EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2013] CSIH 28

A773/10

OPINION OF THE COURT

delivered by LORD BRODIE

in the Reclaiming Motion

by

MARK SMITH

Pursuer and Reclaimer;

against

SABRE INSURANCE

Defenders and Respondents:

_____

Lady Paton

Lord Brodie

Lord Philip

Act: Hofford QC; Thompsons

Alt: Moore QC (sol adv), McNaughtan; HBM Sayers

9 April 2013

Introduction

[1] This is a reclaiming motion against an interlocutor of the Lord Ordinary dated 24 January 2012 sustaining the first plea-in-law for the defenders and respondents which was to the effect that the subject matter of the action is *res judicata*, and consequently assoilzing the respondents from the conclusions of the summons.

Facts as averred

[2] The pursuer and reclaimer is Mark Smith. On 24 March 2009 the reclaimer was driving his BMW 530D motor vehicle, registration number PL02 YXJ on the A811 road near Drymen when a Fiat Punto motor vehicle drive by Robert Holmes turned into the reclaimer's path and collided with the reclaimer's vehicle. It is accepted that the collision was caused by the sole fault of Mr Holmes. At the material time Mr Holmes was insured in respect of motor risks by the respondents. Accordingly in terms of regulation 3 of the European Communities (Rights against Insurers) Regulations 2002, the reclaimer was entitled to sue the respondents, and the respondents were liable to make reparation to the reclaimer, to the same extent as they were liable to indemnify Mr Holmes in respect of the reclaimer's right to reparation against him.

[3] As a result of the collision the reclaimer's BMW motor vehicle sustained extensive damage with the result that the reclaimer was denied its use. In this action the reclaimer sues for certain losses consequential on the damage to his vehicle. These are set out in statement 4 of condescendence as follows:

"As a result of the collision the Pursuer suffered loss and damage. His vehicle sustained extensive damage. His vehicle was written off and he was accordingly denied the use and amenity of the vehicle until he was in funds in respect of the pre accident value of his vehicle. The Pursuer entered into a Credit Hire Agreement with Accident Exchange Limited, Alpha 1, Canton Lane, Hams Hall, Coleshill, West Midlands, B46 1GA. During the period of repair they provided the Pursuer with a replacement vehicle. The Pursuer was able to achieve an excess of nil in his agreement with Accident Exchange by adding waivers and additional charges to the basic hire rate offered by Accident Exchange. He is further contractually obliged to meet Accident Exchange's hire costs for the replacement vehicle, including credit hire rates, waivers charges and interest on all sums until payment. But for the accident and the negligence of the defender, the Pursuer would not have incurred any of these costs or losses. In all of the circumstances the sum sued for is a reasonable estimate of the Pursuer's loss and damage.

For the avoidance of doubt the Pursuer seeks compensation for the following specific losses, charges and expenses:

1. Hire Charges - £26,550.98

2. CDW - £1,337.50

3. Satellite Navigation Charge - £802.50

4. Delivery and collection - £100

5. VAT - £4,318.65

6. Inconvenience - £100"

It is convenient to refer to these items of damage as a "loss of use claim".

[4] The present action was signetted on 10 December 2010. The basis of the respondents' plea of *res judicata* appears from their averments at answer 1. These are as follows:

"Explained and averred that the pursuer has already raised proceedings in Stirling Sheriff Court (Case number PD57/09) against the defenders for loss, injury and damage arising out of the road traffic accident on 24 March 2009 on A811 Drymen, with which the present action is concerned. The pursuer obtained decree against the defenders on 4 May 2010 for the sum of £4,550, together with expenses on the summary cause scale."

In responding to these averments the reclaimer explains that what he refers to as the "Stirling action":

"...related to payment of compensation claimed by Mark Smith for solatium, loss of earnings and in terms of section 8 of the Administration of Justice (Scotland) Act 1982 arising from personal injury suffered by him in a road traffic accident on 24 March 2008 on A811 at Drymen."

[5] The reclaimer incorporates into his pleadings certain correspondence to which either Accident Exchange Limited ("AEL") or solicitors acting on his behalf (Messrs Thompsons) were party. By letter dated 10 April 2009 Messrs Thompsons requested the respondents to note their position as solicitors instructed on behalf of the reclaimer who had suffered damage as a result of a road traffic accident on 24 March 2009. The respondents replied by letter dated 14 April 2009 advising that they had already received notification of an interest on behalf of the reclaimer from Gorman Hamilton, solicitors, and then by letter dated 28 April 2009 that Messrs Bonnar & Co, solicitors, had intimated their interest on his behalf. Thompsons responded by email of 29 April 2009 advising that:

"Bonnar & Co are representing Mark Smith in relation to his personal injury claim only. We are instructed in relation to the loss and damage which Mr Smith has sustained. As previously advised, we are carrying out quantum investigations and shall provide you with a full breakdown in due course."

AEL intimated the claim which is the subject of the present action directly to the respondents by letter dated 15 July 2009. Thompsons wrote again to the respondents on 14 September 2009 restating the heads of claim which had appeared in AEL's letter of 15 July 2009 and adding the further head of "inconvenience" in the sum of £100. Thompsons invited settlement proposals. The respondents replied by letter dated 18 September 2009 requesting to be advised if the reclaimer was impecunious and enquiring why he needed to utilise a credit hire vehicle at a daily rate of £248.14. It would appear that the correspondence came to an end there, at least as far as the pleadings reveal.

Commercial background

[6] The reclaimer avers that he seeks payment of the cost of hiring a replacement car and compensation for inconvenience caused to him as a result of the loss of use of his own vehicle because of the damage done to it in the accident. He distinguishes this loss of use claim from the claim for the losses suffered by him directly as a result of personal injuries, which had been pursued in the Stirling action.

[7] Although not critical to the legal issues raised in this reclaiming motion, it is convenient to say something about the commercial realities which provide a background to the present case. They were touched on by Mr Hofford QC in the course of his submissions on behalf of the reclaimer.

[8] What appears to be the factual position in the present case is commonplace. In *Dimond* v *Lovell* [2002] 1 AC 384 at 403 Lord Hobhouse described it thus:

"The factual situation is typically a collision between two privately owned motor vehicles. Only one driver is at fault. The other's car is damaged and needs to be repaired. It will have to be off the road for a matter of days or weeks while it is repaired."

Lord Hobhouse continued:

"The driver not at fault would like to hire a substitute car so that he is not without one. But he does not want to have to bear the cost. His own insurance does not cover this expenditure. He appreciates that he should be able to recover from the driver at fault the cost of hiring the substitute but is reluctant to get involved in the hassle and expense of going to court to recover the money. He therefore engages the services of an accident hire company. There are quite a number of such companies. They are in a profitable line of business...they provide a substitute car to a party not at fault and see to the recovery of the cost from the other party. The result is designed to be that the customer does not have to go without a car, does not have to find any money and is saved the hassle of himself pursuing the guilty party. It is a good arrangement and understandably popular."

[9] While popular, accident hire agreements entered into between innocent drivers and accident hire companies can give rise to difficulties. They are likely to be construed as regulated agreements in terms of the Consumer Credit Act 1974 and therefore will require to conform to the regime established by that Act: see *Dimond* v *Lovell supra*. The arrangements constituted by accident hire agreements are, as Lord Hobhouse also observed, expensive. In part this is because, as here, the accident hire company will provide (and charge for accordingly) a new or nearly new vehicle with a specification equivalent to what might be a quite elderly damaged vehicle. In part it is because, not considering himself to have the responsibility to pay the charges, the innocent driver has no incentive to exercise economy as to the "hire" rate or the period of use of the replacement vehicle: cf *Lagden* v *O'Connor* [2004] 1 AC 1067 at para 38. It is also because the accident hire company is providing a variety of services (including credit) additional to the simple provision of a substitute vehicle. Whether the innocent driver (at least where he is "impecunious") can recover the cost of these services as part of a loss of use claim or whether he is limited to the spot car-hire rate was what divided the

House of Lords in *Lagden* v *O'Connor supra*. Then there are the difficulties which may arise when the accident hire company finds it necessary to litigate a loss of use claim. We say the accident hire company finds it necessary because, while any such litigation must proceed in the name of the innocent driver it is usual, if not inevitable, for there to be a provision in the accident hire agreement which gives the accident hire company the right to pursue the claim, employing solicitors of its choice and at its expense (see eg *Giles* v *Thompson* [1994] 1 AC 142 at 155, and *Greenlees* v *Allianz Insurance plc* [2011] CSOH 173 at para 8). As Lord Mustill anticipated in *Giles*, the innocent driver may have claims against the driver at fault which are additional to the loss of use claim. *Ex hypothesi* the innocent driver will have suffered loss in the form of the cost of repair of his own vehicle and any consequential diminution in value or, alternatively, the value of his vehicle as a total loss. Insofar as these direct losses are insured they will usually be dealt with by the innocent driver's own insurer and therefore not be of concern to the driver. However, the driver's motor policy will not indemnify him in respect of any loss he suffers consequent upon personal injury and he may require to pursue a claim in respect of that loss by way of action. That is what happened in the present case. The question for the Lord Ordinary was the reclaimer having sued in respect of his personal injuries (but only in respect of his personal injuries) in the Stirling action and taken decree, was he (in reality AEL) thereby precluded from recovering the cost of the accident hire agreement in the Court of Session action?

Decision of the Lord Ordinary

[10] Before the Lord Ordinary, parties had been agreed that the elements necessary for a successful plea of *res judicata* had been accurately identified by Sheriff Macphail, as he then was, in *McPhee* v *Heatherwick* 1977 SLT (Sh Ct) at 46, a decision approved by Lord Macfadyen, sitting in the Outer House, in *Irving* v *Hiddleston* 1998 SC 759 at 770. However, the respondents submitted that Sheriff Macphail had been correct to uphold the plea where a pursuer who had previously obtained damages in respect of his insurance excess and loss of his crash helmet as a result of a road traffic accident, then sought to recover the cost of repair of his motorcycle in a second action arising from the same accident, whereas it was the reclaimer's position that Sheriff Macphail had been in error and that *McPhee* v *Heatherwick* had been wrongly decided. In the reclaimer's submission the subject matter of the two actions considered in *McPhee* v *Heatherwick* had been different in that different heads of damage were sued for, as was so in the present case. That had been the approach of Sheriff Lockhart (as he then was) in *McSheehy* v *MacMillan* 1993 SLT (Sh Ct) 10 and that was the approach which, it was submitted, was to be preferred. In coming to a conclusion as to what had been litigated in a particular action it was, argued the reclaimer, permissible to look at the correspondence between the parties: *Forrest* v *Hendry* 2000 SC 110. Consideration of the pre-litigation correspondence in the present case made it clear that the present action related solely to the loss of use claim, and the Stirling action related solely to the consequences of the reclaimer's personal injury. It was the submission of the respondents that the averments relating to the correspondence were irrelevant.

[11] The Lord Ordinary held that it was not legitimate to look at pre-litigation correspondence to determine the questions which were put in issue by the plea of *res judicata*: namely, what had been litigated in the previous action and what had been decided. It was to the pleadings in the previous action that the court must direct itself in order to answer these questions. When considering the pleadings in the present case the Lord Ordinary accepted that the case was on all fours with *McPhee* v *Heatherwick*. That case, in the opinion of the Lord Ordinary, had been correctly decided, whereas *McSheehy* v *MacMillan* had not. A pursuer who is claiming damages arising from a single act which is a delict or breach of contract must advance all his heads of claim in the same action as, in such circumstances, there is only one cause of action. Looking to the substance of the matter and asking what was litigated and what was decided, the Lord Ordinary concluded that the subject matter of the previous action was the right of the pursuer to obtain reparation from the defenders and the *medium concludendi,* otherwise the ground of action, was the negligence of Robert Holmes. The subject matter and the *medium concludendi* in the present action were exactly the same. Accordingly the plea of *res judicata* fell to be upheld.

Grounds of appeal

[12] The reclaimer advanced five grounds of appeal which can be summarised as follows: (1) the Lord Ordinary erred in failing to have regard to the pre-litigation correspondence when determining what had been litigated and what had been decided in the respective actions; (2) the Lord Ordinary erred in finding that settlement of the Stirling action in terms of tender and acceptance discharged the reclaimer's claim in respect of loss of use of his vehicle; (3) the Lord Ordinary erred in finding that the present case was on all fours with *McPhee* v *Heatherwick* and, further, in finding that *McPhee* v *Heatherwick* and *Irving* v *Hiddleston* were correctly decided on their facts; (4) the Lord Ordinary erred in finding that the subject matter and the *medium concludendi* in the respective actions were exactly the same and (5) the Lord Ordinary erred in finding that the parties in the present action are the same as the parties to the Stirling action.

[13] The reclaimer did not insist upon his fifth ground of appeal.

Submissions of parties

Reclaimer

[14] Mr Hofford QC on behalf of the reclaimer submitted that the Lord Ordinary had erred in holding that the reclaimer had effectively discharged all right as against Mr Holmes to recover his losses by taking decree in the Stirling action. It was Mr Hofford's submission that the reclaimer had two separate rights of action: first, in respect of personal injury, second, in respect of damage to his property rights. Mr Hofford took no issue with the analysis by Sheriff Macphail in *McPhee* v *Heatherwick* which demonstrated that there were five elements which had to be present if a plea of *res judicata* was to be successful. What was in issue in the present case were identity of subject matter and identity of *medium concludendi*. *Stevenson* v *Pontifex & Wood* (1887) 15R 125 was authority for the proposition that one could not claim damages on an instalment basis; damages of a particular kind had to be claimed in one action, irrespective as to when the damage occurred or it was anticipated that it would occur. This was an example of the application of the general policy in favour of requiring once and for all recovery where there was only one cause of action but here there were two causes or grounds of action producing a clear division between, on the one hand, the personal injury claim and, on the other, a property claim: *Brunsden* v *Humphrey* (1884) 14 QBD 141, *Taylor* v *O Wray & Co Limited* [1971] 1 LLR 497. In the present case, that had been clear in the correspondence and the Lord Ordinary should have had regard to that correspondence: *Forrest* v *Hendry supra*. To the extent that what had been said by Lord Keith in *Dunlop* v *McGowan*s 1980 SC (HL) 73 at 81 was to different effect, it was *obiter*. When it came to deciding whether there was identity in subject matter and *medium concludendi* as between two actions the questions to be asked were what was litigated and what was decided?: *Grahame* v *Secretary of State for Scotland* 1951 SC 368 at 387. In answering these questions the court should have regard to all the circumstances of the case, including any correspondence (albeit that in the present case that might not be necessary). The Lord Ordinary had erred in considering that *McPhee* v *Heatherwick* was on all fours with the present case. In *McPhee* both actions had been to recover patrimonial loss. The Lord Ordinary had further erred in over simplifying the nature of the two actions under consideration and had thereby failed to discern that there were two quite distinct causes of action. Applying the test of whether the reclaimer could have led evidence in support of his loss of use claim in the Stirling action, the answer would clearly be no. Accordingly the subject matter of the two actions was different. The reclaiming motion should be allowed.

Respondent

[15] Mr Moore QC, on behalf of the respondents, submitted that the Lord Ordinary had been correct to determine the issue raised by the plea of *res judicata* by a consideration of the pleadings and not the correspondence: *Edinburgh & District Water Trustees* v *Clippens Oil Company Limited* (1899) 1 F 899 at 909, Maclaren *Court of Session Practice* p. 400. *Esto* the Lord Ordinary should have had regard to the correspondence he would have not have found any express reservation of the reclaimer's claim in respect of loss of use. This was not a case of a partial settlement: cf *Irving* v *Hiddleston supra*. Nor was it a case where the pleadings in the previous action contained a specific reservation of the right to bring separate proceedings

in respect of distinct heads of claim: cf *Forrest* v *Hendry supra*. The scope of the plea of *res judicata* had been carefully considered by Lord Hodge in *Primary Healthcare Centres (Broadford) Ltd* v *Ravangave* 2009 SLT 673. There was nothing in that survey of the law to support the legitimacy of looking at pre-litigation correspondence in order to determine what had been litigated and what had been decided in a previous action.

[16] Turning to the nature of the plea of *res judicata*, Mr Moore submitted that it was based on considerations of public policy and sought to prevent the same parties from litigating the same issue repeatedly on substantially the same grounds. The question for the court in determining such a plea was what was litigated and what was decided?: *Grahame* v *Secretary of State supra* at 387, *McPhee* v *Heatherwick supra*. In the present case the subject matter and *medium concludendi* of the Stirling action were the pursuer's right to obtain reparation from the defenders as insurers of a negligent driver involved in a road traffic accident on 24 March 2009. The subject matter and *medium concludendi* of the action in the Court of Session were also the pursuer's right to obtain reparation from the defenders as insurers of a negligent driver involved in a road traffic accident on 24 March 2009. They were identical. cf *McPhee* v *Heatherwick supra*. The patrimonial loss sought by the reclaimer in the present action was a head of claim. There was not a new or different *medium concludendi*: *Irving* v *Hiddleston supra* at 770. The "one action rule" required that all heads of damage arising from one delictual act had to be sued for in one action. Damages arising under different heads could never give rise to separate *media concludendi* or separate subject matter: *Stevenson* v *Pontifex & Wood supra* at 129, *Dunlop* v *McGowans supra* at 81, *Aitchison* v *Glasgow City Council* 2010 SC 411 at 421 and 423. *McSheehy* v *MacMillan* had not been correctly decided. Mr Moore accepted that it was unnecessary for a party to advance all his *medium concludendi* in one action but he emphasised that in the present case there was only one *media concludendi*. One could not seek to recover a head of damage in a subsequent action simply because it had been omitted from a prior action. The test which had been suggested by Mr Hofford of referring to the pleadings in the previous action and asking whether evidence for a particular head of damage could be led was inept. The quotation from *Short's Trustee* v *Chung* 1999 SC 471 relied on by Mr Hofford had been taken out of context. Mr Hofford had relied on the decision of the majority of the English Court of Appeal in *Brunsden* v *Humphrey*. This decision should not be followed in Scotland. It had not fared well when considered in subsequent cases: *Taylor* v *O Wray supra*, *Cahoon* v *Franks* [1967] SCR 455, *Buckland* v *Palmer* [1984] 1 WLR 1109, *Talbot* v *Berkshire County Council* [1994] QB 290, *Aberdeen Development Co* v *Mackie Ramsay & Taylor* 1977 SLT 177 and *McGregor on Damages (18th Edition)* paras 9-005, 9-006, 9-008. There was no basis from departing from the principle that all losses should be recovered in one action. To allow the reclaiming motion would be to undermine a rule which is based on the public interest. The reclaiming motion should be refused.

Discussion

The issue

[17] In the present action the Lord Ordinary upheld the defenders' and respondents' first plea-in-law and granted decree of absolvitor. That plea was in the following terms:

"In respect that the liability of the defenders to make reparation to the pursuer for his losses arising from the said accident has already been determined by a competent court in an action between the parties, the subject matter of the present action is *res judicata* and the defenders are entitled to be assoilzied".

In this reclaiming motion the pursuer and reclaimer submits that the plea should not have been upheld. He argues that notwithstanding that the present action is for damages by way of reparation of losses sustained by him in consequence of the negligence of Robert Holmes in driving his vehicle into collision with the reclaimer's vehicle on 24 March 2009 and that in an earlier Sheriff Court action (the Stirling action) he obtained decree in the sum of £4550 in respect of losses sustained by him in consequence of the negligence of Robert Holmes in driving his vehicle into collision with the reclaimer's vehicle on 24 March 2009, the losses in respect of which he obtained reparation in the Stirling action were different from the losses in

respect of which he seeks reparation in the present action and therefore the plea of *res judicata* has no application. The circumstances disclosed by the pleadings are relatively commonplace. There has, however, proved to be a very sharp difference of view between the parties as to how precisely the law deals with these circumstances and, in particular, as to whether the issue focused in the reclaiming motion is effectively foreclosed by what was said by Lord Keith (with whom Viscount Dilhorne and Lord Fraser agreed) in his speech in *Dunlop* v *McGowans supra*.

[18] In order to resolve this issue we begin by identifying what is meant by the principle or rule encapsulated by the plea of *res judicata* in Scots law. We shall then consider whether there is a cognate principle or rule in Scots law that all heads of damage arising from one delictual act, irrespective of their nature, must, if they are to be recovered, be sued for in one action for reparation ("the one action rule"). In looking at that second matter we need to determine whether there is any place in Scots law for the distinction, drawn by the majority of the Court of Appeal in England in *Brunsden* v *Humphrey supra*, between, on the one hand, recovery of losses in respect of personal injury and, on the other, recovery of losses in respect of damage to property. Incidental to these matters there are the questions as to whether two Sheriff Court actions, *McPhee* v *Heatherwick supra* and *McSheehy* v *MacMillan supra*, were correctly decided.

The exceptio rei judicatae

[19] We turn first to the nature of the plea of *res judicata*. In *Grahame* v *Secretary of State for Scotland supra* Lord President Cooper, reflecting its origin in Roman law referred to the plea as the *exceptio rei judicatae*. Stair said this about it (Institutions at IV.40.14)

"16. The first and most common exception in all processes, is *exceptio rei judicatae*, that the controversy is already decided by a competent judge; ...But the *exceptio rei judicatae* must not only be, that the decree had the same conclusion; but also, that it proceeded upon the same *media concludendi*, ...for though absolvitor was pronounced against a pursuer, it could not hinder him to insist for the same conclusion upon a different medium, in which case competent and omitted takes no place."

[20] In their expositions of the essentials of the plea, modern commentators have followed Stair in what appears above and in what else he had to say about the *exceptio rei judicatae*. Thus, in Dickson, *A Treatise on the Law of Evidence in Scotland* (1887) at para 385:

"When a matter has been the subject of judicial determination by a competent tribunal, that determination excludes any subsequent action in regard to the same matter between the same parties, and on the same grounds."

In Maclaren, *Court of Session Practice* (1916) at p396:

"Peremptory defences are dependent upon the facts and circumstances of each case ... There are, however, certain general features of some exceptions or defences which may be dealt with, and may prove of some service.

... *Res judicata* - This is a plea that the substantial merits of the cause have already been decided by a competent Court in an action between the same parties, or parties having a like interest, and consequently should not be again adjudicated upon."

In Macphail, *Sheriff Court Practice* (3rd edit, 2006) at paragraph 2.104:

"The exercise of jurisdiction is excluded where the court sustains a plea of *res judicata*. The rule may be stated thus: when a matter has been the subject of judicial determination pronounced *in foro contentioso* by a competent tribunal, that determination excludes any subsequent action in regard to the same matter between the same parties or their authors, and on the same grounds."

Each of the above authors, in their respective work, then goes on to identify the conditions or elements which must be present before the plea can be sustained. They are in agreement as to what these elements are. As Lord Hodge observed in *Primary Health Care Centres (Broadford) Ltd v Ravangave supra* at para 21, under reference to Macphail, the elements of the plea of *res judicata* are (i) that there is a prior determination by a court of competent jurisdiction, (ii) that the decree in the prior action is pronounced *in foro contentioso* without fraud or collusion, (iii) that the subject matter of the two actions must be the same, (iv) that the *medium concludendi* in the two actions must be the same, and (v) except where the earlier decree is a decree *in rem*, the parties to the second action must be the same as or representative of the parties to the earlier action, or have the same interest.

[21] In the present case, parties initially seemed to be at issue as to the identity or otherwise of elements (iii) and (iv): subject matter and *medium concludendi* (the point on identity of parties having been departed from by the reclaimer), but as Mr Hofford's submissions were developed, the focus came to be on subject matter. However, while the reference to *media concludendi* has the authority of Stair and subsequent commentators have understandably emphasised the need for identity of "subject matter", the courts have not always found these concepts to be entirely clear or sufficiently useful as tools to determine whether "the controversy" has already been decided by a competent judge. In *Edinburgh and District Water Trustees* v *Clippens Oil Co Ltd* (1899) 1 F 899 at 907, Lord President Robertson acknowledged the difficulty in defining the "abstract expression" *media concludendi*, at least in such a way as to draw the line between grounds of action and arguments in doubtful cases. Again as is noted by Lord Hodge in *Primary Health Care Centres (Broadford) Ltd* v *Ravangave supra*, there is no very clear consensus among commentators as to exactly what *media concludendi* means. Macphail, following Dickson, equates the *media concludendi* with points in controversy between the parties. Trayner *Latin Maxims and Phrases* defines them as the grounds of action, in other words those allegations or grounds on which a pursuer seeks to have decree pronounced, and Paul Beaumont in his article on the plea in 1985 Scots Law Times (News) 133 treats them as the grounds of claim or issues. It is therefore with a sense of relief that one turns back to the opinion of Lord Cooper in *Grahame* v *Secretary of State for Scotland supra* at 387 to find the endorsement of what, at first blush, seems to be a more accessible test, free from reliance on Latin:

"The main legal issue in controversy is that raised by the first question-*res judicata*. No material difference arose as to the principles to be applied. The plea is common to most legal systems, and is 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. I use the word 'substantially' advisedly; for a tendency which can be detected in earlier Scottish cases to concentrate too narrowly upon the precise terms of the conclusions of a summons or of pleas in law was corrected in the third *Boyd v Forrest* appeal [1918 SC (HL) 14] in which we were directed to look at the essence and reality of the matter rather than the technical form, and simply to inquire-What was litigated and what was decided?"

It was a "what was litigated and what was decided?" test that was applied by the Lord Ordinary in the present case and it was a "what was litigated and what was decided?" test that both parties were content that we apply in deciding the reclaiming motion (and see also *Short's Tr* v *Chung supra* at 476 to 477). That is what we shall endeavour to do.

What was litigated and what was decided: the relevance of the correspondence

[22] Parties were agreed as to the what was litigated and what was decided test but, as the Lord President observed in *Grahame*, immediately after the passage quoted above, the difficulty, as so often happens, is not in stating the principle but in applying it. On behalf of the reclaimer, Mr Hofford submitted that the essence and reality of the matter was that what was litigated and what was decided in the Stirling action was whether the reclaimer was entitled to payment of damages in respect of his personal injury under the heads of solatium, loss of earnings and a section 8 claim, whereas what it was proposed to litigate and have decided in the present action was whether the reclaimer was entitled to recover the cost of hire of an alternative vehicle in place of the one damaged in the collision. There were, said Mr Hofford, two distinct causes of action: a

claim in respect of personal injury and a claim in respect of damage to property. According to Mr Moore, on behalf of the respondents, on the other hand, what was litigated and what was decided in the two actions was identical: the reclaimer's right to obtain reparation from the respondents as the insurers of a negligent driver involved in a road traffic accident on 24 March 2009.

[23] Mr Hofford's position came to be that the distinctions as between the two actions upon which he founded were sufficiently apparent from consideration of the pleadings alone, but a matter raised by the reclaimer's first ground of appeal is to what extent is it legitimate to refer to material additional to the pleadings in order to decide what has been litigated and what has been decided. It was the reclaimer's contention that among the errors made by the Lord Ordinary was his conclusion that it was impermissible to examine pre-litigation correspondence when deciding the merits of a plea of *res judicata*.

[24] We are satisfied that the Lord Ordinary came to the correct decision as to the relevancy of the correspondence. His citation from the opinion of Lord Kinnear in *Edinburgh and District Water Trustees* v *Clippens Oil Company Limited supra* at 909 was entirely apposite:

"The validity of a plea of *res judicata* must necessarily depend upon the pleadings and decision in the previous action, and not upon any rights or equities which may have arisen antecedent to the pleadings or from any extra-judicial communications between the parties. The question always is, what was litigated and what was decided."

The Lord Ordinary also referred to what was said by Lord Hodge in *Primary Healthcare Centres supra* at para 35:

"In applying that test in cases which are carefully pleaded, the legal grounds of action which are pleaded will usually determine whether the plea of *res judicata* succeeds. But the court is not tied to the parties' precise formulations in their pleadings; it may look at the substance of the matters pleaded, especially if the pleadings fail to focus on, or if they mask, the issues which were in dispute and determined in the earlier action."

We would agree with that statement, as did the Lord Ordinary, and do not see it as in any way detracting from the necessary focus on the pleadings and interlocutors in the respective cases as the only reliable indicators of the parameters of the relevant litigations. It is of course open to parties to conduct their affairs on a particular basis. Mr Moore readily accepted that irrespective of what might appear to be the case from a consideration of the pleadings alone, parties might agree, for example, to litigate a discrete issue in one action, leaving over the possibility of subsequent litigation of different issues in a subsequent action or subsequent actions. And, short of agreement, it may be that a party by his conduct becomes barred from relying on the plea of *res judicata* in relation to a particular matter. But Mr Hofford was not suggesting that that is what had occurred here. He did not say that the correspondence disclosed an agreement or raised a question of personal bar. Rather, at its highest, the correspondence contained no more than advice from the reclaimer's solicitors that one firm, Bonnar & Co, was acting for the reclaimer in relation to his personal injury claim only, while another firm, Thompsons, were acting in relation to other loss and damage that the reclaimer had sustained. Had the Lord Ordinary been prepared to look at the correspondence we find it very difficult to see upon what basis it would have led him to come to a different conclusion from the one that he in fact arrived at, as we took Mr Hofford eventually to accept, but, as a matter of principle we consider that the Lord Ordinary was correct to decline to go beyond the pleadings in order to determine what was litigated and what was decided. In support of his first ground of appeal Mr Hofford referred to the opinion of Lord Macfadyen in *Forrest* v *Hendry supra*. We do not consider that anything said there is inconsistent with Lord Kinnear's dictum in *Edinburgh and District Water Trustees*. Rather, Lord Macfadyen emphasises that it is "necessary to examine the pleadings" to see what was litigated and what was decided. Agreeing with the Lord Ordinary in the present case, in our opinion what is to be taken from *Forrest* v *Hendry* is that Lord Macfadyen based his conclusion that the claim was not included in the earlier action on a consideration of the substantive parts of the pleadings in that action. The item of correspondence to which Lord Macfadyen was prepared to have

regard was a letter which had accompanied a tender and that only because it reinforced or confirmed the soundness of his reading of what had been pled. The Lord Ordinary in the present case concluded, at para 65 of his opinion:

"I do not believe that Lord Macfadyen was suggesting that in order to arrive at a conclusion as to what was litigated upon and what was decided a wide ranging inspection of pre-litigation correspondence could be entered into. I do not believe that he was saying that pre-litigation correspondence could be used as a tool for construing what was litigated upon. In my view any such correspondence is superseded by the raising of the action."

We agree with that reading of the opinion in *Forrest* v *Hendry* and we agree with the Lord Ordinary's observation that, as a matter of generality, when the issue is what was litigated and what was decided, any correspondence or other dealings between parties prior to the commencement of litigation must be held to be superseded by what follows.

What was litigated and what was decided: a one action rule

[25] On the basis therefore of the pleadings in the respective actions, what then is the essence and reality of the matter; is there or is there not such an identity of what was litigated and decided in the Stirling action with what it is proposed to litigate and have decided in this action so that the plea of *res judicata* must be upheld?

[26] The Lord President in *Grahame* describes the plea of *res judicata* as being based upon considerations of public policy, equity and common sense. Before us, both parties emphasised the policy considerations underpinning the plea. Neither questioned the soundness of that policy. It can be expressed, in the context of claims for damages, which is what we are concerned with here, as a "one action rule" (the term used by Mr Moore, perhaps having been borrowed from the opinion of the Lord President in *Aitchison* v *Glasgow City Council supra*), in other words a rule to the effect that all heads of damage, actual and apprehended, consequential upon one delictual act, must be sued for in one action and if that is not done any omitted head of damage is held to be irrevocably departed from.

[27] Speaking in the context of English law Lord Hoffman referred to such a rule (his term being the "single action rule") in *Rothwell* v *Chemical and Insulating Co Ltd* [2008] 1 AC 281 under reference to *Brunsden* v *Humphrey supra*. At paras 13 and 14 he said this:

"13. The appellants' argument is based upon the common law rule that if a claimant has suffered actionable personal injury as a result of the defendant's breach of duty, he can and must claim damages in the same action for all the damage which he has suffered or will suffer in consequence of that breach of duty. As Bowen LJ said in *Brunsden* v *Humphrey* ...:

'Nobody can doubt that if the plaintiff had recovered any damages for injury to his person, he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently.'"

14. This 'single action rule' is very old and for the protection of defendants. Coke said that it was based upon the maxim *interest rei publicae ut sit finis litium*, 'otherwise great oppression might be done under colour and pretence of law': see Bowen LJ, at p 147. A defendant should not have to answer more than once for the consequences of the same act."

[28] The importance of the existence and precise terms of such a one action rule in the present case and the reason why parties were at issue as to the effect which should be given to *Dunlop* v *McGowans* are self-evident. If there is a rule that all damages by way of reparation for a delictual act must be sued for in one action it follows that where there has been a previous action which has resulted in decree being granted, then a subsequent action can only be in respect of the same matter as was previously litigated and decided in that

any action for damages arising from a particular delictual act must be taken to embrace all possible claims available to the pursuer. Equally, if there is not a single action rule or if the rule is limited in some way, there remains the possibility that a second action, claiming damages in respect of the same delictual act as gave rise to the claim for damages in a first action, might nevertheless elide a plea of *res judicata*.

[29] That Scots law has a one action rule was authoritatively stated by Lord President Hamilton, with whom the other members of what was a Court of Five Judges agreed, in *Aitchison* v *Glasgow City Council supra*. At para 32 of his opinion the Lord President said this:

"It is accepted on all hands that as regards a claim for damages in respect of personal injuries, as of any other claim for damages, only one action can be pursued to decree. Thus, if an individual having sustained injuries through the fault of another sues the wrongdoer to decree (or settles with him), the obligation to make reparation is superseded (and extinguished) by the decree or the settlement agreement. He cannot sue a second or further time for damages in respect of injuries which subsequently emerge caused by the same wrong, even if he neither knew nor had the means of knowing at the time of his original claim of the likely or even possible emergence of these later injuries. That rule, which is a rule of practice, may seem in some circumstances harsh; but it is firmly established in our law (*Stevenson* v *Pontifex and Wood*, per Lord President Inglis, p 129, per Lord Adam, p 130). The observation by Lord Keith in *Dunlop* v *McGowans* (p 81) that 'only one action may be prosecuted for enforcing [the obligation]', while made in the context of a different class of obligation and when considering the application of prescription rather than limitation of action, is equally applicable to actions in respect of personal injuries. In the Court of Session Lord Justice-Clerk Wheatley observed ([1979 SC 22] p33) that the *dictum* of Lord President Inglis in *Stevenson* 'covers the situation where the breach of duty founds an action either on negligence or on breach of contract' (see also Lord Thomson, p 39). The applicability of the 'one action' rule to claims for personal injuries had earlier been confirmed in *Rieley* v *Kingslaw Riding School* [1975 SC 28](p 41). The potential harshness of that rule is alleviated to some extent by the statutory provision (Administration of Justice Act 1982, sec 12) in respect of provisional damages."

Aitchison very clearly states a one action rule in respect of claims for damages for personal injury. Mr Hofford submitted that it went no further than that; in other words it was the Scottish equivalent of the English single action rule referred to by Lord Hoffman in *Rothwell* v *Chemical and Insulating Co Ltd*. *Aitchison* was of course a personal injury case, hence the focus on claims for damages in respect of personal injuries but it is to be noted how the Lord President expressed himself: "as regards a claim for damages in respect of personal injuries, *as of any other claim for damages*, only one action can be pursued to decree" and "[an individual] cannot sue a second or further time for damages in respect of injuries which subsequently emerge *caused by the same wrong*" (emphasis added). These passages do not suggest that the Lord President was simply contemplating actions for damages for personal injury. Moreover, as authority for the existence of the rule the Lord President referred to two cases where the damages being claimed were in respect of injury to patrimonial interests, *Stevenson* v *Pontifex and Wood* and *Dunlop* v *McGowans*.

In *Stevenson* v *Pontifex and Wood supra* Lord President Inglis said this at 129:

"I am of opinion that a single act amounting either to a delict or a breach of contract cannot be made the ground of two or more actions, for the purpose of recovering damages arising within different periods but caused by the same act. On the contrary, I hold the true rule of practice based on sound principle to be, that though the delict or breach of contract be of such a nature that it will necessarily be followed by injurious consequences in the future, and though it may for this reason be impossible to ascertain with precise accuracy at the date of the action or of the verdict the amount of loss which will result, yet the whole damage must be recovered in one action, because there is but one cause of action. The most familiar illustration of this rule is to be found in actions for injury to the person, in which the practice is invariable"

Lord Mure (at 130) was also of opinion that it was incompetent to bring a second action founded upon the same breach (of contract). Lord Adam agreed. He put the matter this way, at 130:

"There was only one wrongous act on the part of the defenders, and in my opinion, as soon as the act was committed, the right of action to recover all damages arising from it arose. I agree with your Lordships that the pursuer is bound to recover all the damages to which he can lay claim in the one action."

In his speech in *Dunlop* v *McGowans supra* at 81 Lord Keith was brief but to the point:

"The language of section 11 (1) [of the Prescription and Limitation (Scotland) Act 1973] affords no warrant for splitting up, in the manner and to the effect contended for, the loss, injury or damage caused by an act, neglect or default. An obligation to make reparation for such loss, injury and damage is a single and indivisible obligation, and one action only may be prosecuted for enforcing it. The right to raise such an action accrues when *injuria* concurs with *damnum*."

It is true, as Mr Hofford stressed, that what was under particular consideration in *Stevenson* v *Pontifex and Wood* and *Dunlop* v *McGowans* was whether damages referable to distinct periods of time could be sued for in consecutive actions but, again, we would point to the generality of the language used. There is nothing in the opinion of Lord President Inglis or the speech of Lord Keith to suggest that in saying that the damages arising from a wrongful act must be recovered in "one action" they mean that damages of a certain sort must be recovered in one action but that damages of another sort may be recovered in another action. Lord President Inglis's reference to "the whole damage" would point in the opposite direction.

Brunsden v *Humphrey*

[30] Fundamental to Mr Hofford's argument was that in the absence of an unambiguous statement to the contrary in the Scottish authorities, this court should follow the decision of the majority of the English Court of Appeal in *Brunsden* v *Humphrey supra*. As already noted, *Brunsden* was cited by Lord Hoffman as authority for the single action rule in relation to claims for personal injury, but it also supports the proposition that one wrongful act, negligently causing a vehicle collision for example, may give rise to two separate causes of action and therefore two separate actions: a claim for personal injury and a claim for damage to property. In Mr Moore's submission that proposition was doubtful as a matter of English law but, in any event, it formed no part of Scots law.

[31] The facts in *Brunsden* were that the plaintiff, a cabman, sued in the Queen's Bench Division of the High Court for damages for bodily injury incurred when the cab he was driving came into collision with a van as a result of the negligence of the van driver, who was an employee of the defendant. The plaintiff's cab had also been damaged. Prior to raising the High Court action the plaintiff had sued the defendant for the damage to his cab in a County Court. In that action the defendant had paid a small sum into court which was accepted by the plaintiff and the proceedings in the County Court were discontinued. In the High Court the plaintiff obtained an award of damages from a jury but on a motion for a new trial at the instance of the defendant, the Divisional Court, constituted by Pollock B and Lopes J, entered judgment for the defendant on the ground that the recovery of damages in the County Court in respect of damage to the cab was a bar to any further action, including an action for injury to the plaintiff's person. The plaintiff then appealed to the Court of Appeal, arguing that the claim in respect of damage to the cab was based on a different cause of action than that which provided the basis for the claim in respect of the plaintiff's bodily injury. That argument was accepted by a majority of the Court of Appeal (Brett MR and Bowen LJ) with the Chief Justice Lord Coleridge dissenting). The Master of the Rolls explained his decision as follows (*supra* at 145):

"The owner of property has a right to have it kept free from damage. The plaintiff has brought the present action on the ground that he has been injured in his person. He has the right to be unmolested in all his bodily powers. The collision with the defendant's van did not give rise to only one cause of action: the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods: therefore the plaintiff is at liberty to maintain the present action."

Bowen LJ was to similar effect (*supra* at 146 *et seq*). He accepted that it was a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once and for all. The difficulty, Bowen LJ explained, arose when attempting to apply the rule in deciding how far the fresh cause was the same in substance as the cause which has been the subject of the previous suit. As appears from the passage from Lord Hoffman's opinion in *Rothwell* v *Chemical and Insulating Co Ltd*, quoted above, for Bowen LJ there was no question of a plaintiff being able to raise "a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently", but there was a question as to whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there was one cause of action only, which would therefore mean that only one action could be raised or whether there were two causes of action which were "severable and distinct", each of which could be pursued in separate actions. In addressing himself to that question Bowen LJ said, *inter alia*, this (*supra* at 150):

"...it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated.... According to the popular use of language, the defendant's servant has done one act and one only, the driving of the one vehicle negligently against the other. But the rule of law, which I am discussing, is not framed with reference to some popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. ... One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. ... the High Court has inherent power to prevent vexation or oppression, by staying proceedings or by apportioning the costs, ..."

Because he took the view that the damage for which the plaintiff was suing in the High Court accrued from a different injury, and therefore a different wrong, from that for which he recovered damages in the County Court, Bowen LJ concluded that the plaintiff was not barred from proceeding. He recognised however that: "[t]he present case is one in which I am conscious that lawyers of great authority do differ and will differ." In so saying he was anticipating the judgment of Lord Coleridge CJ which, substantially, was as follows (*supra* at 152):

"It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same: that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different *rights*, i.e. his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it."

[32] As Mr Moore demonstrated by his review of the case-law, *Brunsden's* rather shaky start (in that three out of the five judges named in the report were of the view that a second action was barred), has been followed by a rather mixed reception when the case has been considered in subsequent judgments. It has been held by the Supreme Court of Canada not to be good law in Canada: *Cahoon* v *Franks supra* and, as appears from the report in that case under reference to Fleming *The Law of Torts* (3rd edit) and the decision of the Supreme Court of Massachusetts in *Deardon v Hey* (1939) 24 NE 2d 644, the dominant American practice has been to reject *Brunsden*.

[33] As far as England was concerned, Mr Moore took us first to the decision of the Court of Appeal in *Taylor* v *O Wray & Co Ltd supra*. That was a road traffic case. There were two county court actions. In the first the plaintiff sued for £100 for personal injuries and for £143 special damage which included the £10 uninsured excess under his motor policy. Parties negotiated and settled on terms that the plaintiff would be paid £30 and costs. In the second action, the insurers, suing in the name of the plaintiff, sought to recover the

insured loss to his motor car which amounted to about £185. The county court judge held that the second action could proceed. The defendant appealed. It was accepted, on the authority of *Brunsden***,** that a plaintiff may in law split his claims arising out of one transaction and sue for them piece-meal provided only that the cause of action in each case is different. However, the defendant argued that because the first action had included a claim for the plaintiff's uninsured loss arising from damage to his vehicle, the plaintiff (suing on behalf of his insurers) was barred from recovering his insured loss arising from damage to the same vehicle. The Court of Appeal rejected that argument and affirmed the decision of the county court judge. *Brunsden* was cited with apparent approval. However, as Mr Moore pointed out, the basis of the decision was that the first action had been settled on terms which expressly related to the plaintiff's "claims in *this* action" (emphasis added), thereby reserving the plaintiff's entitlement to sue for different claims, including a claim for insured losses, in another action. As was observed by Widgery LJ, the Court of Appeal was not required to decide what would have happened had the first proceedings been determined not by compromise but by the entering of judgment.

[34] It was Mr Moore's submission that since *Taylor*, *Brunsden* has "done not at all well". He referred to *Buckland* v *Palmer supra*. In that case the plaintiff was insured under a comprehensive motor policy under which she was to bear the first £50 of every claim. In February 1982 her car was damaged when involved in a collision with the defendant's car. The defendant, who did not at the time appear to dispute his responsibility for the accident, gave the plaintiff details of his insurance. The plaintiff notified her own insurers who told her that they had a "knock for knock" agreement with the defendant's insurers and would be responsible for meeting the damage other than the first £50 for which she would have to look to the defendant. The damage to the plaintiff's car was estimated to amount to £1,142. On 28 April 1982 the plaintiff began a county court action claiming £50 and £5 court fees against the defendant for "uninsured excess on car insurance" as the liable party for the collision with her car. On 6 May 1982 the defendant paid the £50 and £5 costs into court indicating that he disputed the plaintiff's claim and wished to make a counterclaim. The plaintiff accepted the £55 whereupon her action became stayed under the County Court Rules. The plaintiff's insurers then learned that the defendant in fact appeared to be uninsured. On 17 September 1982 the plaintiff's insurers, using the plaintiff's name by subrogation, commenced a second action against the defendant in respect of the collision claiming the sum of £1,142 as the cost of repairs to the plaintiff's car less the £50 already paid. The county court registrar dismissed the defendant's application to strike out the second action as an abuse of the process of the court. The judge in the county court dismissed the defendant's appeal. The Court of Appeal allowed the defendant's appeal from the decision of the county court judge on the ground that it was in principle an abuse of process to bring a second action on the same cause of action. It was however able to do justice in what it saw as a case where advantage had been taken of an ill-informed plaintiff by an experienced defendant, by ordering the second action to be struck out without prejudice to an application to remove the stay on the first action and for leave to amend the particulars of claim thereby permitting the plaintiff to advance the claim for her insured losses. Mr Moore particularly referred to a passage in the judgment of Griffiths LJ at 1115 to 1116:

"In my opinion the general rule should be that [insured and uninsured losses] must be claimed in the same action. I take it to be well settled law that, as Viscount Sumner said in *Clark v Urquhart* [1930] AC 28, 54 "A claimant ... must prove and recover damages, arising from one and the same cause of action, once for all." I also take it to be settled by the decision of this court in *Brunsden v. Humphrey* ... that if as a result of a car accident a plaintiff suffers both personal injury and damage to his car he has two distinct causes of action, one for his personal injuries and the other for damage to his property. I confess that I have always had difficulty in following the reasoning of the majority in *Brunsden* v *Humphrey* and I observe that it has not been followed in either the United States of America or Canada; ... the rule against multiplicity of proceedings in respect of a single cause of action is soundly based on considerations of public policy designed to prevent the harassment of litigants by exposing them to the anxiety and expense of unnecessary legal proceedings; often in the past expressed in the legal maxims *nemo debet bis vexari* and *interest republicae ut sit finis litium*."

[35] Mr Moore saw the authority of *Brunsden* as having been further shaken by what was said by Stuart-Smith LJ under reference to *Henderson* v *Henderson* (1843) 3 Hare 100 at 114, in *Talbot* v *Berkshire County Council supra*. The plaintiff in *Talbot* was a driver who had sustained injury in an accident in 1984. In the course of overtaking another vehicle, the car which the plaintiff was driving struck an expanse of water on the offside of the road, went out of control and hit a tree. The plaintiff's passenger began proceedings against the plaintiff. His insurers appointed solicitors to act on his behalf who, without informing the plaintiff, issued a third party notice against the council as local highway authority, alleging nuisance on the highway and negligence. The claim was confined to one for contribution as between joint tortfeasors and did not include any claim for damages in respect of the plaintiff's own injuries. The passenger joined the council as second defendant in her action. At the trial of that action in 1989 she succeeded in her claim, blame for the injuries she sustained being apportioned as two-thirds against the plaintiff and one-third against the council. In 1990, after the expiry of the limitation period, the plaintiff issued a writ against the council in which he claimed damages for the injuries which he had sustained in the accident. Otton J, deciding the preliminary issues arising on the plaintiff's action, held that the plaintiff was *prima facie* estopped by the doctrine of *res judicata* from bringing his action but that special reasons, namely, the serious nature of his injuries, the negligent conduct of his case by solicitors formerly acting for him and the council's knowledge of his case, permitted the plaintiff to pursue his action. However, he declined to make a direction that the Limitation Act 1980 should not apply to the action, with the result that the plaintiff's action was statute-barred. On the plaintiff's appeal, the council contended that Otton J had been wrong to hold that the plaintiff's action was not barred as *res judicata*. The Court of Appeal dismissed the plaintiff's appeal, holding that there was no reason why the principles of the doctrine of *res judicata* should not apply without any qualification in personal injury actions; that since the plaintiff's claim against the council arose out of substantially the same facts as the cause of action in respect of which the passenger's claim had been made, it should have been included in the third party proceedings in the passenger's action; that the facts giving rise to the plaintiff's claim, the conduct of his professional advisers and the council's knowledge of his case were not capable of amounting to special circumstances justifying the non-application of the doctrine; and that, accordingly, the plaintiff's action against the council was to be struck out as *res judicata* and an abuse of the process of the court. Stuart-Smith LJ gave the leading judgment in the course of which he said this (*supra* at 296 and 297):

"In *Henderson's case* Wigram V.-C. stated the law thus, at pp 114-115:

'In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

The rule is thus in two parts. The first relates to those points which were actually decided by the court; this is *res judicata* in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of *res judicata* but rather is founded on the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process: see *per* Lord Wilberforce in *Brisbane City Council* v *Attorney-General for Queensland* [1979] AC 411, 425G.

Henderson's case ...however appears to have escaped attention in the field of personal injury litigation. In *Brunsden v. Humphrey* ... the plaintiff had sued the defendant for damage to his cab and recovered damages. He subsequently sued for personal injuries sustained in the same collision. The court by a majority held that the two causes of action were different, namely trespass to goods and trespass to person and res judicata

through cause of action estoppel did not apply. Lord Coleridge C.J. dissented. Had *Henderson's case* been cited, the decision might have been different.

...

In my judgment there is no reason why the rule in *Henderson's case* should not apply in personal injury actions. Indeed there is every reason why it should. It is a salutary rule. It avoids unnecessary proceedings involving expense to the parties and waste of court time which could be available to others; it prevents stale claims being brought long after the event, which is the bane of this type of litigation; it enables the defendant to know the extent of his potential liability in respect of any one event; this is important for insurance companies who have to make provision for claims and it may also affect their conduct of negotiations, their defence and any question of appeal."

Mr Moore also relied on what appeared in McGregor *on Damages* (18th edit) at paras 9-005 and 9-006 where the author, having briefly referred to the cases of *Buckland*, *Talbot*, *Cahoon* and *Henderson*, and the "reservations" expressed by the Court of Appeal in the first two of these cases "about the correctness of what was only a majority decision, with Lord Coleridge CJ dissenting", concludes:

"Whether the English courts will be prepared to take their indicated disapproval of *Brunsden* v *Humphrey* to hold for the claimant rather than for the defendant in such circumstances remains to be seen. If they do, and it is thought likely that they will, they would be deciding that, estoppel apart, there was indeed only one cause of action despite the violation of two separate interests that these cases postulate."

As far as Mr Moore's researches had revealed, there was only one instance where *Brunsden* had been referred to in a reported Scottish decision. That was the opinion of Lord Maxwell in *Aberdeen Development Co.* v *Mackie, Ramsay & Taylor supra*. That was a case brought by the developers of 50 houses against their architects for declarator (1) that the design of the houses was materially defective in that their structure was of inadequate strength and stability; (2) that the said defective design amounted to a breach of contract by the defenders; and (3) that the defenders were liable to make reparation to the pursuers for all loss, injury or damage sustained or to be sustained by them as a result of the breach. The pursuers claimed that the loss which they would sustain would be in respect of claims against them by such of the original purchasers of the houses as still owned them and might make claims. They also claimed damages of £15,000 being the cost of repairing the one house in respect of which a claim had already been made. It was argued that the terms of the declarator, looking as it did to future claims arising out of one breach of contract offended against the rule as stated in *Stevenson* v *Pontifex & Wood*. Lord Maxwell upheld that argument. This is what he had to say about *Brunsden* (*supra* at 180):

"Counsel for the pursuers relied on *Brunsden* v. *Humphrey* in which it was held that an action for damages for injury to goods did not preclude a subsequent action for personal injuries arising out of the same wrongful act. Brett M.R. made some comments to the effect that the rule against two actions arising out of the same wrong is a hard and harsh rule where the damages are not patent at the time of the first action but are "afterwards developed". I do not think that I can modify the authority of *Stevenson* v *Pontifex & Wood* by reference to English authority but, in any event, later English and Canadian authorities cited to me show that the English common law is of little assistance to the pursuers. *Brunsden* v. *Humphrey* is discussed in *Conquer* v. *Boot* [[1928] 2 KB 336], *The Oropesa* [[1943] P 32], *H. E. Daniels* v. *Carmel Exporters & Importers* [[1953] 2 QB 242], *Taylor* v *Wray & Co*, and *Cahoon* v *Franks*. From these it appears to me that the general rule of English law is similar to that expressed in *Stevenson* v *Pontifex & Wood*, and that the decision in *Brunsden* v. *Humphrey* turned on the certain distinctions in English law between actions for damages to goods and actions for personal injuries having their origin in certain forms of action. In *Cahoon* v *Franks* the Supreme Court of Canada declined to follow *Brunsden* v. *Humphrey* on the ground that the law of Canada was not encumbered with these somewhat technical distinctions.

It is possibly arguable that, as matter of policy, the rule in *Stevenson* v *Pontifex & Wood*, is too sweeping and over-harsh on pursuers in a case such as the present, but that is not a matter for me. The rule in my opinion is unequivocal, is binding on me in this court, is applicable to the present case and precludes the declaratory conclusion, construed as I think it must be construed in the context of the present action."

[36] We would observe that *Brunsden's* fortunes may have been more mixed (in the sense of being less uniformly negative) than Mr Moore's review of the case-law would suggest. Although the relevant decisions were not cited to us, we note that *Brunsden* was followed by Lord Pearce (with whom the other members of the Judicial Committee of the House of Lords may be taken as having agreed) in *Cartledge* v *E Jopley & Sons Ltd* [1963] AC 758 at 780. Moreover, in *Davidson* v *North Down Quarries Ltd* [1988] 8 NIJB 54, after a very detailed analysis of the authorities, Nicholson J (as he then was) sitting in the High Court of Justice in Northern Ireland concluded that *Brunsden* had survived in that jurisdiction for over 100 years and had been correctly decided.

Brunsden v Humphrey and Scots law

[37] At least for the present, we take *Brunsden* to be part of the law of England and also Northern Ireland, as providing a qualification of the general rule that the damages to which a claimant is entitled from the defendant in respect of a wrongful act must be recovered once and for all, the rationale being that personal injury and property damage involve the violation of two distinct rights and therefore give rise to separate causes of action (see eg Winfield & Jolowicz *Tort* (17th edit) paras 22-2 to 22-3, Salmond & Heuston *Law of Torts* (21st edit) pp550 to 551), Charlesworth & Percy *on Negligence* (11th edit) para 4-27). We do not consider that *Brunsden* is or should be part of the law of Scotland.

[38] That *Brunsden* is not part of the law of Scotland would seem to follow from the fact that no Scottish case was cited to us in which it had been approved let alone followed. At least as far as counsel's researches have revealed, the only discussion of *Brunsden* in Scotland has resulted in it being disapproved by Lord Maxwell as turning on certain distinctions in English law between actions for damages to goods and actions for personal injuries having their origin in certain (obsolete) forms of action and as being contrary to *Stevenson* v *Pontifex & Wood,*: *Aberdeen Development Co.* v *Mackie, Ramsay & Taylor supra*.

[39] Were it open to us to follow *Brunsden* it appears to us that there are compelling reasons for us not to do so. We would begin by observing that for all that the underlying policy may be identical and that the Latin maxims employed are the same, this is an area of the law where the English approach is rather more complex than ours. A number of different concepts are in play, not all of which are familiar to a Scots lawyer: see eg *Ulster Bank Ltd* v *Fisher & Fisher* [1999] PNLR 794, and Zuckerman *On Civil Procedure* (2nd edit) para 24.48 *et seq*. Looking more particularly at *Brunsden*, there is at least a suspicion, shared by Lord Maxwell in *Aberdeen Development Co*, that for all he claimed to be proceeding "not upon any technical consideration of the identity of forms of actions, but upon matter of substance" the distinction as between two separate causes of action (bodily injury, on the one hand, damage to goods, on the other) which Bowen LJ felt able to make depended upon a mindset shaped by procedures which even in 1884 were obsolete. That Lord Coleridge in a trenchant dissent considered it "a subtlety not warranted by law" not to allow a man to bring one action for damage to his arm and another for damage to his leg and yet to permit an action for damage to the coat-sleeve that contained the arm and the trousers that contained the leg in addition to an action for the bodily injuries, indicates that the view adopted by the majority in *Brunsden* was not an inevitable one. That conclusion is underlined when we find Griffiths LJ in *Buckland* v *Palmer* expressing his difficulty in following the reasoning of the majority. In modern English legal usage, "[a] cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person": *Letang* v *Cooper* [1965] 1 QB 232 Diplock LJ at 243 (a judgment in which Diplock LJ warned against the pre-Judicature Act forms of action "[ruling] us from their graves"). McGregor is clearly of the opinion that in a situation where one party has suffered damage as a result of the negligent act of another the preferable view is that one cause of action and only one cause of action arises, irrespective of whether two separate interests are injured: *supra* at para 9-006. We do not recognise "cause of action" as a distinct term of

art in Scots law. The more usually encountered equivalent is "ground of action" although that expression perhaps has no very precise meaning. Translating "cause of action" then as "ground of action" we would see a rule that one act of negligence causing damage gives rise to only one ground of action as being at least consistent with the idea that in Scots law delictual liability can be subsumed under the single general principle, *damnum iniuria datum*, as opposed to an analysis in terms of a number of individual torts (as is suggested by the reference by Bowen LJ in his judgment to trespass to the person and trespass to goods): see eg Reid and Zimmerman *A History of Private Law in Scotland* II pp479, 517-523. Moreover, it avoids the difficulty of a rule that allows a separate cause of action or ground of action for each distinct interest or right that has been injured, of determining what exactly is meant by a distinct interest or right. The present case only concerns injury to the person and injury to one item of tangible moveable property and the discussion was understandably restricted to the interest in bodily integrity on the one hand and the interest in property on the other. That is the distinction made in *Brunsden* and advocated by Mr Hofford. Mr Hofford did not suggest that in the event that damage was sustained to a number of different goods or to a variety of other proprietorial interests that there was a separate ground of action in respect of each damaged article or each adversely affected right, although it was not entirely clear why not if, as he argued, damage to separate interests gave rise to separate rights of action. However, be that as it may, while no doubt most interests can be categorised either by reference to the right to bodily integrity or the right to property, it does not appear to us that all interests which might be damaged by a delictual act necessarily fall into one or the other category. Stair (Institutions I.ix.4) identifies four categories of interests which might suffer damage: life, members and health; liberty; fame, reputation and honour; and goods and possessions. A developing law of personality rights, including rights of confidentiality and privacy, might see Stair's list being extended (see Witty and Zimmerman *Rights of Personality in Scots Law* (2009); Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010)). If, as would be suggested by *Brunsden*, a separate action may be brought in respect of each sort of interest which has been damaged, it is not inconceivable that one delictual act might give rise to a number of actions, but just how many might be difficult to determine. A one action rule offers simplicity and certainty. Following *Brunsden* does not.

The Sheriff Court decisions

[40] Before us parties were agreed that, on any view, there is a one action rule in Scots law in respect of damage to tangible property claims arising out of a single delictual act. That was the effect of the decision of Sheriff Macphail (as he then was) in *McPhee* v *Heatherwick supra*. There, after a collision between their vehicles, a motorcyclist sued the driver of a motor car in the small debt court, on the ground of his negligent driving, for damages consisting of the excess on his insurance policy and the value of his crash helmet. The driver admitted liability and consented to decree. The motorcyclist's insurers, who were unaware of the small debt action, raised a summary action against the driver in the name of the motorcyclist, on the same ground, for the cost of replacing the motorcycle. The defender pleaded *res judicata*. In sustaining that plea, Sheriff Macphail said this (*supra* at 47 to 48):

"Having decided that the decree founded on by the defender, pronounced in a litigation between the same parties, is a decree *in foro contestioso*, I now have to consider whether the two actions relate to the same subject-matter and proceed on the same grounds. Here, the court must look at the essence and reality of the matter rather than the technical form, and simply inquire: What was litigated and what was decided? ... In my opinion, what was litigated in the small debt action was the question whether the pursuer was entitled to reparation from the defender for patrimonial loss sustained through the alleged fault of the defender in causing the accident on 15 November 1975. What was decided was that the pursuer's contentions were correct and that the defender should pay the pursuer the sum sued for plus expenses. In the present action the pursuer raises exactly the same question and invites the court to make exactly the same decision. It makes no difference that in the small debt action the pursuer sued for his 'excess' and the value of his crash helmet, while in the present action he sues for the cost of the repair of his motorcycle. In each case he sues for pecuniary loss caused by the same infringement of his patrimonial interests; and the rule is that the damages which arise from one and the same cause of action must all be assessed and recovered in one action....

The rule may be thought to be particularly apt in a case such as this, where the damages claimed in the second action could have been claimed at the time when the first action was raised. To put it in another way: the subject-matter of the action in the small debt court was the right of the pursuer to obtain reparation from the defender for patrimonial loss sustained as a result of the accident. So also in the present action, and the grounds of action are the same in both cases because in each the ground on which the pursuer has founded his claim is the fault of the defender in driving his vehicle in a negligent manner and so causing the accident."

In our opinion, Sheriff Macphail was correct.

[41] A rather different approach was taken by Sheriff Lockhart (as he then was) in *McSheehy* v *MacMillan supra*. The facts were similar to those in *McPhee* v *Heatherwick*. After a collision between their vehicles, one driver raised a small claim against the other for damages consisting of the excess on his insurance policy, his loss of the vehicle and non-reclaimable insurance. The defender admitted the claim and decree was granted of consent. The first driver's insurers subsequently raised a summary cause against the second driver in the name of the first driver in respect of the same collision for the cost of repairing the vehicle. The defender pleaded *res judicata* and, in support of that plea, founded on what had been said in *McPhee* v *Heatherwick*. Sheriff Lockhart repelled the plea. While accepting that the facts in the case before him were on all fours with those in *McPhee*, he did not accept that the subject matter of the case before him and subject matter of the earlier small claim were the same. In his opinion, a distinction fell to be made as between patrimonial losses which were insured and patrimonial losses which were not insured. Similarly a distinction could be made between an action where the pursuer is suing on his own account in respect of losses which have fallen upon him and an action, notionally in the name of the pursuer but in reality at the instance of his insurer, proceeding in terms of a right of subrogation, to recover losses on which the insurer has paid under a policy. These, we must say, are distinctions without a difference. Damage to an item of property does not take on a different character depending on whether or not the property is insured or the terms in which it is insured. It is a matter of no concern whatsoever to the wrongdoer who has caused the damage that the person with the relevant interest in the item of property has contracted for indemnity, in full or in part, in the event that damage occurs. Equally, an insurer acting under rights of subrogation or in terms of an express assignation can be in no better position than the insured.

[42] Sheriff Lockhart found support for his conclusion in a submission which had been made to him under reference to *Steven* v *Broady Norman & Co Ltd* 1928 SC 351 and, in particular, what had been said there by Lord Anderson at 365 to 366 to the effect that a second action may be brought by a pursuer who has not obtained full satisfaction in a first action, provided that this does not result in recovery of more than the just remedy and that it is not vexatious. It would appear that a similar submission had found favour with Sheriff Principal Bennett QC in the unreported case of *McHarg Houston & McFarlane* v *Newman*, 1 August 1983. It is perhaps sufficient if we observe that the decision in *Steven* v *Broady Norman & Co Ltd* has nothing to do with the plea of *res judicata*, properly understood. If it had, one would have to consider how the threefold test for allowing a second action: absence of full satisfaction, no over-recovery, and not vexatious, derived by Sheriff Lockhart from the opinion of Lord Anderson, squared with the accepted elements of the plea of *res judicata* as identified by Lord Hodge in *Primary Healthcare Centres (Broadford) Ltd* v *Ravangave* and set out above. What was in issue in *Steven* v *Broady Norman & Co Ltd* was whether a pursuer who has obtained decree against one of a number of joint and several obligants, which has not been satisfied, can sue another obligant in a second action. The court held that he can, subject to the safeguards identified by Lord Anderson. The nearest the court got to the rules applicable to the plea of *res judicata* was in considering (and rejecting) the defender's argument that it should adopt as a part of Scots law, an English procedural rule referred to by the Latin tag *transitio in rem judicatam*, whereby a cause of action may become merged in a judgment and thereby extinguished (cf *Taylor* v *O Wray & Co Ltd supra* Lord Widgery at 501).

[43] We accordingly consider that *McSheehy* v *MacMillan* was wrongly decided, albeit we recognise that the sheriff was attempting to do what he saw to be justice in a case where there was a practical divergence in interests as between the insured and the insurer. Sheriff Lockhart set out what he saw as the practical

difficulties associated with what we would see as a correct application of the plea of *res judicata* in these paragraphs (*supra* at 14 to 15):

"An important addendum ... is that often in court today we find a party pursuer involved in a small claim. Such procedure is designed to allow citizens to recover small outlays such as their uninsured losses in road traffic accidents without the expense of employing a solicitor. If such an uninsured party litigant obtained decree for his uninsured losses, and the defender's argument is correct, this would bar the insurance company from pursuing their own outlay in court. There would be no solicitor against whom it might be argued a right of action would lie at the instance of the insurance company.

An essential corollary of the defender's submission is the situation where an insurance company raised the first action against a negligent driver and obtained a determination in *foro contentioso*. The solicitors acting for such an insurance company might endeavour to contact the pursuer to ascertain if he had any uninsured losses, but were unable to contact him as he had moved house without a forwarding address. Having taken these steps, the insurance company's solicitors obtained decree. If the defender's plea of *res judicata* is well founded in this case, it appears that in the case I have outlined the pursuer would have no remedy in respect of his uninsured losses, which could be substantial. In that case it could not, by any stretch of the imagination, be said that there was negligence on the part of the insurance company's solicitors."

We accept that these practical difficulties are real and that they may arise the more often given the popularity of accident hire agreements such as that which is at the root of the present action. Practitioners, insurers and accident hire providers will no doubt be alive to that. That a one action rule may appear harsh was recognised in *Aitchison*. On the other hand, it offers the benefits of certainty and finality, benefits which have commended themselves to courts and to jurists for at least two thousand years.

Conclusion

[44] In our opinion, notwithstanding the particular contexts of the relevant dicta and the absence of a statement in totally unambiguous terms, the matter we have to consider is settled by what was said by Lord President Inglis in *Stevenson* v *Pontifex and Wood* and by Lord Keith in *Dunlop* v *McGowans*. Even were that not so, we consider it to be a sound principle that where a natural or legal person suffers damage as a result of a single negligent act, that gives rise to a single right to obtain reparation which must be pursued in one action. While it is true that when discussing a one action rule in relation to claims for personal injury in *Aitichison* v *Glasgow City Council*, the Lord President described it as a rule of practice (*supra* at para 32), we see it as consistent with the underlying legal analysis and with policy. A right of action for damages emerges as soon as there is concurrence of *damnum* and *iniuria*, that is as soon as loss or injury is sustained as a result of the wrong in question. The opinion of the majority of the Court of Appeal in *Brunsden* depends on a distinction between different kinds of damage: damage to the person and damage to property each of which gives rise to a "cause of action". We do not see that as being consistent with the law of Scotland. *Brunsden* has never been approved in Scotland, as far as we are aware. As far as policy is concerned, without something of the nature of a one action rule a defender cannot know if a particular claim does or does not represent the full extent of his potential liability. We recognise, as did the Lord President in *Aitchison*, that the effect of a one action rule can appear to be harsh (as is illustrated by the facts in that case and the earlier case of *Carnegie* v *Lord Advocate* 2001 SC 802 which was overruled in *Aitchison*) but the remedy for that must lie with the legislature.

Decision

[45] Thus, in determining whether the plea of *res judicata* should be sustained in the present action the critical questions come to be, looking to the substance of the matter, what was litigated and what was decided in the Stirling action and what it was proposed to litigate and decide in the present action. If the answer is that they were the same then the plea has to be upheld and decree of absolvitor granted (as held by Sheriff Macphail in *McPhee* v *Heatherwick* and not challenged as the appropriate form of disposal by Mr Hofford in the event that a plea of *res judicata* is upheld). These were the questions that the Lord Ordinary asked

himself. He was correct to do so. He answered them by concluding that the subject matter of the Stirling action was the right of the pursuer to obtain reparation from the defenders and the *medium concludendi* or ground of action was the negligence of the defenders. The subject matter of and the *medium concludendi* in the present action were, in the Lord Ordinary's estimation the same. We agree. The reclaiming motion falls to be refused. We reserve all questions of expenses.