

THE HIGH COURT

[2018 No. 3950 P]

BETWEEN

MARY MURPHY

PLAINTIFF

– AND –

CROFT NURSING HOME LIMITED

– AND –

SILVER STREAM HEALTH CARE MANAGEMENT LIMITED

– AND –

SILVER STREAM HEALTH CARE MANAGEMENT LIMITED TRADING AS SILVER STREAM
HEALTHCARE GROUP

– AND –

ST JAMES'S HOSPITAL

– AND –

LORCAN BIRTHISTLE

DEFENDANTS

JUDGMENT of Mr. Justice Max Barrett delivered on 18th February 2020.

1. This is an application by the defendants to consolidate various proceedings. The application is made pursuant to O.49, r.6 of the Rules of the Superior Courts ("RSC") which provides:

"Causes or matters pending in the High Court may be consolidated by order of the Court on the application of any party and whether or not all the parties consent to the order."

2. The plaintiffs are brother and sister. Their mother unfortunately died on 9 May 2016 whilst under the care of the defendants. The grounding affidavit, sworn by the defendants' solicitor, outlines the background facts to the within application in the following terms:

"3. All four sets of the within proceedings arise from the death of Kathleen Lee who is the mother of both Plaintiffs. It is alleged that the death arose as a result of the negligence of the circumstances where on the 29th April 2016 Kathleen Lee was being transferred to her bed by staff of the Defendants when she fell and allegedly struck her head. As a consequence of the death of their mother both Plaintiffs have issued proceedings seeking damages for psychiatric injury and a further fatal injuries claim has been issued under...the Civil Liability Act 1961...."

[Court Note: By way of amplification on the foregoing, Ms. Murphy has issued two sets of proceedings against different defendants seeking damages for psychiatric injury. Mr. Lee (the brother of Ms. Murphy) has likewise issued two sets of proceedings and, in one set of those two sets of proceedings, incorporates the statutory claim. The plaintiffs have offered to consolidate Ms. Murphy's two sets of proceedings with each other and, separately, Mr. Lee's two sets of proceedings with each other; however, the defendants want all four sets of proceedings consolidated together.]

4. *I say believe and am advised that it is appropriate that these cases are consolidated where in terms of the liability aspect the issues to be determined are identical in respect of all four cases. This much is abundantly clear where all four PI summonses are almost exact replicas of each other with identical descriptions of the defendant parties and identical pleas advanced at paragraphs 8-13 of each summons setting out the circumstances giving rise to the claim which are repeated verbatim. The Plaintiffs have, again, set out identical particulars of negligence from (a) to (p) in the PI summonses and have, similarly, provided (all dated the 17th April 2019) 13 further identical particulars of negligence in each of the four cases all numbered 1 to 13.*
5. *By reason of that averred at paragraph 4 above, I say it seems quite clear that in terms of liability surrounding the circumstances giving rise to the death of Kathleen Lee identical evidence will be provided in all four cases and identical experts relied upon. Whilst nominally there are separate Plaintiffs in real terms neither was present at [the] time the deceased fell so they will rely on the same evidence to advance their claim which emanates from an insult to their late mother rather than to either of the Plaintiffs themselves directly.*
6. *Insofar as the injuries are concerned both Plaintiffs have retained Dr Anne Leader and both Plaintiffs have been examined by Dr John O'Connor on behalf of the Defendant. It would appear therefore that consolidation would also save time and costs and there would be little risk of confusion where the same experts would be giving psychiatric evidence in respect of both Plaintiffs.*
7. *In practical terms where the same solicitors and counsel act on both sides in respect of all four sets of proceedings again there is little risk of confusion and to maintain four sets of proceedings I say would result in unnecessary duplication of time and costs.*
8. *I say there is no risk whatsoever of any confusion arising as a result of the consolidation of the proceedings.*
9. *If the proceedings are not consolidated there is a risk of unnecessary duplication and most importantly and prejudicially from the Defendants' perspective the costs of defending the proceedings will be quadrupled. Should the Defendant[s] successfully defend the claims as they are currently constituted then each Plaintiff risks being liable for two sets of legal costs each notwithstanding that it could only achieve the same level of damages regardless of the consolidation."*

[Court Note: By the time the consolidation application was heard the position costs-wise had changed to the extent that the form of consolidation detailed above was offered by the respective plaintiffs; however, the defendants (correctly) maintained that there was still the potential for an as yet avoidable increase of the costs presenting.]

3. By way of replying affidavit, the solicitor for Ms. Murphy explains how the various proceedings came about, mentions the amenability to the consolidation of the respective proceedings commenced by each sibling, but that there is objection to consolidation of all four sets of proceedings, averring, *inter alia*, as follows:

"4 [B]oth Plaintiffs strongly wish to maintain their individual actions...[W]hile the death of the Deceased was the triggering event for both the combined fatal injuries and personal injuries action of John Lee and the personal injuries action of Mary Murphy, the injuries and losses sustained were individual to both Plaintiffs, and the nature and scope of their emotional suffering and nervous shock were different....

5 [B]oth Plaintiffs are...entitled to proceed with their individual causes of action....[A]ny potential saving of costs and any saving of [court] time...can be readily and equally achieved, by the listing of and/or running of both Plaintiff's actions together."

4. It may be useful to make a number of observations at this juncture:

- (i) as to listing/hearing together, that is a different form of order to a consolidation order, and a key issue that presents is that when two cases are listed/heard together, two sets of High Court costs result, whereas the effect of an order of consolidation would, in the context just described, halve the legal costs presenting both in the defence of the proceedings (and the related exposure for the plaintiffs should they fail to succeed in their actions);
- (ii) the court ultimately retains a discretion as to how to order costs at the end of the substantive proceedings (with the result that in applications of this type the argument is often raised that 'Oh, this can be dealt with by the trial judge'); however, if the court intervenes at this point in time, provided it is satisfied that the *Duffy* test, considered hereafter, is satisfied, that may have an effect in terms of the impetus and resolution of the proceedings (because all parties will have some certainty as to the likely costs presenting);
- (iii) as neither of the plaintiffs were present at the time of the events complained of, the evidence of the event and the expert report will be identical;
- (iv) the only true difference that presents will be in the medical evidence; however, the same psychologist has been instructed for both plaintiffs and Dr O'Connor has been retained by the defendants, so it seems to the court that there is a very low (if any) risk of confusion presenting;
- (v) a custom has arisen in practice whereby proceedings are issued separately in a fatal claim matter and a personal injuries claim is also brought; however, that is but a custom, and here the fatal injuries claim is really a special damages-type claim that does not create any confusion (there is an amount for solatium and an amount for expenses), with the result that by refusing consolidation the court

would in effect be acceding to a separate set of High Court proceedings (and related costs) for what is essentially a related special damages-type claim.

- (vi) the defendants are entitled to seek the consolidation order now being sought under the Rules of the Superior Courts, rather than having to wait for two sets of costs to present.
- (vii) as to the point that the plaintiffs want to sue separately and ought to be allowed to proceed as they, in their discretion, want, that:
 - (a) forms no part of the test in *Duffy* (considered below),
 - (b) would allow the obstructive free licence to be obstructive (this is by way of general point: the court makes no suggestion, nor should its words be construed to suggest, that Ms. Murphy and/or her brother have at any time sought to be obstructive), and
 - (c) would seem to fly in the face of O.49, r.6, RSC which states that a consolidation order may be made "*whether or not all the parties consent to that order*".

5. The leading case on consolidation orders remains the judgment of McCarthy J., for the Supreme Court in *Duffy v. News Group Newspapers Ltd.* [1992] 2 IR 369, McCarthy J. observing as follows, at p. 376:

"On behalf of both parties, counsel are agreed on the legal principles to be applied, citing a number of authorities....The legal principles are:

- (1) *Is there a common question of law or fact of sufficient importance?*
- (2) *Is there a substantial saving of expense or inconvenience?*
- (3) *Is there a likelihood of confusion or miscarriage of justice?"*,

adding as to the common question point:

"This derives from a much quoted observation of Scrutton L.J. in Horwood v. Statesman Publishing Company (1929) 45 T.L.R. 237:

'Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried',

and noting as follows, at p. 379:

"Whilst the wording of the relevant rule is...very wide, that does not mean that it is to be applied widely or that a heavy burden does not lie upon those who seek to

join or consolidate actions. It is a matter of discretion but this Court is free to exercise its own discretion and in an application of this kind is in the same position as the High Court in doing so. I would not order the consolidation of the actions nor a joint trial of them. It does seem appropriate, however, to direct that the actions should be tried in succession and that the trials should be presided over by the same judge."

6. In *Duffy*, as here, the application was brought pursuant to O.49. r.6, RSC.
7. Turning then to the three questions raised in *Duffy* and applying them to the case at hand:
 - (1) Is there a common question of law or fact of sufficient importance?

The commonality presenting between the proceedings is clearly very broad.
 - (2) Is there a substantial saving of expense or inconvenience?

The saving of a full set of High Court costs is a substantial saving of costs, and is not cured by merely linking the proceedings, it can only be cured at this point by the consolidation sought by the defendants (which may well have an effect in terms of the resolution of the actions).
 - (3) Is there a likelihood of confusion or miscarriage of justice?

There is a low (if any) risk of confusion presenting (see para. 4 above). The court does not see any risk of a miscarriage of justice to present.
8. For the reasons stated above, the court will grant the order of consolidation sought by the defendants.