Neutral Citation No: [2020] NIQB 60 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McF11332** ***ICOS Nos:*** **19/058600** **19/059407** ***Delivered:*** **06/10/2020**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

KATIE JACKLYN WEIR

Plaintiff/Respondent

-and-

CHARLES HUGH McCARTNEY

Defendant/Appellant

_____

John Morrissey BL (instructed by Donard King & Co) for the Plaintiff/Respondent
Timothy Warnock BL (instructed by McKees Solicitors) for the Defendant/Appellant

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His Honour Judge McFarland
Recorder of Belfast
Sitting as a High Court Judge

Background

[1] This is an appeal against the order of Master Bell by which he ordered that the two actions commenced by the Plaintiff against the Defendant be, in the words of the order, "quasi-consolidated", which is understood to mean that the cases be listed and heard together, or heard one after the other by the same judge. The Defendant appeals on the basis that the two actions should be formally consolidated.

[2] Both actions arise out of a single road traffic incident which resulted in the deaths of the Plaintiff's mother and father, who had been travelling in the same vehicle. She sues in both cases in her capacity as the personal representative of each parent. Although no formal defences have been lodged at this stage, the defendant has admitted that he drove his vehicle in a negligent manner, and primary liability is not an issue.

[3] Order 4 Rule 5 of the Rules of the Court of Judicature provides –

> *"(1) Where two or more causes or matters are pending in the same Division and it appears to the Court-*
>
> *(a) that some common question of law or fact arises in both or all of them, or*
>
> *(b) that rights to relief claimed therein are in respect of or arise out of the same transactions of or series of transaction, or*
>
> *(c) that for some other reason it is desirable to make an order under this rule,*
>
> *the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or immediately after another or may order them to be stayed until after the determination of any other of them".*
>
> *(2) Where the Court makes an order under paragraph (1) that two or more causes or matters are to be, tried at the same time but no order is made for those causes or matters to be consolidated, then a party to one of those causes or matters may be treated as if he were a party to any other of those causes or matters for the purpose of making an order for costs against him or in his favour."*

[4] Rule 5 gives the Master a wide discretion should it be considered that either sub-paragraphs (a) or (b) apply, or if not, when there is some other reason making it desirable to make the order. The Master can then formally consolidate the actions on such terms as is thought just, or may order the cases to be tried together, or one after the other, or order the trial of a test case and a stay of the other.

[5] Two important factors need to be taken into account. The first is that any statutory discretion should be exercised in a manner which furthers the objects of the provision (see *Padfield v Minister of Agriculture* [1968] AC 997). The objects of the Rules of the Court of Judicature are to "provide the best way by which justice may be administered between parties, with the highest degree of accuracy, with expedition, and as economically as possible" (Megaw J in *Craig v Hamill* [1936] NI 78 at 93). The second is that an appellate court, although conducting a formal re-hearing, will be slow to interfere with a decision exercising such a discretion, provided that all material facts and factors appear to have been considered and immaterial facts have not.

[6] The Defendant argues that both Writs and Statements of Claim present identical heads of claim, and in particular claims for the financial dependency arise from joint financial assets and that each deceased parent was a regular contributor to the general household expenses.

[7] When pressed, Mr Warnock of counsel, was unable to identify the nature of any clear advantage in consolidating the actions, as opposed to hearing them together as separate actions. As Statements of Claim have already been served, there will be a requirement to serve a new consolidated one. This will add to costs, although this could well be off-set with the provision of a consolidated Defence and then Notices (and Replies) for Particulars. As the actions will be heard together, no witness will be inconvenienced. The judge, when dealing with the financial dependency claims, will have all the relevant evidence. There will be a modest additional inconvenience for a judge who may have to consider delivering two separate judgments.

[8] When considering Rule 5, it must also be borne in mind that it has evolved from a Rule which was conceived at a time when civil actions of this type were determined by judge and jury. Current practice avoids many of the problems that may have arisen in the past. A single judge will be able to resolve potential problems about inconsistent findings and judgments. As costs in the High Court are now largely focussed on time engaged, as opposed to a fixed cost, there is also little prospect of significant additional costs for the parties. Should there be a similar application in the County Court, with its fixed cost regime, a court may be required to conduct a more detailed enquiry.

[9] There are a number of potentially relevant authorities, although it must be borne in mind that each case is fact specific. The authorities all date from the era of jury trial in civil actions. The language used in these authorities indicates a wide range of orders and it is sometimes difficult to determine into which category (consolidation, trying cases together, or trying a test case) the orders fall.

[10] Two decisions of the Court of Appeal in the 1930s are of interest, not least because in both cases the first instance decisions by Moore LCJ were overturned. In *Brady v McDonald* [1931] NI 157, writs had been issued by the personal representatives of two passengers who had both died as a result of a one vehicle road traffic collision. Liability was denied by the driver. The Court of Appeal ordered that the two actions should be tried together as one action, "with separate issues as to damages". In the event of the plaintiffs obtaining verdicts only one set of trial costs would be allowed. In *Craig v Hamill* (above), a husband and wife had sued by separate writs for damages for personal injuries arising from a road traffic collision. The defendant, the driver of the other vehicle, alleged contributory negligence against the husband as driver. (At common law this was then an absolute defence.) The majority held that the two actions could properly be heard together as one action and, in particular, considered that the wife's action (with no

contributory negligence being claimed against her) could be dealt with by a properly directed jury without any injustice.

[11] It is difficult to determine any particular line of authority from either of these cases, save that there is a clear objective that issues concerning liability were to be determined either by consolidation, or by cases being heard together. This was confirmed in *McFall v McCredy* [1957] NI 73 when Black LJ ordered that separate actions brought by a motorcyclist and his pillion passenger against a driver of another vehicle be tried together on the ground of reducing costs. It is unclear if this was a formal consolidation as opposed to simply trying the cases together. A clearer authority is derived from Curran LJ in *Lynn –v- Brand* [1959] NI 140. The passenger in one vehicle sued the driver of another vehicle, and then the passenger in that second vehicle sued the same defendant. Liability was admitted. The application to have both actions tried together was refused on the ground that liability had been admitted, and there was no issue common to the two actions.

[12] The final case is from the English Court of Appeal. In *Healey and others v Waddington and others* [1954] 1 All ER 861. After a mine accident, eight separate actions were commenced, six by widows and administrators of the estates of deceased miners, and two by miners. Gerrard J ordered that one action be tried as a test action, and the others be stayed. One defendant appealed seeking formal consolidation of all eight actions. The Court of Appeal ordered consolidation up to the determination of liability. Should that result in a finding against all or any defendant, the court would then fix a date for the determination of damages for each defendant.

[13] The wording of Rule 5 gives the court a very wide discretion both in relation to when it can consider this type of order, and then what type of order can be made. Every case will be fact specific. As stated in [5] (above), the object is to administer justice between the parties with the highest degree of accuracy, with expedition and as economically as possible.

[14] As a general proposition, if separate claims arise out of the same set of circumstances, it is highly desirable that the question of liability is determined at a single hearing by the same judge. Should a question of damages for any claimant then arise, then it is equally desirable that the same judge determine those issues at the same time. This can be achieved by various methods – full consolidation, hearing cases either together or in sequence, or hearing a test case. It is preferable that the most suitable course is agreed between the parties. The approach to judicial case management is to facilitate the parties by reducing delay, inconvenience to witnesses and legal representatives and costs.

[15] The order of Master Bell, in my view, reflected the correct approach in this particular case and will act to reduce delay, inconvenience and costs. It was the correct decision, and the appeal will be dismissed.

[16] The costs of the appeal, and below, will be the costs of the cause, although I acknowledge that they will be borne by the defendant.