SUPREME COURT OF NOVA SCOTIA
Citation: *Foran v. Malek*, 2023 NSSC 29

Date: 20230127
Docket: Hfx. No. 482453
Hfx. No. 498381
Hfx. No. 501077

Registry: Halifax

Between:

Judith Theresa Foran

Plaintiff

v.

Theodore Malek
Aviva Insurance Company of Canada
TD General Insurance Company

Defendants

DECISION

Judge:	The Honourable Justice Joshua Arnold
Heard:	October 19, 2022, in Halifax, Nova Scotia
Counsel:	Ali Imran Raja, for the Plaintiff
	Karen Bennett-Clayton, for Defendant Malek
	Dennise K. Mack, for Defendant Aviva Insurance
	Michelle Kelly, for Defendant TD General Insurance

Overview

[1] Judith Foran alleges that she was run down by a car while she was in a crosswalk and was seriously injured as a result. She has started separate actions against three defendants, and wants the claims consolidated so that she can schedule one trial. Two of the defendants take no position in relation to the consolidation motion. The third defendant, TD General Insurance Company, which had provided some Section B benefits, opposes consolidation.

Facts

[2] According to the materials filed by the plaintiff, and not disputed by TD, the following is the general background in relation to the parties:

> 1. The Plaintiff brought an action against the Defendant, Theodore Malek on November 16, 2018, claiming general and special damages resulting from the injuries sustained in the November 27, 2016, motor vehicle accident. The claim was defended on December 7, 2020. For ease of reference this claim is referred to as "Section A" claim in the brief.
>
> 2. By virtue of her own automobile insurance policy contract with Aviva Canada, the Plaintiff carried a Family Protection Endorsement commonly referred to as SEF 44 Endorsement, which provided recovery for the amounts of damages that were in excess of the Defendant, Theodore Malek's automobile insurance policy coverage limit. On June 2, 2020, after becoming aware that her damages would exceed the Section A total insurance coverage limits, the Plaintiff brought an action against Aviva Canada claiming the excess amount to be paid in accordance with the SEF 44 provision of the contract. However, this claim required a correction to the legal name of Aviva Canada, and therefore, an amended claim was filed on September 13, 2021. Aviva Canada defended the claim on October 7, 2021. For ease of reference this claim is referred to as "SEF 44" claim in the brief.
>
> 3. Being a pedestrian/motor vehicle collision, the Defendant, Theodore Malek's insurance company, TD General Insurance Company (TD) provided no-fault coverage for the medical treatment and weekly income replacement benefits to the Plaintiff that are commonly referred to as Section B benefits. TD terminated these benefits in the year 2018, following which the Plaintiff brought a breach of contract claim against it on October 7, 2020. TD defended the claim on March 5, 2021. For ease of reference this claim is referred to as "Section B" claim in the brief.
>
> [As appears in original]

[3] Therefore, the claim against Malek is in negligence, the claim against Aviva is in contract for any excess damages depending on the limits of Mr. Malek's insurance, and the claim against TD involves an alleged breach of contract.

[4] The facts are not seriously in dispute as between the parties. An affidavit of a paralegal was filed by the plaintiff, which states:

> 1 I am Meagan Burke, the Litigation Paralegal assisting Mr. Ali Imran Raja, the Solicitor for the Plaintiff, Judith Theresa Foran.
>
> 2 I have personal knowledge of the evidence sworn in this affidavit except where otherwise stated to be based on information and belief.
>
> 3 I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
>
> 4 On November 16, 2018, a Notice of Action and Statement of Claim was filed by the Plaintiff, for an accident that took place on November 27, 2016…
>
> 5 On December 7, 2020, a Notice and Statement of Defence was filed by the Defendant, Theodore Malek…
>
> 6 On June 2, 2020, a Notice of Action and Statement of Claim was filed by the Plaintiff against Aviva Canada, in regards to the SEF 44 endorsement relating to the November 27, 2016, accident…
>
> 7 On September 13, 2021, an Amended Notice of Action and Statement of Claim was filed in order to correct the legal name of Aviva Canada…
>
> 8 On October 7, 2021, a Notice and Statement of Defence was filed by Aviva Canada…
>
> 9 On October 7, 2020, a Notice of Action was filed by the Plaintiff against TD General Insurance Company for the reinstatement of the accident benefits…
>
> 10 On March 5, 2021, a Notice and Statement of Defence was filed by the Defendant, TD General Insurance Company…
>
> 11 A joint discovery for all three matters took place on September 14 and September 15, 2021.
>
> 12 On October 19, 2021, Mr. Ali Imran Raja sent an email communication to Ms. Dennise Mack, counsel for Aviva, Ms. Karen Bennett-Clayton, counsel for Theodore Malek, and Ms. Michelle Kelly, counsel for TD Insurance, inquiring if they would agree to the consolidation of the three matters, to which Ms. Dennise Mack and Ms. Karen Bennett-Clayton both agreed…

13 On October 27, 2021, Mr. Ali Imran Raja sent the Draft Consolidation Order to Ms. Karen Bennett-Clayton for her signatures, further requesting her to circulate the same to the other counsel after her signature…

14 On January 28, 2022, in response to Mr. Ali Imran Raja's follow-up email communications Ms. Karen Bennett-Clayton advised that she had signed the Consolidation Order and forwarded the same to Ms. Michelle Kelly on October 29, 2021…

15 On January 28, 2022, Mr. Ali Imran Raja sent an email communication to Ms. Michelle Kelly inquiring about the signing of the Consolidation Order, and upon her response that she did not believe the matters could be consolidated. Mr. Ali Imran Raja advised all three counsel that he would be proceeding to file individual requests for Date Assignment Conferences for each matter…

16 A Request for Date Assignment Conference was filed by the Plaintiff for the Defendant, Theodore Malek matter on February 1, 2022…

17 A Memorandum for Date Assignment Judge was filed by the Defendant, Theodore Malek, on February 8, 2022…

18 A Request for Date Assignment Conference was filed by the Plaintiff for the SEF 44 matter on February 1, 2022…

19 A Memorandum for Date Assignment Judge was filed by the Defendant, Aviva Insurance Company of Canada, on February 3, 2022…

20 A Request for Date Assignment Conference was filed by the Plaintiff for the Section B matter on February 1, 2022…

21 A Memorandum for Date Assignment Judge was filed by the Defendant, TD General Insurance Company, on February 17, 2022…

22 A joint Date Assignment Conference was held on May 20, 2022, with Honourable Justice Darlene Jamieson presiding, but the same could not proceed as the parties did not agree to either consolidate the three matters, or to have a joint trial.

23 On May 31, 2022, Ms. Dennise Mack sent correspondence to the court advising of her agreement to the matters being consolidated…

24 On September 28, 2022, Ms. Dennise Mack sent another email correspondence to all the counsel advising that she did not oppose the consolidation of the three matters…

[As appears in original]

[5] The statement of claim filed by Ms. Foran against Mr. Malek states:

3. On or about the 27th day of November, 2016, at approximately 1:50 o'clock in the afternoon, the Plaintiff was a pedestrian crossing Alderney Drive, at or near the intersection of Alderney Drive and Prince Street, in Dartmouth, Halifax Regional

Municipality, Province of Nova Scotia. The Plaintiff engaged the overhead flashing crosswalk sign and waited for traffic to come to a complete stop before proceeding to safely cross Alderney Drive in the marked crosswalk. The Plaintiff reached the grass median, approximately half way across Alderney Drive, secured a sign in the median, turned and started to walk back across Alderney Drive, in the direction from which she came. As the Plaintiff was crossing the last lane, approaching the sidewalk, she was suddenly struck by the Defendant's motor vehicle.

4. As a result of said striking, the Plaintiff suffered bodily injuries, including various, and other loss and damage.

…

8. The Plaintiff therefore claims against the Defendant:

(a) general damages, including:

(i) pain and suffering, inconvenience and loss of amenities;

(ii) loss of future earnings or alternatively earning capacity;

(iii) loss of capacity to perform valuable services;

(iv) cost of future care;

(v) extraordinary services rendered for the benefit of the plaintiff, on a quantum meruit basis or otherwise;

(vi) and such other damages as may appear.

(b) special damages, particulars of which shall be provided, including damages for;

(i) loss of income and employment benefits;

(ii) all out-of-pocket expenses;

(iii) such other damages as may appear.

(c) interest on all damages;

(d) costs;

(e) HST;

(f) such further relief as this Honourable Court deems just.

[As appears in original]

[6] The amended statement of claim filed by Ms. Foran against Aviva states:

4. The Plaintiffs further states that on or about the 27th day of November 2016, at approximately 1:50 o'clock in the afternoon, the Plaintiff was a pedestrian attempting to cross Alderney Drive at the intersection with Prince Street in

Dartmouth, Nova Scotia. The Plaintiff had engaged the overhead flashing crosswalk lights and as she was in the process of crossing the street, was suddenly and negligently struck by a 2014 Dodge Caravan vehicle owned and operated by Theodore Malek.

5. The Plaintiff states that as a consequence of the aforesaid collision, the Plaintiff sustained significant personal injuries and loss.

6. The Plaintiff has commenced legal action in the Nova Scotia Supreme Court against Theodore Malek, for negligence and damages. The Plaintiff's claim includes, but is not limited to, a claim for general non-pecuniary damages, past and future wage loss, loss of valuable services, medical care costs, out-of-pocket expenses, costs and interest. The particulars of all damages claimed will be provided prior to the trial in this action.

7. By an endorsement to the policy entitled S.E.F. 44, the Plaintiff states that she is an eligible claimant and an insured person under the terms of the policy issued by the Defendant, and as such are entitled to indemnity from the Defendant for all amounts that she is legally entitled to recover from Theodore Malek, who is an inadequately insured motorist as defined in the said endorsement.

…

9. The Plaintiffs therefore claims from the Defendant:

a. a declaration stating that the Plaintiffs are entitled to indemnity under the said endorsement;

b. damages for breach of contract, including, but not limited to:

i. all damages claimed against Theodore Malek for personal injury sustained, including:

1) pain and suffering, inconvenience and loss of amenities;

2) loss of future income or alternatively earning capacity;

3) loss of capacity to perform valuable services;

4) costs of future medical care;

5) extraordinary services rendered for the benefit of the Plaintiff, on a quantum meruit basis or otherwise;

6) special damages, particulars of which shall be provided, including damages for:

a) loss of income and employment benefits;

b) all out-of-pocket expenses;

c) such other damages as may appear;

c. interest on all damages;

d. costs and HST;

e. such further relief as this Honourable Court deems just.

[As appears in original]

[7] The statement of claim filed by Ms. Foran against TD states:

2. The Plaintiff was injured in a motor vehicle collision on or about November 27, 2016. The Plaintiff states that at the time of the collision she was a pedestrian in a designated crosswalk.

…

5. The Plaintiff states that she has continuously been unable to perform the essential duties of her own occupation, or to engage in any occupation or employment for which she is reasonably suited by education, training or experience.

6. The Plaintiff claims entitlement to benefits for weekly indemnity payments under the Section B policy. The Plaintiff's claim for weekly indemnity benefits has been denied by TD. The Plaintiff claims that the denial of Section B benefits for weekly indemnity payments is in breach of the Section B policy. As a result of the denial, the Plaintiff has suffered loss and continues to suffer loss.

7. As a result of TD's breach of contract, the Plaintiff has suffered loss and continues to suffer loss. The Plaintiff states that in the circumstances of this case, TD would have been ordered to pay weekly indemnity payments to the Plaintiff. Therefore, but for TD's denial of Section B benefits for weekly indemnity payments breaching the Section B policy, the Plaintiff would have been compensated for the loss and damages she suffered as a result of the motor vehicle accident on November 27, 2016.

[8] In its statement of defence, TD pleads:

5. As to the Plaintiff's claim that the Defendant breached its contractual obligations to the Plaintiff in respect of Section B of her Standard Automobile Policy, the Defendant states:

(a) that the Defendant has fulfilled all of its obligations to the Plaintiff under the applicable policy of motor vehicle insurance;

(b) that the Plaintiff has been fully reimbursed for all Weekly Indemnity Benefits under the policy, for which she is entitled;

(c) <u>that the Plaintiff has failed to prove that she is disabled by reason of her motor vehicle accident from engaging in any occupation or employment.</u>

[Emphasis added]

[9] TD does not agree that consolidation is appropriate for a variety of reasons, including: a lack of evidence on this motion to support the plaintiff's request; the fact that the cause of action against it is based in contract, not negligence; and that the evidence to be heard at trial in relation to the claim against it differs in part from the other claims.

[10] According to TD:

> The Defendants Malek and Aviva consent to the consolidation therefore the issue is simply whether the action commenced by Ms. Foran as against TD should be consolidated into the actions involving Ms. Foran and Malek and Aviva.

[11] Malek and Aviva had notice of the motion and did not participate.

[12] Counsel for Ms. Foran, Mr. Raja, initially stated at the hearing that liability was not in dispute. Notice to admit fault has not been filed. On questioning by the court, Mr. Raja clarified that there were no formal admissions from the defendants that would remove liability as an issue:

> The Court: Maybe before you start with your submissions, I'm pretty sure you made a comment and Ms. Kelly mentioned it, you…I think that you said that liability was not going to be an issue.
>
> Mr. Raja: Yes, my Lord.
>
> The Court: Is there…I mean, aside from you saying that, is there anything that supports that? Like, where is the support for that comment?
>
> Mr. Raja: Um, it has not been admitted on the record, my Lord, but without prejudice basis and I cannot really speak to that, but…but it has not…
>
> The Court: But if you're saying it, in this…so this is part of what the complaint is in Ms. Kelly's submissions…
>
> Mr. Raja: Yes, my Lord.
>
> The Court: …and it's part of the complaints that were in other cases from this court that didn't…didn't order consolidation and that is you need evidence to support what you're saying. You can't just come in and say it and, so, is liability an issue today for the purpose of this hearing, or isn't it? There's no, "it might be, probably is". It either is or it isn't and that's…that's what a trier of fact – me – that's what the decision-maker will struggle with is, is there evidence to support what you're proposing? So, this is a "is liability an issue, or isn't it?".

Mr. Raja: My Lord, she was hit in a crosswalk.

The Court: Is liability an issue or isn't it?

Mr. Raja: I…I don't believe so, no.

The Court: But based on…

Mr. Raja: It has not been admitted, my Lord.

The Court: Then it's still an issue.

Mr. Raja: Yes, my Lord.

The Court: Okay, so this is the difficulty that I've got with this submissions, is you can't just speculate about things, I have to work on evidence.

Mr. Raja: Yes, my Lord.

The Court: So, what else did you submit today…I mean we've got time here, it's only twenty-five after three…what other submissions did you make to me that weren't based on evidence, but were based on speculation, because I don't want to craft a decision based on speculation. I need to craft a decision based on evidence.

Mr. Raja: Yes, my Lord. My Lord, the submissions that I've made are based on…on the evidence that I have already provided to you and had already submitted that we cannot really go into the details of the medical evidence at this stage…

The Court: Why…but that's…that's, see that's your…that's your choice. Your choice is to bring a motion…

Mr. Raja: Yes, my Lord.

The Court: …and if you want me to consider medical evidence or the relevance of it or how it might relate from one to the other, you have to have evidence of it. So, you would have to have…anyway, evidence could come in a zillion different ways. It could come in viva voce, it could come in in affidavit form, it can come in by consent, in can come in…there's lots of ways it can come in.

Mr. Raja: Yes, my Lord.

The Court: Or counsel's submissions can be consented to as being the truth, but that hasn't happened here. So, that's…that's a problem for me.

Mr. Raja: I'll…I'll try my best to…to allay those…those issues, my Lord. What I have heard here today from my friend is that "we do not need to cross-examine this witness, or we do not want to cross-examine the psychologist, we are…they are not relevant to the claim". My Lord, they are, because all those records prepared and the reports prepared by those psychologists are speaking to the plaintiff's

> disability and the…as far as the disability is concerned, it is equally relevant to all the claims.
>
> The Court: So…so the defendant can say, strategically, that "you can call this evidence if you wish, we're just not going to cross-examine on…these witnesses because we're going to argue that they're not relevant or it goes to weight" or whatever it is that they may argue when it comes to trial. That doesn't mean that…that they aren't relevant from your perspective and it doesn't mean that they may not turn out to be relevant. That's…that's an argument.
>
> Mr. Raja: Yes, my Lord, and this is what I'm trying to say. As far as the plaintiff is concerned, I have outlined and provided names of all the relevant witnesses for all the claims – not for one. Now, my…my friend, as she stated that some of them are irrelevant for her, that is a discussion that…that is to be had, whether she wishes to agree to those documents going in by consent or not, but we never got to that stage. I don't believe there is any dispute with respect to having some common issues in fact and law. My friend agrees with that. My friend agrees with a number of witnesses that are there, that are relevant. It is just, you know, portions of their testimony that my friend says might be irrelevant and that…that is correct. I'm not disputing that fact. But if there are portions of some testimonies that are irrelevant, that does not mean that the person has to come again and testify all over again because I don't think anybody would go to a trial without having the family physician testify because that, in the national health system that we have in Canada, the family physician is the most important witness in…in every personal injury trial – irrespective of the fact whether it is long-term disability, it is weekly indemnity payments, or is it purely tort.

Issue

[13] The sole issue in this motion is whether the three matters should be consolidated. The defendants Malek and Aviva take no position. TD is opposed to the order sought.

Law

[14] Civil Procedure Rule 37 governs a motion for consolidation:

37.01 Scope of Rule 37

A judge may consolidate proceedings, trials, or hearings or may separate or sever parts of a proceeding, in accordance with this Rule.

37.02 Consolidation of proceedings

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) a common question of law or fact arises in the proceedings;

(b) a same ground of judicial review or appeal is advanced in the applications for judicial review or appeals and the ground involves the same or similar decision-makers;

(c) 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.

37.03 Proceedings to be tried or heard together

A judge may order that proceedings be tried or heard together, or in sequence.

37.04 Issues to be tried or heard together

(1) A judge may order common issues in two or more proceedings be tried, or heard, together.

(2) The judge who orders the trial, or hearing, together of common issues may provide times for the trial, or hearing, of the issues that are to be tried, or heard, separately.

37.05 Separating parts of a proceeding

A judge may separate parts of a proceeding for any of the following reasons:

(a) a party joined a party or claim inappropriately;

(b) although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;

(c) the benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.

37.06 Directions

> A judge who orders consolidation of proceedings, trials, or hearings or separates parts of a proceeding may give directions for the course of a proceeding in which the order is made, including directions on any of the following subjects:
>
> (a) in an action, the status of each party as plaintiff, defendant, third party or intervenor;
>
> (b) in an action, the status of each claim as main claim, counterclaim, crossclaim or third party claim;
>
> (c) amendments;
>
> (d) place of the proceeding, trial, or hearing.

[15] Section 41(g) of the *Judicature Act* is also relevant:

> (g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided;

[16] There are several cases that provide instruction in relation to a motion for consolidation. In *Stone v Raniere and Stone v. Confederation Life Insurance Co.* (1992), 117 N.S.R. (2d) 194, 1992 Carswell NS 219, (S.C.T.D.), Saunders J. (as he then was), adopted the reasoning in *Hillcrest Housing Limited et al* (1986), 56 Nfld. & P.E.I.R. 237 (P.E.I.S.C.), and set out six factors relevant to determining whether matters should be consolidated:

> 10 Prince Edward Island's Procedure Rule 39.01 is identical to our C.P.R. 39.02. In *Re Hillcrest Housing Limited et al* (1986), 56 Nfld. and P.E.I.R. 237 (P.E.I.S.C.), the court in considering whether an order should be made for consolidation, referred to six factors relevant to this determination. The factors are stated at page 247 of the decision and can be summarized as follows:
>
> (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
>
> (4) 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.

11 In addition, the court recognized the principle formulated in a number of cases and stated at p. 247:

> The common element in these decision 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.
>
> [As appears in original]

[17] Justice Saunders denied the request for consolidation and stated variously:

> 9 While on its face, there may be some merit to the argument that judicial economy would invite a consolidation where the medical experts were common to each case, there is much more to an application for consolidation than that. I must consider all of the circumstances and all of the issues raised by the parties in their pleadings and decide whether it would be just and appropriate to combine the proceedings. Having done so, I am convinced there are cogent reasons for refusing consolidation.
>
> …
>
> 13 I am not at all persuaded that there is any advantage to Confederation in having these two actions joined. The trial of any consolidated action would be lengthier and more expensive not only for Confederation, but the two individual litigants.
>
> 14 A decision in one of these cases will <u>not</u> dispose of the essential cause of action in the other case. This is reason enough to refuse consolidation. The issues involved in the tort action are different than the issues which arise in the Confederation action. In the former the issues will include contributory negligence, special damages, non-pecuniary damages, loss of income and the cost of future care. In the Confederation action the only relevant issue is whether Mr. Stone meets the test of a "totally disabled employee" within the meaning of his policy. This will involve a consideration whether the plaintiff could work at an occupation where his earnings would be 75% or more of the current monthly earnings he received as a fireman.
>
> 15 Not only are the issues different but so are the claims for relief. In the tort action damages are claimed arising out of a motor vehicle accident allegedly caused by Mr. Raniere's breach of duty. In the other case Mr. Stone's claim to relief arises

> out of the insurer's obligations pursuant to a long term disability policy. The motor vehicle accident is irrelevant. Mr. Stone's disability might have arisen from any mishap. The decision in the tort action will not determine whether Mr. Stone is a "totally disabled employee" and therefore entitled to benefits under his policy with Confederation. That is a separate issue which may be effectively tried in a separate action.
>
> [Emphasis in original]

[18] This reasoning was adopted by the Court of Appeal in *Best v. Pontius*, 2009 NSCA 39 at paragraphs 6 and 12.

[19] In *Martin v. Stewart*, [2001] N.S.J. No. 413, 2001 Carswell NS 580 (S.C.), leave to appeal denied, 2001 NSCA 164, Coughlan J. applied the factors set out by Saunders J. and found in favour of consolidation:

> [6] In applying the essential factors set out by Saunders, J. to the case at bar, I find the following:
>
> **1. GENERAL CONVENIENCE AND EXPENSE**
>
> The two actions have several issues in common, such as the extent of any injuries suffered by the plaintiff, the effect of such injuries on the plaintiff, and consequently, many common witnesses will be required in both actions.
>
> **2. WHETHER JURY NOTICE INVOLVED**
>
> Any party could request a jury trial, so this factor does not have impact on the decision concerning consolidation.
>
> **3. HOW FAR THE ACTIONS HAVE PROGRESSED**
>
> While a notice of trial has been issued in the tort action, a notice of objection has been filed to it as the defendant in that action wishes to discover an out-of-province witness and carry out an independent medical examination. The Section B action is in the process of conducting discoveries. The two actions are at approximately the same stage.
>
> **4. WHETHER THE PLAINTIFF HAS SEPARATE SOLICITORS**
>
> Here the plaintiff has the same solicitor.
>
> **5. SUBSEQUENT MATTERS ARISING IN ONE ACTION**
>
> Both claims arise from the injuries, if any, suffered by the plaintiff in the same motor vehicle accident in August, 1995.
>
> **6. PRIVILEGED AND NON-PRIVILEGED DISCOVERY QUESTIONS**
>
> There would be in a consolidated action questions and documents which are relevant to some or all of the issues against some or all of the defendants.

> In this case, a consolidation is otherwise proper. The fact that on discovery questions that would be objectionable in one action might be privileged in the other action is not a sufficient reason for refusing an order to consolidate.
>
> [7] This is not a case such as in ***Stone v. Confederation Life Insurance Company***, supra, or in ***Leask Estate and Leask v. Crocetti and MacLeod*** (1990), 95 N.S.R. (2d) 353, affirmed, 97 N.S.R. (2d) 221 (C.A.) , where the insurer is in a conflict of interest with its own insured and should take different positions in the two actions.
>
> [8] In this case, Canadian General Insurance Company is the plaintiff's Section B insurer and the plaintiff can recover from the defendant in the tort action whatever she is entitled to, less that which is received pursuant to the Section B benefits. On this point, I was referred by counsel to ***Corkum v. Sawatsky et al.,*** 126 N.S.R. (2d) 317 (C.A.) and ***Dillon v. Kelly***, 150 N.S.R. (2d) 102 (C.A.).
>
> [9] I am not satisfied that the plaintiff will be prejudiced if the actions were consolidated. I find that the factors are substantially in favour of a consolidation and the application for consolidation is granted.

[20] In *Healy v. Halifax (Regional Municipality),* 2016 NSCA 47, Bourgeois J.A., for the court, explained that the overarching consideration on a motion for consolidation is what is "just" between the parties:

> [35] An order issued under Rule 37.04 is, in my view, fundamentally akin to a consolidation, albeit a partial one. As such, it is appropriate to consider principles governing that remedy. Although many cases have articulated a series of factors for consideration in a consolidation motion, the overarching consideration has been, and continues to be, what is "just" between the parties. See for example *Stone v. Raniere* (1992), 117 N.S.R. (2d) 194, and the many cases in which it has been followed. Determining what is "just" may be aided by the court considering certain factors, but should not be dictated by a rigid set of criteria. Perhaps what may not be "just" for a total consolidation, may be "just" for the extraction of a common issue.

[21] Similarly, in *Wheatley and Williston v. Karsch et al*, 2019 NSSC 82, Muise J. adopted these principles and confirmed that the onus is on the moving party to show that the proceedings are "inextricably intertwined" and that it would be just and convenient and in the interests of justice to hear the matters together:

> [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 [*sic*] in the interests of justice to hear the matters together”.

[22] In *King v. RBC Dominion Securities Inc.*, 2012 NSSC 225, Bourgeois J. (as she then was) clarified that consolidation may be ordered even where a decision in one case would not dispose of the essential cause of action in another:

> [17] Although the continuing relevance of the six factors outlined by Saunders, J. has been continually endorsed, including recently by the Court of Appeal in ***Best v Pontius***, 2009 NSCA 39, there has been some divergent consideration as to whether it is mandatory in order to successfully argue for consolidation that "a decision in one case would dispose of the essential cause of action in the other case."
>
> [18] Although that remains an important consideration favouring consolidation, the absence of same does not preclude it. As noted by Hood, J. in ***MacNutt v Nova Scotia (Attorney General)*** 2005 NSSC 337, and very recently by Rosinski, J. in ***Jeffrie v. Hendriksen***, 2011 NSSC 351, an alternate consideration is whether the proceedings in question are "inextricably intertwined". With respect, I disagree with Counsel for the Applicant that the law with respect to consolidation has become unclear since the advent of the new Rules. It remains, as it was in the past, a balancing of factors.
>
> [Emphasis added]

[23] In *Jeffrie v. Hendriksen*, 2011 NSSC 351, Rosinski J. noted that the risk of inconsistent findings or outcomes is “a good barometer of whether the proceedings are "inextricably intertwined" (para. 55).

Analysis

[24] In relation to the requirements for consolidation under CPR 37.02, TD says it is “clear that at least one element of the test for consolidation is met – there is one common issue – that of whether Ms. Foran is disabled from any and all employment.” Since one of the conditions required for consolidation is conceded by TD, I will go on to assess whether Ms. Foran has met the burden of establishing that it would be just and convenient and in the interests of justice for the three matters to be heard together.

General convenience and expense

[25] General convenience and expense is the most hotly contested factor on this motion. Ms. Foran says:

> At the trial the same set of witnesses are expected to testify. The subject of cross examination is going to be the same as well. Barring two witnesses (Cost of future care expert, and income loss expert) all the other witnesses are equally relevant to the Section B claim.
>
> Specifically, the Section B claim is for the reinstatement of the weekly indemnity benefits. One of the central issues to be determined at the trial is whether the Plaintiff is disabled from engaging in any gainful employment, and whether this disability was caused by the November 2016, motor vehicle accident. The trial court's determination on this issue will have a direct impact on the assessment of special damages (recovery for the loss of income) in the Section A and SEF 44 claims. If the matters are heard and decided separately, any variance in the outcome by way of separate decisions could be of a serious detriment to the Plaintiff. It is important to state that any monies paid by Section B are to be deducted by Section A [and SEF 44] when calculating the income loss.
>
> We submit that separate trials of the actions would not only result in duplication of the evidence, but the Plaintiff will also be subjected to increased expense which is unnecessary and contrary to the principals [*sic*] of the administration of justice enshrined in *Nova Scotia Civil Procedure Rules*, Rule1.01.
>
> …
>
> ***Application of the essential factors to the case:***
>
> **(1) The general convenience and expense:**
>
> One trial will be most convenient to all the parties and the witnesses. It will save weeks of time and expense required to the preparation and the trial itself.
>
> …

[26] On the subject of whether the witnesses will be the same, TD says the following:

> In her brief, Ms. Foran indicates that "although the Section B claim results from the breach of contract, the issues to be determined in all three are intricately connected" and "at the trial the same set of witnesses are expected to testify" (page 6). However, Ms. Foran has not indicated how the witnesses would be the same. She simply states that "barring two witnesses (Costs of future care expert, and income loss expert) all the other witnesses are equally relevant to the Section B claim."
>
> With respect, it is hard to imagine how all other witnesses except for the ones outlined, would be relevant to the Section B matter. For example, there is a live liability issue at play. Clearly the witnesses relevant to liability will not be applicable to the TD action. In addition, it is anticipated that TD would consent to various treatment records being admitted into the record without the need for

> further proof or need for the witnesses to attend for direct or cross-examination, given the issue of damages is not relevant to the matter involving TD. The matter of whether Ms. Foran is disabled from work will be assessed by experts. You can see from the TD's Memorandum for Date Assignment Judge, that TD anticipates leading evidence from Dr. Koshi and Mike MacDonald, neither or which are listed by Malek or Aviva.
>
> Of course, it is likely that the some of the experts identified by Ms. Foran will be required for the action involving TD. However, Ms. Foran has provided no details with respect to these experts and what overlap will take place. No evidence was led in relation to her injuries and why such overlap would occur.

[27] As such, TD submits that the evidence does not establish that consolidation should be ordered:

> It is important to put this issue at the forefront of this motion – that the Court does not have evidence indicating what exactly the time savings would be and how the 19-20 witnesses identified in Ms. Foran's Request for Date Assignment Conference would be applicable to the TD action.
>
> Turning to what evidence the Court does have to rely on with respect to this motion, TD says the following is relevant:
>
> 1. The actions against Mr. Malek and Aviva Canada involve elements of negligence and liability. The action against TD involves elements of breach of contract only.
> 2. Ms. Foran claims general damages as against Malek and Aviva for:
>
> a. pain and suffering, inconvenience and loss of amenities;
>
> b. loss of future earnings or alternatively earning capacity;
>
> c. loss of capacity to perform valuable services;
>
> d. cost of future care;
>
> e. extraordinary services rendered for the benefit of the plaintiff, on a quantum meruit basis or otherwise; and
>
> f. such other damages as may appear.
>
> 3. Ms. Foran claims for damages outlined above are applicable to the actions against Malek and Aviva only. They have no application or hearing to the action against TD.
> 4. Ms. Foran claims for damages for mental distress in relation to the breach on contract by TD (if proven) as well as payment of arrears, prejudgment interest and costs as against TD. None of these are applicable to the claims against Malek and Aviva.

> 5. Ms. Foran anticipates calling 19-20 witnesses at trial to prove her claims. She will testify and she will call 2-3 lay witnesses. She will also call her family doctor, three pain specialists who are treatment providers, an internal medicine specialist, three psychologists, three occupational specialist (one as a Rule 55 expert), a massage therapist, a physiotherapist, Dr. King as a Rule 55 expert, a further Rule 55 expert in neurology or pain management and an economic loss expert.
>
> 6. The facts surrounding Ms. Foran's injuries that the Court must use to assess this motion are the details contained in Dr. Koshi's Independent Medical Examination Report. That is the only evidence before the Court. In that report, located at Exhibit C of the Moulton Affidavit, Ms. Foran's "Present Chief Complaints" are noted as hand pain, weakness in both hands and arms, temperature issues and sleep issues. [As appears in original]

[28] Even though the claims against TD and Aviva are in contract, while the claim against Mr. Malek is in tort, all three actions relate to the same incident – the pedestrian/motor vehicle accident that occurred on November 16, 2018. In each of the claims, Ms. Foran's success depends, in part, on a finding by the court that the accident caused her injuries. If causation is established, the court must then consider the nature and extent of those injuries, and their impact on the plaintiff's functioning.

[29] The claim against TD is that it breached its contractual obligation to provide Ms. Foran with Section B benefits. Section B of the Nova Scotia Standard Automobile Policy provides for mandatory accident benefits, including medical rehabilitation in Subsection 1 and loss of income payments in Subsection 2, Part II. Under Subsection 2, Part II, the insurer agrees to pay:

> Subject to the provisions of this Part, a weekly payment for the loss of income from employment for the period during which the insured person suffers substantial inability to perform the essential duties of his occupation or employment, provided:
>
> (a) such person was employed at the date of the accident;
>
> (b) within 30 days from the date of the accident, and as a result of the accident, the insured person suffers substantial inability to perform the essential duties of his occupation or employment for a period of not less than seven days;
>
> (c) no payments shall be made for any period in excess of 104 weeks except that if, at the end of the 104 week period, it has been established that such injury continuously prevents such person from engaging in any in any occupation or employment for which he is reasonably suited by education,

> training or experience, the Insurer agrees to make such weekly payments for the duration of such inability to perform the essential duties.

[30] Because Ms. Foran was paid benefits under Section B, TD appears to have been satisfied that she met the definition applicable to the initial 104-week period. The trial issue, then, is whether she is totally disabled, as a result of the accident, from any employment for which she is reasonably suited by education and experience. Both the tort claim, which includes a claim for loss of future earnings or earning capacity, and the Section B claim will require evidence on whether Ms. Foran was injured in the accident, the nature and extent of those injuries, and the impact of the injuries on her ability to earn employment income.

[31] Evidence as to the cause and extent of Ms. Foran's injuries is also relevant to the claim against Aviva, the SEF 44 insurer. The Supreme Court of Canada, per Abella J., described the Nova Scotia SEF 44 Endorsement in *Sabean v. Portage La Prairie*, 2017 SCC 7, [2017] 1 S.C.R. 121:

> [1] This case involves the interpretation of the Nova Scotia SEF 44 Endorsement, an excess insurance policy. This Endorsement is a standard form contract that exists in similar terms across the country. Canadians purchase these policies, sometimes called Special or Family Protection Endorsements, in addition to their existing automobile insurance coverage. These endorsements indemnify insureds for any shortfall in the payment of a judgment for damages against an underinsured tortfeasor, subject to the deductions set out in the Endorsement. …
>
> …
>
> [15] An insured pays an additional premium for the protection of the excess coverage provided under the Endorsement, which indemnifies the insured for any shortfall in the payment of a judgment for damages against an underinsured tortfeasor: *Somersall v. Friedman*, 2002 SCC 59, [2002] 3 S.C.R. 109, at paras. 16-19. However, the amount owed under the Endorsement is not necessarily the full amount of the shortfall owed by the underinsured tortfeasor. The terms of the Endorsement provide for specific deductions from the shortfall in order to determine the amount payable by the insurer to the eligible claimant.

[32] The SEF 44 insurer is responsible to pay the difference between the damages awarded, if any, against Mr. Malek and the limits of Mr. Malek's coverage under Section A of his insurance policy. It follows that Aviva's monetary obligation, if any, to Ms. Foran under the SEF 44 Endorsement depends on the court's determination of liability and damages in the negligence action against Mr. Malek.

As such, evidence as to the cause and extent of Ms. Foran's injuries and any resulting disability is relevant to both claims.

[33] The extent of Aviva's liability under the SEF 44 Endorsement also depends on the outcome of the Section B claim against TD. Section 4 of SEF 44 states:

> 4. AMOUNT PAYABLE PER ELIGIBLE CLAIMANT
>
> (a) The amount payable under this endorsement to any eligible claimant shall be ascertained by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist and deducting from that amount the aggregate of the amounts referred to in paragraph 4(b), but in no event shall the Insurer be obliged to pay any amount in excess of the limit of coverage as determined under paragraph 3 of this endorsement.
>
> (b) The amount payable under this endorsement to any eligible claimant is excess to any amount actually recovered by the eligible claimant from any source (other than money payable on death under a policy of insurance) and is excess to any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from:
>
> …
>
> (vi) any automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;
>
> …

[34] As noted above, the SEF 44 insurer is entitled to make certain deductions from the amount owed to an insured. One of those deductions is any payment(s) made and owing by Section B. As Saunders J.A. noted, for the court, in *Lombard Insurance Company v. Campbell-MacIsaac*, 2004 NSCA 87:

> [69] The risk or promise undertaken by Lombard, the SEF 44 insurer, is to pay to its insured the "amount payable" under the endorsement. That cannot be calculated without first determining the total amount of damages the insured is entitled to recover from the underinsured motorist and then as a separate step accounting for whatever other sources of payment might arise by deducting any one or more of the sources specified in s. 4(b).

The "amount payable" by Aviva under the SEF 44 Endorsement therefore depends on the outcome of the other two actions.

[35] All of the matters will have some common witnesses – in particular, medical experts. While Mr. Raja submitted that the matters would have essentially <u>all</u> witnesses in common, counsel for TD pointed out that this statement is inaccurate,

since TD has no interest in liability. Nonetheless, the request for a date assignment conference filed by Ms. Foran in all three actions was identical, with the same medical witnesses.

[36] Civil Procedure Rule 4.13(3) describes what should be in an RDAC:

> The request for a date assignment conference must include all of the following:
>
> (a) the request;
>
> (b) the party's election as required by Rule 52 - Trial by Jury;
>
> (c) a statement showing that the requirements to obtain a date assignment conference have been satisfied, or that an order for permission to request a date assignment conference has been issued;
>
> (d) a chronological list of all pleadings;
>
> (e) a chronological list of all orders affecting the future conduct of the action, or the conduct of the trial;
>
> (f) a general description of the status of the action, including information about the status of discoveries, disclosure, and expert opinion;
>
> (g) a statement of all steps in the proceeding the party making the request foresees being taken by any party before trial, including holding a discovery, delivery of an expert's report, and making a motion;
>
> (h) a general description of the documents and electronic information the party foresees being introduced by all parties at trial;
>
> (i) the number of witnesses the party expects to call and an estimate of the length of testimony by each;
>
> (j) an estimate of the number of days required for the trial and a breakdown stating the number of days attributed to each party's case and any jury selection and deliberations;
>
> (k) whether special requirements need to be accommodated;
>
> (l) whether a settlement conference is requested;
>
> (m) when the party anticipates all parties being ready for trial.

[37] In all three RDACs filed by Mr. Raja on behalf of Ms. Foran, he states that the pleadings have closed, everyone has disclosed their documents, all discoveries are complete and all interrogatories, if filed, are answered. All of the listed witnesses are medical treatment providers or medical experts, with the exception of two or three unnamed lay witnesses. Mr. Raja should have detailed the anticipated testimony of those lay witnesses in an affidavit from Ms. Foran. However, a lack of evidence on this point does not carry the day.

[38] In response to the RDACs, counsel for Mr. Malek, Aviva, and TD each filed a memorandum for the date assignment judge. The memorandum must contain the following, according to Rule 4.15(2):

> (2) A memorandum for the date assignment judge must contain all of the following information:
>
> > (a) any correction of, or addition to, the information or estimates in the request for trial dates;
> >
> > (b) the number of witnesses the party expects to call and an estimate of the length of testimony by each;
> >
> > (c) when the party anticipates being ready for trial;
> >
> > (d) if applicable, the party's election of trial with or without a jury.

[39] The memorandum for date assignment judge filed by Ms. Kelly for TD states that Ms. Foran's case should take 3.5 days and that TD's case should take 1.5 days. Ms. Kelly lists TD's case as being comprised of two to three lay witnesses, a physiatrist, an occupational therapist, and a potential rebuttal expert. All of the medical witnesses deal with the injuries suffered by Ms. Foran and whether those injuries are totally disabling.

[40] In arguing against consolidation, Ms. Kelly noted that neither of the other two defendants listed TD's medical experts as witnesses. This is not unusual, however, given each defendant's right to call its own independent medical expert to examine Ms. Foran. All of the experts would likely consider similar issues: the nature and extent of Ms. Foran's injuries, and the impact of those injuries on her functional abilities.

[41] Mr. Malek's memorandum identifies one to three possible lay witnesses, described as taking .5 to 1.5 days, and four to five possible experts. While these lay witnesses might be irrelevant to TD's Section B issue, the medical experts called by Mr. Malek will be relevant.

[42] Aviva says it might call one to two lay witnesses, described as taking two-hours each, in relation to the SEF 44 issue. It also lists one potential rebuttal expert, which I infer will likely be a medical expert. Again, the medical expert testimony is relevant to the claim against TD.

[43] The lay witnesses are the only witnesses who can provide evidence as to fault, since the only other listed witnesses are medical experts. Ms. Foran alleges that she

was struck by Malek's motor vehicle while she was in a crosswalk. Section 148C(2) of the *Insurance Act* creates a reverse onus on the driver in that circumstance:

> (2) Where a person sustains loss or damage by reason of a motor vehicle on a highway, the onus of proof in any civil action that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or the employee or agent of the owner acting in the course of that person's employment or of the driver of the motor vehicle is on that owner or driver.

The file materials do not suggest that any of the lay witnesses will provide lengthy or overly complicated evidence.

[44] To sum up, evidence as to the cause and extent of Ms. Foran's injuries, and any resulting disability, is relevant to all three claims. Although the Section B claim against TD is a first party claim in contract, there is considerable overlap with the tort claim. The distinct legal issue in the Section B claim is whether Ms. Foran's injuries caused by the accident continuously prevent her from engaging in any occupation or employment for which she is reasonably suited by education, training or experience. The evidence needed to determine that issue, however, is also relevant to the tort action, which includes a claim for loss of future earnings or earning capacity, and to the SEF 44 claim.

[45] The issues for all three claims relate to the same accident, the same plaintiff and the same injuries. Separate trials with substantial overlap in witnesses and evidence would increase the plaintiff's costs, and impose an unnecessary burden on the courts. As the Supreme Court of Canada noted in *R. v. Hryniak*, 2014 SCC 7, the application of rules of court involving discretion, such as Rule 37, includes "an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (para. 30). Two years later, in *R. v. Jordan*, 2016 SCC 27, the Supreme Court of Canada imposed new limits on delay in criminal matters. Courts have responded by redirecting scarce resources from civil proceedings to criminal matters. Delays and disruption caused by the Covid-19 pandemic contributed to further backlogs, as courts necessarily had to prioritize criminal and family cases to the detriment of the timely resolution of civil cases. In view of this backdrop, requiring medical experts to testify multiple times about the same opinions would be contrary to the principle of proportionality and place an unreasonable burden on judicial time and resources.

[46] Considering the relevance of the medical evidence to all three of the claims, and the relatively brief amount of time that will be devoted to lay witnesses that are irrelevant to the claim against TD, the general convenience and expense factor weighs in favour of consolidation.

Whether a jury notice is involved

[47] No jury is involved. This is a neutral factor.

How far the actions have progressed

[48] On all three of the RDAC forms filed by Ms. Foran, she states that the pleadings have closed, everyone has disclosed their documents, and that all discoveries and interrogatories are complete. Joint discovery took place in relation to all three matters and the actions are all at the same stage. This weighs in favour of consolidation.

Whether the plaintiffs have separate solicitors

[49] There is only one plaintiff with one solicitor. This is a neutral consideration, or one that mildly favours consolidation.

Subsequent matters arising in one action

[50] All claims arise from the same accident. This weighs in favour of consolidation.

Privileged and non-privileged discovery questions

[51] Counsel for TD sat through joint discoveries. I can infer that she was interested in what the witnesses would say, as their evidence would be relevant to her strategy and preparation. There is no issue of privileged discovery questions being improperly raised in one action as the result of consolidation. This weighs in favour of consolidation.

The risk of inconsistent findings

[52] In each of these actions, determinations will need to be made as to the cause, extent, and impact of Ms. Foran's injuries on her ability to work. Separate trials would create the risk of inconsistent findings. In *Wright v. Sun Life Assurance Company of Canada*, 2023 NSSC 13, a recent decision involving a motion to

consolidate a tort action arising out of a motor vehicle accident and an action for payment of long-term disability benefits, Campbell J. described the risk of inconsistent findings as "an issue that impacts on the administration of justice":

> [19] Having one trial of one action would be substantially more convenient than having two trials dealing with many of the same issues. But it is not just a matter of "convenience". Having two trials dealing with such intertwined or linked issues presents the real risk of inconsistent findings. That is an issue that impacts on the administration of justice. A judge hearing the second trial is required to hear that trial fairly and impartially but could be faced with findings of fact made by another judge in a case involving the same parties and the same incident that are determinative of the issues in the trial before them.

[53] This factor weighs in favour of consolidation.

Conclusion on consolidation

[54] Having considered all of the relevant factors, I find that Ms. Foran has shown that the proceedings are "inextricably intertwined" and that it would be just and convenient and in the interests of justice for the matters to be tried together.

Consecutive trials

[55] TD suggested the alternative remedy of having the matters heard consecutively – that is, in sequence – by the same judge to avoid the possibility of inconsistent findings about Ms. Foran's degree of injuries/disability. TD points out that this "would dispel … the concern of an inconsistent finding and still ensure that TD is not required to sit through 5 days of trial that it takes no interest in." At the end of the hearing, Mr. Raja said on this point:

> Mr. Raja: …I have, as an alternative remedy, in Rule 37.03, my Lord, sought that if…if the Court does not think that these matters should be consolidated, then, at least, under Rule 37.03, my Lord, these should be heard together. I believe that might be the best compromise, but otherwise I will have to produce the same set of witnesses three times.
>
> The Court: And can I just clarify, Ms. Kelly, did I understand that your position was that you were also in agreement with that? Like, I wasn't totally clear on what you were saying there.
>
> Ms. Kelly: No, and that's my apologies, my Lord. So, I should have indicated in my brief that we would be prepared under Rule 37.03 to have the trials run consecutively and be heard by the same judge. So, i.e., one

right after the other. That would dispel with the inconsistent finding issue that I had highlighted in my brief. Um, I understand in…in the recess that we took to discuss this, my friend is not looking for that as a remedy. He would be okay with them proceeding separately but concurrently, so i.e., heard in the same fashion, but I don't see how that gets TD out of the seat for the five extra days. So, I think the disagreement is we're both happy to have Rule…an Order under Rule 37.03. My form of order would read that the trials proceed consecutively in front of the same judge. My friend is looking for the Order to read that the trials proceed concurrently in front of the same judge. Do I have that correct?

Mr. Raja: Yes.

The Court: So, having never dealt with that practically, I'm not sure what the difference is between a trial running concurrently and a consolidation. Can somebody illuminate me?

Mr. Raja: So, My Lord, in sequence it is going to be…

The Court: Well, I understand the…I understand what consecutive means…

Mr. Raja: Yes, my Lord.

The Court: …and I understand what concurrent means…

Mr. Raja: Yes, my Lord.

The Court: …I'm just not certain as to the difference between a consolidated trial and two trials happening concurrently. That's what I'm…I…I understand the Rules contemplate it and there must be an obvious difference, I'm just not familiar with what it is.

Mr. Raja: Well, my Lord, if it is consolidated then it becomes one action.

The Court: 'K.

Mr. Raja: Um, and, I think for all intents and purposes, all the three defence counsel would be kind of acting together, but looking out for the interests for their own clients, but the whole trial would run as one big trial. If it is concurrent, then there will be three separate closings at the end of the day, where I am going to argue one case against A, then SEF 44, and then Section B, and if they are being heard consecutively, then I would be doing the same exercise three times before the same judge and I would be getting three decisions, so that…that is…that is how it is going to pan out. So, concurrent versus consecutive, the…the major difference is that in concurrent if, say, the family doctor takes the stand, the evidence that is being recorded is being recorded for all three trials separately, so it is convenient for the witness and for…for the plaintiff, as far as the

> cost is concerned. But I will still have to address all…all three claims separately at the end of the day.

[56] Ms. Foran met her burden regarding consolidation, therefore the proposal by TD for consecutive trials is denied. The relevant factors weigh in favour of consolidation, not consecutive trials.

Conclusion

[57] Ms. Foran's actions against Malek, Aviva, and TD will be consolidated.

[58] The plaintiff will prepare the appropriate order, circulate it to the parties, and submit it to me within 15 days of the release of this decision.

[59] The parties will have 30 days from the release of this decision to determine whether they can come to an agreement on costs. If not, I will set filing deadlines for written submissions.

Arnold, J.