

Compass Chambers

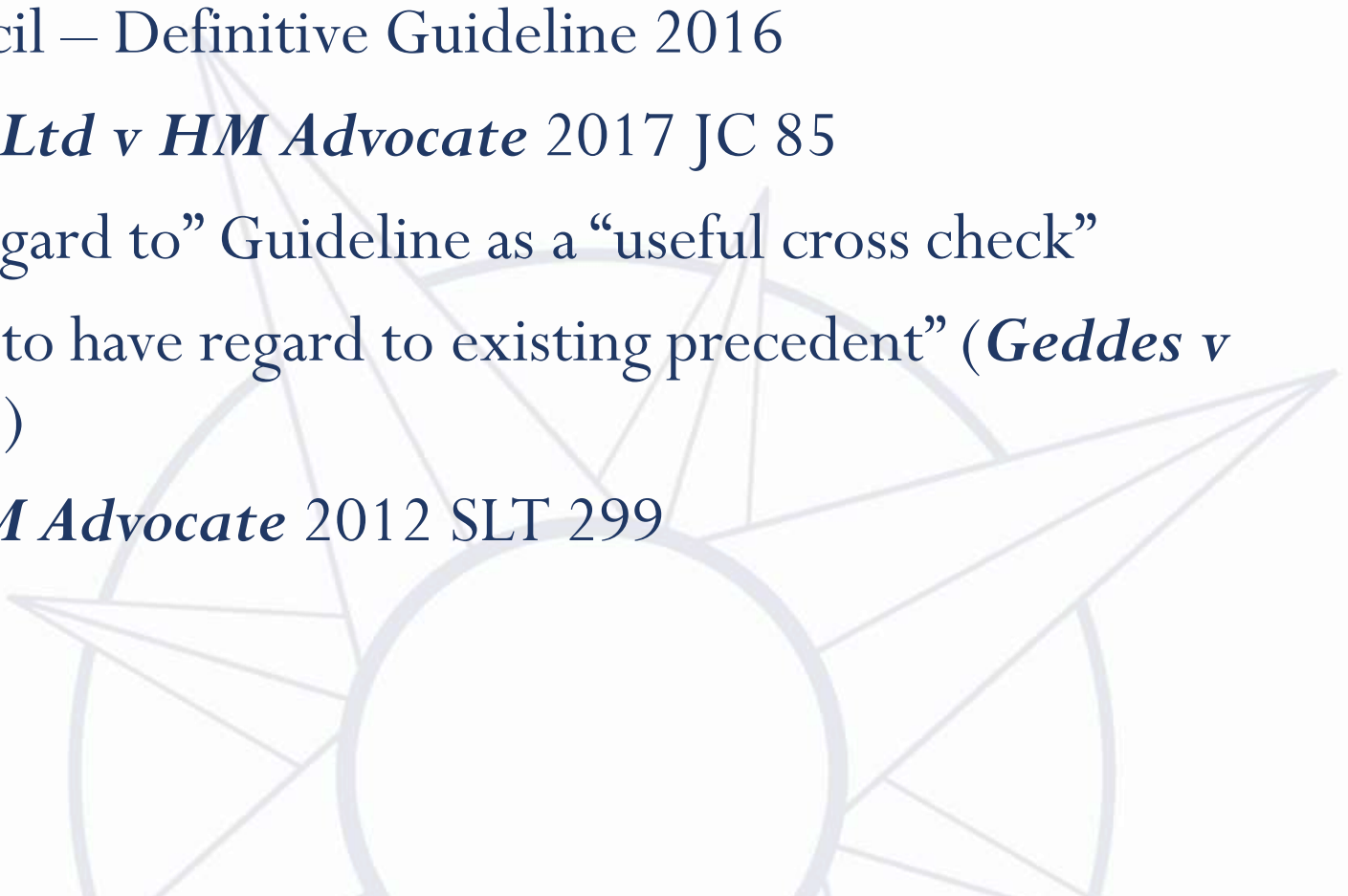


HEALTH & SAFETY Sentencing Update

Barry Smith KC



Background

- Sentencing Guidelines Council – Definitive Guideline 2016
 - *Scottish Power Generation Ltd v HM Advocate* 2017 JC 85
 - Sentencing judges to “have regard to” Guideline as a “useful cross check”
 - It may be “equally important to have regard to existing precedent” (*Geddes v HM Advocate* 2015 SLT 415)
 - *Scottish Seafarms Ltd v HM Advocate* 2012 SLT 299
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St. David's Care Home, Forfar





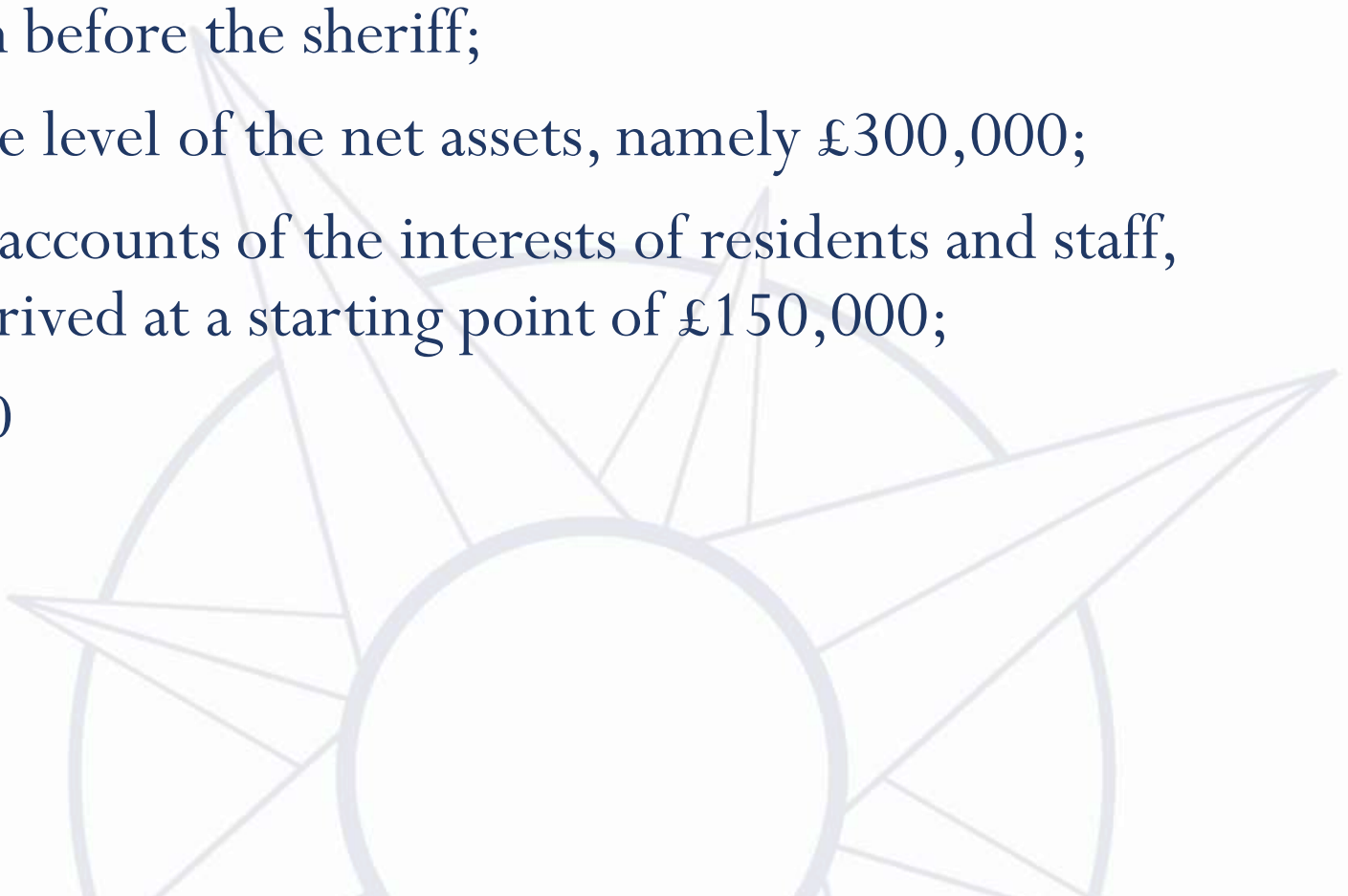
St. David's Care Forfar Ltd v HMA

[2023] HCJAC 17

- In January 2017, an elderly, frail resident with advanced dementia got up during the night and wandered outside, where she was later found in a poor condition;
- Mrs Norrie died a short time later;
- Cause of death, *inter alia*, hypothermia;
- Failure to put adequate measures in place;
- Motion sensor deactivated by taping over sensor;
- Dining room fire exit door unlocked



St. David's Care Forfar Ltd v HMA [2023] HCJAC 17

- Limited financial information before the sheriff;
 - Sheriff assessed fine at half the level of the net assets, namely £300,000;
 - Further reduced that to take accounts of the interests of residents and staff, and mitigatory factors and arrived at a starting point of £150,000;
 - Further reduced to £100,000
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St. David's Care Forfar Ltd v HMA [2023] HCJAC 17

- Appeal, *inter alia*, on basis that sheriff had failed to apply Guideline;
- Decision: fine not excessive; no error on the part of the sheriff;
- “While the sheriff did not base his approach on the [Guideline], he was not bound to do so...” [para.48]
- “[...] nothing in the sheriff’s approach that is materially inconsistent with the Guideline.” [para. 49]
- “We stress that the Guideline should not be used in a mechanistic manner; it can be used as a broad cross-check against the sentence that would be considered appropriate according to current sentencing practice.” [para.53]



St. David's



Tigh-Na-Muirn, Monifeith





Tigh-Na-Muirn Ltd v HMA

[2023]HCJAC 30

- In May 2020 an elderly resident, with Alzheimer's, was self-isolating in his room having contracted COVID-19;
- Various COVID measures were in place, including storage of cleaning products in rooms;
- Mr Fyfe found having breathing difficulties and chest pain;
- Cup with green residue and bottle of "Sterigerm" cleaning fluid found;
- Cause of death, *inter alia*, tracheobronchitis & pneumonia due to ingestion of ammonia based cleaning product.



Tigh-Na-Muirn





Tigh-Na-Muirn Ltd v HMA

[2023]HCJAC 30

- Failure to adequately assess risk of storage of cleaning products in resident's rooms; and ensure residents were not exposed to hazardous cleaning chemicals;
- Sheriff assessed culpability as “low” per Guideline & Harm Category 2 [range £3,000 – £40,000 for a small company];
- Sheriff imposed fine of £20,000 (discounted from £30,000);
- Crown appeal against sentence.



Tigh-Na-Muirn Ltd v HMA

[2023]HCJAC 30

- Crown appeal on the basis that the sheriff had erred in her assessment of culpability and harm;
- Decision: the Sheriff placed undue influence on the context, which was mitigatory, and erred in her assessment of culpability [para.31];
- Culpability was medium (*c.f.* low), HC 2 [range £25,000 - £230,000 for a small company] [para.33];
- Appropriate sentence was £60,000 (reduced from £90,000) [para. 35]



Tigh-Na-Muirn Ltd v HMA [2023]HCJAC 30

- The “relevant principles [are] summarised in *Scottish Seafarms...*” [para. 28];
- “As this approach is reflected in the English Guideline, it should be used as a cross check on Scottish precedent, though not applied mechanistically...” [para.30]
- The period of the libel was important to the assessment of the extent of risk [para. 29];
- Fine imposed “failed to fulfill sufficiently the relevant sentencing objective of punishment and deterrence.” [para.34].



Linbrooke Services





Linbrooke Services Ltd v HMA

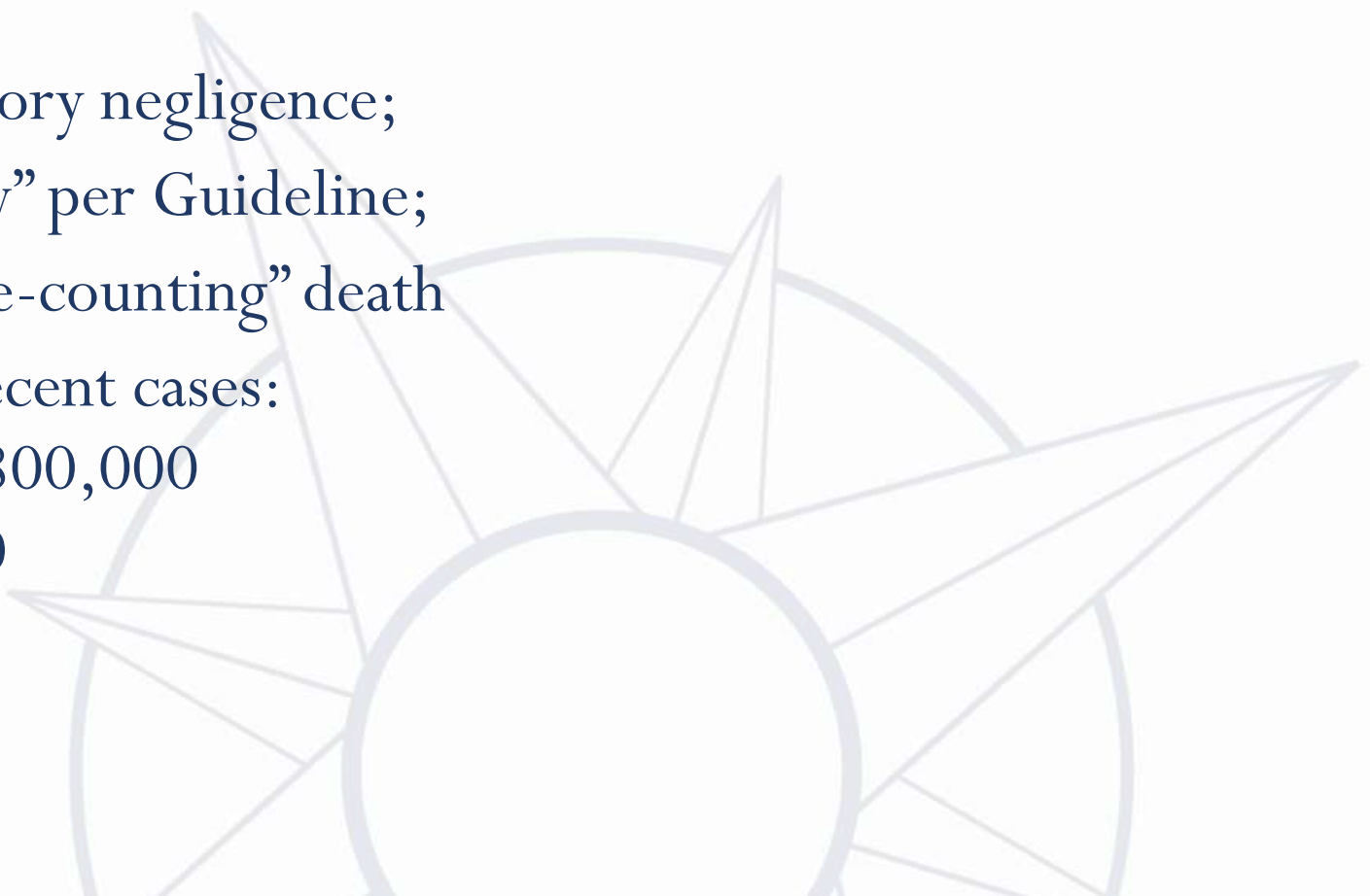
[2023]HCJAC 31

- Fall from height at Bearsden Railway Station on 5 June 2018;
- Work to install cabling for new PA system through conduits at c.3m;
- Company convicted after trial per HSWR 1999 Reg.3(1), and WAHR 2005 Reg 4 & 6(4)(b);
- Fine £750,000 (comprising compensation order of £200K and fine £550K);
- Sheriff's assessment: Medium Culpability, HC 2, large company (turnover £50M+)
- Starting point £1M, reduced to £750K



Linbrooke Services Ltd v HMA

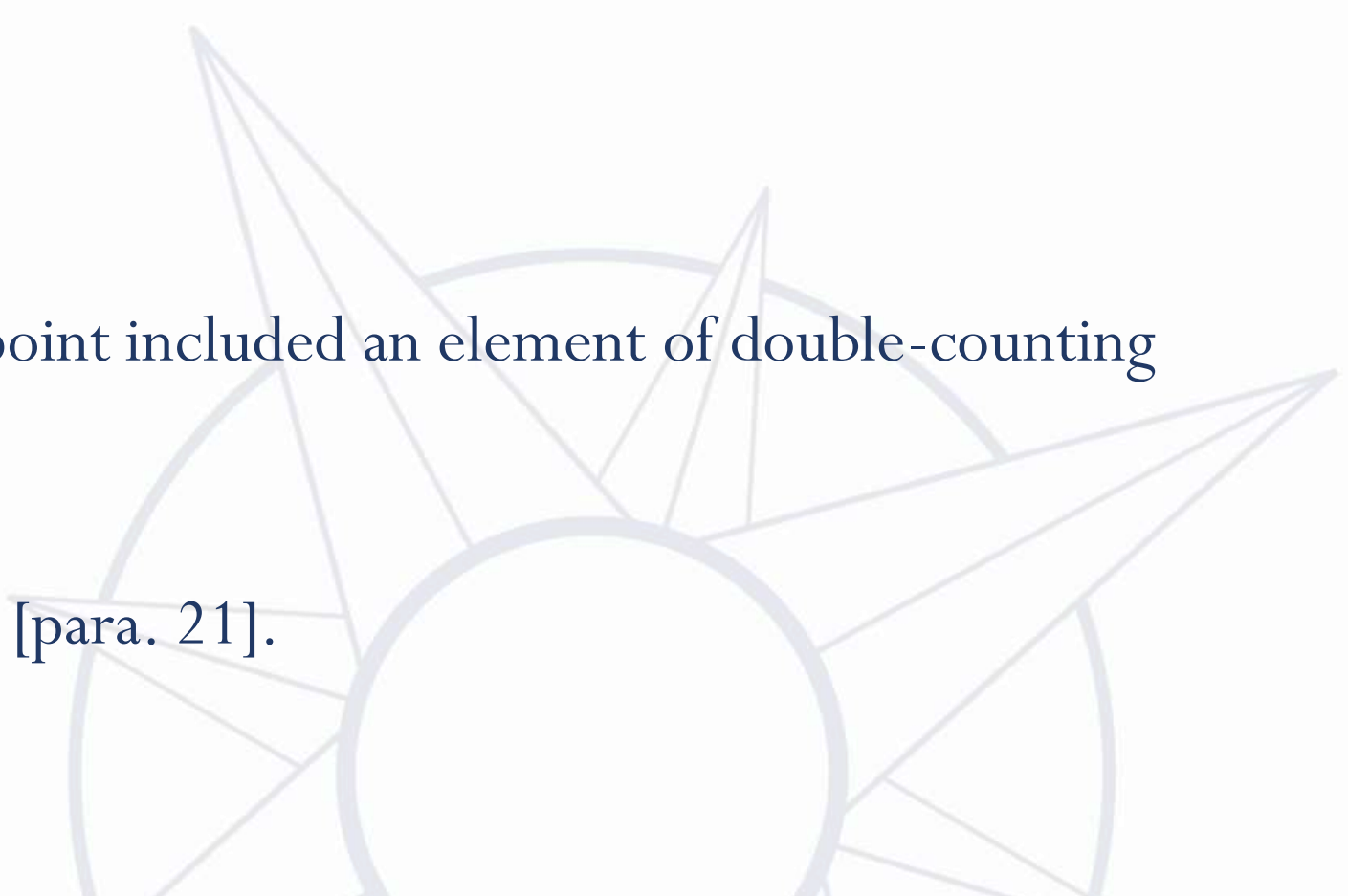
[2023]HCJAC 31

- Grounds of Appeal:
 1. Deceased's contributory negligence;
 2. Not a “large company” per Guideline;
 3. HC error but “double-counting” death
 - On ground 2, reference to recent cases:
 - Mowi Scotland Ltd £800,000
 - RJ Macleod £800,000
 - BP £650,000
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Linbrooke Services Ltd v HMA

[2023]HCJAC 31

- Decision:
 1. Rejected [para. 17];
 2. Rejected [para. 18];
 3. Accepted – starting point included an element of double-counting [para. 19];
 - Appeal allowed;
 - Fine of £600,000 substituted [para. 21].
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Linbrooke Services





Questions?



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