

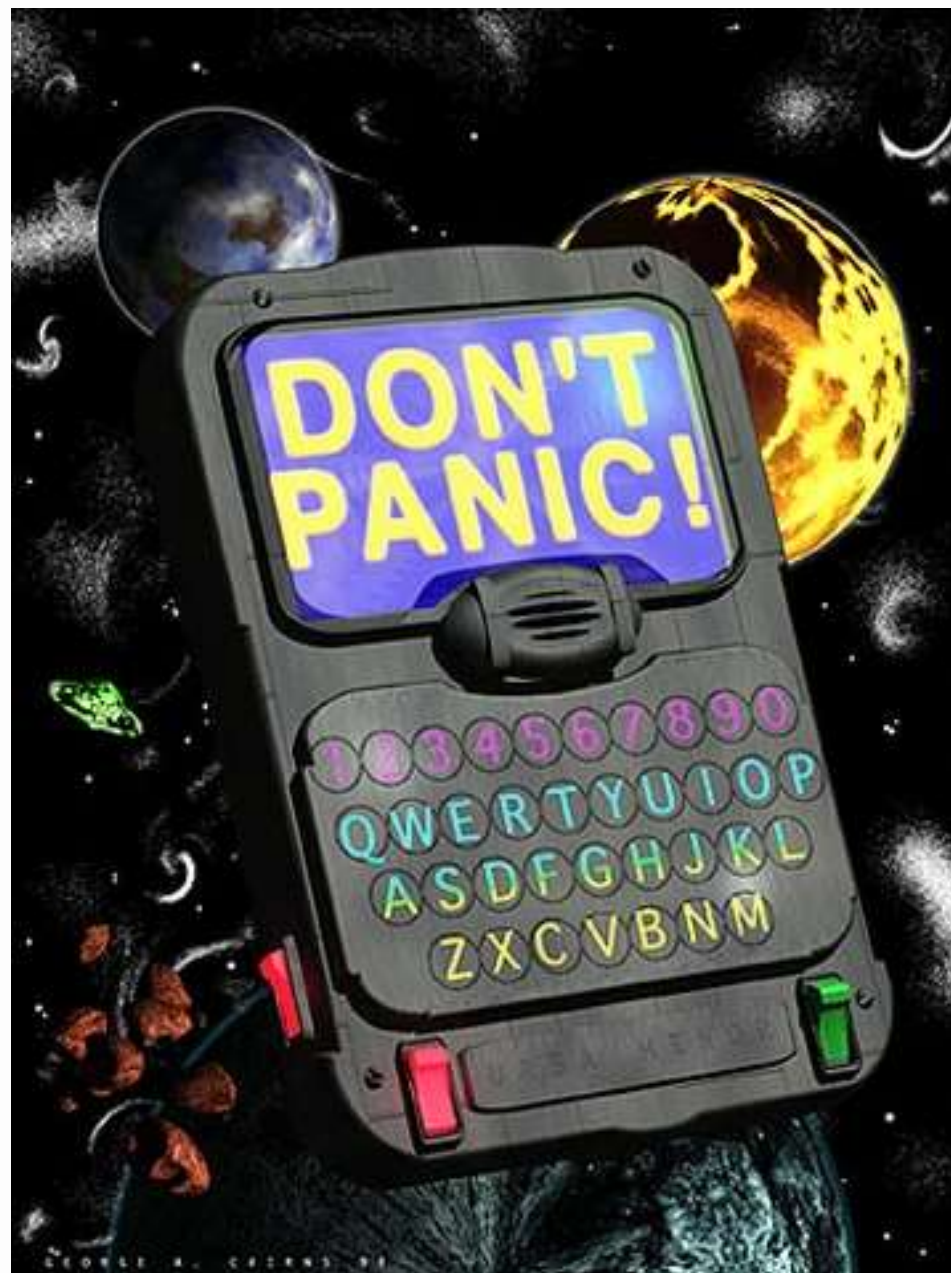
Compass Chambers



The Graveyard Shift: what to do if a party dies mid-case

Mark Nicholson, Advocate








- General Issues
- Practicalities





General Issues arising from death of a party

- Who becomes your client?
 - Effect of the death on the claim
 - What caused the death – is there a link to the action at hand
 - Evidential Issues
- 



Who becomes your client

- Power of Attorney?
- Guardian?
- Next of Kin?
- Closest Relative?
- The family member who helps set up zoom calls?





Who becomes your client

- Executor/ Executrix?
- Two main types
 - Executor/Executrix Nominate(s)
 - Executor/Executrix Dative(s)





Executor / Executrix

- “A son can bear with equanimity the loss of his father, but the loss of his inheritance may drive him to despair” – Niccolo Machiavelli (1532)
- A Shereival take: Dobbie v Patton [2016] EDIN SC 6 – Sheriff McCormick

“Finally, the parties’ mother, Ellen McGowan or Patton, died intestate on 2 January 2013. She left five children/beneficiaries and an estate of £33,000. Thus far this estate has resulted in litigation at Glasgow Sheriff Court, a subsequent appeal to the sheriff principal and two actions proceeding in Wick Sheriff Court leaving aside this matter before me. I say no more.”



Effect of the death on the claim

- Can affect Quantum

Solatium - not beyond

Wage Loss

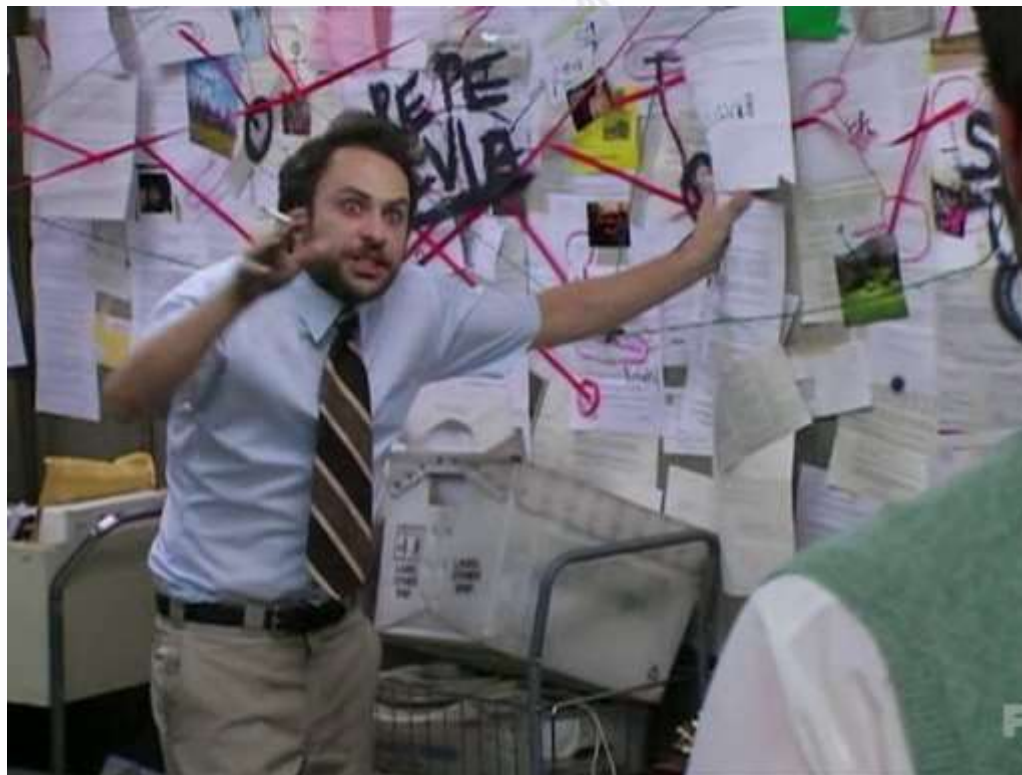
Pension loss





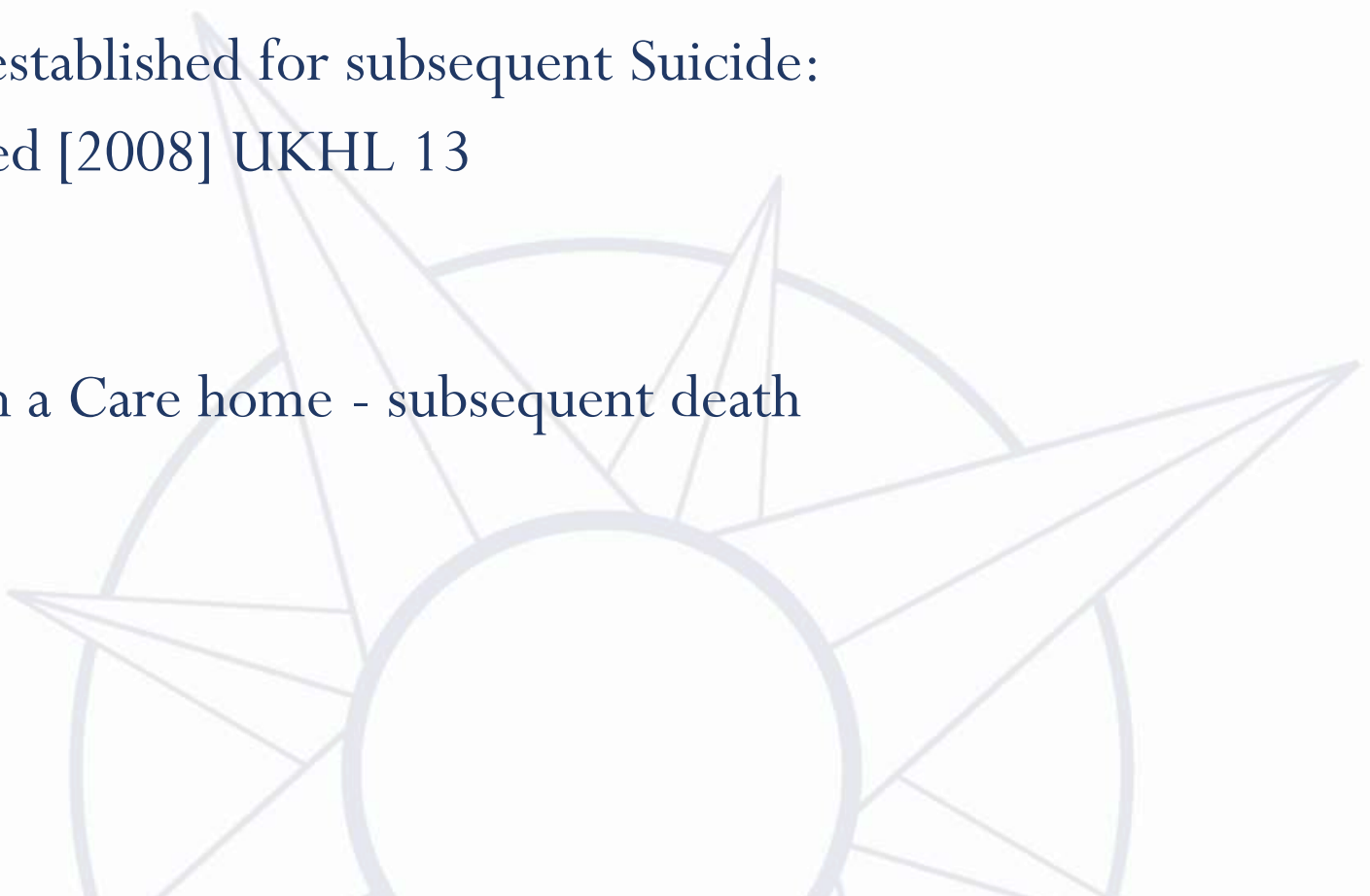
What caused the death

- Is there a causal link to the injury arising from the action at hand?





What Caused the Death

- Direct Link to Cause of Action: Mesothelioma
 - Injury causing PTSD, Liability established for subsequent Suicide:
Corr v IBC Vehicle Limited [2008] UKHL 13
 - Other potential examples
Elderly person who fell in a Care home - subsequent death
 - Usual Causation rules apply
 - Can affect Limitation
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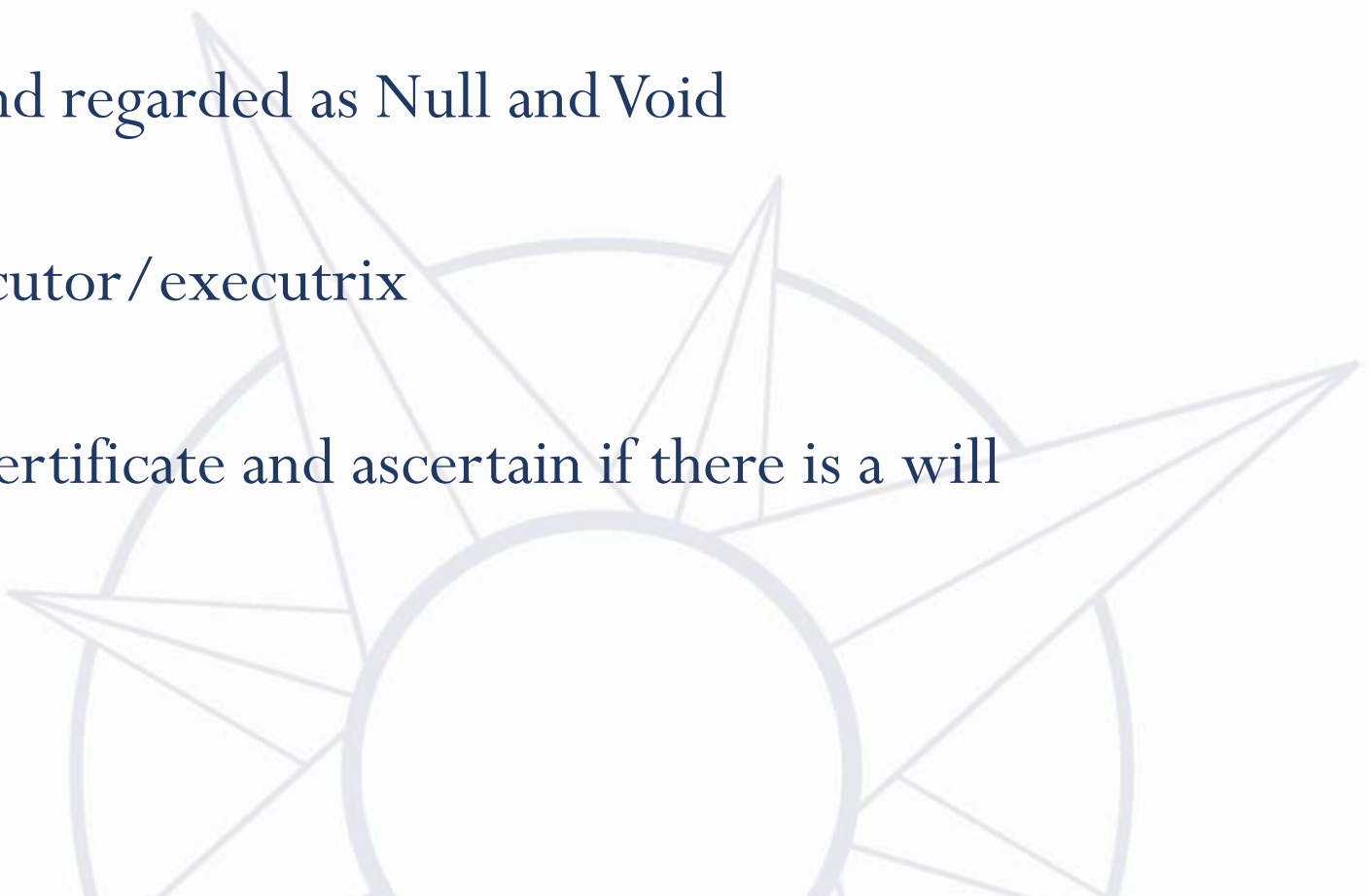
Evidential Issues

- Best Evidence - McGowan v Belling & Co. 1983 SLT 77
- Affidavit
- Signed or Annotated Statement
- Unsigned Statement
- Precognitions



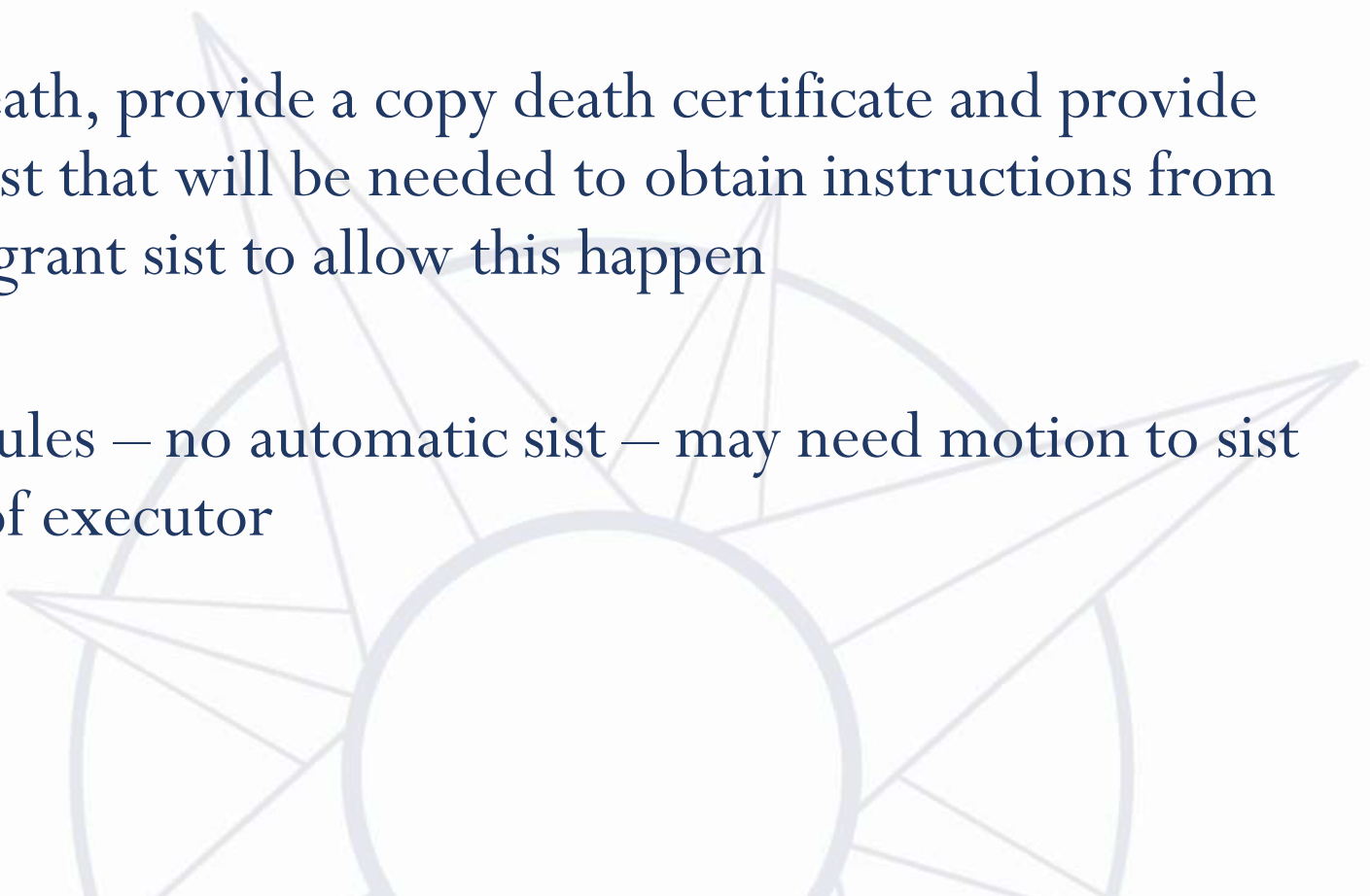


Practicalities

- If there is a live action – All procedure stops!
 - Further steps incompetent and regarded as Null and Void
 - Pending the sisting of an executor/ executrix
 - First Step: get a copy death certificate and ascertain if there is a will
 - Next: tell the court
- 



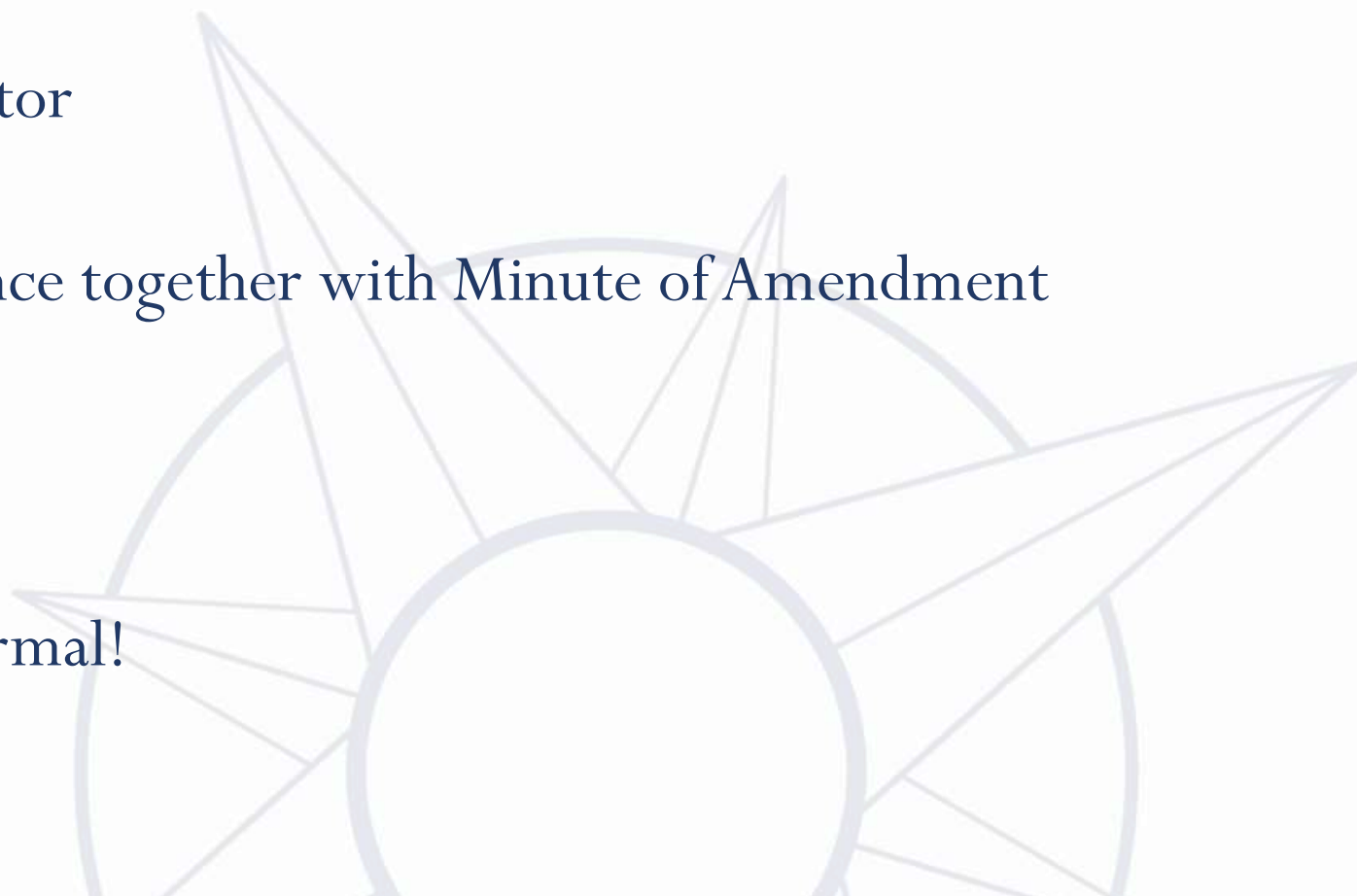
Practicalities

- RCS: Chapter 31.3
 - Write to court advising of death, provide a copy death certificate and provide estimate as to the length of sist that will be needed to obtain instructions from the executor – court should grant sist to allow this happen
 - OCR: Doesn't mirror RCS rules – no automatic sist – may need motion to sist cause pending appointment of executor
- 



Practicalities

- All being well – Action on Hold
- Get Instructions from Executor
- Minute of Sist and Transference together with Minute of Amendment
 - RCS chapter 31
 - OCR chapter 25.1
- Get on with the action as normal!





Practicalities – No Executor!

- What happens if you cannot get instructions from an Executor/Executrix?
 - death or incapacity of Executor/Executrix Nominate
 - family not cooperating regarding a dative petition
 - no family or next of kin with right to be appointed via a dative petition
- Bigger Issue – Delay - what can the other side do?
 - Defender who has died: *decree cognitionis causa tantum*
 - Pursuer who has died: *Absolvitor*



Practicalities

- Timescales for sitting in an executor/ executrix
- No set time limits in rules
- X v Y 1945 SLT (Sh Ct.) 2

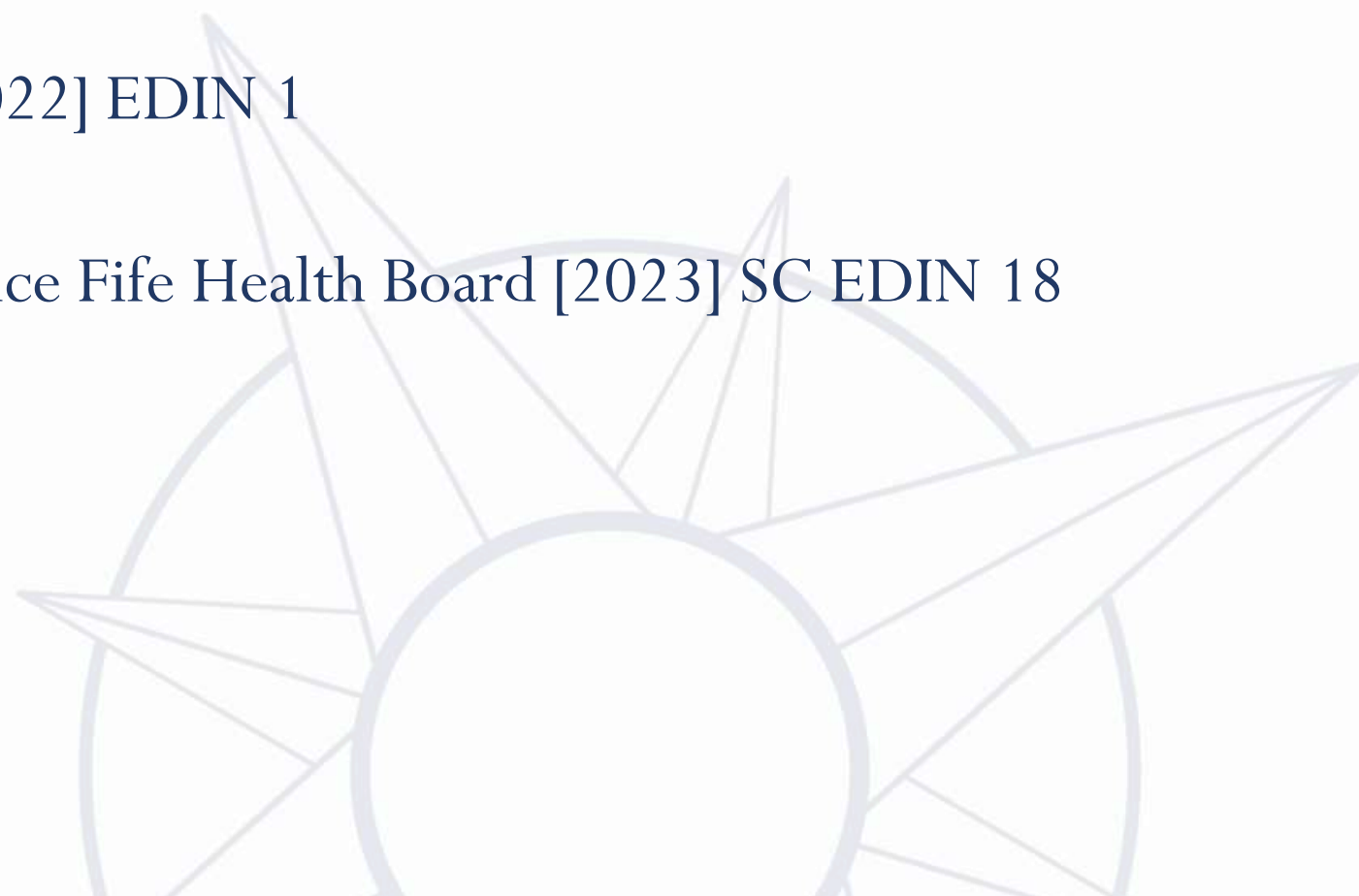




Practicalities

Title to Sue

- Riddell v Arcus Holdings [2022] EDIN 1
- Love v National Health Service Fife Health Board [2023] SC EDIN 18





Practicalities

Riddell v Arcus Holdings [2022] EDIN 1

- Workplace Accident: 28 February 2018
- Pursuer Died on 28 July 2018
- Claim intimated on 7 July 2020
- Breach of Duty Conceded on 8 October 2020
- Writ served 22 February 2021 – in name of John Riddell as executor dative...





Practicalities

Riddell v Arcus Holdings [2022] EDIN 1

- Motion to sist July 2021 - to allow pursuer to be confirmed as executor dative
- Opposed – pursuer had no title to sue
- Pursuer's note of argument accepted that pursuer was not appointed as executor dative but that he had a right as spouse and de facto beneficiary to be so appointed.
- Procedure got slightly complicated, Motion was refused *in hoc statu*, a record was lodged, and the case ultimately proceeded to debate



Practicalities

Riddell v Arcus Holdings [2022] EDIN 1

- Case was dismissed as pursuer had no title to sue
- Pre QUOCS
 - Pursuer found liable for the expenses





Practicalities

Love v National Health Service Fife Health Board [2023] SC EDIN 18

- Pursuer's mother died on 28 October 2018
- The pursuer consulted a firm of solicitors in August 2021
- A triennium extension was agreed from 9 October 2021 to 9 October 2022
- 22 March 2022 the pursuers solicitors advised they were no longer acting
- In October/November 2022 a further timebar extension was agreed between the defenders and the pursuer – stating proceedings had to be raised by 16 November 2022
- 12/13 November 2022 – a different firm of solicitors was instructed by the pursuer
- Between 16 November and 24 November 2022 a succession of writs were submitted for warranting to the Sheriff Clerk
- The warranted writ was sent to the defenders on 6 December 2022 and Service was effected on 12 December 2022



Practicalities

Love v National Health Service Fife Health Board [2023] SC EDIN 18

- The defenders asked if the pursuer was intending to sist the cause. At this stage no reports regarding liability or causation had been obtained
- Defences were lodged on 12 January 2023
- Motion lodged seeking decree of absolvitor for a variety of reasons including the lack of title to sue – this was opposed, it was continued a few times for various reasons
- Pursuer’s solicitor withdrew prior to the opposed motion calling on 13 March 2023 – the hearing was continued to allow the pursuer to seek further representation and pending a legal aid outcome
- On 27 April 2023 – Summary Decree was granted, it was held that the pursuer had no title to sue.

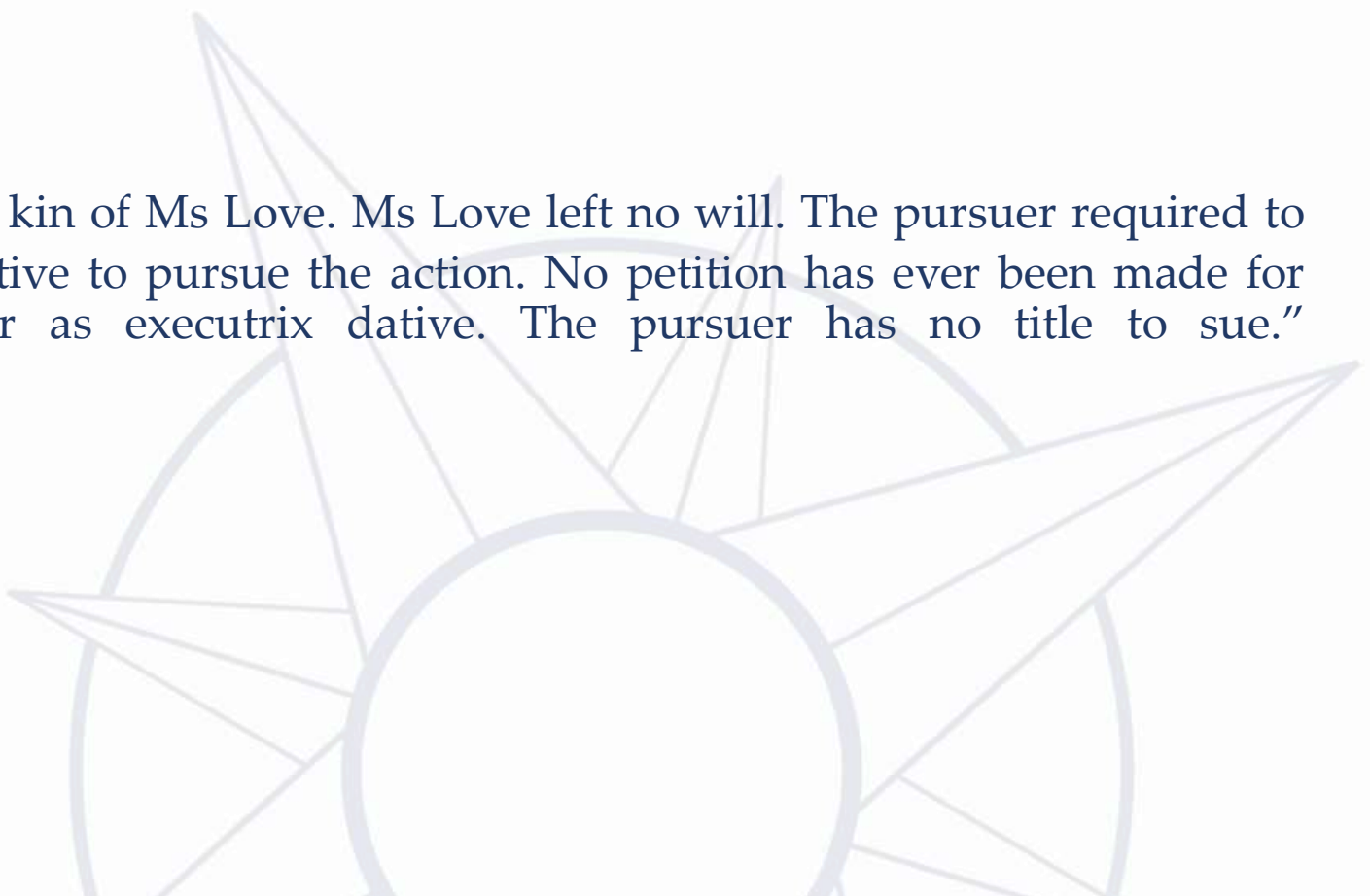


Practicalities

Love v National Health Service Fife Health Board [2023] SC EDIN 18

- The note records that:

“The pursuer was the next of kin of Ms Love. Ms Love left no will. The pursuer required to be appointed as executrix-dative to pursue the action. No petition has ever been made for appointment of the pursuer as executrix dative. The pursuer has no title to sue.”





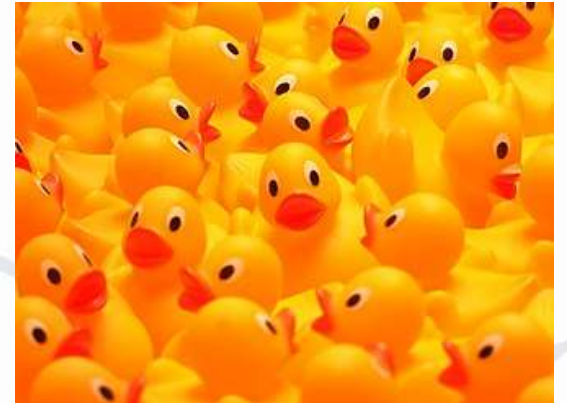
Practicalities

Love v National Health Service Fife Health Board [2023] SC EDIN 18

- QUOCS?

[65] The circumstances of this case are unusual, but not exceptional.

[66] If there had been further substantive procedure and/or if the pursuer and Mr Law had persisted on continuing with the action over a period time when it had no or substantially no chance of success, the circumstances might well have been exceptional.





Practicalities

What happens if a Party dies during negotiation?

Is there a concluded contract?





Practicalities

- If party dies during negotiations?
- Thomson v James (1855) 18 D 1
-a deceased lacks capacity to contract
- Glasgow City Council v Peart 1999 GWD 29 -1390
-Agency ceases with death of client





Practicalities

- After I get Instructions from the executor – Can I still accept a tender made in life?






Practicalities

- Material Change in Circumstances



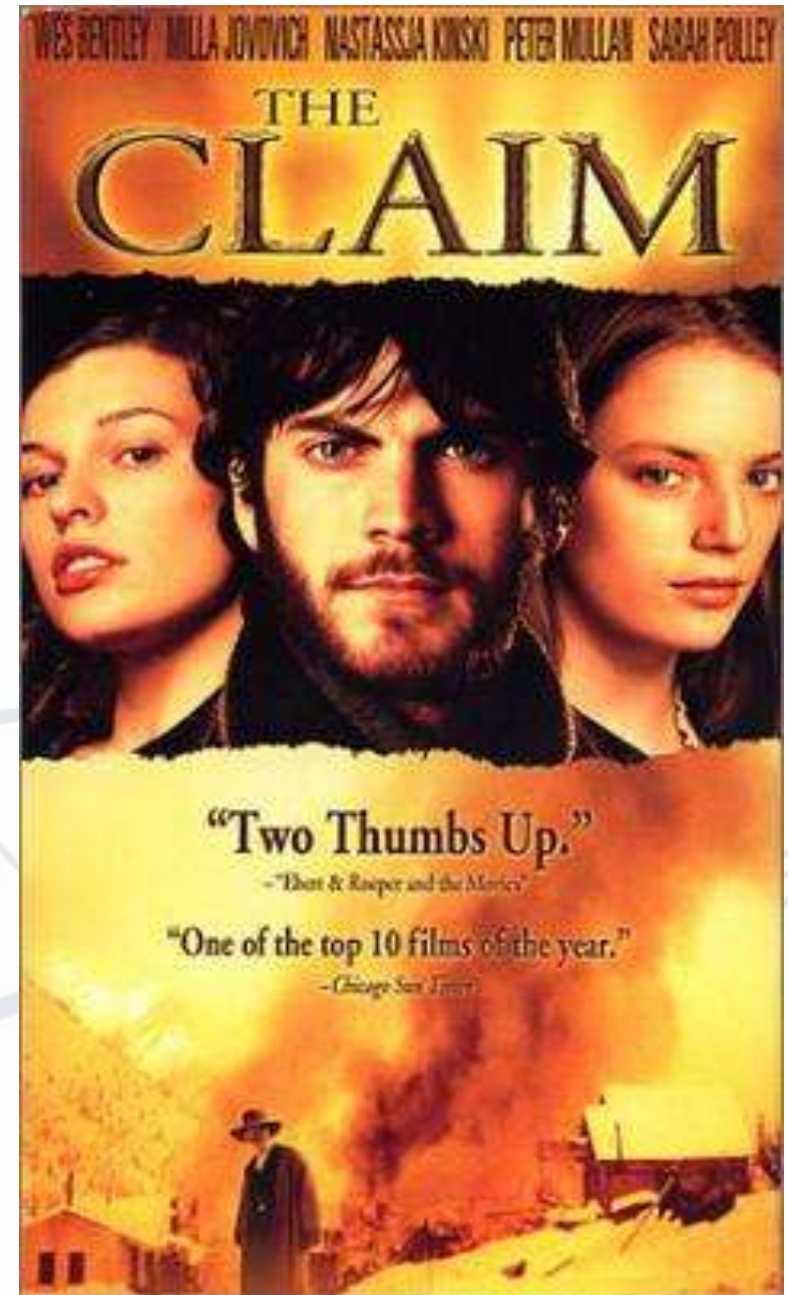
- Tender: *Sommerville v National Coal Board* 1963 SC 666 – Inner House
 - Pursuer's Offer: *Davidson v Clyde Training Solutions* [2020] SC EDIN 34
- 



Practicalities

No live court action

- What do we need to do?
- Limitation Issues





Practicalities: Limitation

- For cases where the cause of death is not linked to the accident – s.17 Prescription and Limitation (Scotland) Act 1973
- Usual 3 years applies - Mackie v AB 2000 Limited 2004 S.C. 344 – Inner House, Extra Division
- Accident on 29 November 1996
- Pursuer died on 16 March 1998
- Court action raised on 16 March 2011 – third anniversary of death
- Argument was that she only came into existence as executor dative on death and accordingly her knowledge must post-date the actual accident
- Inner House did not agree – limitation period was three years from accident, but acknowledged that could be extended depending on the executors actual or imputed knowledge of factual matters.



Practicalities

- Executor's knowledge of right of action – fact dependant

*"The facts, Ma'am.
Just the facts."*





Practicalities

- Where the death is linked to the cause of action
- s.18 Prescription and Limitation (Scotland) Act 1973

18

Actions where death has resulted from personal injuries.

(1) This section applies to any action in which, following the death of any person from personal injuries, damages are claimed in respect of the injuries or the death.

[^{F1}(1A) This section does not apply to an action of damages in respect of personal injuries or death to which section 18ZA applies.]

(2) Subject to subsections (3) and (4) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after—

(a) the date of death of the deceased; or

(b) the date (if later than the date of death) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of both of the following facts—

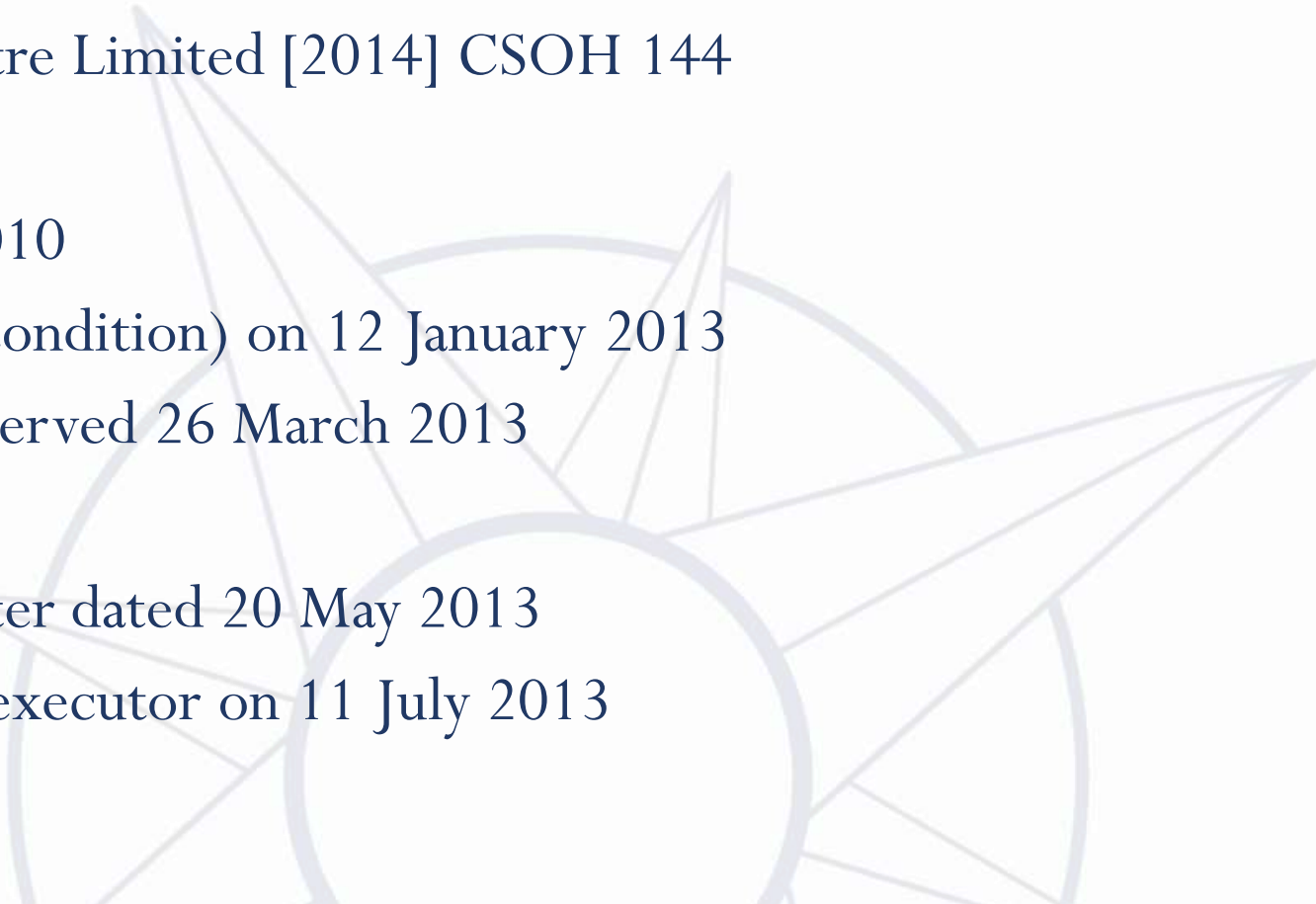
(i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and

(ii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

- Not a reset if limitation period has elapsed since accident – see s.18(4) but if accident/illness has occurred within 3 years of the death then limitation period runs from death or knowledge.



Practicalities

- s.19A Prescription and Limitation (Scotland) Act 1973
 - Peat's Executors v Assembly Theatre Limited [2014] CSOH 144
 - Accident 6 August 2010
 - Claim intimated 20 September 2010
 - Pursuer died (unrelated medical condition) on 12 January 2013
 - Summons (in name of deceased) served 26 March 2013
 - Defences Lodged 29 April 2013
 - Defenders advised of death by letter dated 20 May 2013
 - Action sisted for appointment of executor on 11 July 2013
- 



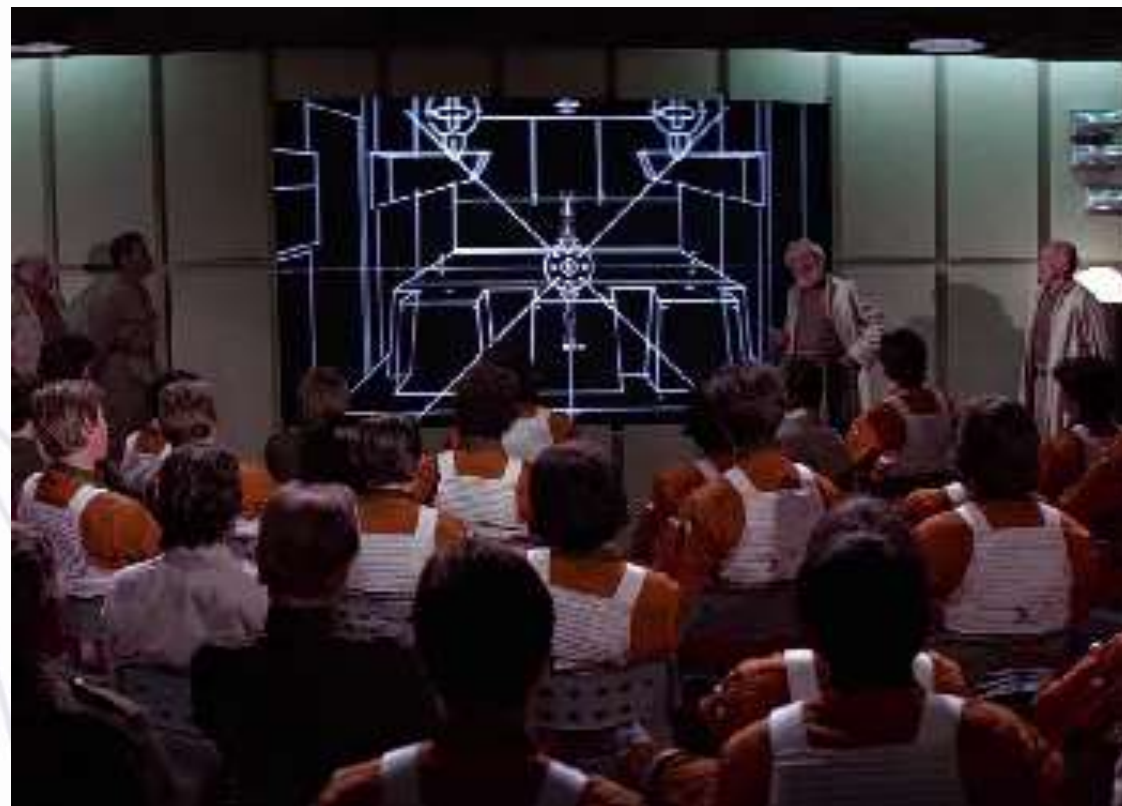
Practicalities

- s.19A Prescription and Limitation (Scotland) Act 1973
- Peat's Executors v Assembly Theatre Limited [2014] CSOH 144
- A new summons (in name of executor) was drafted and served on 9 September 2013
- The original action (in the name of the deceased) was dismissed by consent
- In the case brought in the executors name a s.19A argument was advanced
- Lord Doherty allowed the action to proceed as the only prejudice to the defenders was loss of the time bar defense. The original pursuer had died prior to the expiry of the triennium and even had the action been raised timorously they would not suffer any material disadvantage due to her not being available to give evidence.



Planning

- Statements/Precognitions
- Health/Age of Pursuer
- Consider Commission/Affidavit
- Advice regarding making a will



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