THE HIGH COURT

[2022] IEHC 670

Record No. [2020/1877 P]

BETWEEN:-

JEAN WILSON

PLAINTIFF

AND

PETER LEONARDI AND VIRGINIA PARK LODGE LIMITED

DEFENDANTS

JUDGMENT of Mr Justice Barr delivered *extempore* on 1st day of December, 2022.

Introduction.

1. This action concerns personal injury proceedings brought by the plaintiff against the defendants arising out of an accident on 10th July, 2017. The action has been settled between the parties.

2. The parties have requested that the Order of the court should include a term that liability was determined on a 50/50 basis between the plaintiff and the second defendant. The court will return to the specifics of the order sought by the parties in this case, later in the judgment.

3. First the judgement will deal with the question of whether it is appropriate for the court to insert certain terms into the order of the court, by agreement of the parties. Such terms are sought by defendants so as to relieve them of the obligation to pay to the Minister for Social Welfare the entire amount of the benefit specified in the Recoverable Benefits and Assistance certificate (hereinafter "RBA certificate") that issued in respect of the plaintiff.

4. There are conflicting judgments in the High Court concerning this issue. It is for that reason that the court has felt it necessary to give a judgment explaining its approach to the matter.

Background to the RBA Scheme.

5. From as far back as the Social Welfare (Consolidation) Act 1993, certain social welfare benefits were deductible when assessing the compensation to which a plaintiff, who had suffered personal injuries as a result of an accident, might be entitled: see ss. 75, 236 and 237 of the 1993 Act. The purpose of these deductions was to prevent a plaintiff receiving compensation "on the double", i.e. by getting a benefit by way of social welfare payments and then subsequently receiving compensation for the same head of loss in his damages.

6. The deductibility of these benefits when assessing damages, was carried over by ss. 96 and 286 of the Social Welfare (Consolidation) Act 2005 (hereafter, the “2005 Act”). The fact that these payments were deductible when assessing damages meant, in effect, that the tortfeasor and/or his indemnifier, received a windfall, in that they were relieved of the obligation to pay an amount of compensation, because that head of loss had been catered for by way of social

welfare benefits, which were deemed deductible from the amount of damages payable by the tortfeasor.

7. This aspect was addressed by 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). It recommended that where an injured person had received social welfare benefits as a result of his injuries, the tortfeasor should pay the value of such benefits to the State, as it had been due to the fault of the tortfeasor that such benefits had had to be paid to the injured person. The LRC recommended as follows at paragraphs 5.108 *et seq*:

> *"5.108 To state a straightforward principle: it seems to the Commission to be wrong for the Department (and beyond it, the taxpayer) 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.*
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> *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.*
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> *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 has been reduced, by virtue of the payment of social welfare payments including health allowance, should be reimbursed by the defendant to the Department of Social and Family Affairs or a Health Board, as appropriate."*

8. The recommendation of the LRC was given statutory effect in Part 11B of the 2005 Act, as inserted by s. 13 of the Social Welfare and Pensions Act 2013. This section repealed and replaced s. 96 (1) and (2) and s. 286 of the 2005 Act.

9. The newly inserted statutory provisions provide that the specified period in respect of which specified benefits are recoverable, is the period beginning on the date on which the injured person first becomes entitled to a specified benefit as a result of the personal injury and ending on the earliest of the following: (a) the expiration of the period of five years from that date; (b) the date on which a compensator makes a compensation payment in final discharge of any claim made by or in respect of the injured person as a result of the personal injury, or (c) the date on which an agreement is made under which agreement an earlier payment is treated as

having been made in final discharge of any such claim. The section goes on to detail which social welfare benefits are "specified benefits" for the purposes of the Act.

10. The section also provides for the provision of a statement of recoverable benefits by the Department of Social Welfare in respect of the benefits that have been paid to a plaintiff.

11. The obligation on a compensator to pay recoverable benefits to the Minister is set out in s. 343R, which is in the following terms:

> *"(1) Subject to subsection (2), a compensator shall pay to the Minister the amount of recoverable benefits specified in the statement of recoverable benefits before making any compensation payment to, or in respect of, an injured person.*
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> *(2) Where the recoverable benefits specified in the statement of recoverable benefits exceed the amount of the relevant compensation payment and that relevant compensation payment was the subject of an order of a court or assessment by the Board in accordance with the Act of 2003, the compensator is liable only to the extent of that amount so ordered or assessed.*
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> *(3) A compensator who fails to comply with subsection (1) or otherwise fails to pay the amount of recoverable benefits due to the Minister is liable to pay on demand to the Minister that amount of recoverable benefits so due."*

12. The net effect of the statutory changes in relation to the recovery of benefits, is that where a compensator settles with a plaintiff simpliciter, the compensator is liable to repay the full amount specified in the statement of recoverable benefits; the obligation is not limited to cases where there is a loss of earnings aspect to the claim. It applies irrespective of whether the compensator is able to deduct the recoverable benefits from the damages to be paid to the injured person. Apportionment of liability does not impact the amount of recoverable benefits to be repaid. Thus, if the defendant's insurer settles with a plaintiff, they must repay all of the benefits stated in the plaintiff's RBA certificate to the Minister for Social Welfare.

13. In order to avoid that situation, the compensator must bring itself within s. 343R(2), by obtaining an order from the court, which limits or expunges his obligation to repay the total value of the social welfare benefits, by either making certain orders in relation to the extent or duration of the plaintiff's loss of earnings claim, or by determining an apportionment of liability between the parties.

14. If the order of the court does either, or both, of these things, the liability of the compensator to pay the amount specified in the RBA certificate, is modified, or eliminated, in accordance with the terms of the court's order.

15. Examples of the type of recital that are often sought to be included in a consent order made by the court, include the following: "the plaintiff has withdrawn the claim for loss of earnings"; "the plaintiff incurred no loss of earnings after a (specified date)"; "the plaintiff did not recover any payment in respect of loss of earnings in the settlement figure"; "liability is apportioned between the defendant and the plaintiff in (a specified ratio) on the basis of the plaintiff's contributory negligence". The RBA scheme commenced operation on 1st August, 2014.

Conflicting Authorities in the High Court.

16. The practice of the court making orders, which contained determinations of the type set out above following the settlement of personal injury actions, was first questioned in two academic articles published in 2020. The first of these, was an article published by Mr. Justice David Keane in the Irish Judicial Studies Journal, vol. 4 (2) of 2020, entitled "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". The second article was by Ms. Neasa Peters, former Judicial Assistant to Ms Justice O'Regan, in the Irish Law Times, Vol. 38 (19) of 2020, entitled "Litigation, Recovery of Benefits and Assistance Scheme: Aim and Implementation". In each of these articles, the learned authors questioned the practice whereby, following the settlement of a personal injuries action, the parties would request the court to recite in its order various determinations or findings, which had the effect of reducing or eliminating the compensator's liability to repay the full amount specified in the RBA certificate that had been issued in respect of the plaintiff.

17. The issue in relation to the making of such orders was first raised in a judgment delivered by Twomey J. in the joined cases of *Condon v. Health Service Executive* and *Szwarc v. Hanford Commercial Ltd* [2021] IEHC 474, which was delivered on 29th June, 2021. In that judgment, the learned judge held that the purpose of the reference to court orders in s. 343R(2) of the 2005 Act, was to ensure that before an insurance company was able to benefit from the financial concession provided for in that subsection, at the cost of the taxpayer, there must have been an independent and neutral verification process overseen by a judge, who makes a determination regarding how much of the compensation is made up of loss of earnings.

18. The court held that the term "court order" in the subsection, amounted to the requirement of an independent and neutral determination of the evidence, which was subject to cross-examination, or other testing, during an adversarial process at a time when the defendant's and the plaintiff's interests were not aligned. He held that the section did not contemplate a plaintiff and defendant agreeing a settlement between themselves, in which they would agree that the compensation payable had no (or only a certain percentage of) loss of earnings; thereby entitling the insurance company to the concession of not making any (or full) reimbursement to the Department.

19. The court held that once a settlement had been reached between the parties to the litigation, both parties' interests were then aligned, which was not the case for a court order which was made after an adversarial hearing. The court held that, more significantly, the court order that was sought on consent of both parties, was not one whose terms would only affect those parties. The court order sought in the case before him, was one which would financially prejudice another party, being the Department/taxpayer, who was not represented in the application.

20. The judge further held that when a court was hearing and application for a court order to reflect the settlement reached between the parties, one was dealing with a court order, this was entirely on the basis of submissions made by lawyers after the case had settled. It was not based on evidence, which had been tested in an adversarial hearing. Without sufficient evidence before him, the judge refused to make the order that had been sought by the parties in the respective cases.

21. The issue was next considered in a judgment delivered by Cross J. on 2nd July, 2021 in *Matthews v. Eircom* [2021] IEHC 456. In that case, the judge had been asked to make a consent order following settlement of the action, which was to include a determination that the proceedings had been settled on the basis of a 50/50 apportionment of liability.

22. Having reviewed the provisions of the statute in relation to the recoverability of benefits and having reviewed the earlier decisions on the matter, Cross J. held that the terms of s. 343R of the 2005 Act, did not prevent a court including in its order determinations of the type outlined earlier in this judgment. The essential findings were set out at paragraphs 31 and 32:

> *"31. The provisions of s. 343R (2) are clear in relation to the definition of "order". The Act clearly makes no provision itself for any requirement that the Minister be put on notice of all cases. There is absolutely no evidence of any fraud even if, as pointed out by Twomey J., after settlement there is an identity of interest between the plaintiff and the defendant. This court is of the view that insofar as the cases were decided by Twomey J. on the basis that orders "should only be granted if there was evidence that the party prejudiced, the department was also consenting to the terms being made an order of the court" and insofar as the cases were decided that in the particular circumstances the term "order" could not include orders by consent, this court respectfully disagrees with the ab urbe judgment in the cited cases by Twomey J. and will continue with its former universal practice.*
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> *32. Of course if any judge believes that he cannot trust the counsel or solicitors in front of him and requires to embark upon a hearing of settled actions or requires to have the Minister put on notice to engage counsel or solicitors to represent the State that is a decision in any particular case that any judge may make. Clearly however*

> *there is no legal obligation that a judge should take such extraordinary a step and it is the opinion of this court that such a step, absent compelling reasons, would be most unwise."*

23. On 1st November, 2021, Twomey J. delivered a further judgment on the issue in *Fahy v. Padraig Fahy Tiling Contractors Ltd* [2021] IEHC 682. In that case, the court held that it was not appropriate for the court to determine the percentage of liability between the parties as a recital in a consent order made following settlement of the action. The court further ruled that it was not appropriate to "note" in an order that no loss of earnings have been recovered in the settlement amount. The court further ruled that it was not appropriate for the court to hear evidence on the recitals that should be contained in the order, after the consent terms had been agreed, because by that time the parties' interests were totally aligned.

24. At paragraph 50 of the judgment, Twomey J. gave a summary of the reasons why "consent terms" should not be inserted into the orders that are made by the court following settlement of an action:

> *"Before going on to consider the argument that the Szwarc case should be distinguished from the case before this Court, it is useful to summarise the four key reasons why this Court believes that the Court should not insert 'consent terms' into a Court Order:*
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> *(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."*

25. The issue was again considered by Twomey J. in the course of two judgments that he delivered in the same case. In *Kuczak v. Treacy Tyres (Portumna) Ltd (No.1)* [2022] IEHC 181, which was delivered on 29th of March, 2022, the learned judge again refused to insert into the order that

would be made by the court following settlement of the action, a term that there was a determination that the liability of the defendant only extended to 50%.

26. In the course of his judgment, the judge reiterated the views that he had expressed in the judgment in the Fahy case. However, at the request of counsel for the defendant, he adjourned the making of a final order, until after the Minister for Social Welfare had been put on notice of the defendant's application to have the term in relation to liability inserted into the consent order.

27. On 9th November, 2022, having heard counsel for the Minister for Social Welfare, Twomey J. delivered his second judgment in the *Kuczak* case, which is reported at [2022] IEHC 619. In that judgment, Twomey J. noted that the Minister was not consenting to any term being included in the order of the court, to the effect that liability had been determined on a 50/50 basis. It was the view of the Minister that the court should not include such terms in orders that are made by consent of the parties following settlement of an action. For the reasons that had been set out in his earlier judgments, Twomey J. held that it was inappropriate for a court to include such determinations in a consent order, because no evidence had been put before the court that would warrant the making of such a determination. He further ruled that, even if evidence was called following settlement of the action, such evidence would not enable the court to make the necessary determination, because the interests of the parties were completely aligned by that stage; therefore, it could not be said that the evidence was properly tested by means of cross examination in the usual way.

Conclusions.

28. While ordinarily a judge should follow the decision given by a judge at the same level of jurisdiction, it is settled in the leading authorities that where there are conflicting decisions at the same level, a judge is free to follow whichever line of authority appears to him, or her, to be the most persuasive: see *Re Worldport Ireland Ltd (In Liquidation)* [2005] IEHC 189; *Kadri v Governor of Wheatfield Prison* [2012] IESC 27; *A. & Ors v Minister for Justice and Equality* [2020] IESC 70.

29. Having carefully considered the authorities cited above and the academic articles referred to therein, I am of the opinion that it is appropriate for a court to include consent terms in relation to either the loss of earnings claim maintained by the plaintiff, or a determination on liability, provided there is some rational and fair basis for making those determinations.

30. I reach that conclusion for the following reasons: first, I am very far from convinced that it has been established in evidence that there has been a shortfall to the Minister of €20 million due to such consent orders having been made by the courts in the past. That statement of fact was relied on heavily by Twomey J. in several of his judgments. However, that finding appears to me to be based on what might be regarded as triple hearsay.

31. The reference to a shortfall of €20 million was referred to in the article written by Ms. Peters. In that article she stated as follows: "*The department is of the opinion that in many cases the court orders do not reflect an accurate position of the settlement negotiated between the parties and that orders are also being obtained to deliberately avoid an RBA liability*." That statement of fact was cited at footnote 34 as follows: "FBD Insurance plc, "FBD Prospectus (Central Bank of Ireland, 2 October 2018) available at [a link to the central bank website was given] pp. 20 – 21." Unfortunately, that particular prospectus is no longer available on the Central Bank's website. Efforts that were made by this court to obtain a copy of the prospectus directly from the Central Bank, were unsuccessful.

32. From a newspaper article that was published on the website of the Irish Independent newspaper on 11th October, 2018, under the heading "State Accuses Insurers of Dodging €20 million", it was alleged that in the prospectus which had been issued by FBD Insurance plc in 2018, when they were inviting people to subscribe to instruments that were in the nature of 10 year bonds, that would be redeemable in 2028, it was stated that in 2017, a letter had been written by the Minister for Social Protection to Insurance Ireland stating that it was the Minister's "*belief*" that there was a shortfall in recoupment of benefits under the RBA scheme of €20 million up to 2017.

33. Thus it would appear that the finding in some of the earlier judgments that there has been a shortfall of €20 million in respect of benefits that ought to have been repaid under the RBA scheme, was based on a statement contained in the article written by Ms. Peters, which in turn was based on a statement contained in the prospectus issued by FBD Insurance plc, which referred to a statement of belief contained in a letter that had apparently been written by the Minister to the relevant insurance body in 2017. I do not think that the court should make a finding that a loss of such magnitude has been established, without cogent admissible evidence to that effect.

34. Secondly, I do not think that when writing in 2017, the Minister could possibly have formed the opinion that insurers generally had wrongfully failed to pay €20 million, which ought to have been paid under the RBA scheme. There is no evidence of any fraud, either of that scale, or at all. I suspect the source of the information leading to the statement which she allegedly made in her letter of 2017, was a simple mathematical calculation of the total amount stated in RBA certificates that had issued to plaintiffs up to that date, less the amount actually received on foot of court orders made in personal injury actions that had settled up to that time.

35. That there may have been a difference of €20 million between what had been stated in the RBA certificates and what was actually repaid by compensators, does not mean that that amount was fraudulently withheld by them.

36. If there had been either, no claim for loss of earnings, or a limited claim for loss of earnings, or a determination apportioning liability between the parties, or if the plaintiff's case had either been thrown out, or had been withdrawn by the plaintiff; all of these things would have legitimately meant that the full amount stated in the plaintiff's RBA certificate, would not have been repayable.

37. Thirdly, if the Minister genuinely believed that she was being wrongfully denied the full amount of recoupment of relevant benefits, as a result of consent terms in orders made by the courts, she could have taken steps to address that state of affairs. She could have sought by means of a judicial review application, a declaration that such consent terms in orders of the court are not "orders" for the purposes of s. 343R of the 2005 Act. Or she could have made an application to the court under O. 15 of the Rules of the Superior Courts to be joined into any proceedings in which she felt that an inappropriate determination had been made by the court on consent of the parties. Alternatively, she could have introduced amending legislation to the effect that determinations made by the courts as part of consent orders, would not be "orders" of the court for the purposes of s. 343R of the 2005 Act. It does not appear that any of these steps have been taken by the Minister.

38. In these circumstances, this court cannot hold that there has been a wrongful shortfall in the repayment to the Minister of benefits in the sum of €20 million, or of any sum, up to 2017.

39. That is not the end of the matter. There is substance in the conclusion reached by Twomey J. that there is the potential for injustice in a situation where A and B agree terms between themselves in a particular way and then consent to an order in these terms, which has the effect that the rights of C are adversely affected. That is the central point made by the learned authors of the academic articles and is the core rationale behind the ruling of Twomey J. in his judgments.

40. While recognising the legitimacy of those concerns, the court is of the view that the fact that fraud may occur, does not mean that it is occurring on a vast scale, or on a frequent basis. In large part, the making of consent orders following settlement of a personal injuries action, which might contain recitals of the type under consideration, depends on trust between the bench and the barristers who applied for such orders. Every day judges rely on barristers to tell them the truth. The administration of justice is dependent on this principle. Judges proceed on the assumption that barristers representing plaintiffs and defendants, when proposing that the court should make a particular determination, as part of a consent order, do so because there is a rational evidential basis for asking the court to make that determination.

41. For example, when a court is asked to make a determination that liability has been apportioned, say 60/40 in favour of the plaintiff; counsel are warranting that in the circumstances of the case and on the state of the evidence available, there is a statable case to be made that the

defendant should be found 60% responsible for the accident and the plaintiff should be found guilty of contributory negligence of 40%.

42. That is not to suggest that the court should blindly rubberstamp whatever determination the parties request when announcing the terms of settlement. The circumstances which pertain when a party requests the insertion of terms into a consent order is similar, though not at all identical, to the application that is made to the court when it is asked to rule on the adequacy of a proposed settlement figure in an infant's personal injury action.

43. In an infant's case, the interests of the infant are protected by the requirement that the child's action can only be settled once the figure on offer is ruled by the court as being adequate. In order to make that determination, the barrister representing the child opens all the relevant material to the court that has a bearing on the issues of liability and quantum. The plaintiff's barrister will submit copies of the plaintiff's medical reports and material relevant to the issue of liability, such as an engineer's report and photographs and witness statements. With that information, the court can reach a determination on the adequacy of the figure on offer.

44. In much the same way, in cases where a determination is sought for RBA purposes, it is appropriate that the court be given sufficient information to satisfy the judge that the determination sought to be included in the order, is appropriate in all the circumstances. Further, if the court is of the view, upon hearing the relevant evidence, that the apportionment of liability proffered by counsel does not accurately reflect the true position, it can refuse the settlement terms and highlight to counsel the issues that the court has with the terms as suggested.

45. If that procedure is followed, I am satisfied that the risk of the parties colluding in such manner, as to effectively defraud the Minister of a recoupment of relevant benefits that ought properly be paid by the compensator, is greatly reduced, if not entirely eliminated.

46. The advantage of proceeding in this way, is that it enables personal injury actions to be settled, while at the same time ensuring that the interests of the Minister in respect of recoupment of social welfare benefits, are not adversely affected. In addition, in an appropriate case, the Minister could apply for liberty to intervene, if she has concerns about the propriety of the determination made in any particular case. Accordingly, I hold that it is appropriate for a court to make declarations and determinations as part of a consent order, once a rational basis for such determinations has been properly put before the court.

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

The Present Case.

48. In the present case counsel for the plaintiff, Mr. Kilfeather SC, outlined to the court that at the time of the accident, the plaintiff, who is 65 years of age, was employed by the second defendant in its hotel. On 10th July, 2017, she was involved in an RTA, when she was driving a golf buggy out of a church and was proceeding across the road for the purpose of returning to the hotel, when she was struck by a vehicle driven by the first defendant.

49. Counsel outlined that on the day in question, the plaintiff had been requested by her supervisor to bring a number of people in the golf buggy from the hotel to the church for the purposes of attending a wedding. The church was very close to the hotel on the other side of the road. The plaintiff and another employee brought the wedding party to the church in two golf buggies.

50. Having deposited the guests at the church, both the plaintiff and her fellow employee proceeded out of the grounds of the church and across the road in their respective golf buggies. The other employee made it across the road safely. Unfortunately, when the plaintiff drove from the church car park onto the road, she was struck by the first defendant's vehicle.

51. Counsel indicated that as a result of the impact the plaintiff suffered a head injury, with a loss of consciousness, together with soft tissue injuries to her neck and back. She is not able to recall the exact circumstances of the accident. He indicated that there was evidence from an independent witness, who was at the scene, that the plaintiff simply drove out of the church car park without looking to see if there was traffic proceeding along the road. The independent witness would apparently state that the car driver was given no chance to avoid the impact.

52. In these circumstances, counsel indicated that a decision had been made to let the first defendant out of the proceedings. The case that the plaintiff would make against her employer, the second defendant, would be that it had been guilty of negligence in the following respects: the plaintiff had not been trained to drive the golf buggy; while she had driven it before, she had never done so outside the grounds of the hotel; the golf buggy was not insured or permitted to be used on the public road; and such vehicles only had rear brakes, unlike a car, which had both front and rear brakes. On this basis, it was submitted that there was an arguable case that there had been negligence on the part of the second defendant. However, counsel conceded that, in light of the evidence that would be given by the independent witness, there was a reasonable basis to infer that the plaintiff would probably be found guilty of at least 50% contributory negligence.

53. In terms of the overall quantum of the case, counsel indicated that the plaintiff's injuries had been valued by counsel in the region of €80,000, together with special damages of approximately €20,000. The settlement figure had been agreed at €50,000 plus Circuit Court costs.

54. Having considered the submissions of counsel in relation to the circumstances of the accident and the likely evidence that would be given at the trial of the action, the court is satisfied that it is appropriate to make a determination of liability on a 50/50 basis between the plaintiff and the second defendant.