SUPREME COURT OF NOVA SCOTIA
Citation: *Wiswell-Wheatley v. Karsch*, 2019 NSSC 82

Date: 20190325
Docket: 454565 and 455179
Registry: Halifax

Between:

Jessica Wiswell-Wheatley

(Plaintiff)

v.

Michael Karsch and Sherry Karsch

(Defendants)

-and-

Between:

Laura Williston

(Plaintiff)

v.

Jessica Wheatley, Michael Karsch and Sherry Karsch

(Defendants)

LIBRARY HEADING

Judge:	The Honourable Justice Pierre L. Muise
Heard:	January 31, 2019 in Halifax, Nova Scotia
Written Decision:	March 25, 2019
Subject:	Consolidation of Proceedings – CPR 37
Summary:	JW was the driver and owner of a Jeep rear-ended by the car MK was operating and SK owned. LW was passenger in the Jeep. JW commenced an action against the K's. LW commenced an action against JW and the K's. Her claim

against JW was particularized during discoveries to include an allegation that the passenger seat and seatbelt failed because of lack of maintenance. JW cross-claimed against the K's in LW's action. The Plaintiffs agreed to trial by judge and jury. The K's brought this motion to consolidate the actions. LW consented. JW, through her lawyer as Plaintiff consented, but, through her lawyer as Defendant, opposed the motion.

Issues: Should the actions be consolidated?

Result: The distinct issues outnumbered the overlapping issues. The time and resources wasted for LW, and the respective lawyers for JW outweighed the savings a consolidated trial would provide to the K's and the Court. Consolidation would create confusion for the jury and prejudice to JW, particularly as Defendant. The inconsistent findings that had a realistic chance of materializing on separate trials were not objectionable. The balance of convenience did not favour consolidation. Motion for consolidation dismissed.

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Heard: January 31, 2019, in Halifax, Nova Scotia

Counsel: Ronan Holland, for Jessica Wiswell-Wheatley (as Plaintiff)
Michelle Kelly and Colin Gale, for Michael Karsch
Michelle Kelly and Colin Gale, for Sherry Karsch
Tara Miller and Allison Harris for Laura Williston
Karen Bennett-Clayton for Jessica Wheatley (as Defendant)

MOTION BY KARSCH DEFENDANTS FOR CONSOLIDATON

INTRODUCTION

[1] All parties were involved in the same motor vehicle accident on September 9, 2013. Laura Williston ("Williston") was the passenger in the Jeep owned and driven by Jessica Wiswell-Wheatley ("Wheatley"). It was hit from behind by the Hyundai driven by Michael Karsch and owned by Sherry Karsch. Williston and Wheatley both suffered injuries, including brain injury.

[2] Wheatley commenced an action against the Karsch Defendants in August 2016. Williston commenced an action against the Karsch Defendants and Wheatley in September 2016. In October 2016 Wheatley filed a defence and crossclaim against the Karsch Defendants, who have defended the claims and crossclaim.

[3] Discoveries in both actions are complete, and a joint mediation occurred.

[4] Both Plaintiffs agree to proceed by judge and jury.

[5] The Karsch Defendants ask that the actions be consolidated.

[6] Williston consents. Wheatley as Plaintiff consents, but, as Defendant, she opposes the request.

ISSUE

[7] The issue is simply whether consolidation should be ordered.

LAW AND ANALYSIS

[8] ***Civil Procedure Rule 37.02*** provides for consolidation of proceedings. It states:

> **37.02** A judge may order consolidation of proceedings if the proceedings to be consolidated are of the same kind, that is to say, actions, applications, applications for judicial review, or appeals, and one of the following conditions is met:
>
> a common question of law or fact arises in the proceedings;
>
> ….
>
> claims, grounds, or defences in the actions or applications involve the same transaction, occurrence, or series of transactions or occurrences;
>
> (d) consolidation is, otherwise, in the interests of the parties. [Emphasis by underlining added]

[9] In the case at hand, the proceedings are both actions. Common questions of law and fact arise, at least in relation to the liability of the Karsch Defendants. The claims and defences arise from the same motor vehicle accident, even though some of the claims and defences relating to Wheatley involve the maintenance and condition of the Jeep.

[10] Therefore, at least one of the conditions is met and the Court has discretion to consolidate these actions.

[11] The "overarching consideration" is whether consolidation is "just between the parties": ***Healy v. Halifax (Regional Municipality)***, 2016 NSCA 47, para 35.

[12] The Court in ***C.(R.) v. Nova Scotia (Attorney General)***, 2016 NSSC 299, at paragraph 14, stated that the party seeking consolidation bears the onus of showing that the proceedings are "inextricably intertwined" and that "it would be just and convenient in the interests of justice to hear the matters together".

[13] In ***Stone v. Raniere***, 1992 CarswellNS 219 (S.C. T.D.), Justice Saunders, as he then was, cited with approval six factors to consider in determining whether consolidation should be ordered as listed in *Re Hillcrest Housing Ltd. and Clans Ltd.*, a 1985 case from Prince Edward Island. Those factors have informed the determination in a multitude of Nova Scotia cases since then. They were listed with approval by our Court of Appeal in ***Best v. Pontius***, 2009 NSCA 39.

[14] The factors are the following:

1. the general convenience and expense;
2. whether a jury notice is involved;
3. how far the actions have progressed;
4. whether the plaintiffs have separate solicitors;

5. actions should not be consolidated where matters relevant in one action have arisen subsequent to the commencement of the other, and the actions have proceeded to a considerable extent; and

6. where consolidation is otherwise proper, the fact that on discovery questions would be unobjectionable in one action which might be privileged in the other action is not a sufficient reason for refusing an order consolidating the actions.

[15] Justice Saunders also noted that:

> In addition, the court recognized the principle formulated in a number of cases and stated at p. 247:
>
> > 'The common element in these decisions is that in order for consolidation to be ordered a decision in one case would dispose of the essential cause of action in the other case.'

[16] Consolidation may still be ordered where there are some distinct issues. However, the Court should assess whether they are outnumbered by overlapping issues; and, considering all relevant factors, determine whether the balance of convenience favours consolidation: ***National Bank Financial Ltd. v. Potter*** , 2007 NSSC 38, paras 28 to 33.

[17] As stated at paragraph 8 of ***Seafreez Foods Inc. v. Rothmar Manufacturing Corp.*** (1993), 126 N.S.R.(2d) 197 (S.C.):

> It is an overriding concern of the court that all matters be dealt with at the same time and that all parties and common matters of law and fact of law, be decided in a uniform fashion. This concern is reflected in s.41(g) of the Judicature Act, R.S.N.S. 1989, c. 240 which sets forth a broad jurisdiction to ensure that all matters in controversy arising from a transaction may be completely and finally determined at the same time.

[18] At para 16, the Court expressed concern over "the effect on the administration of justice of two trials on the same factual issues and the possibility of different results".

[19] I will first consider the six factors from ***Stone v. Raniere***, then assess the risk of inconsistent findings.

1. <u>The General Convenience and Expense</u>

Trial Economy

[20] No Date Assignment Conference ("DAC") has been held in relation to either action. However, some DAC materials were filed in both actions. They indicate the following.

[21] In August 2017, while contemplating a trial by judge alone, Williston estimated that 15 days would be required for trial. Wheatley, as Defendant, agreed with that estimate, except that she would require three to four days for her defence alone, while Williston estimated three days for the cases of all Defendants. No estimate was provided by the Karsch Defendants. They requested that the DAC be

set aside because they would be adding a third party. That ultimately occurred, but the third party claim was discontinued.

[22] In November 2018, having elected trial by judge and jury, Wheatley, as Plaintiff, estimated a total of eight and one-half days for her case, jury selection and submissions. She did not build in time for jury instructions or deliberations. The Karsch Defendants estimated two days for their case.

[23] That indicates a significant difference in the time estimates for each trial. In addition, a consolidated trial, would, more likely than not, take longer than the longest separate trial, adding more expense at least to Williston who is only a party in her own action.

[24] The lists of witnesses and the time estimates for each provide some insight into how much time and resources Williston is likely to use up sitting through evidence that is not relevant to her claim. Although Williston consents to consolidation, the inconvenience to her still a relevant consideration in the balancing exercise.

[25] Each Plaintiff will have to prove her damages. Williston will have no interest in the damages evidence presented by Wheatley. Wheatley estimates, as

Plaintiff, three days of medical and accounting evidence, which would all relate to her damages.

[26] She estimates two days for her own evidence and one day for other lay witnesses.

[27] The mechanics of the accident appear relatively straightforward. Since it was a rear-end collision, there is a presumption of liability.

[28] The Karsch Defendants only estimate two hours for their lay evidence, being the evidence of Michael Karsch. He would not be providing damages evidence. So, that two hours is an indication of how much time would be spent on liability. One could expect Wheatley's evidence on liability to take about the same time, leaving over one and one-half days of damages evidence.

[29] It is unclear what portion of the other lay witnesses' evidence will be liability evidence and which portion will be damages evidence. However, in addition to the Karsches expressing an intention to call Williston as a liability witness in the Wheatley Action, Wheatley noted that she is also likely to call Williston as a liability witness in her action. Assuming Williston is called by either, it may add up to a couple more hours. That is relatively minimal.

[30] Both Plaintiffs will almost certainly lead lay evidence from others regarding their own unique conditions, abilities and activities before and after the accident.

[31] More likely than not, a consolidation would require Williston to sit through at least four and one-half days of damages evidence in which she has no interest.

[32] The witness time estimates provided by Williston in her DAC materials provide additional insight into the extent of liability evidence, a portion of which constitutes the bulk of the commonality between the actions.

[33] Williston estimates that her case will require eight and one-half days of medical evidence. That would all be for damages. She estimates one day of evidence from her husband. He was not present during the accident. Therefore, his evidence would also relate to damages. For the same reasons noted in relation to Wheatley as Plaintiff, about one and a half days or more of her own evidence ought to relate to damages, leaving only one-half day or less, out of eleven and one-half days for liability.

[34] Separate trials would likely require the Karsch Defendants to repeat the two hours of liability evidence from Michael Karsch, plus deal twice with the evidence from the Plaintiffs on liability, which should be less than one day in total.

[35] Williston's claim against Wheatley, in addition to alleging negligence related to the manner in which she operated her vehicle, alleges operation of a vehicle that was improperly maintained and in an unsafe condition. More particularly, in discoveries, she has alleged that the seat and seatbelt she was in failed. That issue generated an engineering report. The failed equipment issue relates only to the Williston Action. Therefore, the expert engineering evidence and the evidence relating to the maintenance and condition of the front passenger seat and seatbelt of the Jeep, are only relevant to the Williston Action. There is no commonality between actions in relation to that evidence.

[36] The Karsch Defendants point to: their Statement of Defence in the Wheatley Action; their Statement of Defence in the Williston Action; and, the portion of Williston's Statement of Claim alleging negligence against Wheatley. They argue that the allegations of negligence and contributory negligence against Wheatley are essentially the same in both actions. Those pleadings include six allegations of negligence directly related to manner of operation that are essentially the same.

[37] Williston's Statement of Claim includes a seventh allegation relating to operating an unsafe and improperly maintained vehicle. The other pleadings noted do not; but, they include a reference to such further negligence as may appear. That could include negligence related to the maintenance and condition of the Jeep.

[38] However, those are boiler-plate allegations in pleadings. Apart from that related to the allegations regarding the Jeep passenger seat and seatbelt, and the engineering report, no evidence was presented to particularize the negligence allegations that are really in issue, nor to indicate the nature and extent of evidence expected to be presented to prove or disprove them. The alleged issue with the seat and seatbelt highlights how the negligence alleged against Wheatley in the respective actions can differ.

[39] Allegations of negligence by Wheatley in the manner of operation could be common to both actions; and, result in a finding that such negligence contributed to the injuries suffered in both actions. However, the evidence presented on this motion does not show: what those are likely to be; their degree of commonality; nor, the trial time required to deal with them. The information presented indicates that the Wheatley Vehicle was stopped behind other stopped vehicles and was rear-ended by the Karsch Vehicle. In those circumstances, the manner of operation evidence ought not be long. Similarly, any vehicle maintenance evidence that may be common to both actions ought not take long.

[40] The Karsch Defendants argue, in support of consolidation, that: both Plaintiffs allege some similar injuries, including traumatic brain injury resulting in total disability; and, two of the medical witnesses are common to both Plaintiffs.

They are Erica Baker, Neuropsychologist, presented as a Rule 55 Expert; and Paula Taylor, Nurse Practitioner, presented as a treatment provider. They submit it will avoid duplication of attendance and allow cost sharing in preparation of witnesses and exhibits.

[41] Even if the injuries are similar, they must still be proven separately. As submitted by Wheatley, each Plaintiff's injuries, past medical history, treatment, response to treatment and prognosis are unique to that Plaintiff. Each will also have her own unique losses of income and valuable services, and cost of care, which must be proven by separate evidence.

[42] Requiring those two witnesses to be present for two separate trials would result in some additional inconvenience to them personally. However, from the perspective of the trial process, the only significant duplication would be: the process of qualifying the neuropsychologist as an expert; the general explanations regarding the various tests performed; and, the general description of the operations, programs and services of the brain injury clinic where the nurse practitioner works. Otherwise, she and the nurse practitioner would be giving separate and distinct evidence in relation to the injuries suffered by each Plaintiff.

[43] Plus, their evidence is only estimated to take one day in total. Therefore, even if all their evidence was common to both trials, it would only result in overlap

of one day. The actual overlap will be significantly less. The Karsch Defendants, who have the onus of doing so, have not shown more than relatively minimal overlap.

[44] The qualifying process is often not lengthy, whether conducted during the trial or in a pretrial motion.

[45] Each Plaintiff, even with a consolidation, would present separate Rule 55 reports and treatment narrative, and conduct their own witness preparation. There may be a base fee for Ms. Baker to appear, which might be shared; but, no evidence was presented on that point.

[46] There may be some savings resulting from joint exhibit books; but, they would be minor.

[47] Further, those are only two of multiple medical witnesses. Williston is proposing 17 medical or treatment witnesses, plus an accountant. Wheatley did not provide the number of anticipated experts. She estimated four and one-half days of expert witnesses. The Karsch Defendants estimated one and one-half days of experts related to Wheatley's damages and did not provide any estimate regarding their witnesses in the Williston Action.

[48] The Karsch Defendants indicate that the Plaintiffs worked at the same place. Therefore, they anticipate evidence pertinent to damages from each Plaintiff reciprocally, and from other workplace witnesses. However, there is no evidence of the extent of such evidence, nor how much of it would be common to both. The inconvenience to such unknown number of witnesses of appearing twice, once for each separate trial, is not a factor that weighs heavily in support of consolidation.

[49] I have considered: the great number of different expert and treatment witnesses; the fact that even the two that would testify in both actions would need to provide separate evidence in relation to each Plaintiff; and, the insufficiency of evidence regarding the extent of workplace evidence anticipated. That leads me to find, contrary to the submissions of the Karsch Defendants, that consolidation would not result in significant savings in terms of motions to address expert evidence and evidentiary issues surrounding records, nor in terms of duplication of evidence.

[50] Similarly, the ability to have a joint DAC would be a minimal saving, because they are generally not lengthy, and, take more time and are more cumbersome when additional parties and counsel are added.

[51] Also, the challenge of coordinating a trial date that accommodates the schedules of the additional people involved, and the extra trial days resulting from

a consolidation, would, more likely than not, require trial dates to be set further into the future.

[52] Therefore, the time and resources wasted for Williston in consolidation outweighs any duplication related waste of time and resources for the Karsch Defendants arising from separate trials.

[53] Wheatley is also involved in both actions. So, technically, the duplication effect is the same for her, as a party, as well as for the court. However, since she has separate lawyers to represent her in her different capacities, trial economy concerns still arise.

[54] The time and resources consumed by the evidence of Williston's damages and the negligence issues related to the passenger seat and seatbelt would be a waste for her lawyer as Plaintiff. The time and resources consumed by the evidence of her damages would be a waste for her lawyer as Defendant. Each of those individually would outweigh the waste for the Karsch Defendants arising from separate trials.

Prejudice

[55] The Karsch Defendants argue that the only prejudice to Wheatley as Defendant is that her lawyer will have to sit through the portion relevant only to

her claim, and that can be remedied by arranging for that lawyer not to attend those parts of the trial.

[56] However, in practice, that lawyer could not be certain that Wheatley's damages evidence would not contain elements relating to her liability that may be considered by a jury, and which she would wish to address, such as by seeking special jury instructions, or refute.

[57] More importantly, because Wheatley is a Plaintiff in one action and a Defendant in the other, consolidation would create procedural and tactical problems prejudicial to her.

[58] Consolidation would put Wheatley, as Defendant, in the position of a Plaintiff joining in the lawsuit against the Karsch Defendants and herself. It would not give her a cause of action against herself; and, that fact could be explained to a jury. However, as argued by her lawyer, she would still effectively be in the position of suing herself and the Karsch Defendants. Though this is not necessarily fatal to a consolidation application, it is a factor which militates heavily against consolidation: ***Nickas et al v. Thompson***, 1951 CarswellBC 103 (S.C.); ***Phelan v. Toronto Dominion Bank***, 1985 CarswellSask 1098 (Q.B.); and, ***696591 B.C. Ltd. v. Madden***, 2012 BCSC 1914.

[59] The approaches she would likely take if she was only a Plaintiff, and only a Defendant, in separate proceedings, would likely be different from the approaches she would take when pursuing and defending in a consolidated action. As suggested, that would impact pre-trial and in-trial procedures, witness preparation, witness examinations and trial conduct.

[60] She has two different lawyers, each with a different mandate and each likely having their own idea of which tactical approach is best. Those are likely to clash at trial, and have already done so in this motion.

[61] The Karsches argued commonality across actions in the evidence of the neuropsychologist and the nurse practitioner as supporting consolidated trials. That same commonality would create a situation where counsel for Wheatley, as Plaintiff, would be conducting a direct examination of them to prove her damages, while her counsel as Defendant would be seeking to cross-examine those same witnesses in relation to Williston's damages. If permitted, that would create an awkward situation that would be confusing for a jury, even if explained.

[62] I agree with the submission that consolidation would create confusion in navigating the trial logistics.

[63] For example, during Wheatley's case in Chief, it is easily conceivable that there would be a request that she be subject to a direct examination by her lawyer as Plaintiff and Cross-examined by her lawyer as Defendant, at least in relation to points pertaining to Williston's claim. In addition to creating confusion, it could easily result in a dispute regarding whether that gives her an unfair advantage, and whether, conversely, it would be unfair to deny her those examination opportunities. That would only add to trial complexity and potential prejudice to one or more of the parties.

[64] In the Williston Action, Wheatley has cross-claimed against the Karsch Defendants. Consequently, there could also easily be a request for Wheatley's lawyer as Defendant to also conduct a direct examination of Wheatley in support of that cross-claim. If permitted, Wheatley would be examined by both of her lawyers and cross-examined by her lawyer as Plaintiff. Even more jury confusion, trial complexity, and potential prejudice would likely result.

[65] Generally, only one lawyer for each party is permitted to question a particular witness. The general order of presentation of cases would likely result in the lawyer for Wheatley as Plaintiff being the one to do so. That would likely result in prejudice to Wheatley as Defendant.

[66] Similarly, in a consolidated action, both counsel for Wheatley would want to cross-examine Williston, one to dispel contributory negligence in the Wheatley Action, the other to dispel negligence in maintaining the passenger seat and seatbelt, or other alleged negligence relating to Williston's claim against her. The general rule against multiple lawyers for one party examining the same witness would likely result in prejudice to Wheatley in one of her capacities.

[67] If the trial is consolidated it will hamper Wheatley's ability to challenge the expert evidence offered by Erica Baker and the treatment evidence offered by Paula Taylor in support of Williston's damages. Especially in front of a jury, she would be foolhardy to challenge the credibility, reliability and weight of their evidence in relation to Williston's damages, as that would be highly likely to impact their assessment of the credibility, reliability and weight of the evidence those witnesses would provide in support of her own damages. That would create significant prejudice to Wheatley.

[68] Wheatley, as Defendant, argues that within her action, heard separately, no liability apportionment is possible with respect to negligence; but, in a consolidated action, it is possible that liability could be split between her and the Karsch Defendants, thus reducing her damages. Although this argument ignores the potential of her damages being reduced by a finding of contributory negligence,

it does signal the risk that a jury may be confused by the fact that Wheatley is one of the Defendants and fail to distinguish the applicable concepts of liability.

[69] Even if they are not confused about the liability issues, the mere fact that Wheatley is also a Defendant, as opposed to only a Plaintiff, risks creating a subconscious image or approach prejudicial to Wheatley. From a tactical point of view, in that regard, consolidation would greatly favour the Karsch Defendants.

[70] Further, as previously noted, issues related to the maintenance and condition of the passenger seat and seatbelt would be unlikely to be of relevance in the Wheatley action. Yet, in a consolidated trial, the jury would hear that evidence. It would be difficult for a jury to ignore it, creating a significant risk of improperly carrying any failure to maintain the seat and seatbelt over to their assessment of whether Wheatley, by failing to maintain, was contributorily negligent in relation to what led to her own injuries. That would also be prejudicial to Wheatley.

2. Whether a Jury Notice is Involved

[71] Wheatley elected trial by judge and jury. Williston, though she first elected trial by judge alone, has consented to a judge and jury trial. Therefore, consolidation would not force either plaintiff into a mode of trial to which they do not agree, at least at this stage.

[72] Separate trials would result in duplication of jury selection, and some jury instructions as well as jury deliberations. That factor supports consolidation.

[73] On the other hand, the confusion and prejudice already noted as arising from the fact that Wheatley would be both plaintiff and defendant would be exacerbated with a jury.

[74] Here is a further example related specifically to the trial being heard by a jury. The trial judge would be unable to fully explain to a jury why Wheatley has two different lawyers without stating that one of them is the lawyer hired by her insurer. Referring to such insurance coverage would be prejudicial to Wheatley, at least as Defendant, and could be advanced as grounds for discharging the jury or a mistrial.

[75] Such confusion and prejudice strongly militate against consolidation.

3. How Far the Actions Have Progressed

[76] There is no dispute that both actions have progressed in a similar fashion and are approximately at the same stage. Thus, this is not a factor which complicates consolidation.

[77] The Karsch Defendants argue that, consequently, consolidation would not delay either action. I agree that the progression and stage of the actions would not cause delay. However, as previously stated, the additional lawyers, parties and trial days created by consolidation would likely result in a less expeditious trial date.

4. Whether the Plaintiffs Have Separate Solicitors

[78] The Court in ***Morguard Real Estate Investment Trust v. ERM Canada Corp.***, 2012 ONSC 4195, at paragraphs 21 and 22, stated:

> A litigant's right to choose his/her/its own solicitor is not to be interfered with lightly … .
>
> Where separate plaintiffs have instructed different solicitors, consolidation is not possible unless the plaintiffs agree to instruct a single solicitor. ERM cites cases to the contrary but they turn on their own particular facts.

[79] There is no absolute rule prohibiting consolidation where separate plaintiffs have separate solicitors: ***Alvi et al. v. LAL***, 1990 CarswellOnt 570 (H.C.J.).

[80] Even the Court in ***Morguard*** denied consolidation based on a balancing of factors. It did not automatically deny for multiplicity of plaintiff lawyers. However, it highlights the lack of single lawyer representation as being a factor which detracts from the appropriateness of ordering consolidation. The case also highlights the importance of litigants' right to counsel of choice.

[81] In the case at hand, the same lawyer could not represent both Wheatley, as Plaintiff, and Williston. That would create a conflict as Williston is suing Wheatley.

[82] The fact that the Plaintiffs do not, and cannot, have the same lawyer is a factor militating against consolidation. I also agree with the submission of Wheatley, as Defendant, that the fact that they cannot have the same lawyer because it would create a conflict, is indicative of the very awkward situation consolidation would create.

5. Whether Matters Relevant In One Action Have Arisen Subsequent To the Commencement Of the Other, and Whether the Actions Have Proceeded To a Considerable Extent

[83] There is no issue regarding matters relevant in one action having arisen subsequent to the commencement of the other action, and there appears to be agreement that all relevant matters have arisen in both actions. I agree with Wheatley, as Defendant, that this is a neutral factor.

[84] It is also agreed that discoveries have been completed in both actions and that, though there have been requests for date assignment conferences filed, none have been held. Therefore, neither action has proceeded to an extent which would militate against consolidation.

6. Fact That Discovery Questions Would Be Unobjectionable In One Action Which Might Be Privileged In the Other Action Is Not a Sufficient Reason For Refusing an Order Consolidating the Actions

[85] No party noted any privilege issues arising in discoveries, so none were noted that were not common to both actions.

[86] Wheatley, as Defendant, noted that, since she has a different lawyer as Plaintiff, each might have privileged communications not in the knowledge of the other. That highlights the awkward situation created by her being both Plaintiff and Defendant. However, each lawyer is bound to protect that privilege. Therefore, like the issue of inconsistent privilege related to discovery questions, if consolidation is otherwise proper, it would not warrant refusing consolidation.

7. The Risk of Inconsistent Findings

[87] The Karsch Defendants argue that consolidation should be ordered to avoid multiplicity of proceedings and the possibility of a different results. I bear in mind the comments at paragraphs 8 and 16 of ***Seafreez*** in that regard.

[88] Both actions in the case at hand arise from the same motor vehicle collision. Both Plaintiffs were in the same vehicle. It would generally be the type of situation where consolidation would be appropriate.

[89] Also, both Plaintiffs, and two of the Defendants agree to consolidation. Only Wheatley, as Defendant, opposes it.

[90] However, I agree with the submission of Wheatley, as Defendant, that, in the circumstances of the case at hand, acceptable differing results in the separate actions are possible. They would not necessarily be objectionable, nor contrary to the interests of justice. I say that for the following reasons.

[91] Both actions are based upon the same rear-end collision. Both actions allege a similar basis of liability as against the Karsch Defendants, arising from the manner in which Michael Karsch operated the Karsch Vehicle. However, the Williston Action also alleges negligence against Wheatley arising from the manner in which she operated the Jeep, and from its improper maintenance and condition, resulting in failure of the passenger seat and seatbelt. Therefore, it is possible, and would not be objectionable, that: the Karsch Defendants may be found fully liable to Wheatley in her action; and, Wheatley may be found at least partly liable to Williston in her action. The allegations regarding the failure of the seat and seatbelt makes such an inconsistent finding a real possibility.

[92] Similarly, even if Wheatley's manner of operation is found to be contributorily negligent, the co-existence of the seat and seatbelt issue could justify a different percentage of contributory negligence in each action.

[93] It is also possible, and not objectionable, contrary to the submissions of the Karsch Defendants, that in separately tried actions, as stated by them: "there could be a scenario where one trier of fact finds Erica Baker to be a credible expert but the other does not" and "[o]ne trier of fact could place more weight on expert findings than another". There would be nothing wrong with that result. A witness' evidence in relation to the injuries suffered by one plaintiff will not necessarily be as credible, reliable or weighty as that in relation to another plaintiff.

[94] Wheatley, as Defendant, should have the opportunity to fully test and challenge the evidence of Erica Baker offered in support of the damages suffered by Williston, even if the ultimate effect is a differing assessment of credibility and reliability. She would likely be hampered in doing so in the course of a consolidated trial. She would effectively be discrediting her own witness in the eyes of the jury.

[95] An inconsistent result that would be problematic is if the Karsch Defendants were found to bear no liability in the Wheatley Action, and to be fully liable in

the Williston Action. That demonstrates that the issue of the liability of the Karsch Defendants is inextricably linked, and thus a "common matter of law and fact".

[96] However, Mr. Karsch was the driver of the vehicle that rear-ended the Wheatley Vehicle. In those circumstances, there is little chance of an inconsistent finding in relation to whether he was negligent or not.

[97] In addition, in this motion, there is no evidence, from discoveries or otherwise, nor even pleadings particularizing the allegations of negligence against Wheatley, which might result in a finding that she was contributorily negligent as it relates to her own injuries. There is only evidence particularizing a maintenance issue relating to the passenger seat and seatbelt. The Karsch Defendants have presented the bare boilerplate pleadings. In oral argument they stated that, through the discovery process, issues arose regarding "potentially" improper maintenance of the Wheatley Vehicle. Without further detail, no assessment can be made regarding what impact that may have in a contributory negligence assessment relating to Wheatley's injuries. They have not presented evidence or information indicating what, if any, risk there is that she may be found contributorily negligent as it relates to her own injuries.

[98] The ability of Wheatley to bring a summary judgment motion on the issue is no substitute for the Karsch Defendants' onus of providing a sufficient basis for their consolidation motion.

[99] Further, the existence of one common matter of law and fact does not obligate the Court to order consolidation. It does not even mandate consolidation where a decision in one case would "dispose of the essential cause of action in the other case". Rather, as noted in ***Stone v. Raniere***, such an effect is a precondition to ordering consolidation. The Court in ***King v. RBC Dominion Securities Inc.***, 2012 NSSC 225, at paragraph 32, stated that "to be supportive of consolidation, there should … be more than just a single common question of law or common question of fact", and the Court must look at the overall "degree of commonality".

[100] As indicated in ***National Bank Financial Limited v. Potter***, the Court must examine whether the distinct issues outnumber the overlapping issues, and consider all factors, to determine whether the balance of convenience favours consolidation.

[101] I have already discussed commonality and the balancing exercise.

8. <u>Effect of Severance of Liability and Damages</u>

[102] Severing the issue of liability from that of damages, and having a consolidated trial on liability, would address some of the concerns over duplication of evidence in separate trials and waste associated with evidence relating only to one action in consolidated trials, as well as concerns over inconsistent results. However, none of the parties want that result; and, it would be difficult to do with a jury.

CONCLUSION

[103] Considering, the points I have discussed, I find the following.

[104] The distinct issues outnumber the overlapping issues.

[105] The time and resources wasted for Williston, as well as the respective lawyers for Wheatley, outweigh the time and resources saved by the Karsch Defendants, in a consolidated trial.

[106] A consolidated trial would cause significant confusion to the jury, and prejudice to Wheatley, particularly as Defendant, which outweigh any economies it might afford to the Karsch Defendants and the Court.

[107] Any inconsistent findings on separate trials that have been shown to have a realistic risk or chance of materializing would not be objectionable in the circumstances of this case.

[108] For these reasons: the balance of convenience does not favour consolidation; consolidation would not be just between the parties; and, separate trials do not pose a real risk of negatively affecting the administration of justice due to differing results.

[109] Therefore, the motion by the Karsch Defendants for consolidation is dismissed, without prejudice to any party making a future motion for consolidation should further developments in either action warrant it.

COSTS

[110] If the parties are unable to agree on costs, I invite submissions in writing on the issue.

ORDER

[111] I ask counsel for Wheatley, as Defendant, to prepare the order.

Pierre Muise, J.