THE HIGH COURT

CIRCUIT COURT APPEALS

Record No. 2020/00159

[2024] IEHC 84

BETWEEN

JASON MOLONEY

APPELLANT/PLAINTIFF

AND

CATHAL DUNNE

AND

BUS EIREANN

RESPONDENTS/DEFENDANTS

JUDGEMENT of Mr Justice Twomey delivered on 15th day of February, 2024

INTRODUCTION

1. For several years there have been two completely contradictory approaches by the High Court to whether it is lawful to insert terms into the court order which is made when a personal injuries case settles ("Personal Injury Settlement Orders").

2. One view is that these orders are perfectly legal, even though they prejudice the Department of Social Protection, which is not party to the proceedings.

3. The other view is that they are not lawful and they are, in effect, a means by which the taxpayer ends up funding payouts by insurance companies to plaintiffs to settle their personal injury claims.

4. Yet, despite that uncertainty in the High Court regarding the law applicable Personal Injury Settlement Orders, there has been no clarification from the Court of Appeal/Supreme Court as to which approach is the correct one.

5. This is because there has been no appeal, by the parties to such cases, of such orders. It is also because the High Court itself has no way of resolving these conflicting interpretations. This is because under s 38 of the Courts of Justice Act, the High Court cannot, of its own accord, seek to clarify the law by referring the issue to the Court of Appeal by way of case stated (in contrast to the District Court which under s 52 of the Courts (Supplemental Provisions) Act, 1961 can state a case to the High Court).

6. This means that today, a judge of the District, Circuit or High Court, who is dealing with a personal injuries case that has settled, has an *arbitrary* choice as to which of the two conflicting interpretations to apply.

7. This is an issue of considerable importance, since the rule of law requires that all persons are *accountable to the same laws,* rather than there being an arbitrary choice for a judge of which law to apply. It was of sufficient importance in 2020 that Keane J published an article on the issue in the *Irish Judicial Studies Journal.*[1] In that article, he highlighted that the lack of uniformity of approach in the courts to Personal Injury Settlement Orders, was '*bound to have an adverse effect on public confidence'*.

[1] Keane, *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'* [2020] *Irish Judicial Studies Journal* Vol 4(2) 43 at 58

8. However, in the many years which have passed since this lack of uniformity first arose, and also since it was first highlighted by Keane J., there does not appear to have been any appeal by a defendant/insurance company of a refusal of a court to insert terms into a Personal Injury Settlement Orders and so the legal uncertainty continues.

9. This is also a matter of considerable practical relevance when one considers that personal injury cases are one of the most common types of cases heard in the Irish courts, with 12,459 personal injury cases in 2022.[2] Furthermore, since *circa* 99% of personal injuries cases settle,[3] this means that Personal Injury Settlement Orders play a huge part in personal injury law. Indeed, it is arguable that one of the most important *practical* and financial issues in personal injury law today is the question of the legality of the terms of Personal Injury Settlement Orders. Yet, even though hundreds of Personal Injury Settlement Orders are made on a weekly basis in the Irish courts, there continues to be an arbitrary choice for judges as to which law to apply to the finalisation of their terms. On the one hand, *Kuczak v Treacy Tyres (No. 2)* [2022] IEHC 619 says that it is *unlawful* to insert terms, which prejudice an unrepresented third party, in such orders. On the other hand, *Wilson v Leonardi* [2022] IEHC 670 takes the completely contrary position, i.e. that it is *lawful* for these terms to be inserted in those orders.

BACKGROUND

10. This issue arose in this case because there was an application by a defendant/insurance company to insert terms in a Personal Injury Settlement Order, which have the effect of

[2] Court Service Annual Report 2022, at page 47.

[3] *Report of the Personal Injuries Guidelines Committee* (published by the Judicial Council in December, 2020) states that only about 0.54% of all personal injury claims were actually heard in court (in the period 2017-2019). See also the statement of President of the High Court of 10 July, 2020 which states approximately 97% of personal injury cases settle.

depriving the Department of Social Protection ("Department") of a repayment of monies, to which it would otherwise be entitled to, *from* the defendant/insurance company.

11. However, the Law Reform Commission has stated that it is *'wrong'* that, in personal injury cases, such as this one, the taxpayer has to '*foot the bill for what might be regarded as a business expense of the insurance companies'.*[4] Yet, in this Court's view, this is exactly what happens with the current practice of insurers inserting a term in court orders when a personal injury case settles with the intention of depriving the Department of a repayment, to which it would otherwise be entitled (e.g. the insertion of a term in a Personal Injury Settlement Order that 'liability was split 50/50' or that there 'was no claim for loss of earnings').

12. For this reason, in *Kuczak (No. 2)*, this Court agreed with the Law Reform Commission and concluded that it would be *'wrong'* to insert such terms in Personal Injury Settlement Orders. It did so because, *inter alia*, the only purpose of such terms is to financially prejudice the Department, which is not represented when the order is made.

Taxpayer ends up funding a settlement payout to a plaintiff in a personal injuries claim

13. The real-life effect of such court orders is that an insurance company has more money, at the expense of the taxpayer, to fund a payout to a plaintiff on the settlement of his personal injuries' claim. In effect therefore, the taxpayer is funding a payout to a plaintiff on the settlement of his personal injuries' claim, which this Court believes is '*wrong*'.

14. For example, in *Fahy v Padraic Fahy Tiling Contractors Ltd & Anor* [2021] IEHC 682, if this Court had inserted the order in the Personal Injury Settlement Order, the insurance company would have saved on having to pay €42,000 in '*recoverable benefits'* to the Department. Then, it could have used this saving to pay that sum instead to the plaintiff for settling his case. It is this Court's view that this sum of €42,000 is taxpayer's money and should

[4] *Consultation Paper on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits from Awards of Damages (LRC 68-2002* at para 5.108).

be paid to the taxpayer and so the defendant/insurer should not be relieved of the obligation to repay the Department.

15. As is clear from that decision in *Kuczak (No. 2)* at para 43, the Minister for Social Protection ("Minister") also took the view that these terms should *not* be inserted in court orders. Her view on the law was the same as this Court's i.e. that s 343R(2) of the Social Welfare (Consolidation) Act, 2005 *'does not apply to settlements'*. It is this Court's view that to be a court order for the purpose of s 343R(2), the term which is inserted (apart from those *inter partes* terms, such as striking out the proceedings, vacating previous orders, allocating costs) had to be one determined by a court after *hearing the case* and determining liability and any other factual issues regarding a personal injuries claim. To put it another way, a court order for the purpose of s 343R(2) is not some statement that is agreed between a plaintiff and defendant for their financial benefit, as *part of their settlement*, which is put into a court order in order to prejudice the taxpayer (who is not party to the proceedings) and help fund the payment of a settlement sum to the plaintiff.

A different conclusion reached in the *Wilson* case

16. However, since the *Kuczak (No. 2)* case was heard, the *Wilson* judgment has been handed down, in which another High Court judge reached a different conclusion from this Court. In line with *Re Worldport Ireland Ltd (In Liquidation)* [2005] IEHC 189, that court departed, as it was entitled to do, from *Kuczak (No. 2).* For the reasons set out in that judgment, it found that it is appropriate for such terms to be inserted in Personal Injury Settlement Orders, even though they financially prejudice a third party, which is not party to the proceedings.

17. There is, of course, nothing unusual in two judges carefully analysing the law and reaching different conclusions. On the contrary, it might be regarded as a positive, from the perspective of the independence of the judiciary, that all judges do not hold the same views. For example, the recent Supreme Court case of *O'Meara v Minister for Social Protection*

[2024] IESC 1 is a case where two of the seven judges differed on the relevant law. However, different judicial opinions at appellate court level do not create any uncertainty regarding the state of the law, since the majority opinion is the settled law.

18. In contrast, where judges of a trial court, such as the High Court, reach different views, there is a resulting lack of certainty regarding the state of the law. This lack of certainty is normally very short-lived, as it is *usually* resolved by an appeal by one of the parties, which results in a decision of an appellate court, which clarifies the law.

19. Yet, what is unusual about the law relating to Personal Injury Settlement Orders is that there have been no appeals, and no apparent prospect of such appeals, to enable the Court of Appeal/Supreme Court to clarify the law.

20. This is despite that fact that the divergence in practice has been in existence for several years[5] and was first brought to public attention in 2020 by Keane J., who was then sitting in the personal injuries list. This is because, in the absence of an appeal, and the absence of any power by the High Court to state a case to the Court of Appeal, Keane J. brought this issue to the attention of the judiciary by publishing his article in a journal whose primary purpose is '*to provide Irish judges with analyses and opinions that are relevant and useful to them in their work'*.[6]

A trial judge has arbitrary choice of which law to apply

21. Crucially all of this means that when this Court is asked by the plaintiff and the defendant in this case to insert terms into a Personal Injury Settlement Order (with the aim of depriving the taxpayer of money which it might otherwise receive), this Court has, in effect, *a completely arbitrary choice of which law* it wishes to apply - the law as stated in *Kuczak (No.*

[5] See for example the decision *Condon v Health Service Executive; Szwarc v Hanford Commercial Ltd t/a Maldron Hotel Wexford* [2021] IEHC 474 refusing to insert terms, and the decision in *Matthews v Eircom* [2021] IEHC 456 inserting terms, in a Personal Injuries Settlement Order.
[6] Website of *Irish Judicial Studies Journal* https://www.ijsj.ie/about-us/

2), which prohibits the insertion of those terms, or the law as stated in *Wilson*, which permits the insertion of those terms.

22. Bearing in mind that the rule of law requires laws not to be arbitrary, this is a far from satisfactory situation, and as noted by Keane J., it is bound to have an adverse effect on public confidence.

23. In these unusual circumstances, this judgment is forced to consider, *inter alia*, how it could be that in the years since issues surrounding the finalisation of Personal Injury Settlement Orders were first raised by Keane J., there has never been an appeal by an insurance company of a rejection of its application to have terms inserted in a Personal Injury Settlement Order. It also considers how, in the public interest, this legal uncertainty might be clarified, if defendants/insurance companies continue not to seek to clarify the law by referring the matter to an appellate court.

THE APPLICATION IN THIS CASE

24. On 29th January, 2024, this Court was told that the appeal in this case could be struck out, vacating all existing orders and with no order as to costs.

25. It was an appeal by Mr. Moloney against *the dismissal* by the Circuit Court (Judge O'Donohoe) of his claim for personal injuries against Bus Eireann. Bus Eireann agreed to pay Mr. Moloney, in order to withdraw his appeal, the sum of €10,000 as an all-in payment (i.e. including his legal costs).

26. Three days later, on 1st February, 2024 counsel for Bus Eireann made an application to this Court with the consent of both parties. It was an application that this Court state in its order, not simply that it was striking out the proceedings and vacating all existing orders, but also, a term, and so a 'court order', to the effect that there was no claim for loss of earnings in the proceedings and/or that the settlement did not reflect any claim for loss of earnings.

27. Bus Eireann is perfectly entitled to an order that the proceedings be struck out and that all previous orders be vacated. Hence this Court has no hesitation in granting that order, subject to any payment, or none, which Bus Eireann chooses to make. There is clearly no issue with Personal Injury Settlement Orders containing terms such as these, i.e. striking out the proceedings, making ancillary orders (such as vacating previous orders) and making costs orders – all of which concern only the parties to the proceedings.

28. However, why, in settling the claim brought against it by Mr. Moloney, would Bus Eireann want to have a term put in the court order that there was no claim for loss of earnings or that the settlement did not reflect a claim for loss of earnings?

29. On one level, there was either a claim for loss of earnings or there was not, this is a factual matter – but it is a factual matter which *was not determined* by this Court, since the case settled.

30. Thus, if the defendant wishes to claim *to the Department* (in order to avoid paying recoverable benefits to it) that there was no claim for loss of earnings (if this is the case), it is perfectly entitled to do so.

31. However, it is not entitled to *a court order* to that effect, which it can then produce to the Department, so as to claim that the Department is not entitled to a repayment of any recoverable benefits from the defendant because it has a court order for the purposes of s 343R(2) 'ordering' that there was no claim for loss of earnings. This is because the Court did not determine whether there was a claim for loss of earnings – it was simply told that as part of the settlement the parties had consented to such a term being inserted in the order.

32. Indeed, the presence or absence of claim for loss of earnings is as much a factual matter as a claim for unjust enrichment, for defamation, for breach of contract, for mental distress etc. Yet, when cases involving those claims settle, courts are not asked to make orders, that, say, there was no claim for defamation or no claim for mental distress. Indeed, if the courts were so

asked, it seems to this Court that, they would refuse, since these are factual matters which were not determined by the court and so they have no place in a court order, particularly if they prejudice an unrepresented third party.

33. So why are courts asked, when a personal injuries case settles, to make an order about some factual matter which was never determined by the Court e.g. that the defendant was only 50% liable for the accident[7] or that there was no claim for loss of earnings?

34. The answer is clear. Obtaining a *'court order'* that there was no claim for loss of earnings, is to the *financial advantage of the two parties* settling the case and *to the financial detriment* of the Department/taxpayer, which is not a party to the proceedings. This is because, as is clear from *Kuczak (No. 2)*, the defendant avoids having to repay the Department any '*recoverable benefits'* paid to the plaintiff by the Department, and so the defendant has more funds to pay an increased settlement sum to the plaintiff.

How do Personal Injuries Settlement Orders work?

35. In *Kuczak (No. 2)*, this Court set out how these Personal Injury Settlement Orders achieve this financial gain for an insurer and a financial loss for the taxpayer. In brief, logic dictates that where a defendant/insurer causes a personal injury, it should be liable for any loss of earnings caused to the plaintiff. It follows that if the Department pays an injured plaintiff a disability or other benefit arising from his injuries, the party that caused the injury (the defendant/insurer) should reimburse the Department in respect of these '*recoverable benefits'*.

36. However, where a court hears and tests the evidence in an adversarial setting, and then decides a contested factual or legal matter and makes a finding and then issues a *court order* (e.g. that the defendant/insurer was only 50% liable), it is also logical that the defendant/insurer

[7] In *Eircom*, Cross J. inserted a term, in the court order on the settlement of the case, to a 50/50 split in liability at the request of the parties. This had the effect of entitling the defendant to claim that it had a 'court order' saying it was only 50% liable for the injuries and so should only be liable to reimburse 50% of the recoverable benefits paid to the plaintiff by the Department.

should only pay 50% back to the Department, since *a court has found* that it is only 50% liable for the accident.

37. Yet, what we are concerned with in Personal Injury Settlement Orders is where a defendant/insurer *settles a case,* and the plaintiff (for its *indirect* financial benefit) and the defendant/insurer (for its *direct* financial benefit) want a court to put in a term in the court order (striking out the proceedings without any hearing), which will relieve the defendant/insurer of its repayment obligation to the Department. Such a term is not a *finding of fact* by the court (and so appropriate to be in a court order), but rather *a statement* agreed by two parties to settle their case in order to financially prejudice a third party (which is not appropriate to be in a court).

Current practice in High Court continues not to be uniform.

38. Yet, it seems clear from Bus Eireann's application in this case, that these orders are still being sought and presumably still being inserted in court orders and also presumably still being relied upon by insurers to have the taxpayer cover their business expenses. The reason for this seems clear to this Court, namely that in addition to the decision in *Kuczak (No. 2)*, that it is *unlawful* for such terms to be inserted in Personal Injury Settlement Orders, there is the decision in *Wilson,* that it is *lawful* for such terms to be inserted in those orders. Thus an insurance company can seek to have these terms inserted in a Personal Injury Settlement Order and it is up to each individual judge to choose which law to apply and so, in effect, to *arbitrarily choose whether it is lawful or unlawful* to insert those terms. Since there are hundreds of Personal Injury Settlement Orders being made on a daily basis in the courts, this arbitrary choice of law is a regular occurrence in the courts.

39. It is important to point out that there is nothing unusual about two High Court judges analysing the law and reaching different conclusions. However, normally, when there are two divergent High Court views on the law, the issue gets resolved by a judgment of the Court of

Appeal or the Supreme Court. The most recent example of this is the determination of the Supreme Court to hear an appeal regarding the allegedly different views of the law taken by Humphreys J. and Holland J.[8] in the Planning and Environment List of the High Court (*Sherwin v An Bord Pleanala* [2023] IEHC 26; [2023] IESCDET 108). However, for this appeal to be pursued, there had to be one of the parties to a High Court decision deciding to pursue an appeal.

No decision on Personal Injury Settlement Orders by an appellate court

40. What is unusual about Personal Injury Settlement Orders is that there never appears to have been an appeal of any of the refusals to insert terms in those orders by an insurance company. In this regard, it is important to realise that because one is dealing in most personal injury claims with a *private insurer*, with numerous *other* personal injury cases to defend, one can see why, from a business perspective, an insurer might not want to appeal a refusal by a court to insert terms into *one* particular Personal Injury Settlement Order.

41. This is because, even though it might be possible or even probable that an appellate court might adopt the statement of the law set down in *Wilson*, there is some risk that an appellate court might not do so and instead find:

- that terms prejudicing a third party should not be inserted in *any* Personal Injury Settlement Order (in light of the very comprehensive analysis of the issue conducted by Keane J. in his article and which has been relied upon by this Court in its previous judgments), and/or;
- that s. 343R(2) '*does not apply to settlements'* (which would accord with the views of the legal advice of the Minister), and/or;

[8] *Jennings v. An Bord Pleanála* [2023] IEHC 14.

- that it is '*wrong'* for the taxpayer to foot the bill for the business expenses of insurers (in light of the views of the Law Reform Commission).

However, if an appellate court were to find that the insertion of these terms into Personal Injury Settlement Orders was unlawful (or that s 343R(2) only applies to settlements, per the Minister), then there would be an end to insurers having the taxpayer covering its business expenses and so an end to taxpayers funding personal injury settlement payouts, since there would be an end to the uncertainty regarding the law.

42. Whatever the reasons, it remains the position that there has not been any appeal of any of refusals by this or other courts to insert such terms in Personal Injury Settlement Orders. Accordingly, the lack of uniformity in the courts, which Keane J brought to public attention in 2020, continues to this day.

The decision in this case

43. All of this means that, in having to decide this case, this Court is in the unenviable of position that if it concludes that it is not lawful to insert the terms into the order, as sought by Bus Eireann, it will do so, knowing that other High Court judges take the contrary view. Yet there is no clarification from an appellate court of which view is correct. Furthermore, this Court has no power to seek any clarification of the law from an appellate.

44. In all these circumstances, and notwithstanding the careful analysis of the law by the High Court judge in *Wilson*, this Court respectfully takes a different view. It does so for the reasons set out in its previous judgments, which it does not propose to repeat in detail, i.e. in *Kuczak v Treacy Tyres (Portumna) Ltd (No.1)* [2022] IEHC 181, *Swarcz v Hanford Commercial t/a Maldron Hotel Wexford* [2021] IEHC 474, *Fahy* and *Kuczak (No.2)*. The reasons are summarised at para 50 of *Fahy*:

"[I]t is useful to summarise the four key reasons why this Court believes that the Court should not insert 'consent terms' into a Court Order:

(i) the terms are not based on evidence tested in an open court before a judge with no financial interest in the conclusion, between parties whose interests are opposed,

(ii) the proposed term arose from a private settlement between parties who are no longer in dispute since they have reached a settlement agreement, and whose interests are aligned in making the application to Court for insertion of the terms,

(iii) the effect of such an order is to have the taxpayer subsidise any settlement payment by the defendant/insurance company to the plaintiff (by relieving the defendant/insurance company of the obligation to reimburse the taxpayer) and thus for the direct financial benefit of the defendant/insurance company and the indirect financial benefit of the plaintiff, and

(iv) the party, who is financially disadvantaged by the order, the taxpayer, has no say in the term proposed to be inserted in the order."

45. It is to be noted that in that one case alone (*Fahy*), the amount which would have been lost to the taxpayer, and gained by the insurance company and the plaintiff,, if the terms had been inserted in the Personal Injury Settlement Order, was €42,000. While it is impossible to know how representative *Fahy* is of the hundreds of cases which are settled every week, it is nonetheless likely that insertion of such terms in Personal Injury Settlement Orders is a matter of considerable financial significance.

46. Despite this, it is clearly the case that the financial implications of the orders generally, or even of Bus Eireann's application in particular, *is not a basis* for this Court refusing Bus Eireann's application. Thus the article entitled *'State accuses Insurers of Dodging €20 million'* from the *Irish Independent* website 11 October, 2018 (which this Court only became aware of because it was referenced by the High Court in *Wilson* at para 32) is of no relevance to this

Court's decision. This is because, as pointed out in *Wilson*, any such commentary in the public domain, is *not evidence*, upon which a court could, rely regarding the actual cost to the taxpayer of these orders. The party with this evidence is the Minister and no such evidence has been provided to this Court. In any event, even if this evidence was provided to a court, the cost to the taxpayer of such orders, while it may be relevant to the *significance* of such orders, has no impact on the question of their *legality.*

47. In conclusion in this regard, for the same key reasons set out in *Fahy*, this Court refuses to insert the terms sought by Bus Eireann in the Personal Injury Settlement Order, which have as their effect the financial prejudice of a third party (the Department).

<u>An appeal of this decision by Bus Eireann?</u>

48. It is clear from the foregoing that today, if a judge of the District, Circuit and High Court is dealing with Personal Injury Settlement Orders, the position, she finds herself in, is far from satisfactory. This is because she can *arbitrarily choose* which set of rules to apply. Yet, since this Court cannot of its own motion state a case to the Court of Appeal, the only way in which to clarify the law on Personal Injury Settlement Orders is for there to be an appeal of a decision by the High Court, to either grant or refuse the insertion of terms into such an order.

49. Obviously, an appeal in relation to the *grant* of such orders is not going to happen, since these terms are inserted because *both* parties want them inserted. Therefore, neither party is going to appeal a decision to grant it an order which it has sought.

50. It follows that it is only if there is a *refusal* by a court to insert the terms, as in this case, that there is any possibility of an appeal and therefore a clarification of the law.

51. However, the usual defendant in a personal injuries action is an insured private business/individual. For the reasons already stated, it does not appear to be in the financial interest of an insurer to have an appellate court clarify the law in relation *to one particular* Personal Injury Settlement Order, since this carries with it the risk that an appellate court might

decide that these terms should never be inserted *in all* Personal Injury Settlement Orders to which insurers are party throughout the courts of Ireland (and which financially benefit them, but prejudice the taxpayer).

52. However, in this case, one is dealing with a defendant, Bus Eireann, *which is funded by the taxpayer,* just as the Department (which is prejudiced by such orders) is also funded by the taxpayer. Thus, looking beyond the confines of this case, to the interests of the taxpayer as a whole, it is possible that Bus Eireann might conclude that there is merit in appealing this Court's decision in order to clarify this aspect of personal injury law. Indeed, this issue is arguably of more relevance that any other aspect of personal injury law, in light of the fact that nearly every personal injury case ends up with Personal Injury Settlement Order.

53. Quite apart from the public interest arising from the financial consequences to the taxpayer, there is a broader public interest, since, as noted by Keane J., the current absence of uniformity in the courts to Personal Injury Settlement Orders is '*bound to have an adverse effect on public confidence'*.

54. In this regard, the recently launched State Litigation Principles may be relevant. Although Bus Eireann might not be regarded as 'the State' for the purposes of these principles, nonetheless, it might be expected to have regard to these principles, since it is a State-funded entity. Principle 12 states that:

> "The State shall endeavour to conduct litigation in accordance with the following principles […]
>
> 12. Not to appeal unless there is a reasonable prospect of success or in the public interest The State should not ordinarily appeal against adverse decisions unless there are valid legal or policy reasons for doing so. The State may appeal where it is considered that the appeal has a reasonable prospect of success; **clarification of the law** or legal

certainty is required; the appeal is supported by valid legal or policy reasons or the **appeal is otherwise in the public interest**." (Emphasis added)

This principle, insofar as it says that the State should consider appealing cases in certain situations is particularly relevant to this case. This is because firstly, there is no doubt that an appeal in this case is necessary, since there is clearly a need for a '*clarification of the law'*. Secondly, it seems clear that there is a *'public interest'* in bringing an appeal, since, as already noted, taxpayers' funds are at stake and public confidence is being undermined because there are rule of law issues at stake.

55. It is possible therefore that Bus Eireann, as a defendant with a public service remit, and without the profit motive of a private insurer, may decide to do something, which no private insurer has done to date, and conclude that it is in the public interest to clarify the law and so appeal this decision.

56. If this were to happen, and if an appellate court were to conclude that the law is as stated in *Wilson*, then this will be the law which will be applied in a consistent fashion by all courts. This would bring an end to the situation where different judges are arbitrarily applying different rules. In this way it would also bring an end to the situation where public confidence is undermined, a concern to which Keane J. referred.

57. While this is a decision solely for Bus Eireann, in light of the rule of law issues at stake, this Court feels obliged to highlight the unsatisfactory current position and how it might be resolved.

The position of the Department

58. Reference also needs to be made to the position of the Department, since it is the party which is financially prejudiced by the practice of inserting these terms in Personal Injury Settlement Orders.

59. Despite being the party *prejudiced*, the Department is not entitled to appeal a decision by a court to insert those terms in a court order, since the Department is not party to those proceedings and so *it has no right of appeal.*

60. In *Kuczak (No. 2),* the Minister indicated that she was of the view that s 343R(2) does not apply to settlements. As this is her view, this means that when presented with such 'orders' of the court by a defendant/insurer, she could seek a court declaration that such an order *does not* constitute a court order for the purposes of s 343R(2). Then if this declaration is not granted, she could appeal that decision to an appellate court, in order to clarify the law. Indeed, the State Litigation Principles support such an approach. This is because the Department/Minister is an emanation of the State and there is therefore no doubt that she is subject to those principles (*albeit* that they are not legally binding). These principles clearly suggest that the State should consider pursuing litigation where it is in the public interest and in order to ensure that there is legal certainty.

61. In this regard, the High Court in *Wilson* specifically referred to the fact that the Minister could have this issue determined by being a party to proceedings which determine whether s. 343R(2) applies to Personal Injury Settlement Orders. At para 47, it stated:

> "This judgment does not deal with the issue of whether an order that is made by the court on consent of the parties upon settlement of personal injuries action, is an 'order' for the purpose of s 343R(2) of the 2005 Act. That issue will be determined when that question is raised in **appropriate proceedings to which the Minister is party**." (Emphasis added)

Despite this reference in *Wilson*, there has to date been no such proceedings in which this matter could be clarified. Accordingly, the current situation continues where judges have a completely arbitrary choice as to which set of contradictory rules to apply to the exact same factual situations.

CONCLUSION

62. This Court rejects the application by Bus Eireann to insert terms in the court order striking out these proceedings, since those terms are designed to financially prejudice the Department. It does so because terms, such as these, are intended to deprive the taxpayer of a repayment from a defendant/insurer of recoverable benefits. In this way the taxpayer ends up benefiting the insurer and so funding the payment of a settlement sum to a plaintiff in a personal injuries action. This Court adopts the reasoning of the Law Reform Commission to conclude that this is *'wrong'* and so refuses the application.

63. In doing so, this Court is conscious of the fact that a contrary view has been expressed by another High Court judge and that the existence of two different views in the courts (which is clear from Keane J.'s article has been ongoing for several years) is far from satisfactory. This is particularly concerning, as hundreds of Personal Injury Settlement Orders are made every week in the courts, with judges in all those cases having a completely arbitrary choice, as to which set of rules to choose from, to govern the finalisation of those orders.

64. In most other situations this difference of views between trial judges would have been resolved by an appellate court.

65. However, firstly, this is a most unusual situation where the party prejudiced by the orders is not a party to the proceedings and so has no right of appeal.

66. Secondly, it is unusual because, as regards the parties to the proceedings, unlike normal proceedings, the plaintiff and defendant are *both* seeking the terms to be inserted in the order (since it is to their financial advantage) and so they will obviously not appeal an order (which prejudices a third party) if it is granted, since they both requested it.

67. Thirdly, it is unusual because if the application is refused, it seems that it is not in the financial interests of the defendant/insurer to appeal. This is because there is a risk that an

appellate court could say that those terms should not be inserted in *any* Personal Injury Settlement Orders. Indeed, in light of the amounts of money involved in some of these cases (e.g. €42,000 in *Fahy*) and the fact that hundreds of Personal Injury Settlement Orders are made every week, it is not surprising that defendants/insurers might not want to risk such a finding. Hence this unsatisfactory situation looks like it will continue.

68. However, this Court believes that it is not satisfactory that in Bus Eireann's application, it is placed in the unenviable position where it is choosing one set of rules, while it knows that other courts are choosing a different set of rules, to govern the exact same applications. This is the exact opposite of what the rule of law demands, i.e. that all persons are *accountable to the same laws.*

69. Keane J. has pointed out that the current situation has *'an adverse effect on public confidence'.* Undoubtedly therefore all judges would prefer to have the uncertainty removed. It is ironic therefore that the judges themselves have no power to resolve this issue This is because, unlike the District Court (which can, through the Case Stated procedure, ask a higher court to determine a conflict on legal interpretations), this Court has no such power to ask the Court of Appeal to resolve the current lack of uniformity regarding the treatment of Personal Injury Settlement Orders.

70. For this reason, all this Court can do is highlight the issues involved (as Keane J. did some years ago) and, because rule of law issues arise, this Court has somewhat unusually referred to the steps that a person, other than a High Court judge, can take in order to resolve this issue, i.e. one of parties to this case (Bus Eireann) and/or a non-party (Minister/Department).

71. In particular, this Court has pointed out the public interest reasons why a State funded entity such as Bus Eireann might, in the public interest, appeal this Court's refusal to insert the terms in the order. Failing that, this Court outlined why the State itself (the

Minister/Department) might seek to clarify the legality of Personal Injury Settlement Orders. As noted in *Wilson*, this would involve the Minister being *'party'* to *'appropriate proceedings'* to determine the meaning of s 343R(2), e.g. an application by the Minister for a court declaration that s. 343R(2) does not apply to orders made on the settlement of personal injury claims.

72. This Court is conscious of the fact that it is entirely possible that it may be wrong regarding its conclusions in *Kuczak (No. 1),* in the sense that an appellate court may prefer the interpretation of the law in *Wilson*. However, it does not believe that it is wrong in its views that this issue regarding Personal Injury Settlement Orders should be appealed/clarified, in the interests of the rule of law.

73. It is for this reason that this Court is asking the registrar to provide a copy of this judgment to the Minister.

74. It does so also because, if the matter is heard by an appellate court, and the conclusion is that the correct approach is that set down in *Wilson*, then at least the application of the law in this important area of personal injuries will cease to be arbitrary, since all judges in the District, Circuit and High Courts would then be obliged to follow the same rules.