RECENT DEVELOPMENTS

FEDERAL CIVIL PROCEDURE: CONSOLIDATION OF NEGLIGENCE ACTIONS INAPPROPRIATE WHERE LEAD COUNSEL ORDER AGGRAVATES CONFLICT OF INTEREST BETWEEN PLAINTIFFS

IN *Dupont v. Southern Pac. Co.*[1] the Fifth Circuit Court of Appeals held that it was an abuse of discretion for the trial court to consolidate suits initiated by the survivors of the passengers and the driver, especially when the appointment of a lead counsel was also required. Following a railroad crossing collision involving an automobile and one of defendant's trains, separate suits were brought against the railroad by the survivors of the driver and by the survivors of the three other occupants of the car. The trial judge, utilizing his discretionary power under rule 42 (a),[2] consolidated the cases and further required the designation of a lead counsel. Counsel for the passengers objected to consolidation, asserting that the additional issue of contributory negligence in the driver's suit would confuse and prejudice the jury and that, because the passengers intended to prove concurrent negligence, a conflict of interests between the passengers and driver would result. The objection was overruled, although the lead counsel order was modified to provide that at the trial each party might have an opportunity to examine all witnesses. The jury returned four general verdicts in favor of the defendant; thereupon plaintiffs appealed, contending that the order of consolidation was prejudicial and thus an abuse of the trial judge's discretion.

Federal Rule 42 (a)[3] provides as follows:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

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[1] 366 F.2d 193 (5th Cir. 1966), *cert. denied*, 87 Sup. Ct. 1027 (1967).

[2] FED. R. CIV. P. 42 (a).

[3] See generally 2B BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 941-42 (Wright ed. 1961); 5 MOORE, FEDERAL PRACTICE ¶ 42.02 (2d ed. 1964).

The trial judge is thus given broad authority to consolidate cases, for the only specified requirement is that the suits contain a single common question of law or fact; and, in accordance with the stated purpose of the Federal Rules "to secure the just, speedy, and inexpensive determination of every action,"[4] the judge is encouraged to make use of this consolidation power wherever possible and fair.[5] Courts have consolidated actions by different plaintiffs arising out of the same tort,[6] suits involving the naturalization of several aliens,[7] actions challenging the validity of a patent,[8] and numerous claims involving a bankrupt's estate.[9] Since the original consolidation statute of 1813,[10] which provided that courts could consolidate cases where reasonable to avoid unnecessary costs or delay in the administration of justice, the chief purposes in allowing such consolidation have been convenience, justice, and judicial economy.[11] Separate trials are eliminated, time and cost of reduplication of evidence is saved, a more thorough trial is made possible by having all the parties and evidence presented at one time, and inconsistent results from identical or similar evidence are avoided.[12]

Concomitant with these advantages of judicial economy and justice are certain limitations on the power to consolidate. As one commentator has observed, courts, in keeping with the policy of judicial economy, postulate that the actions be capable of reasonably parallel determination,[13] although under the rule suits need contain only a single common question of law or fact to be consolidated.

[4] FED. R. CIV. P. 1. See also Blume, *Required Joinder of Claims*, 45 MICH. L. REV. 797, 803 (1947).

[5] See Popkin v. Eastern Air Lines, 204 F. Supp. 426, 431 (E.D. Pa. 1962), *aff'd*, 376 U.S. 612 (1964); Weitort v. A. H. Bull & Co., 192 F. Supp. 165, 166 (E.D. Pa. 1961). See generally CLARK, CODE PLEADING § 76 (2d ed. 1947).

[6] *E.g.*, Schreiber Trucking Co. v. Rail Trailer Co., 194 F. Supp. 164 (E.D. Pa. 1961); Rando v. Luckenbach S.S. Co., 155 F. Supp. 220 (E.D.N.Y. 1957).

[7] *E.g.*, United States v. Knauer, 149 F.2d 519 (7th Cir. 1945), *aff'd*, 328 U.S. 654 (1946).

[8] *E.g.*, Scovill Mfg. Co. v. Dulberg, 194 F. Supp. 165 (S.D.N.Y. 1960), *aff'd*, 290 F.2d 821 (2d Cir.), *cert. denied*, 368 U.S. 882 (1961).

[9] *E.g.*, Martin v. Campanaro, 156 F.2d 127 (2d Cir.), *cert. denied*, 329 U.S. 759 (1946).

[10] Act of July 22, 1813, ch. 14, § 3, 3 Stat. 21.

[11] See MacAlister v. Guterma, 263 F.2d 65, 68 (2d Cir. 1958); Polak v. Koninklijke Luchtvaart Maatschappij N. V. KLM Royal Dutch Airlines Holland, 19 F.R.D. 87, 88 (S.D.N.Y. 1956). See also Note, 38 IND. L.J. 86 (1962).

[12] See Getz v. Robinson, 232 F. Supp. 763, 765 (W.D. Pa. 1964); Moss v. Associated Transp., Inc., 33 F.R.D. 335, 337 (E.D. Tenn. 1963), *aff'd*, 344 F.2d 23 (6th Cir. 1965).

[13] 30 U. CHI. L. REV. 373, 375 (1963).

Thus, while all of the issues need not be identical, a substantial community of common questions of law or fact is generally required.[14] Even where this test is met, considerations of justice may still forbid consolidation where it would be prejudical to one or more of the parties.[15] As it is conceivable that confusion and prejudice may result almost any time a case involving another party and possibly different issues is added, a literal application of this limitation would, in effect, abrogate the consolidation rule. Therefore, trial courts must balance the likelihood of prejudice and the extent of consequent harm against the benefits of convenience and judicial economy.[16] Only where it is possible that the prejudice created can significantly affect the outcome of the case is consolidation denied.[17] Before arriving at such a conclusion, however, judges often consider the means available to mitigate the prejudice.[18] For instance, in *Gaines v. Racenet*[19] the judge suggested that confusion could be eliminated and a just verdict returned where the court carefully instructed the jury as to the law. Similarly, special verdicts[20] or a general verdict with interrogatories[21] are frequently used to insure that the jury has not become confused.[22] Generally, then, consolidation is disallowed only where prejudice is inherent and cannot be eliminated, such as instances in which a conflict of interests exists between the parties[23] or where factors in one suit, such as a gruesome injury to a party, would likely affect the result in another suit.[24]

In reversing the jury verdicts for the defendants and remanding the case, the Fifth Circuit in *Dupont* seems to have imposed a some-

[14] *Compare* International Prods. Corp. v. Koons, 33 F.R.D. 21 (S.D.N.Y. 1963), *with* Schreiber Trucking Co. v. Rail Trailer Co., 194 F. Supp. 164 (E.D. Pa. 1961).

[15] See Bascom Launder Corp. v. Telecoin Corp., 15 F.R.D. 277 (S.D.N.Y. 1953); Baker v. Waterman, 11 F.R.D. 440 (S.D.N.Y. 1951); 2B BARRON & HOLTZOFF, *op. cit. supra* note 3, § 941, at 177.

[16] See Poulson v. Louisiana, A. & T. Transp. Co., 7 F.R.D. 484 (W.D. La. 1947).

[17] See Atkinson v. Roth, 297 F.2d 570 (3d Cir. 1961); Rankin v. Shayne Bros., 234 F.2d 35 (D.C. Cir. 1956); Miller v. Sammarco, 9 F.R.D. 215 (N.D. Ohio 1949). *Compare* Baker v. Waterman, 11 F.R.D. 440 (S.D.N.Y. 1951), *with* Walker v. Biggs, 7 F.R.D. 78 (E.D. Tenn. 1946).

[18] *Cf.* Capstraw v. New York Cent. R.R., 15 F.R.D. 267 (N.D.N.Y. 1954).

[19] 11 F.R.D. 109 (S.D.N.Y. 1950).

[20] See, *e.g.*, Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965); Getz v. Robinson, 232 F. Supp. 763 (W.D. Pa. 1964).

[21] See, *e.g.*, Plough v. Baltimore & O.R.R., 172 F.2d 396 (2d Cir. 1949).

[22] See Holtzoff, *Entry of Additional Parties in a Civil Action*, 31 F.R.D. 101, 111 (1963).

[23] See Atkinson v. Roth, 297 F.2d 570 (3d Cir. 1961); Capstraw v. New York Cent. R.R., 15 F.R.D. 267 (N.D.N.Y. 1954).

[24] See Baker v. Waterman, 11 F.R.D. 440 (S.D.N.Y. 1951).

what stricter standard by requiring only an initial showing that some prejudice might result in order to disallow consolidation. The court held that the direct conflict of interest between the passengers and driver created by the passengers' contention of concurrent negligence and the confusion caused by the additional issue of contributory negligence in the driver's suit produced such prejudice in the instant case. The court further held that the requirement of a lead counsel prevented either set of plaintiffs from receiving the representation to which each was entitled, since counsel was required to contest contributory negligence on the part of the driver and at the same time to advise the jury that the passengers could recover despite a finding of contributory negligence. Further, the use of general verdicts was viewed as prejudicial because they provide no indication as to the basis for the jury's decision. The dissenting opinion contended that to reverse there must not only be prejudice but also a showing that the substantial rights of the parties were adversely affected.[25] Pursuing this theory the judge concluded that since only the passengers' rights could be infringed by the confusion and probable resultant imputation of contributory negligence to the passengers, the verdict in the driver's suit should be affirmed and only the decision in the passengers' actions reversed.

Considering the trial orders, the type of verdict, and the possible confusion brought about by consolidating suits containing different issues, there probably was sufficient prejudice to require reversing the verdicts. That there was sufficient prejudice, though, was not due to the mere act of consolidation but to the failure of the trial court to compensate for its possible existence. Accordingly, upon retrial separate trials do not seem necessary if such prejudice can be mitigated, although the court's language would suggest that separate trials were required in any event.[26] As stated in *Schreiber Trucking Co. v. Rail Trailer Co.*,[27] "that there are other questions which are not common to all the actions does not remove the right to consolidate." Where no suit or charge of negligence is brought against the driver by a passenger, courts almost always consolidate the actions by the driver and the passenger with no apparent adverse effects.[28]

[25] 366 F.2d at 198 (dissenting opinion).

[26] See *id.* at 196-97, 198.

[27] 194 F. Supp. 164, 165 (E.D. Pa. 1961).

[28] See, *e.g.*, Getz v. Robinson, 232 F. Supp. 763 (W.D. Pa. 1964); Gaines v. Racenet, 11 F.R.D. 763 (S.D.N.Y. 1950); Miller v. Sammarco, 9 F.R.D. 215 (N.D. Ohio 1949). *Contra*, Clark v. Elgin, 25 F.R.D. 248 (N.D. Ohio 1960).

Where, however, an action is brought by a passenger against his driver as well as against the other driver, the suits are usually not consolidated.[29] In that instance there is a direct conflict of interest between the passenger and driver. The *Dupont* case falls somewhere between these two situations, as here the passengers alleged that the driver was negligent but asserted no claim.[30] A mere allegation, however, should not be sufficient to prevent consolidation, since as a practical matter the conflict created is still minimal. The passengers, not having sued the driver, cannot recover from him even if he were negligent, and both passengers and driver must prove the train engineer negligent in order for either to recover. Thus, their interests in this respect are identical.[31] The real danger, as in similar consolidated actions, is the imputation of the driver's possible contributory negligence to the passengers, but such danger should not prohibit consolidation if not accentuated by requirement of a lead counsel and use of general verdicts. The appellate court, adopting the procedure generally followed by trial courts, should not require separate retrials without first considering what different or additional steps might be taken at the trial level to alleviate prejudice and allow consolidation. In this case, if the role of the lead counsel were limited to supervising and coordinating the conduct of the cases,[32] each party would receive more adequate representation, thus reducing the possibility of the jury imputing the driver's contributory negligence to the passengers. Likewise, the use of a special verdict would help insure that the jury had not become confused. Further steps are also available to limit the prejudice which consolidation might create. Efficient use of discovery procedures may narrow the scope of the issues, pre-trial conferences can be used to establish an organized and economical trial plan, and a careful charge by the judge can provide an essential guide for the jury's deliberations.[33] The benefits from consolidation in convenience and judicial economy are so great that only where the outcome probably would be adversely affected even after employing these methods should consolidation be forbidden.

[29] See Atkinson v. Roth, 297 F.2d 570 (3d Cir. 1961).

[30] 366 F.2d at 194.

[31] See Dupont v. Southern Pac. Co., 231 F. Supp. 601, 604 (W.D. La. 1964) (opinion on plaintiffs' application for permission to prosecute their appeals in forma pauperis).

[32] *Cf.* MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958).

[33] 30 U. CHI. L. REV. 373, 379 (1963).