested, much less recommended, by the Law Reform Commission. As we shall see, the operation of that concession gives rise to certain issues in principle and in practice at the point of intersection between private and public law.

In the UK, the relevant guidelines[64] give worked examples illustrating the operation of the benefits recovery scheme there. Although the equivalent Irish guidelines[65] do not do so, the following worked examples may help to clarify the operation of the RBA Scheme.

Example 1

An award of compensation totalling €100,000 is agreed, assessed or ordered and is broken down as follows: €50,000 for general damages (pain and suffering), €30,000 for loss of earnings, and €20,000 for other special damages. A statement of recoverable benefits issues in the amount of €25,000. The compensator pays out an aggregate sum of €100,000, comprising €25,000 to the Minister, as the amount of recoverable benefits, and €75,000 to the injured party.

Example 2

An award of compensation totalling €85,000 is assessed or ordered and is broken down as follows: €50,000 for general damages (pain and suffering), €15,000 for loss of earnings, and €20,000 for other special damages. A statement of recoverable benefits issues in the amount of €25,000. The compensator must pay the Minister €15,000, as the amount of the injured party's loss of earnings (because the amount of the recoverable benefits exceeds that amount 'as ordered or assessed'), before paying the relevant compensation, which the compensator is entitled to reduce by that amount, to the injured person. Thus, the compensator pays out an aggregate sum of €85,000, comprising €15,000 to the Minister in respect of recoverable benefits of €25,000 paid by the Minister to the injured party, and €70,000 to the injured party.

The RBA Scheme commenced operation on 1 August 2014.[66] The amounts recovered in the years 2014 to 2018 were: 2014 (August to December) €5.03m; 2015 €21.60m; 2016 €22.75m; 2017 €26.41m; 2018 €24.75m.[67] €24.76m was recovered in 2019.[68]

Consent Applications for 'Loss of Earnings' Recitals in Strike Out Orders

[64] '*Guidance: Recovery of benefits and lump sum payments and NHS charges: technical guidance*' (Department for Work & Pensions, 23 March 2020) <https://www.gov.uk/government/publications/recovery-of-benefits-and-or-lump-sum-payments-and-nhs-charges-technical-guidance/recovery-of-benefits-and-lump-sum-payments-and-nhs-charges-technical-guidance> accessed 15 August 2020, para. 4.3.

[65] 'Recovery of Benefits and Assistance (RBA) Scheme' (Department of Employment Affairs and Social Protection, 14 June 2019) <https://www.gov.ie/en/service/9f50f5-recovery-of-benefits-assistance-rba-scheme/> accessed 15 August 2020.

[66] Social Welfare and Pensions Act 2013 (Sections 13 and 14) (Commencement) Order 2014 (S.I. No. 308 of 2014).

[67] Dáil Deb 25 June 2019, Vol. 984 No.2, col. 714.

[68] Unpublished information provided by the Department of Employment Affairs and Social Protection to the author on request.

The enactment of s 343R(2) has created a new phenomenon in settled personal injuries actions. Defendants now regularly apply to the court, either on consent (*i.e.* with the active agreement of the plaintiff) or unopposed (*i.e.* with the acquiescence of the plaintiff) for the inclusion in the order striking out the proceedings of a recital about the injured person's loss of earnings or profits. Invariably, the recital sought is a variation on the theme that the said loss is limited or non-existent. Examples include a recital that: 'the plaintiff has made no claim for loss of earnings'; 'the plaintiff has withdrawn the claim for loss of earnings'; 'the plaintiff has incurred no further loss of earnings after [a specified date]'; or 'liability is apportioned between the defendant and plaintiff in [a specified ratio] on the basis of the plaintiff's contributory negligence'. Sometimes, it is made clear that the application is being made by reference to the terms of the RBA Scheme. On other occasions, the court is left to infer that the purpose of the application it is to enable the defendant compensator to adopt the position in dealing with the Minister that, for the purpose of s 343R(2), the injured person's loss of earnings or profits is 'the subject of an order of a court' and that the compensator is 'liable only to the extent of the amount so ordered', rather than to the extent of the amount set out in the statement of recoverable benefits. Certainly, it is difficult to see what other purpose such an application might serve.

The emergence of this phenomenon prompts two closely related questions. The first is whether such recitals in orders are capable in either law or fact of having the effect under s 343R(2) evidently contended for. The second, assuming such recitals can have that effect, is whether it is appropriate in justice or fairness for a court to accede to an application to include one in an order striking out proceedings that have been compromised. As it appears that neither of these questions has yet been judicially determined, it would be inappropriate to venture an answer to either of them here. But there may be a benefit in very briefly sketching out some of the arguments likely to arise if and when a court is given the opportunity to make a formal determination.

The resolution of the first question will almost certainly involve a consideration of both the proper construction of s 343R(2) and the proper characterisation of the particular recital sought to be included in the order striking out the proceedings. On the construction point, the issue may very well turn on what is meant by the words 'the amount so ordered'. Does it extend to an amount for loss of earnings (whether express or implied), incorporated into an order on the application of one or both of the parties (rather like the entry of a money judgment on an uncontested application)? Or is it limited to an amount ordered after an adjudication upon evidence? If it is the former, it is noteworthy that, in using the terms '*order of a court or assessment by the Board*' and '*amount so ordered or assessed*' in framing the scope of s 343R(2), the Oireachtas did not expressly extend it to encompass an '*agreement between the parties*' and an amount '*so agreed*'. It is also noteworthy that the former construction would create an apparently arbitrary distinction between the compromise of a claim for loss of earnings, the terms of which are included as a recital in the order striking out the proceedings, and an otherwise identical one, the terms of which are not. For that reason, should the former construction of s 343R(2) prove to be correct, it is difficult to see why every such compromise should not properly lead to an application for the inclusion of such a recital in the final order. That in turn leads one to wonder whether the number of such compromises would not artificially expand (if it has not done so already), for reasons that the following worked example may help to explain.

Example 3

> As in example 1 above, an injured person brings a compensation claim, valued at approximately €100,000, in the form of a personal injuries action. The value of that claim, broken down, comprises €50,000 for pain and suffering, €30,000 for loss of earnings, and €20,000 in other special damages. The Minister has issued a statement of recoverable benefits in the amount of €25,000. As noted in example 1, if those figures were upheld by a court order or Personal Injuries Board assessment, then the Minister would recover €25,000 and the injured person would receive €75,000. However, in the context of a private law negotiation, a sensible compensator, perfectly properly, might adopt a sceptical stance on the injured person's €30,000 loss of earnings claim. Whether or not the loss of earnings claim was a strong one on the available evidence, the injured person's legal representatives would be remiss in not pointing out to their client that the issue could be of little concern, given that - under s 343R(2) - €25,000 of that €30,000 claim is the Minister's money. Thus, as those representatives might also point out, their client's interests would be better served by seeking more generous damages for pain and suffering of, say, €65,000 as the quid pro quo for any concession on the point. If that concession were the withdrawal of the loss of earnings aspect of the claim (later made a recital in the order striking out the proceedings), then, on the former construction of s 343R(2), the Minister would recover nothing (the €25,000 in recoverable benefits exceeding the nil loss of earnings agreed, making the compensator liable to the Minister only to the extent of the latter – nil – amount); the compensator would pay out an aggregate sum of €85,000 (rather than €100,000); and the injured person would receive a payment of €85,000 (rather than €75,000).

Hence, it is not difficult to see why the Oireachtas might want to ensure that the reduction of a compensator's liability to the Minister – from that of the full amount of the injured party's recoverable benefits to the lesser (or nil) amount of the injured party's loss of earnings or profits – can only occur when the latter amount has been independently verified by an assessment of the Board or an adjudication of the court on evidence submitted or adduced.

On the characterisation point, the novelty of a recital of this kind in an order striking out proceedings contributes to the difficulty of assessing its effect. In the vast majority of instances where a personal injuries action has settled, the final order sought is (or, certainly, was) one simply striking out the proceedings with no further order. Thus, most personal injuries actions settle on undisclosed terms. This is unremarkable because each is, after all, a matter of private law – at least to the extent that the machinery for the recovery of benefits under the Act of 2005 does not obtrude. Although rare in personal injuries litigation, it is possible for a compensator to settle a personal injuries action by consenting to a money judgment or to having the terms of an agreed settlement made an order or rule of court. But that is not at issue here, where the recital sought by the compensator on consent does not address the overall terms of settlement between the parties, being solely directed instead to the injured person's loss of earnings with the specific aim of reducing or eliminating the compensator's public law obligation to reimburse the Minister the full amount of the recoverable benefits paid to the injured person.

As Foskett explains,[69] the courts welcome and encourage compromise because it is in the interests of both the individual litigants concerned and the civil justice system as a whole.

[69] Sir David Foskett, *Foskett on Compromise* (9th edn, Sweet and Maxwell 2020) para 10-02.

For that reason, as Staughton LJ put it for the England and Wales Court of Appeal in *Bruce v Worthing Borough Council* '[i]n our adversarial system a judge who is asked to make a consent order should do so, provided that the parties are of full age and understanding and that the order is not illegal, immoral or so equivocal as to give rise to further dispute.'[70] However, there are exceptions to that general principle, with the result that, in the words of Staughton LJ in the same case, 'sometimes the inquisitorial system takes over.'[71] In *Bruce*, the court's inquisitorial function was engaged because the statutory provision that permitted the order at issue there to be made – s 5(1) of the UK Rent Act 1920 – required certain necessary facts to be proved or admitted, even where there was consent to that order. Thus, there is ample scope for the argument that the court's inquisitorial function is engaged where a consent application is made for a loss of earnings recital in an order striking out proceedings where that recital has no apparent purpose other than to delimit the public law reimbursement entitlement of the Minister in private law proceedings to which the Minister is not a party. Should it turn out to be the law that such recitals in orders striking out proceedings are capable of coming within the terms of s 343R(2) of the Act of 2005, and should a court be minded to consider entertaining - and, perhaps, acceding to – an application to include one in such an order, a second question would still arise. That question is whether it would be just or fair to do so.

Under the material part of Order 15, rule 13 of the Rules of the Superior Courts ('the RSC'), a court can, of its own motion, add a person as a party to proceedings at any stage, where it considers it 'necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter'. As the Minister, representing the taxpayer, plainly has an interest in whether a loss of earnings recital should be included in an order striking out a settled personal injuries action, the application of the rule falls to be considered. The argument that the joinder of the Minister would be too unwieldy or costly a procedural imposition on the conduct of personal injuries litigation to be practical or useful only serves to refocus attention on the a priori assumption that loss of earnings recital applications can be fairly entertained and justly adjudicated upon. A suggestion has been made that this difficulty in dealing with loss of earnings recital applications might be overcome through the improvisation of a procedure analogous to that under RSC Ord 22, r 10 for the approval of settlements in actions brought on behalf of infants or persons of unsound mind. But, leaving aside the trite observation that the introduction of such a procedure is a matter for the Superior Court Rules Committee, it is hard to see the force in an analogy between the historically paternalistic role of the court as protector of persons lacking full capacity and its suggested new role as protector of the Minister's interest in the reimbursement of social security payments. It has also been suggested that fairness and justice are ultimately assured in any event because it is open to the Minister at some later point to apply to the court to have any loss of earnings recital in an order striking out personal injuries proceedings amended or excised. However, it is not clear how the Minister could do that effectively either in principle or in practice. Apart from clerical mistakes accidental slips or omissions; failure to correctly record the decision of the court; or cases of bias or fraud (none of which are relevant here), the rule is that a final order can only be amended in special or unusual circumstances where necessary in the interests of justice.[72] It is unlikely that the Minister could reasonably hope to use that jurisdiction as a viable mechanism by which to test the veracity of recitals on loss of earnings agreed in the

[70] [1994] 26 HLR 223, 228
[71] Ibid.
[72] Hilary Biehler, Declan McGrath and Emily Egan McGrath, *Delany and McGrath on Civil Procedure* (4th edn, Thomson Reuters 2018) 1042.

course of confidential negotiations in private law proceedings to which the Minister was not a party. Even if a more liberal test, adopting a significantly lower threshold, could be applied to an application to amend or set aside an order (a proposition for which there is no authority), it seems unrealistic to imagine that the Minister could properly establish the factual position in each case without recourse to the procedural machinery available to litigants generally, such as pleadings, particulars, discovery, interrogatories, inspection and independent medical examination, as appropriate.

Finally, it is worth attempting to identify – at least, some of - the policy arguments that may be relevant to the proper construction of s 343R(2). Under a broad interpretation of that provision, the inclusion by agreement between the parties of a loss of earnings recital in an order striking out the proceedings makes that loss of earnings 'the subject of an order of the court', and makes the amount of that loss, as stated in or implied by that recital, the measure of the compensator's liability to the Minister 'so ordered'. Thus, on that interpretation, a compensator's liability to the Minister is either the amount assessed by the Personal Injuries Board on evidence submitted; the amount ordered by the court on evidence adduced; or the amount privately agreed by the compensator and the injured person (though not the Minister) and included as a recital in a consent order without judicial – or other independent – scrutiny of any kind. Under a narrow interpretation of s 343R(2), the section extends only to a loss of earnings that is ordered or assessed, and cannot extend to a loss of earnings that is privately agreed by the parties (though not the Minister), even where that term, and that term alone, of the wider agreement between those parties is subsequently incorporated as a recital in a consent order striking out the proceedings.

Proponents of the broad interpretation contend that the narrow one would become an impediment to settlements in personal injuries cases, creating a backlog within the courts system. In particular, they suggest that it would greatly inhibit 'all-in' or 'nuisance value' settlements if the compensator had to reimburse the Minister in the amount of the recoverable benefits rather than in a lower or nil amount for loss of earnings where the latter figure has been privately agreed between the compensator and the injured person.[73] As we have seen, precisely the same arguments were vigorously pressed in opposition to the more stringent UK scheme, under which the compensator must pay the Secretary of State an amount equal to the total of the recoverable benefits in every case without exception or qualification, yet in that instance those arguments proved to be entirely unfounded. There is also a counter-argument that the risk of an eventual greater liability for recoverable benefits than for loss of earnings provides a useful incentive to compensators to promptly settle claims,[74] which incentive should not be undermined or eliminated by an overbroad interpretation of s 343R(2). In addition, there is a policy argument that 'all-in' or 'nuisance value' settlements are a blight upon, rather than a necessary or useful component of, the tort liability system of accident compensation.[75]

Conclusion

[73]Ben Mannering, 'Aye, there's the rub' (2014) 198 (5) LSG, 28 <https://www.lawsociety.ie/globalassets/documents/gazette/gazette-pdfs/gazette-2014/june-2014.pdf > Accessed 5 October 2020.

[74] Lewis (n 34) 54.

[75] See, *O'Connell v Martin; Ali v Martin* [2019] IEHC 571 (Unreported, High Court (Twomey J), 10 May 2019) para 37 – 39.

The UK scheme for the recovery of social security benefits from tort damages has been the subject of trenchant academic criticism to the effect that it 'departs from notions of community responsibility for injury and entrenches a discredited tort liability system as a means of raising public revenue'.[76] As stated at the outset, such fundamental policy debates as they apply to the RBA Scheme are beyond the scope of this discussion, which has concentrated instead on just one aspect of that scheme – the practical operation of s 343R(2) of the Act of 2005. In the operation of the RBA Scheme, current practice is not uniform in that some courts are willing to accede to consent applications to include loss of earnings recitals in orders striking out proceedings, while others are not. If allowed to continue indefinitely, this inconsistency of approach – and, consequently, of outcome – is bound to have an adverse effect on public confidence in the tort liability system. Internal consistency must be a priority for a system already facing significant external criticism. That is why the present lack of clarity on the correct approach to such applications is of more than purely academic interest.

[76] Lewis (n 7) 294. See also Hedley (n 4) 120.