Group proceedings, negligence and res judicata in Scotland.

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Group Proceedings, Negligence and *Res Judicata* in Scotland

McCluskey v Scott Wilson Scotland Limited

[2024] CSOH 4, 2024 SCLR 183
Outer House, Court of Session
Opinion of Lord Clark
23 January 2024

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Introduction

McCluskey v Scott Wilson Scotland Limited[1] brings to the fore the relatively recent changes to the law governing group proceedings in Scotland. Those changes were wrought by the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (the '2018 Act'), which entered into force in July 2020. The case highlights an issue that the legislation might not adequately address. The essence of the case, and this point of arguably unsettled law, concerns the relationship between group and individual rights, and the extent to which one set of rights might be subsumed within the other. Relevant here are the arrangements governing the group action: more specifically, the implications of a decision in a lead case upon other possible actions by group members. Under what conditions, and to what extent, can an individual in a group action take individual steps to ventilate their rights concerning the same subject matter of the group dispute? The Outer House of the Court of Session grappled with some of these issues in *McCluskey*.

Background

The pursuer was one of 44 parties who in 2013 raised an action for damages for negligence against the defender, a civil engineering company. The pursuers were residents of a development in Motherwell. They had allegedly suffered personal injuries from being exposed to vapours from harmful substances suspected to have been present on the land upon which the development was built. They alleged that the defender, which previously had responsibility under various contractual arrangements to investigate and remediate the alleged contamination, had breached its duty of care owed them as residents in respect of the inspection and remediation process.

[1] [2024] CSOH 4, 2024 SCLR 183.

To coordinate the 44 actions, the Lord President issued Practice Direction No 1 of 2013, viz: Personal Injury Actions relating to alleged ground contamination at the Watling Street Development in Motherwell.[2] This was an attempt to facilitate groups of actions with similar claims prior to the 2018 Act and the rules made thereunder. Among other things, the Practice Direction provided that each action would proceed as an ordinary action.[3] Consequently, the pursuers were required to take certain steps in relation to their respective actions. The Outer House identified a lead case, *McManus v Scott Wilson Scotland Limited,*[4] which proceeded to proof before answer in 2020. Two issues were considered: whether the defender owed a duty of care to the pursuers and, if so, whether that duty had been breached. The remaining actions were sisted pending the outcome of *McManus.*

After reviewing the evidence, the Lord Ordinary in *McManus* (Lord Clark) held that the defender owed a duty of care to the pursuers. In his view, there was sufficient proximity between the defender and the pursuers, as residents on the site, for a duty of care to exist between them.[5] The scope of the duty was for the defendant to exercise reasonable care in carrying out its roles under the various contracts for inspection and remediation of the alleged contamination.[6] The Lord Ordinary, however, was not convinced that the defender had breached this duty.[7] Among other things, it had sought and relied on advice from the Regional Chemist in developing and executing its strategy for investigation and remediation. This approach was in line with practice at the time and there was no evidence the defender had assumed responsibility for this advice.[8] An appeal to the Inner House was rejected,[9] and permission to appeal to the Supreme Court was refused.[10]

***McCluskey* - Facts**

Following the disposal of the lead case in *McManus*, McCluskey, a pursuer in one of the other 43 cases which had been sisted, revived her negligence claim against the defender. She was a tenant within the housing development. The defender called the case before the Lord Ordinary (again, Lord Clark) for a diet of debate, contending that the pursuer had no basis to relitigate the issues which had previously been pled and decided in *McManus*. It urged the Lord Ordinary to dismiss the case on the grounds of *res judicata*, irrelevancy and abuse of process. The pursuer, in turn, argued that she was a different person from the two tenants in the lead case. She sued as an occupier of a premises different from that in *McManus,* with a separate legal interest in the subject matter of the action. Further, the pursuer argued

[2] Available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/court-of-session/directions/direction-no-1-of-2013--watling-street-development-cases.pdf?sfvrsn=27e55ed3_12>.
[3] Ibid [4].
[4] [2020] CSOH 47.
[5] Ibid [53].
[6] Ibid [55].
[7] Ibid [56]-[62].
[8] Ibid [59].
[9] [2021] CSIH 37, 2021 SLT 985.
[10] UKSC 2021/0200 (4 August 2022).

that she had additional averments on the issue of causation and an additional breach of duty which was not previously litigated in *McManus*. The debate focused on the three key issues of whether the defence of *res judicata* was available, the question of relevancy, and whether the pursuer's action was an abuse of process.

The Judgment

The Lord Ordinary considered these three issues in turn. As regards *res judicata*, he set out Lord President Cooper's description in *Grahame v Secretary of State for Scotland*[11] of it being '… based upon considerations of public policy equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis'. The key question for the Lord President in *Grahame*, and for the Lord Ordinary in *McCluskey*, was 'what was litigated and what was decided'.[12] As for the question of identity of parties, the Lord Ordinary noted that McCluskey was of course a different person from McManus. She lived in a different property and had her own pecuniary interest. She was required, however, to establish the existence of a duty and a breach of that duty before the court would consider causation and loss. Those were generic issues in which all the pursuers had the same interests such that both cases met this part of the test of *res judicata*.[13] However, the Lord Ordinary considered that the question of the *media concludendi,*[14] was more open. He found that there were different grounds underpinning this new claim which were distinct from what had previously been litigated.[15] Accordingly, whilst he agreed with the defender that the interests of the parties were sufficiently coterminous to satisfy the first part of the test on *res judicata*, the Lord Ordinary upheld the pursuer's argument that the *media concludendi* in her case was not the same as it was in *McManus*.

The Lord Ordinary then considered relevancy. This is a plea which asserts that, even if the pursuer may prove all the facts they have averred, their case nevertheless would be bound to fail, and therefore should be dismissed summarily. On examining the further averments and new breach of duty alleged by McCluskey, he could not entirely dismiss the case as irrelevant. The new averments could influence or affect the outcome of McCluskey's case compared to that in *McManus*.[16]

Turning to abuse of process, Lord Clark noted that dismissing a case on this basis was a draconian power, to be used only as a last resort.[17] He accepted that abuse of process was, in Scotland, capable of being used to dismiss an action 'in circumstances in which a group of related actions have been the subject of case-management under a Practice Direction and a lead action has proceeded and been finally

[11] 1951 SC 368 (IH) 387.
[12] *McCluskey* (n 1) [25].
[13] Ibid [27].
[14] On this term, which may not be susceptible to precise definition, see ibid [29] and cases there cited.
[15] Ibid [29].
[16] Ibid [31].
[17] Ibid [32].

determined…'.[18] However, he held that he was unable to conclude that the action should be summarily dismissed as an abuse of process, again given that the further averments and additional alleged breach of duty meant that McCluskey's case was not entirely on all fours with the decision in *McManus*.[19]

Discussion - What Has Changed and What Might Not Have?

What has Changed

The decision in *McCluskey* gives insight into what has changed regarding group proceedings in Scotland, and what might not have. As to what has changed, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 introduced a specific set of rules governing group proceedings. As is evident from *McCluskey*, a form of such proceedings pre-dated the 2018 Act, but this required the making by the Lord President of bespoke Practice Directions to consolidate and guide proceedings. A degree of dissatisfaction with the informal nature of the procedures on multi-party actions ultimately led to the 2018 Act. The Act sets out the basic framework for group litigation in Scotland.[20] Section 20 establishes group proceedings and permits a person, referred to as the 'representative party', to bring group proceedings. The specific procedural rules relating to group proceedings were produced in 2020. The Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Group Proceedings) 2020[21] introduced a new Chapter 26A into the Rules of the Court of Session[22] ('the Rules').

A notable facet of the 2018 Act relates to how a group is formed. Section 20(7) provides for the creation of opt-in, opt-out, and either opt-in or opt-out proceedings. The distinction is relevant, in part, as regards the nature and effect of a party's consent to be part of a group. Part 4 of Chapter 26A of the Rules provides for opt-in proceedings, which requires that a group proceeding be brought with the express consent of each group member. That consent can be withdrawn in writing by a party serving the required notice. One consequence of that consent – of relevance in *McCluskey* – is that interlocutors made in group proceedings will bind all group members, except those who withdraw from the group prior to a court order.[23]

The binding nature of the outcome of group proceedings under the 2018 Act was alluded to in *McCluskey*, where the Lord Ordinary noted that the implication of Rule 26A.8(1)(b) was that the outcome of a group proceeding is binding on all group members. In so far as is relevant, the rule provides '… an interlocutor given in group proceedings… (b) binds all such persons, other than any person who has, at the date of the interlocutor, withdrawn their consent to their claim being brought in the proceedings'. The Lord Ordinary distinguished this position from the Practice Direction authorising

[18] Ibid [34].
[19] Ibid [35].
[20] See generally J Mante and P Arnell, 'Group Proceedings in Scotland' 2023 Scots Law Times (News) 93.
[21] SSI 2020/208.
[22] Act of Sederunt (Rules of the Court of Session 1994) 1994, SI 1994/1443, Schedule 2.
[23] Ibid Chapter 26A, Rules 28(1)(a) and (b)

the group proceedings in *McManus,* noting that there was no express term or agreement that the decision in *McManus* would be binding on all group members.[24] As seen, this distinction had only a partial impact in the case, because the court held in any event that it was inappropriate for generic issues previously litigated in *McManus* to be relitigated in the new case of *McCluskey*.[25] The Lord Ordinary found that such 'duplication' will be 'entirely inappropriate' and 'unacceptable'.[26] Generic issues, it was held, could not be relitigated, but McCluskey's action was not barred to the extent that it raised additional averments.

What Might not Change

The decision on generic versus additional averments brings to the fore what might not change following the 2018 Act. This is the effect of the rules on *res judicata* in group proceedings as it appears that neither they, nor the relevant parts of the 2018 Act and amended Rules, will prevent dissatisfied pursuers from relitigating their individual cases after judgment in the lead case. [27] As seen in *McCluskey,* the rules on *res judicata* did not prevent the pursuer's action from proceeding. Therefore, neither the new legislative regime nor the current Scottish rules on *res judicata* appear to provide adequate safeguards against parties to group proceedings relitigating individual claims in certain circumstances. This fact has potential to jeopardise some of the underpinning rationale for the introduction of group proceedings in Scotland, such as swift resolution of disputes and efficient and proportionate use of resources. That noted, in certain cases the opportunity to relitigate may further the interests of justice.

A party pleading *res judicata* in Scots law must satisfy several requirements, namely that: (i) the earlier decision was made by a court of competent jurisdiction in *foro contensio* (after an appropriate court process); (ii) the subject matter of the two actions must be substantially the same; (iii) the parties in the first and second actions must be identical or have same interest; and finally, (iv) that the *media concludendi* (means of concluding) in the two actions must be identical.[28] 'Same parties' and 'same subject-matter' are not to be construed narrowly or too strictly. The courts look at the 'essence and reality of the matter rather than the technical form'.[29] It is enough if the interests of the parties in both actions are the same.[30]

Of all the requirements, *media concludendi* is most difficult to define. In *Primary Health Care Centres (Broadford) Ltd v Ravangave,*[31] Lord Hodge identified the different shades of explanations of the term

[24] *McCluskey* (n 1) [17]-[18], [23].
[25] Ibid [37].
[26] Ibid.
[27] The focus of this note is on the effect of res judicata following the 2018 Act, but noted that relevancy and abuse of process also play roles in stopping duplicative and vexatious actions.
[28] *Primary Health Care Centres (Broadford) Ltd v Ravangave* [2009] CSOH 46, 2009 SLT 67 [21], citing T Welsh (ed) *MacPhail*'s *Sheriff Court Practice* (W Green, 3rd ed 2006) [2.104]–[2.109].
[29] *Grahame* (n 11) 387.
[30] *Glasgow and South-Western Rly Co. v. Boyd & Forrest,* 1918 SC (HL) 14 at 28.
[31] (n 28) [23].

media concludendi from various authors.[32] These include points in controversy between the parties, grounds of action (allegations on which a pursuer seeks to have a decree pronounced), claims, or issues. What does appear to be the case is that parties to group litigation who do not like the outcome of a decision in a lead case can, under certain circumstances, relitigate on an individual basis.

The position in Scotland on *res judicata* differs from the approach taken by the courts south of the border.[33] Parties in Scotland, in appropriate circumstances, have liberty to bring the same action if they can demonstrate that the *media concludendi* in the new action is distinct from that put forward in previous proceedings. In *Phosphate Sewage Co*, Lord Blackburn noted that 'the plaintiff in the action is not obliged to join all his *media concludendi* in one suit; if he has one *medium concludendi*, and fails in proving that he may start another, and that whether or not he knew of it at the former time, provided it be a separate medium concludendi'.[34] In *Primary Health Care Centres (Broadford) Ltd v Ravangave*[35]*,* Lord Hodge dispelled the notion that the decision in *Glasgow and South-Western Railway v Boyd & Forrest*[36] had aligned Scottish law with the English position in *Arnold v National Westminster Bank plc*[37] and *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd*[38] and held that in Scotland, the general rule remains as stated by Lord Blackburn in *Phosphate Sewage Co*.[39] This position gives pursuers involved in group proceedings a 'glimmer of hope' that if they can find a *medium concludendi* which was not in issue in earlier group proceedings, a fresh step could be taken to relitigate that point.

The decision in *McCluskey* illustrates that relitigation may not be prevented under the new rules on group proceedings in Scotland because of the approach taken to *res judicata*. With the pursuer alleging a further breach of duty and including additional averments on causation she was able to overcome the defender's arguments, not all of which were upheld. The Lord Ordinary stated that 'the pursuer's averments in this case in relation to existence of duty and breach of duty have a substantial degree of similarity'.[40] The Lord Ordinary also admitted the parties had not addressed him on the pursuer's specific averments 'to show whether or not the outcome could differ from that in *McManus*'.[41] Indeed,

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[32] ibid, referring to *McPhail*'s *Sheriff Court Practice* (n x), Lord Trayner, *Latin Maxims and Phrases,* and Paul Beaumont, '*Res Judicata* and Estoppel in Civil Proceedings'1985 Scots Law Times (News) 133.
[33] As regards English law, in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2013] UKSC 46, [2014] AC 160, the Supreme Court held, at [22], that *res judicata* (known in English law as 'cause of action estoppel') 'bars raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence, and should in all circumstances have been raised' (Lord Sumption).
[34] (1879) 6 R (HL) 113, 121.
[35] (n 28).
[36] (n 30) at 28.
[37] [1991] 2 AC 93.
[38] [2013] UKSC 46.
[39] (n 34) at 23.
[40] *McCluskey* (n 1) [14].
[41] Ibid [16].

applying *Grahame* and *RG* v *Glasgow City Council*[42], the Lord Ordinary held that the interest of the parties in *McManus* and *McCluskey* were sufficiently similar, in that they shared a common interest. With these findings, an English court applying English law would have most likely concluded that there was cause of action estoppel. In *McCluskey*, however, Lord Clark took a different view. He found that a matter that is omitted is not part of the same *media concludendi,* even if the matter was wrongly omitted.[43] Consequently, he held that the *media concludendi* requirement had not been met.[44]

Conclusion

McCluskey has implications for group proceedings in Scotland under the 2018 Act and Rules. Parties can seemingly choose which causes of action to litigate now and could start new claims as individual pursuers if they so wish. Whilst public policy and the remedy of abuse of process may militate against this, neither the 2018 Act nor *res judicata* appear to offer a foolproof basis for stopping such actions. Accordingly, determination of these issues under the 2018 Act would be welcome. However, this may not happen for some time: whilst group proceedings have commenced, progress to date has been slow. As things stand, questions remain over the effect of consent under the Rules (especially where group members have had no input into the management of the lead case) and whether the approach to *media concludendi* freely enables dissatisfied group members to relitigate their case independently.

Postscript

The First Division, Inner House (per Lord President Carloway, Lord Malcolm and Lord Pentland) delivered its decision in a reclaiming motion (appeal) on the issue of plea of *res judicata* 28 August 2024. As discussed above*,* the Lord Ordinary (Lord Clark) had held previously that the plea of *res judicata* failed on the ground that the *media concludendi* in *McManus* and *McCluskey* were distinct. The defenders/reclaimers challenged that conclusion. In answering whether the *media concludendi* was the same or distinct, both Lord Clark (Outer House) and Lord President Carloway (Inner House) agreed that the key question is 'what was litigated and what was decided'.[45] Both relied on the same legal principles and authorities but, notably, arrived at different conclusions. Lord Carloway, interpreting the averments in *McManus* and *McCluskey,* concluded that the *media concludendi* in the two cases were the same.[46] The additional arguments put forward by the pursuer in *McCluskey* did not 'change the essence of what was litigated'.[47]

[42] 2020 SLT 65.
[43] *McCluskey* (n 1) [29].
[44] Ibid.
[45] *McCluskey* (n 1) [25]; *McCluskey v Scott Wilson Scotland Ltd* [2024] CSIH 26, [37]
[46] *McCluskey v Scott Wilson Scotland Ltd* [2024] CSIH 26, [37]-[40]
[47] Ibid [39]

The Inner House decision in *McCluskey* by Lord President Carloway brings to the fore the opacity of what constitutes *media concludendi,* and by extension what will satisfy the requirement of *res judicata* in Scots law. Whilst the judgments in both cases agreed on the law they differed on its interpretation and application. Lord Carloway emphasised the essence of what was litigated and what was decided. Lord Clark, on the other hand, appeared to give more weight to what was pleaded and what was concluded. One conclusion that can be drawn is that it remains distinctly possible that in appropriate circumstances an unsuccessful party to group proceedings could re-litigate aspect of a claim if they are able to satisfy a judge that the *media concludendi* in the previously decided group proceeding is sufficiently distinct in essence from that pursuer's claim.

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