OUTER HOUSE, COURT OF SESSION

[2026] CSOH 48

GP8/25
GP9/25

OPINION OF LADY HALDANE

In the causes

STUART MCKENZIE

Applicant

against

COVIDIEN LP

Respondent

Applicant: R Miligan KC, A Black; Thompsons Scotland LLP
Respondent: A Smart KC, R Anderson; DLA Piper Scotland LLP

29 May 2026

Introduction

[1] Stuart McKenzie has applied to this court for permission to bring group proceedings on behalf of (currently) 83 other individuals who all underwent treatment for various types of hernia using mesh products manufactured by the defender. He applies also, and separately, for authorisation to be a representative party in these proposed proceedings. The respondent objects to both the grant of permission in terms of section 20(5) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 for the proposed group proceedings to be brought, and to the grant of authorisation to Mr McKenzie in terms of section 20(3)(b) of the 2018 Act to be a representative party.

[2] The summons lodged contains two conclusions, firstly for declarator that the defender was negligent in its design, manufacture and marketing (read short) of a number of named mesh products, and also that such products were not as safe as persons generally are entitled to expect. The second conclusion is for payment of damages to the representative party of the pursuers.

The relevant legal framework

[3] Section 20(6) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which deals with the circumstances in which the court may grant permission for the institution of group proceedings, provides inter alia as follows:

> "(6) The Court may give permission—
> (a) only if it considers that all of the claims made in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to, each other,
> (b) only if it is satisfied that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings, and
> (c) in accordance with provision made in an act of sederunt under section 21(1)."

[4] Chapter 26A of the Act of Sederunt (Rules of the Court of Session 1994) 1994/1443, which was made in exercise of the powers provided by section 21(1) of the 2018 Act and regulates the procedure in group proceedings in the court, provides inter alia as follows:

> "26A.11.— The permission stage 26A.11(5). The circumstances in which permission to bring proceedings to which this Chapter applies may be refused by the Lord Ordinary are as follows—
> (a) the criteria set out in section 20(6)(a) or (b) (or both (a) and (b)) of the [2018] Act have not been met;
> (b) it has not been demonstrated that there is a prima facie case;
> (c) it has not been demonstrated that it is a more efficient administration of justice for the claims to be brought as group proceedings rather than by separate individual proceedings;
> (d) it has not been demonstrated that the proposed proceedings have any real prospects of success."

[5] So far as the appointment of a representative party is concerned, Rule 26A.7(1) provides that the court must be satisfied that the applicant is a suitable person to act in the capacity of the representative party. Rule 26A.7(2) identifies a number of factors which are to be considered by the court in determining suitability. Those factors are:

> "(a) the special abilities and relevant expertise of the applicant;
> (b) the applicant's own interest in the proceedings;
> (c) whether there would be any potential benefit to the applicant, financial or otherwise, should the application be authorised;
> (d) confirmation that the applicant is independent from the defender;
> (e) demonstration that the applicant would act fairly and adequately in the interests of the group members as a whole, and that the applicant's own interests do not conflict with those of the group whom the applicant seeks to represent; and
> (f) the demonstration of sufficient competence by the applicant to litigate the claims properly, including financial resources to meet any expenses awards (the details of funding arrangements do not require to be disclosed)."

[6] As to how these provisions should be interpreted and applied in practice, two recent decisions of the Inner House in *Mackay* v *Nissan Motor Co Ltd* 2025 CSIH 14 and *Milligan* v *Jaguar Land Rover Automotive plc* 2025 CSIH 16 provide authoritative guidance in that respect. The following propositions may be drawn from the decision in *Mackay* in particular; firstly, that the decision is a discretionary one with which an appellate court will not lightly interfere (*Mackay*, paragraph [76]); secondly the exercise of such broad and discretionary case management powers requires a pragmatic and realistic approach to be adopted with a particular emphasis being given to ensuring that the underlying policy, aim and purpose of the 2018 Act are given proper effect. The clear objective of the 2018 Act is to increase access to justice by creating a new procedure designed to enable similar claims to be grouped together so that they no longer had to be brought individually. The procedure is intended to be streamlined and efficient. The court is expected to handle group claims in a flexible and cost-efficient manner (*Mackay* paragraph [73]); thirdly that the determination of such

applications must not become ensnared in technicality or the exploration of detailed questions of fact or law. Technical points should not be allowed to get in the way, particularly at the outset of proceedings (*Mackay* paragraph [75]).

[7] Other relevant considerations, the court held in *Mackay*, were as follows: The existence of a prima facie case requires no more than the appearance of a serious question to be tried; a case to argue and a case to answer. That does not involve examination of questions of relevancy and specification of averments, which should be dealt with after the pleadings have been finalised, not at the stage of a preliminary application. The test of there being real prospects of success is similarly not an exacting one. The prospects have to be genuine as opposed to being speculative or fanciful: paragraph [89]. The preliminary nature of the application means that all substantive legal issues should be left for determination later; these are not suitable for resolution at the outset of the proposed proceedings: paragraph [90].

[8] So far as the appointment of a representative party is concerned, the following considerations are relevant and are drawn from paragraph [77] of *Mackay*:

> "The matters specified in RCS 26A.7(2) are ones which the Lord Ordinary is required to consider when deciding whether or not the applicant is a suitable person, but this does not mean that the applicant requires to tick off each and every one of these requirements in order to demonstrate that he is so suitable. That would involve an unrealistically prescriptive and inflexible approach. There is only one overriding requirement, that of suitability. Whether or not an applicant is suitable must be assessed in a holistic fashion, taking account of all the relevant features of the particular case and having regard to the considerations mentioned in RCS 26A.7(2). The issue is one to be addressed in the round."

[9] With those legal principles as the framework I turn now to consideration of each sides' submissions. As it was correctly submitted, each of these applications requires separate consideration, as they do not necessarily stand or fall together. I begin therefore with parties' competing contentions on the appointment of the representative party.

Appointment of representative party - the applicant's submissions

[10] Mr Milligan reiterated the proposition emerging from the authorities cited above, that the list of requirements set out in the Rules of Courts as requiring consideration in an application for appointment as a representative party was not exhaustive, and nor were the requirements mandatory. Rather they were simply considerations that should be taken into account in determining whether an applicant was a suitable representative party. He contended that in the present case, only point f - the competence of the proposed party and their financial resources - was seriously in dispute. Whilst he understood the defenders intended to approach this matter as though it were a mandatory requirement, in fact, Mr Milligan submitted, the proper approach is that where a proposed representative is represented by responsible counsel and reputable agents, not much more is required. In the present case Mr McKenzie could go further and point to funding provided by Quantum Claims.

[11] It should be remembered that this was always an anxious process and there were often not many people willing to assume the role of representative party, which was an important consideration, however in the present case the affidavit provided by the representative party demonstrated that he was well qualified to take on the role. In any event, Mr Milligan pointed out, the cases were all personal injury cases and as such covered by Quocs (qualified one-way cost shifting), so there was unlikely to be an adverse award of expenses even if the actions were unsuccessful. In similar proceedings (*Donnelly* v *Johnson and Johnson Medical Ltd* [2025] CSOH 77) the court had no difficulty in being satisfied that the proposed representative party was suitable.

[12] In summary, an unduly restrictive approach to the question of suitability undermined the policy objectives underlying group proceedings. The overriding test was suitability which has to be assessed in a holistic fashion, and there were appropriate safeguards in place should any problems with the proposed representative party arise.

Appointment of representative party - respondent's submissions

[13] Miss Smart, on behalf of the respondent, took no issue with the relevant tests as set out in the applicant's note of argument. However, the fundamental difficulties arose in relation to the selection process, and funding, with an overarching issue in relation to commonality which was relevant to both applications. Put another way, the question that arose was whether the commonality is such that the proposed representative party could properly represent the interests of the whole group. For example, the representative party had received treatment with a polyester "ProGrip" product whereas others had received treatment with different types of mesh product, and it was not at all clear that he could be an appropriate representative for those who had not had such products implanted. If, as an aspect of case management, a decision was taken to divide the claimants into sub groups according to the product implanted, could it be said that the representative party could continue to represent the whole group?

[14] Further questions arose when the issue of prescription was considered - the representative party had surgery in 2013 and so would be affected by the 10-year statutory limitation period and would only have a common law claim at best, which was another issue undermining his suitability. So far as funding was concerned, Miss Smart observed that having regard to the most recent accounts of the litigation funder it appeared that no provision had been made for contingent liabilities such as those that might arise from the

present litigations, which she suggested was surprising. In summary there were sufficient legitimate concerns arising from the lack of commonality as between the representative party and the other claimants, as well as the different considerations so far as the question of prescription and limitation was concerned, to permit the conclusion that the representative party was not suitable for appointment.

Analysis and decision on the application for appointment of a representative party

[15] The Court of Session has now had the benefit of a number of applications for appointment of representative parties and allied applications for permission to bring group proceedings under the 2018 Act. Many applications have been opposed at the permission stage, as well as opposition advanced to the appointment of the proposed representative party. Appeals against the grant of permission and/or the appointment of a representative party have been examined by the Inner House. What emerges from a consideration of the available first instance and appellate decisions is a clear understanding of the purpose and aims of the policy backdrop to this legislation; read short, that this procedure should be flexible, efficient, and applied in a way consistent with the broad policy aims of creating greater, more efficient and more cost effective access to justice than would be possible if litigants were obliged to raise individual proceedings. A broad and flexible approach should be adopted with a view to bringing down, rather than putting up, barriers to justice.

[16] So far as the appointment of a representative party is concerned, the authorities confirm that this question should not be approached in a rigid, tick box fashion, and that a holistic approach is required. Factors such as the proposed party being represented by responsible counsel and solicitors are important. The question of funding is also significant, however in the present case the respondent did not demur from the proposition that these

are cases to which Quocs would apply and so concerns around that issue are less acute than they might be in other cases. The proposed representative does not contend that he has any special skills or experience in the conduct of litigation, but it is not mandatory that he do so, having regard to the factors identified above. There is no suggestion or evidence put forward that he would not act responsibly upon advice tendered. He has no interest in proceedings other than his own personal interest, and it has not been suggested that he stands to benefit in any other way from acting as representative party. He has no connection to the defender. The respondent has raised concerns around time bar and prescription, and the fact that the proposed representative had a different product implanted compared to others in the group. The former issue is one that will have to be addressed but is not directly relevant to the question of suitability. On the second issue, whilst that may present case management issues in due course, and will also have to be addressed, once again it is not an issue that fundamentally undermines the suitability of the applicant for the role for which he has applied. In short, I cannot identify a relevant impediment to the applicant's suitability that militates against his appointment, and, having regard to the terms of the relevant legislation and appellate interpretation thereof, I am satisfied that the applicant meets the relevant criteria and I shall accordingly grant the application.

Permission to bring proceedings - submissions for the applicant

[17] Mr Milligan readily acknowledged that the key issue for consideration in deciding whether permission should be granted to bring group proceedings was the issue of commonality. However, that question had to be considered against the relevant principles to be drawn from the 2018 Act and the relevant Rules of Court, in particular that the issues do not require to be identical, only similar or related. The test for there being a prima facie

case and assessing the prospects of success were both set at a low bar at this stage. He accepted that in due course there would require to be subsets of cases but that was equally true in the cases involving car emissions which were pending before the court and that had not been an impediment to them proceeding.

[18] In the proposed group of cases, all the products involved were mesh products, and manufactured by the same manufacturer. Whilst they had different names and had different characteristics it was not controversial that any mesh implanted in the body can give rise to problems. However, the contention at the heart of these cases related to the "dose" of mesh implanted in these products - in other words, that the more mesh that is implanted, the more likely it is that problems will occur such as erosion and contracture. What was clearly common to all of the cases, and which would be explored through the same evidence was the known complications of using mesh products and the data available on that question. Similarly common questions would arise as to what can be done to reduce the risks arising from anything more than the most basic dose. Those common issues would then be tested by comparing the products with each other as well as with a baseline product.

[19] In any event having regard to questions of efficiency and the administration of justice, the application clearly met that test. There were 83 cases listed in the proposed group register. The flexibility and broad case management powers available in the Court of Session using the group proceedings provisions were clearly more suitable than requiring the individual pursuers to raise separate actions in the Sheriff Court, which would be the appropriate forum having regard to the likely value of each case in isolation. In short, the application met all the essential criteria and permission should be granted.

Permissions to bring proceedings - respondent's submissions

[20] Miss Smart opposed the grant of permission. She concurred in Mr Milligan's view that the primary (though not sole) factor militating against the grant of permission was the lack of commonality between the various cases. She explained that the various members of the proposed group register had had different products implanted, albeit all manufactured by the respondent. The products included mono filament and multi filament mesh. The respondent had the benefit of an expert report from Dr Wright who advised that there is an infinite combination of the type of mesh chosen by the surgeon depending on the location and type of hernia involved. This was in contrast to mesh used to treat stress urinary incontinence or pelvic organ prolapse where the physical location of the implants were the same across all products. A similar point could be made in relation to the cases involving metal on metal hip implants. In contrast, hernia mesh was entirely different, and was a gold standard procedure used over many years in different parts of the body. Therefore, the group of pursuers was more heterogenous than in the pelvic mesh or hip cases.

[21] This lack of commonality was amplified by the suggestion that cases could be put into subdivisions or groups. Whilst this had been done in cases relating to car emissions, cars could easily be grouped by, for example model, engine type or software types, but the same could not be done in hernia mesh cases. This was due to the fact that every person undergoing, for example, an inguinal hernia repair with mesh would be different physiologically from another person undergoing the same procedure with the same mesh. That gave rise to what Miss Smart described as a "fundamental problem" in cases involving medical products. It precluded the necessary fundamental analysis and description of what it is the group is founding on by way of defect or breach of common law duty. That had to be done so that a convincing picture can be presented of the underlying logic of the group.

It was instructive, suggested Miss Smart, that there had been no Group Litigation Orders in England involving medical products since cases involving hip implants in 2015. The reason for that, she suggested, was the fundamental difficulties she had outlined.

[22] Miss Smart amplified her argument to suggest that it would be difficult to find a "read across" from a decision in the group relating to the product in question to any of the manufacturer's other products. It was difficult to determine what the relevant question would be that the court was being invited to answer. The expert report by Dr Iakovlev produced and relied upon by the applicant did not provide a consistent comprehensible basis to say each of the 83 cases in the register raised the same or similar questions of fact and law. In short, this was a scenario where a wholly disparate group of products were being brought together despite being used in different situations. Miss Smart then provided an analysis and critique of the competing experts positions and made observations on the lack of specificity in the summons, incorporating the report from Dr Iakovlev, as to exactly what the defect asserted was. The requisite level of analysis of these key issues was what was absent in the present case, and what had similarly been absent in *Donnelly* where the court had refused to grant permission. Unless a clear prima facie case could be demonstrated then the application must be refused.

[23] Miss Smart reiterated issues around time bar and prescription that arose in many of the proposed cases and which would necessitate individual inquiry in the case of each pursuer, again all as militating against the suitability of these cases for group procedure. Whilst Miss Smart conceded that there were case management advantages if one were dealing with a homogenous group, the lack of commonality taken together with the prescription and limitation issues in particular presented an insuperable hurdle to the suitability of the present cases for this procedure.

[24] On more practical matters, Miss Smart also highlighted that there were issues in relation to the orders sought at paragraph 48 of the applicant's note of argument, querying whether the proposed name of the group would be sufficient to encompass all who had had these devices implanted, suggesting that there would need to be a definition by reference to a product or products. Even if the court were minded to grant permission, these were all issues that would require to be focussed before proceedings could commence. In that event, Miss Smart suggested that the matter should be put out By Order to address these points, as well as the initial timetable for defences. She emphasised that this was very much an *esto* position, and maintained, for all the reasons stated, her opposition to permission being granted at all.

Analysis and decision on the application to bring group proceedings

[25] It was the respondent's broad position that the nature of these proceedings, involving medical products implanted in human beings, with all of the potential for varying and idiopathic issues of causation made them unsuitable for this sort of procedure. Certainly it is true that these actions raise different and arguably more challenging issues in terms of establishing either negligence or a statutory defect within the meaning of the Consumer Protection Act 1987, and causation of loss, than might be presented by cases involving inanimate objects such as cars. But it is not unreasonable to assume that had Parliament considered that product liability cases involving medical devices were fundamentally unsuitable for this sort of procedure, that it would have made that clear within the terms of the legislation. Cases involving alleged defects in medical devices have been pursued in various jurisdictions using their equivalent of this procedure. Miss Smart is of course correct to point out that cases involving hip implants, for example, relate to one

part of the body, as did, in general terms, litigation involving pelvic mesh. But nowhere in the legislation or the relevant rules of court is the test for permission viewed from that perspective - that is to say that in the case of medical products or devices, the commonality must relate to the same part of the body. The test for permission is deliberately flexible and non-prescriptive, consistent with the overarching public policy aims of the legislation to increase access to justice. So far as the alleged lack of comparable cases in our closest neighbouring jurisdiction is concerned, it would not be appropriate to speculate why that might be so, but the answer is likely multi-factorial, and in the end of the day not directly relevant to the test to be applied in this jurisdiction.

[26] With that in mind, I acknowledge that many of the criticisms made by Miss Smart in relation to questions of prescription or limitation that might arise, or the likely requirement to group the cases by product or composition will undoubtedly present challenges from a case management perspective. High levels of focussed preparation, as well as cooperation between the parties will be essential. On that vein, there was much force in the points made by Miss Smart in relation to the orders sought in the first instance by the applicant, and that too, will require to be addressed. However, ultimately, these are all issues for further down the line. The key and only question at this stage is whether the test for granting permission at this stage has been met.

[27] On the question of commonality, the statutory test is whether the proposed proceedings raise issues that are the same as, or similar, or related to each other. The issues are not identical, that much is true. The group members had a variety of mesh products implanted to treat various types of hernia. The common factor is that all were manufactured by the respondent. However, the overarching issues are similar, or related to each other, that is to say whether the defender manufactured and/or promoted these

products either negligently or when they were not as safe as persons generally were entitled to expect. That is a serious issue capable of being tried, although that is not to ignore significant issues of specification and relevancy that will no doubt give rise to challenge, if not addressed. The prospects, whilst not certain, are more than fanciful.

[28] There was no substantive challenge to the proposition that managing these cases in a group would not be a more efficient administration of justice than for them to be raised individually in the Sheriff Court. I can see no sound reason not to grant permission having regard to that particular criterion. Whilst the numbers in the group register are less than 100, and certainly far short of the numbers in some comparable group proceedings, there can be no doubt that attempting to pursue over 80 individual product liability cases, with the associated cost and complexity, giving rise to the possibility of conflicting decisions, depending where the cases are raised, is not commensurate with the efficient administration of justice.

[29] For all of the foregoing reasons, I will grant the application for permission to bring group proceedings. However, both parties invited me, in that scenario, to put the matter out By Order so that more focus can be brought to the orders actually sought at this stage. I concur that it will be necessary to do so, as well as for the defender to make any ancillary motion so far as the lodging of defences is concerned. I will accordingly put this matter out By Order for those purposes.