

Compass Chambers



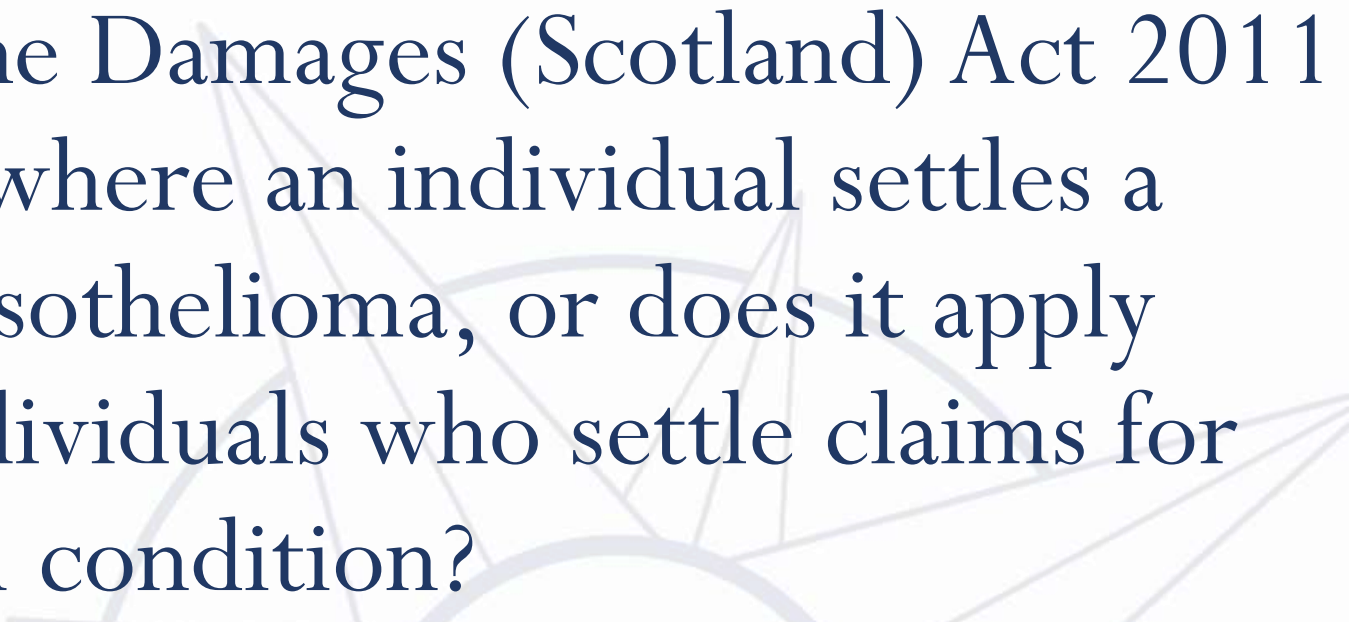
Fatal Claims
Crozier and Loss of Support

Gordon Balfour



Crozier - The Question

Does section 5 of the Damages (Scotland) Act 2011 apply only in cases where an individual settles a claim related to mesothelioma, or does it apply more broadly to individuals who settle claims for any asbestos-related condition?





Crozier – The Statutory Background

- Fatal claims are creatures of statute - Damages (Scotland) Act 2011
- Section 3:

Sections 4 to 6 apply where a person (“A”) dies in consequence of suffering personal injuries as the result of the act or omission of another person (“B”) and the act or omission—

- (a) gives rise to liability to pay damages to A (or to A’s executor), or
- (b) would have given rise to such liability but for A’s death.



Crozier – The Statutory Background

- Section 4(2):

But, except as provided for in section 5, no such liability arises if the liability to pay damages to A (or to A's executor) in respect of the act or omission—

(a) is excluded or discharged, whether by antecedent agreement or otherwise, by A before A's death...

- If deceased settles claim - generally no liability to relatives



Crozier – “The invidious situation”

- Mesothelioma – time for deceased to raise an action
 - *Dow v West of Scotland Shipbreaking Co Limited* 2007 Rep LR 59
– “The invidious situation”
 - The solution - Rights of Relatives to Damages
(Mesothelioma) (Scotland) Act 2007
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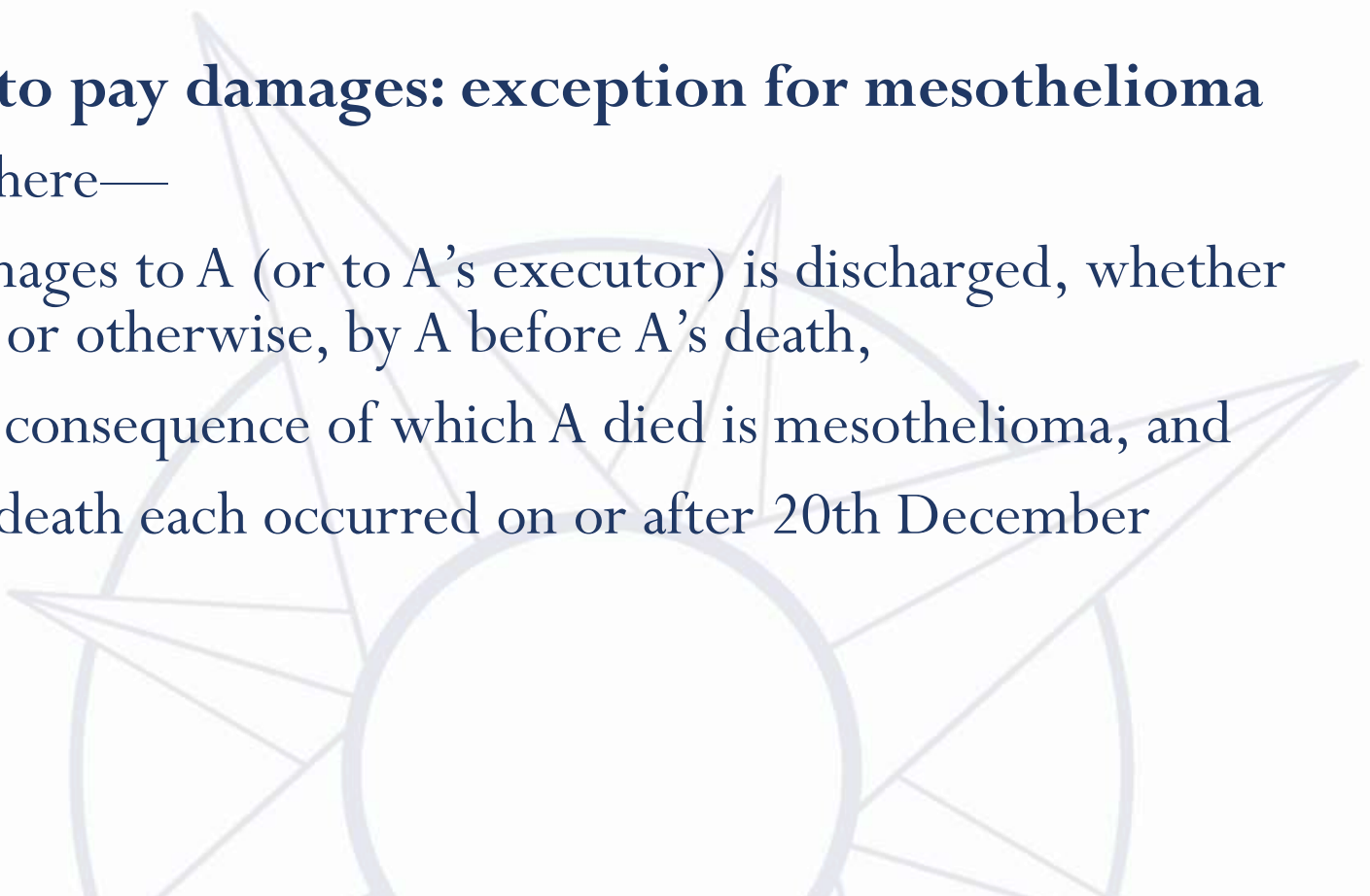


Crozier — Section 5

- Section 5 of the 2011 Act:

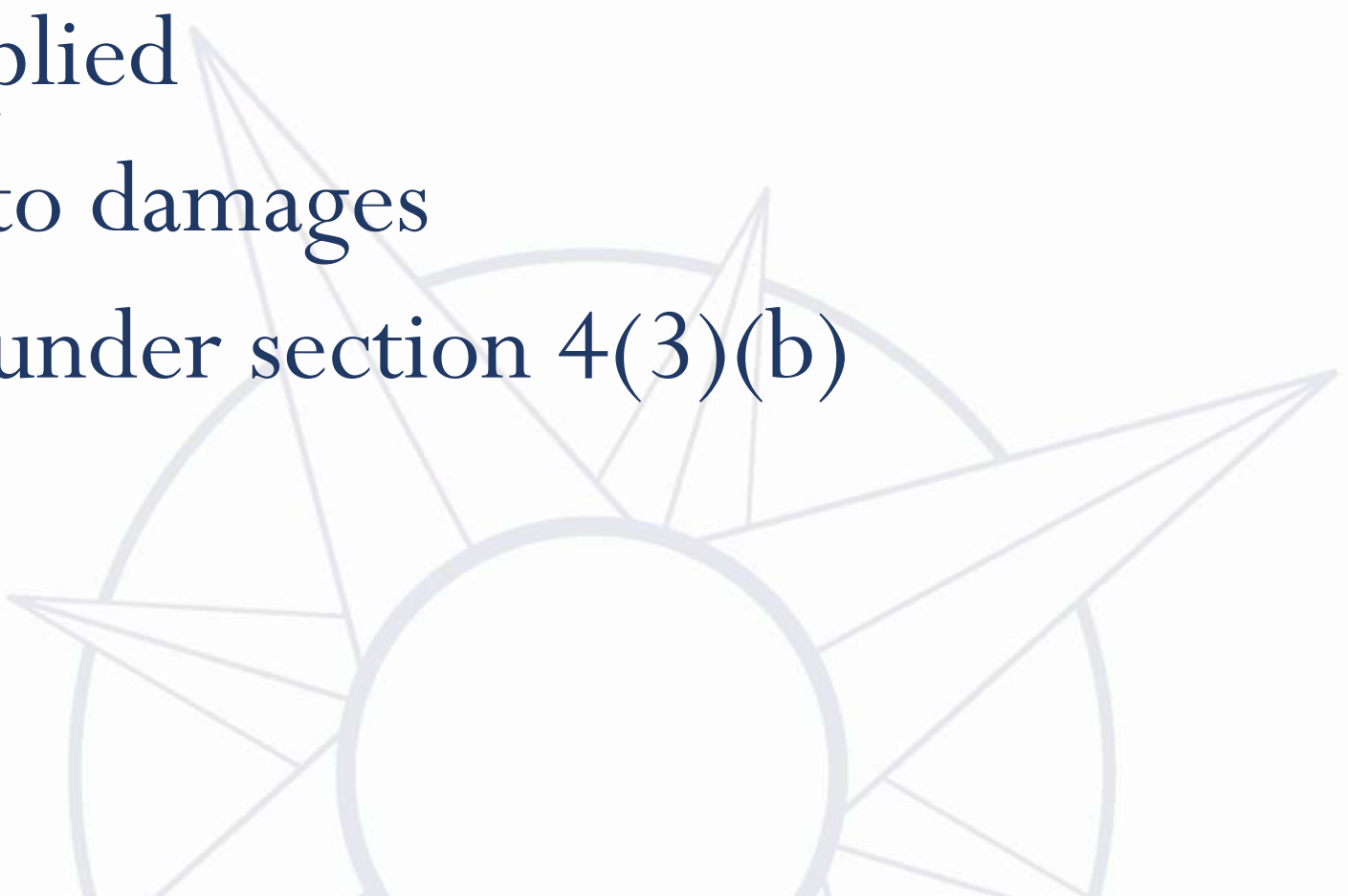
Discharge of liability to pay damages: exception for mesothelioma

(1) This section applies where—

- (a) the liability to pay damages to A (or to A's executor) is discharged, whether by antecedent agreement or otherwise, by A before A's death,
 - (b) the personal injury in consequence of which A died is mesothelioma, and
 - (c) the discharge and the death each occurred on or after 20th December 2006.
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Crozier – Effect of Section 5

- Section 4(2) disapplied
 - Relatives entitled to damages
 - Limited to claims under section 4(3)(b)
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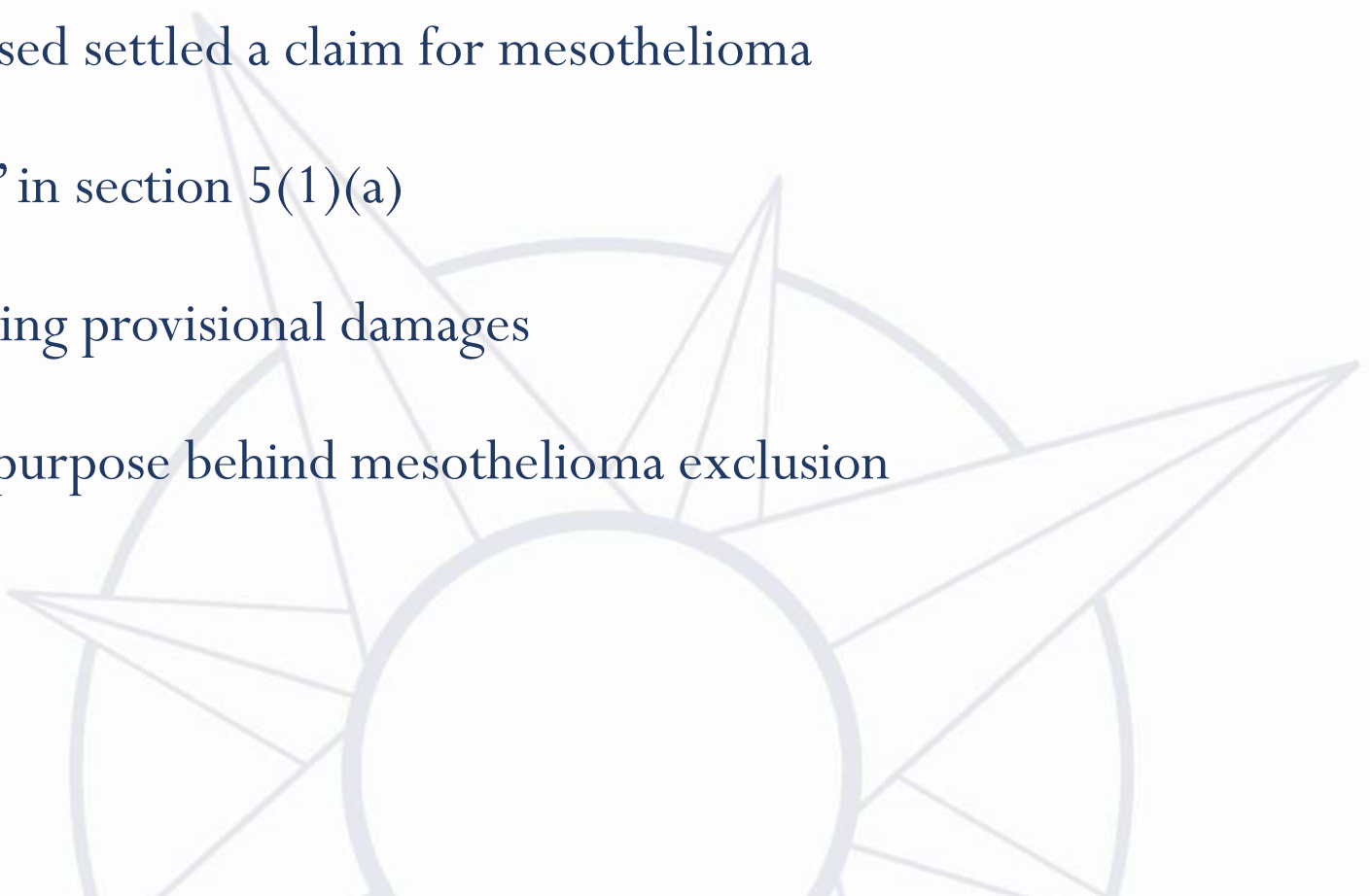
Crozier — Facts

- 2011 - developed pleural plaques and asbestosis
- 2014 - claim settled on a full and final basis
- Developed mesothelioma
- Died 15 October 2018
- Family members raised present action
- Not in “the invidious situation”



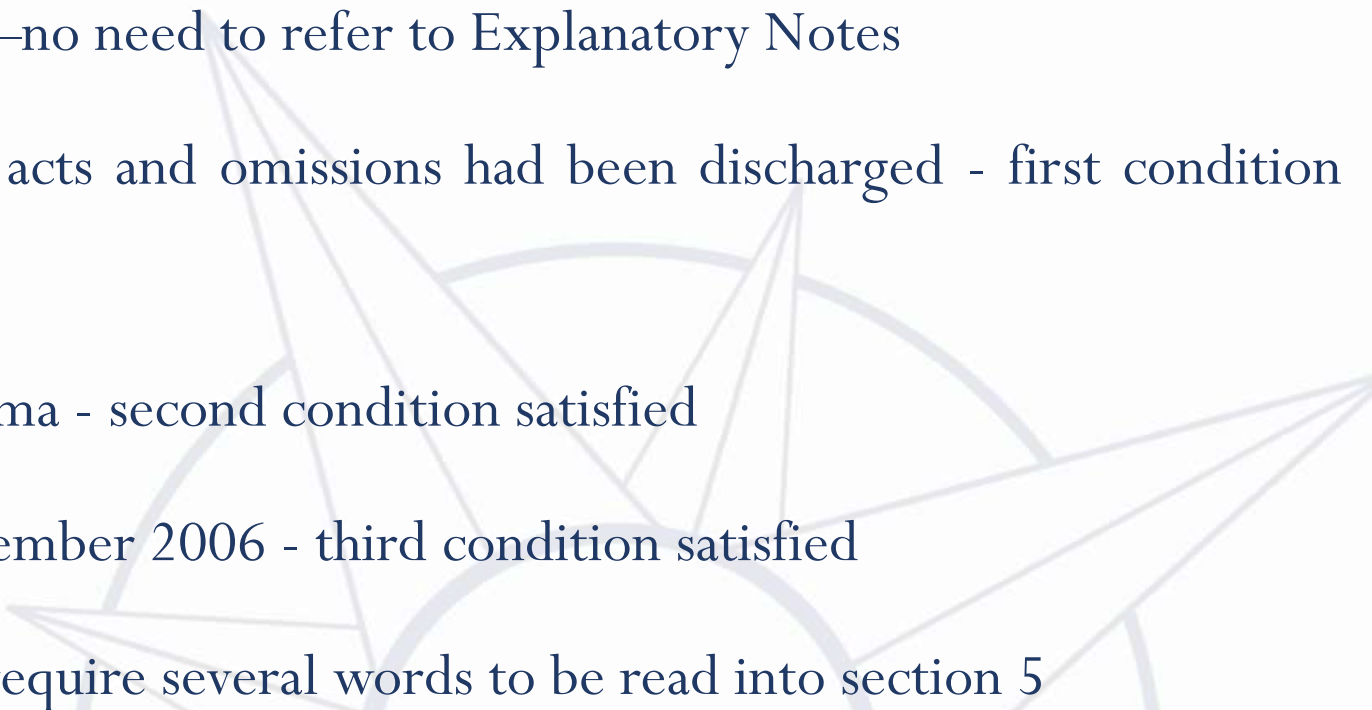


Crozier – Defender’s Argument

- Section 5 applies only if the deceased settled a claim for mesothelioma
 - Turns on meaning of “the liability” in section 5(1)(a)
 - Could have preserved right by taking provisional damages
 - Relies on Explanatory Notes and purpose behind mesothelioma exclusion
- 



Crozier – Pursuers’ Argument

- Section 5 clear and unambiguous –no need to refer to Explanatory Notes
 - Defender’s liability in respect of acts and omissions had been discharged - first condition satisfied
 - Mr Crozier died from mesothelioma - second condition satisfied
 - Discharge and death after 20 December 2006 - third condition satisfied
 - Defender’s interpretation would require several words to be read into section 5
- 



Crozier – Current Position

- Lord Stuart agreed with pursuers' submissions
- Case remitted to proof
- Defender has reclaimed
- Likely to be heard during 2024





Crozier – Implications

- Importance to claimants with asbestos-related conditions
 - Full and final or provisional – what rights will relatives have?
- Importance to family members
 - Is there a competent claim?
- Unclear pending reclaiming motion






Loss of Support – Some Thoughts

- Use a Spreadsheet!
- Use a Spreadsheet!!!
- **USE A SPREADSHEET!!!!!!**





Loss of Support – Some Thoughts

- Section 7 of the 2011 Act
 - Two categories:
 - Partners and dependent children
 - All other relatives who receive support
 - Partners and dependent children
 - 75% unless “manifestly and materially unfair result”
- 



Loss of Support – Some Thoughts

- Net Income
 - Earnings
 - Pensions
 - State Benefits?





Loss of Support – Some Thoughts

- Split Past/Future
- Past Loss
 - Period to death - $YEARFRAC$
 - Table E discount
 - Interest at 4%





Loss of Support – Some Thoughts

- Future Loss Multiplier
 - From now
 - Table 1
 - Interpolate between ages
 - If “atypical” use bespoke medical evidence
 - Limits of medical evidence
 - Table F





Loss of Support – Some Thoughts

- Current age: 82.5
- Table 1 life expectancy (0% column): 7.49 years
- Reduce by medical evidence: $7.49 - 1 = 6.49$ years
- Term certain (Table 36 at -0.75%): 6.65
- Table F (assume 3 years since death): 0.78 (interpolate between ages 80 and 85)
- Multiplier: $6.65 \times 0.78 = 5.19$

Compass Chambers



Parliament House

Edinburgh

EH1 1RF

DX 549302, Edinburgh 36

LP 3, Edinburgh 10

www.compasschambers.com

Gordon Balfour

gordon.balfour@compasschambers.com

Gavin Herd

Practice Manager

Phone: 0131 260 5648

Fax: 0131 225 3642

gavin.herd@compasschambers.com