

# Compass Chambers



## Material Contribution, in fact... where do we stand?

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# Talk Overview

Ross — Part 1: The framework and the foundation

- The three tests — indivisibility — Buccleuch (1866) — the dormant years — Wardlaw — McGhee

Craig — Part 2: Modern authority and the contemporary canvas

- Holmes v Poeton — Kerr v Midlothian — Rehman — five fields of application

Ross — Part 3: Practical takeaways and the roadmap





# Three Tests for Causation

## 1 — **But-for**

The universal default. Most cases end here.

## 2 — **Material contribution in fact (MCIF)**

Indivisible outcome + material contribution proved on BoP + science cannot quantify. Our subject today.

## 3 — **Material contribution to risk (MCTR)**

*Fairchild / Compensation Act 2006, s.3 — mesothelioma only. Will not be extended: Kerr v Midlothian [2024] CSOH 112.*

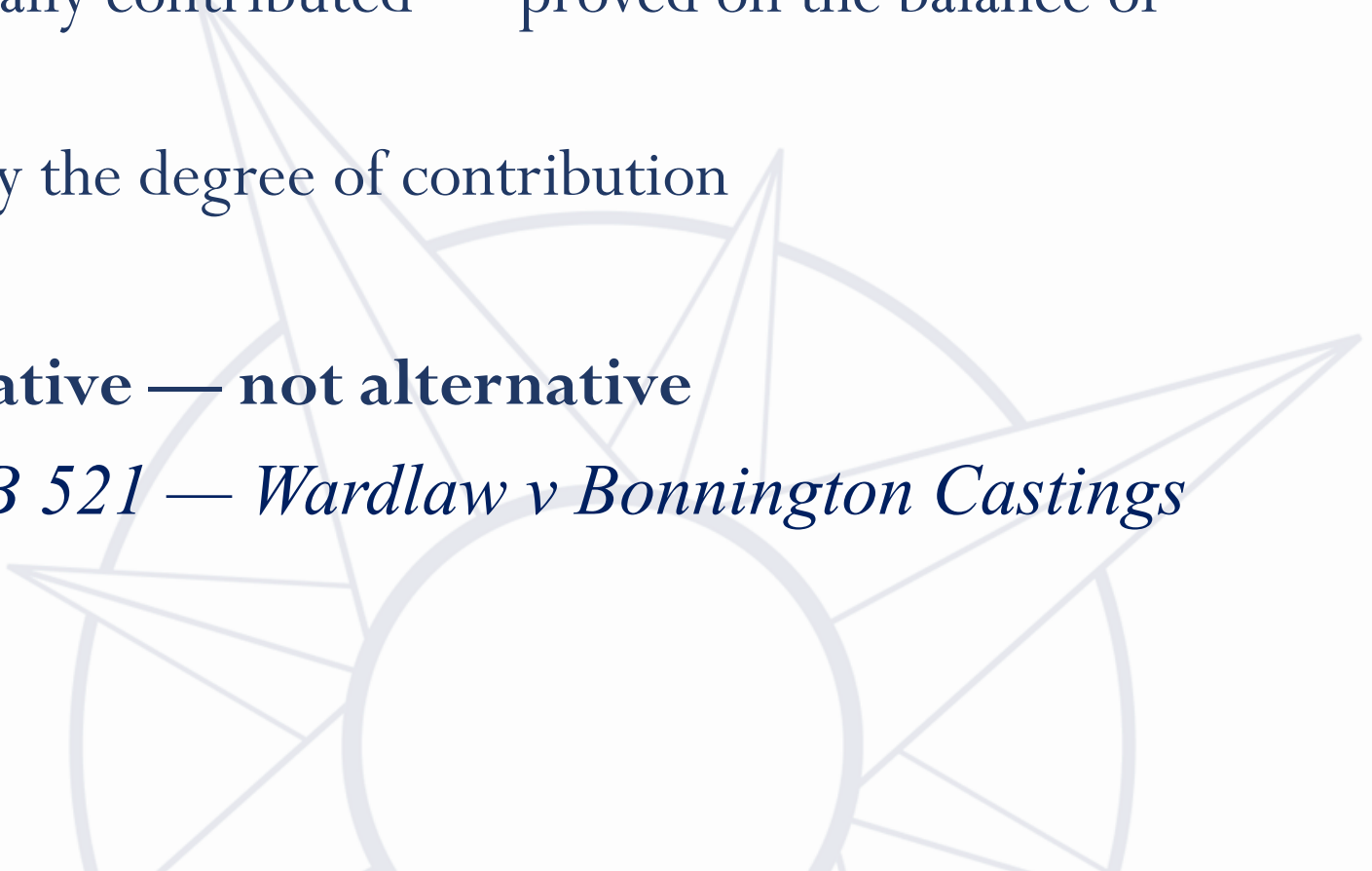


# MCIF — The Three Criteria

- (i) The outcome is indivisible
- (ii) The wrongful cause materially contributed — proved on the balance of probabilities
- (iii) The science cannot quantify the degree of contribution

**(+) Causes must be cumulative — not alternative**

*Holmes v Poeton [2024] KB 521 — Wardlaw v Bonnington Castings  
1956 SC (HL) 26*





# Indivisibility — The Threshold Question

*“Mesothelioma is an indivisible disease because, although the risk of developing a mesothelioma increases in proportion to the quantity of asbestos dust and fibres inhaled, the condition once caused is not aggravated by further exposure and the severity of the condition, if it occurs, is not thought to be affected by variations in the victim’s overall exposure.”*

— *Stuart-Smith LJ, Holmes v Poeton [2024] KB 521*

Divisible: asbestosis • NIHL • HAVS • pneumoconiosis — apportionment under Holtby

Indivisible: mesothelioma • Parkinson’s (Holmes) • TBIs • infections





# The Scottish Foundation

Duke of Buccleuch v Cowan (1866) 5 M 214





# Buccleuch v Cowan (1866) — The Facts

- The Duke owned a stretch of the river North Esk in Midlothian
- Six paper mills upstream — each releasing effluent into the river
- Each proprietor: “Not me — there are five others doing the same thing”

**The court held: each who materially contributed in fact to the pollution was liable**

*Court of Session, First Division (1866) 5 M 214*





# Buccleuch — Lord Cowan’s Question

*“The question is whether each and all of the parties who have materially contributed to the wrong may not be made responsible for the consequences? Or whether they are to evade responsibility for their acts because it is not proved — or cannot be proved — that their individual pollution of the stream, although materially contributing to it, amounts in itself to nuisance?”*

*— Lord Cowan, Buccleuch v Cowan (1866)*

**Lord Neaves answered with common sense. That is the doctrine, in 1866.**





# The Dormant Years: 1866–1956

- Lord Watson (obiter) in *Wakelin v LSWR* (1886): liability must depend on a negligent act which “materially contributed to the injury”
- Otherwise: the doctrine lies dormant for ninety years

## Why? Two suggestions:

- (i) The science — cumulative aetiology for industrial disease came of age in the mid-twentieth century
- (ii) Alternative routes — joint-tortfeasor doctrine absorbed the problem without resolving the causation question

*By 1956, Buccleuch was not in working memory — neither side cited it in Wardlaw*

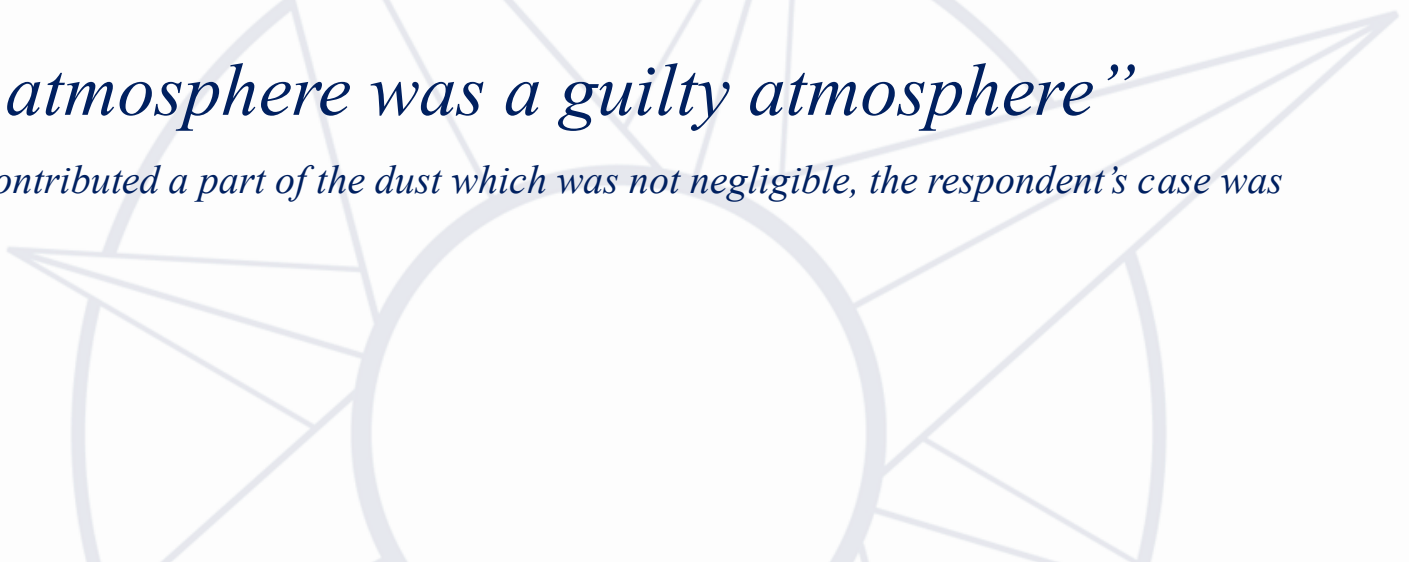


# Wardlaw v Bonnington Castings 1956 SC (HL) 26

- Mr Wardlaw — steel dressing shop, Leith — pneumoconiosis from silica dust
- Two sources: pneumatic hammers (no breach) and swing grinders (breach)
- First Division: 2–1 on causation — Lord President Clyde dissenting
- Appellants in HoL: pursuer must “eliminate all innocent sources”

*Respondent’s counsel: “the atmosphere was a guilty atmosphere”*

*“If the appellants were shown negligently to have contributed a part of the dust which was not negligible, the respondent’s case was proved.”*





# Wardlaw — Lord Reid

*“What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material.”*

*— Lord Reid, Wardlaw v Bonnington Castings 1956 SC (HL) 26*

**That last sentence is the working content of the threshold.**





# Wardlaw — Lord Keith of Avonholm

*“... it is impossible, in my opinion, to resolve the components of that atmosphere into particles caused by the fault of the defenders and particles not caused by the fault of the defenders, as if they were separate and independent factors in his illness. Prima facie the particles inhaled are acting cumulatively.”*

*— Lord Keith of Avonholm, Wardlaw*

The same inferential move as Buccleuch: the polluted whole — not any individual particle — causes the harm.

*Wardlaw followed immediately by Quinn v Cameron and Robertson 1957 SC (HL) 22*





# McGhee v NCB 1973 SLT 14

- Kiln worker — dermatitis from brick dust — two phases of exposure
- Breach: no showers. Innocent: the working day.
- Medical evidence: breach increased the risk — but could not establish cumulative contribution in the Wardlaw sense


**Lord Reid: materially increasing risk = material contribution (in the practical sense)**

*The missed opportunity: Buccleuch was deliberately not cited by appellant's counsel*

*Result: McGhee decided on a risk-based footing without resolving the underlying MCIF doctrine*



# The Framework — Handing Over

- 1866 — Buccleuch: the doctrine is born on the river North Esk
  - 1886 — Wakelin: a single obiter reference; then silence
  - 1956 — Wardlaw: the modern statement in a Leith steel dressing shop
  - 1957 — Quinn v Cameron: followed immediately
  - 1973 — McGhee: extended, confused; Fairchild [2002] eventually clarified
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*Material Contribution in Fact*

*Part 2*

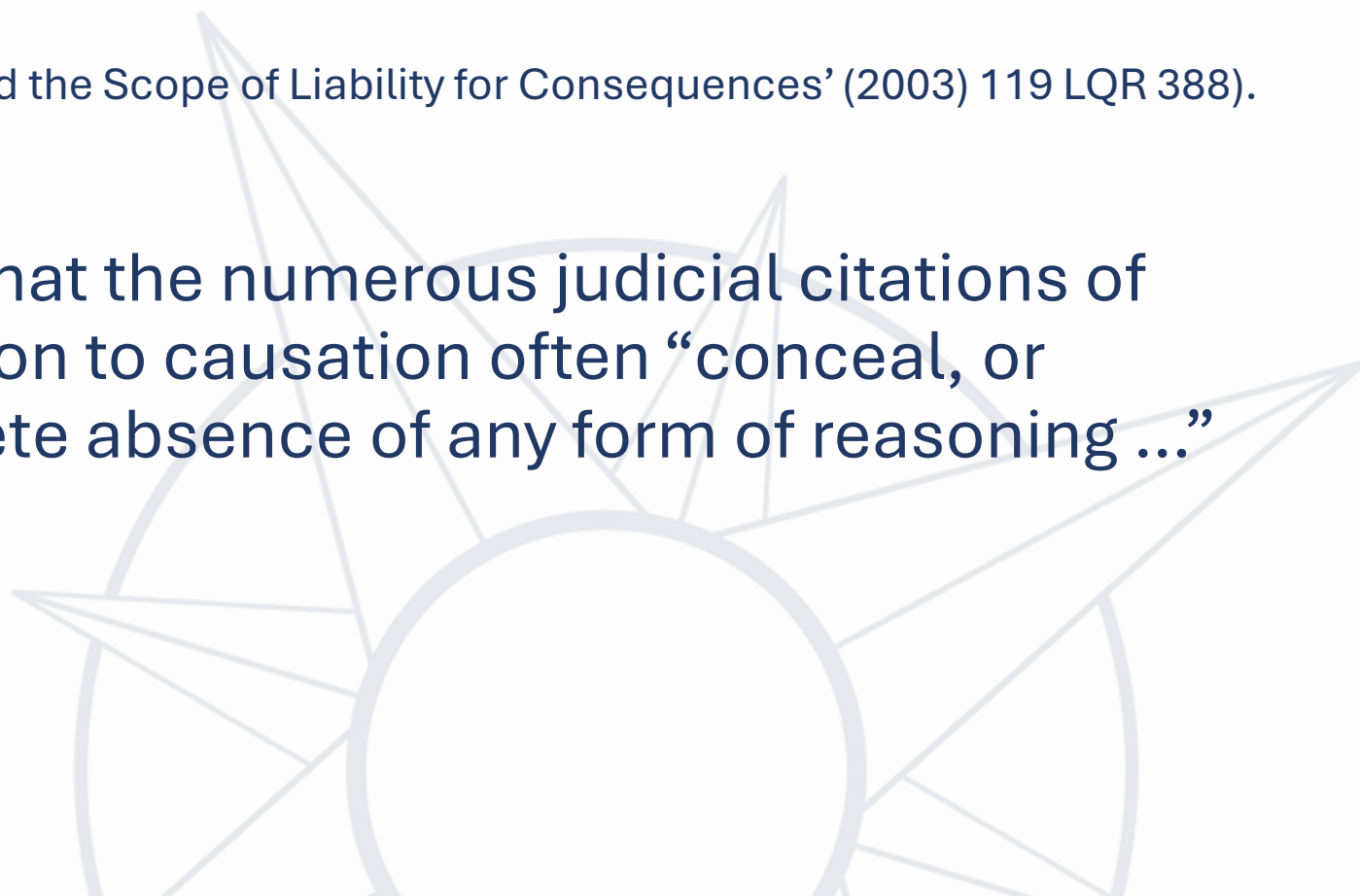




Legal causation remains a difficult concept, apt to lack clarity and produce confusion

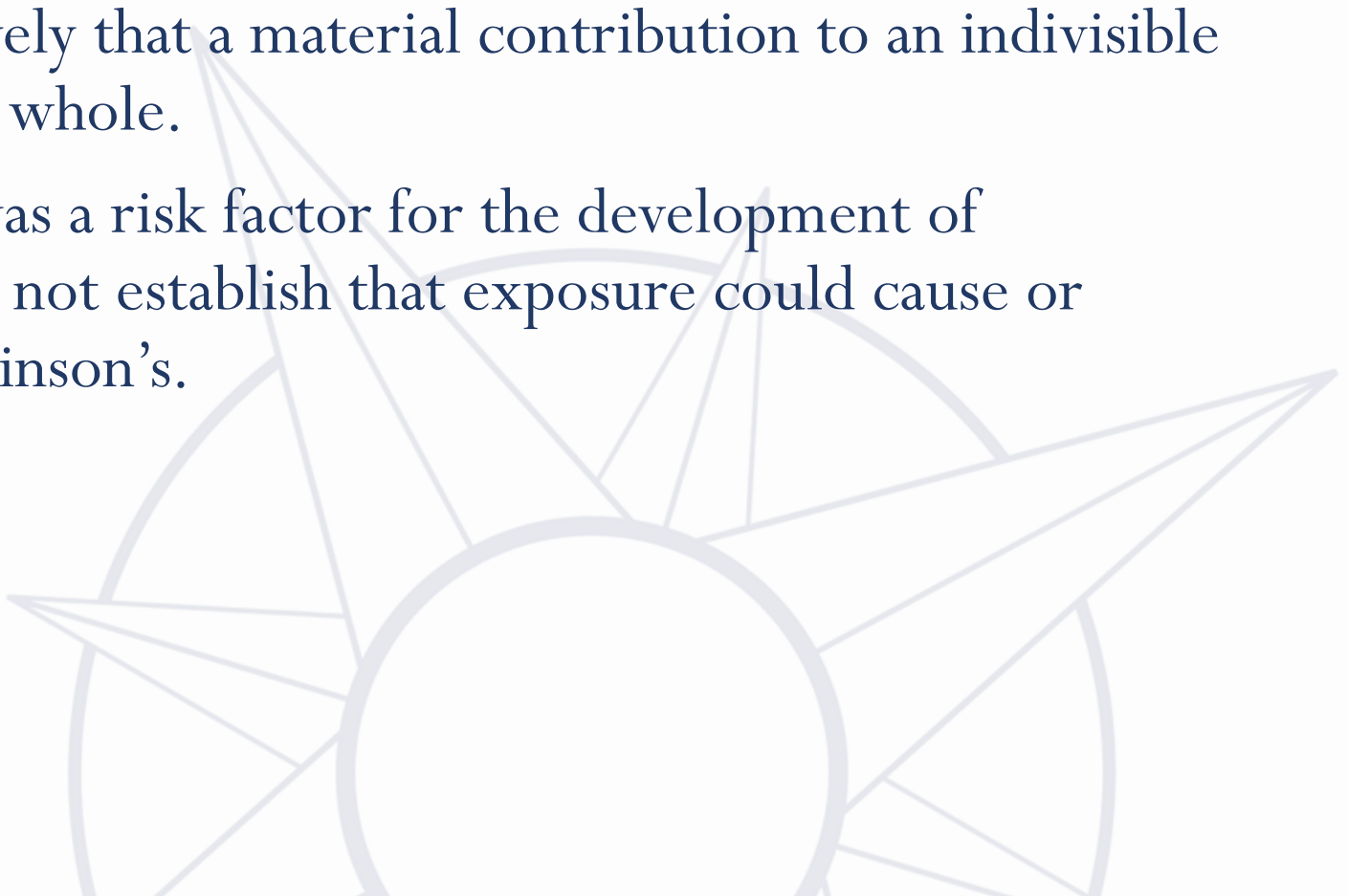
(see e.g. Stapleton, J., 'Cause-in-fact and the Scope of Liability for Consequences' (2003) 119 LQR 388).

Lord Hoffman once said that the numerous judicial citations of “common sense” in relation to causation often “conceal, or perhaps, reveal, a complete absence of any form of reasoning ...”





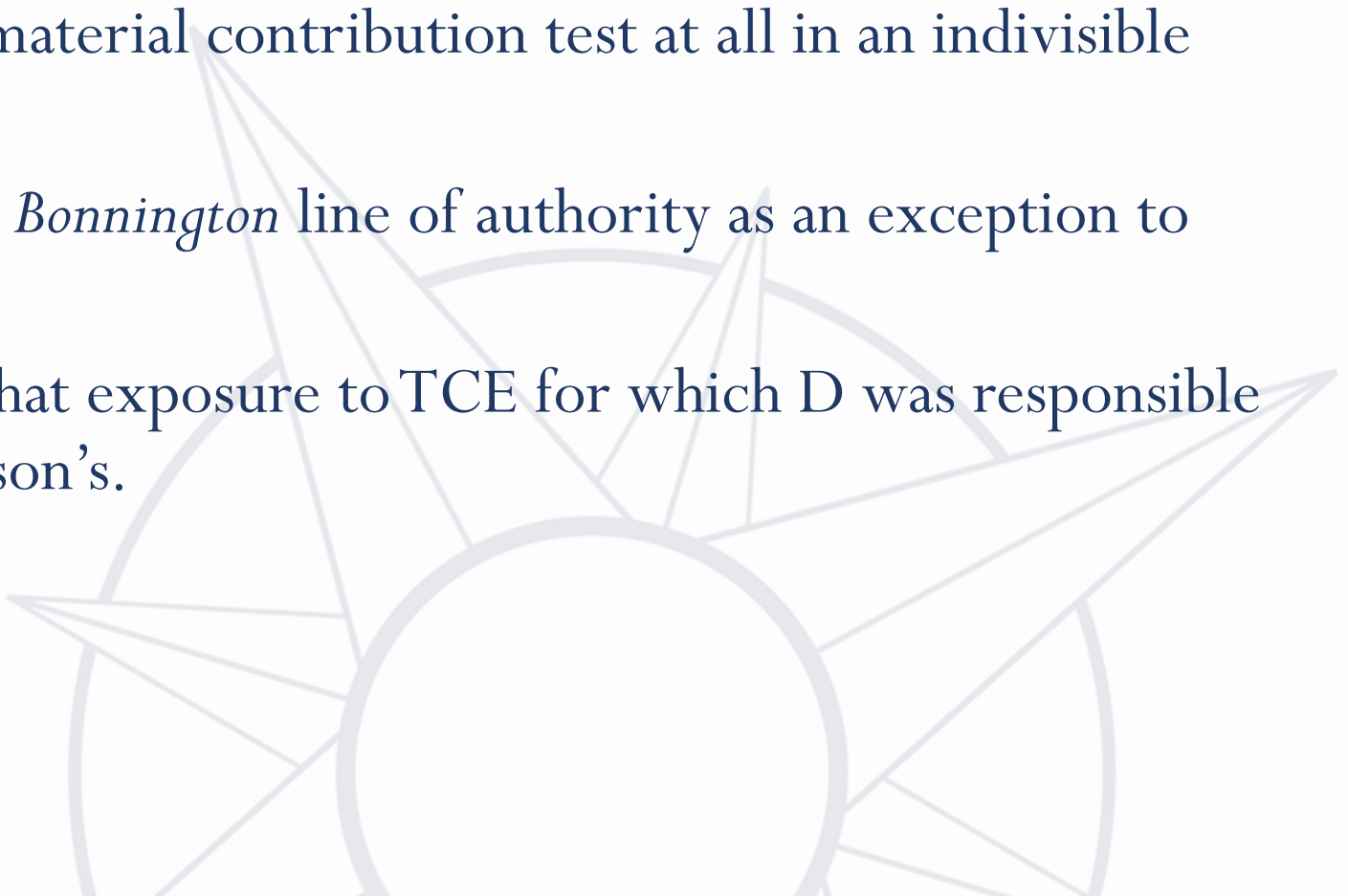
# *Holmes v Poeton Holdings Ltd* [2024] KB 521

- Exposure to TCE in employment.
  - Authorities showed conclusively that a material contribution to an indivisible disease made D liable for the whole.
  - Although exposure to TCE was a risk factor for the development of Parkinson's, the evidence did not establish that exposure could cause or materially contribute to Parkinson's.
- 



## *Holmes*

Submissions for the appellants:

- Judge was wrong to use the material contribution test at all in an indivisible injury case.
  - Judge was wrong to treat the *Bonnington* line of authority as an exception to the “but for” test.
  - The C still needed to prove that exposure to TCE for which D was responsible was a but for cause of Parkinson’s.
- 



## *Holmes*

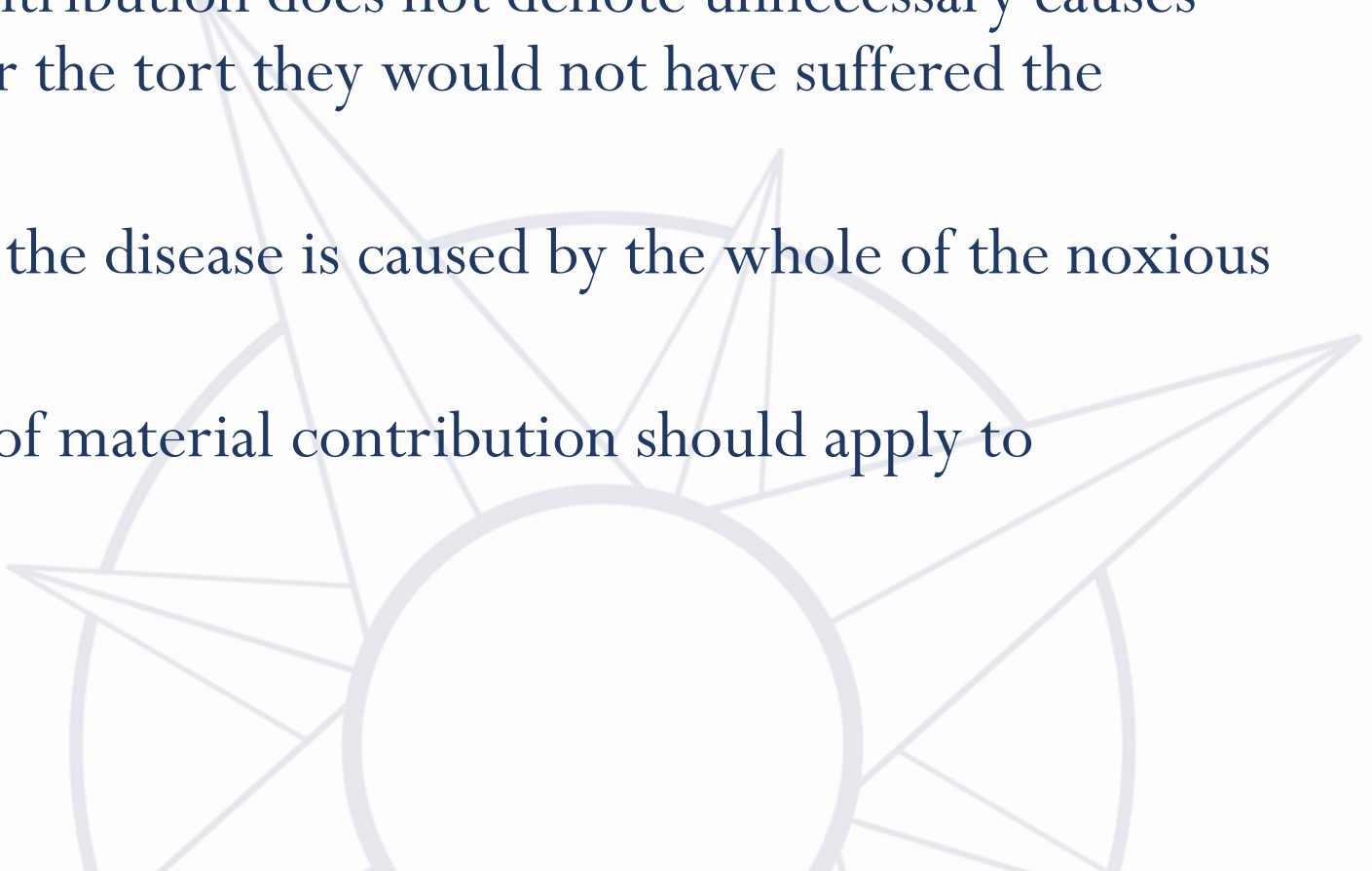
### Respondent's submission

- Where there are competing and independent alternative causes, there is no presumption of MCIF.
- Material contribution approach applies:
  - (a) Where MCIF is proved; but
  - (b) It cannot be said to what degree MCIF impacted on the outcome (i.e. the harm is indivisible).





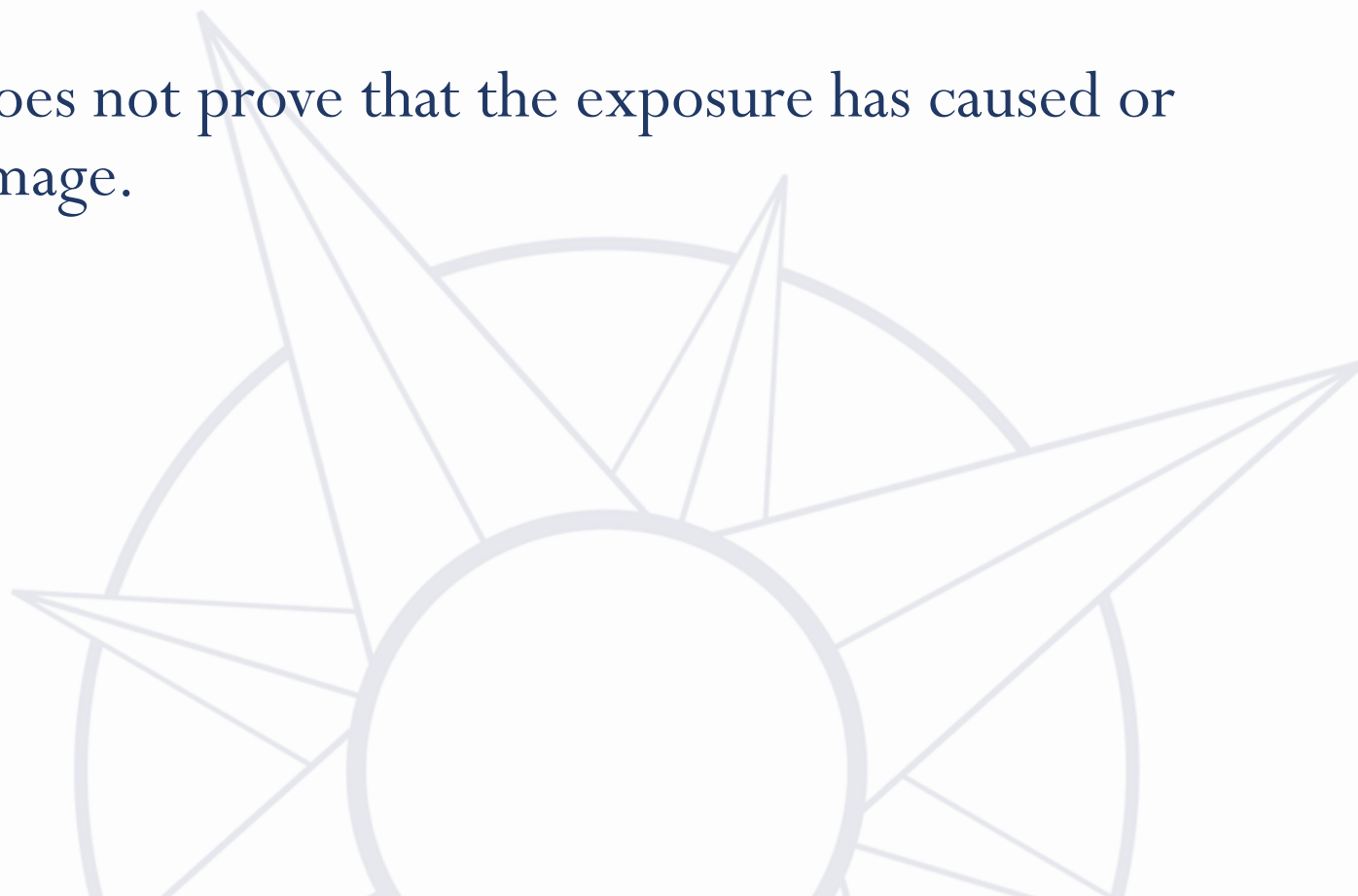
# *Holmes*

- No *Fairchild* exception was advanced.
  - Stuart-Smith LJ: Material contribution does not denote unnecessary causes — C must still prove that but for the tort they would not have suffered the damage.
  - Lord Reid in *Bonnington*: “... the disease is caused by the whole of the noxious material inhaled ...”
  - “... the *Bonnington* principle of material contribution should apply to indivisible diseases ...”
- 



## *Holmes*

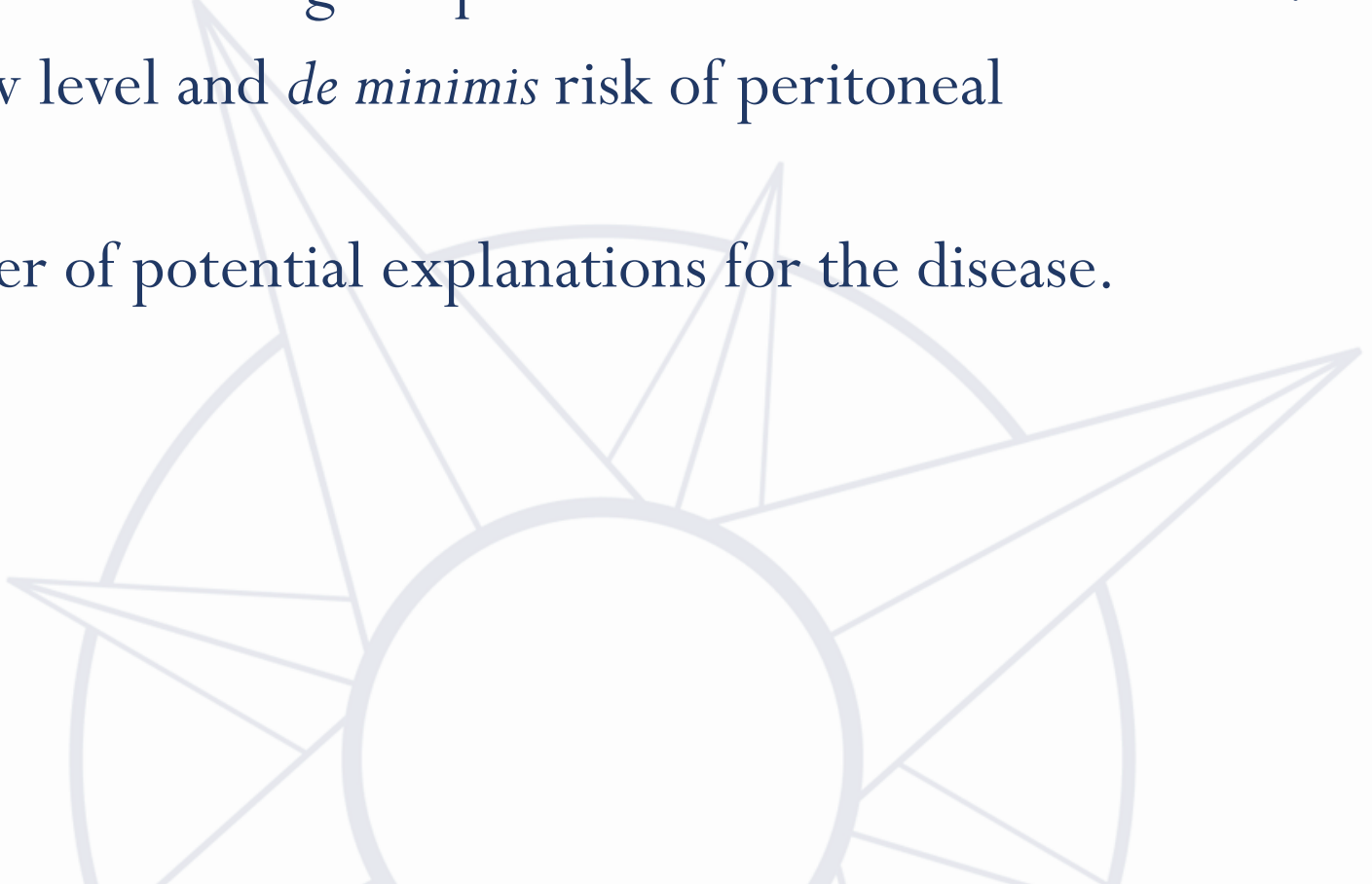
- Accepted that C was exposed to many environmental risk factors for Parkinson's.
- Proof of tortious exposure does not prove that the exposure has caused or materially contributed to damage.
- Not permissible to speculate





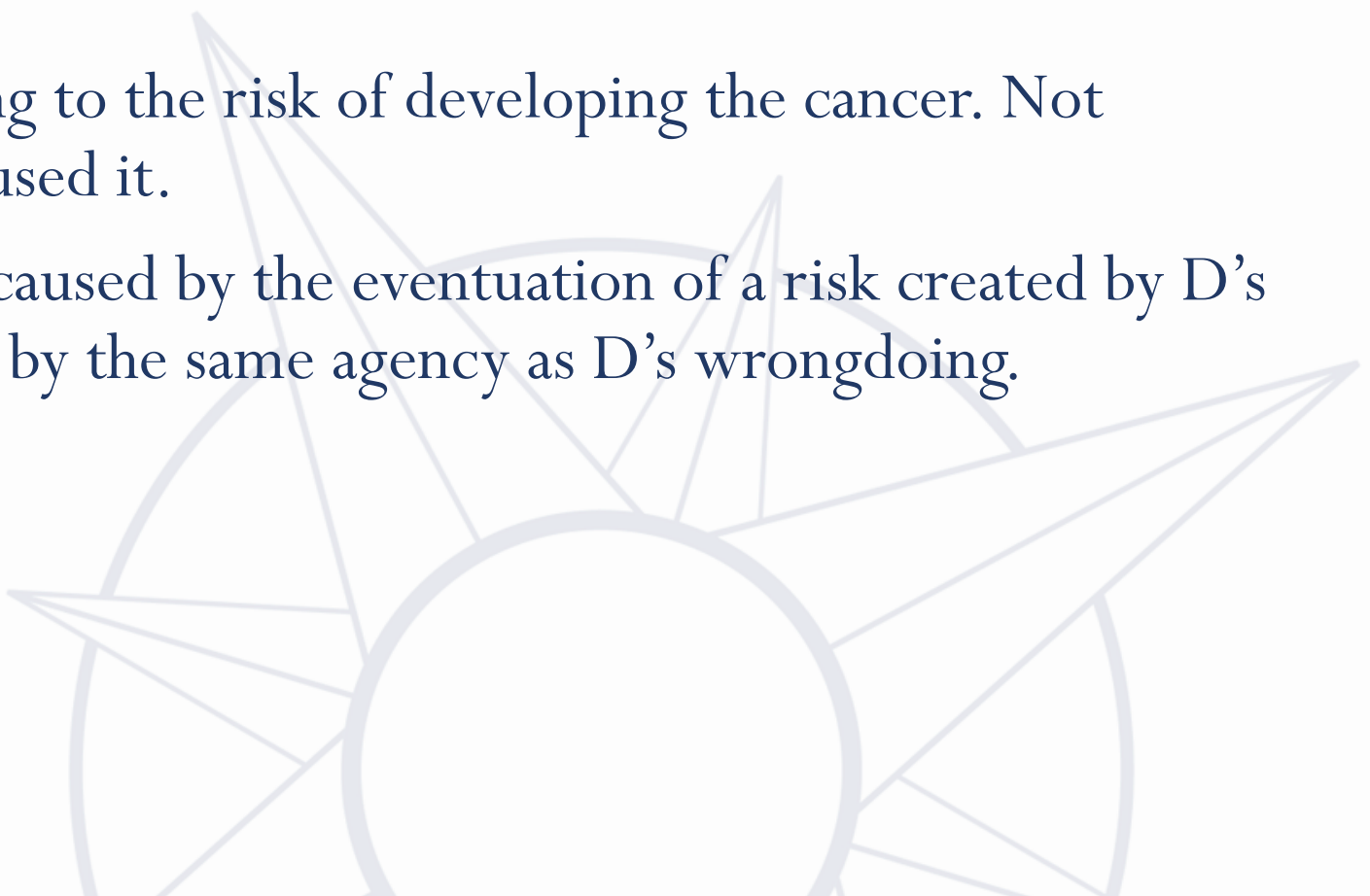
# *Kerr v Midlothian Council*

## 2025 SLT 268

- P contended that it was not necessary to prove asbestos exposure played a causative role in the normal sense - enough to prove a material increase in risk.
  - Evidence of exposure at a low level and *de minimis* risk of peritoneal mesothelioma.
  - Exposure was one of a number of potential explanations for the disease.
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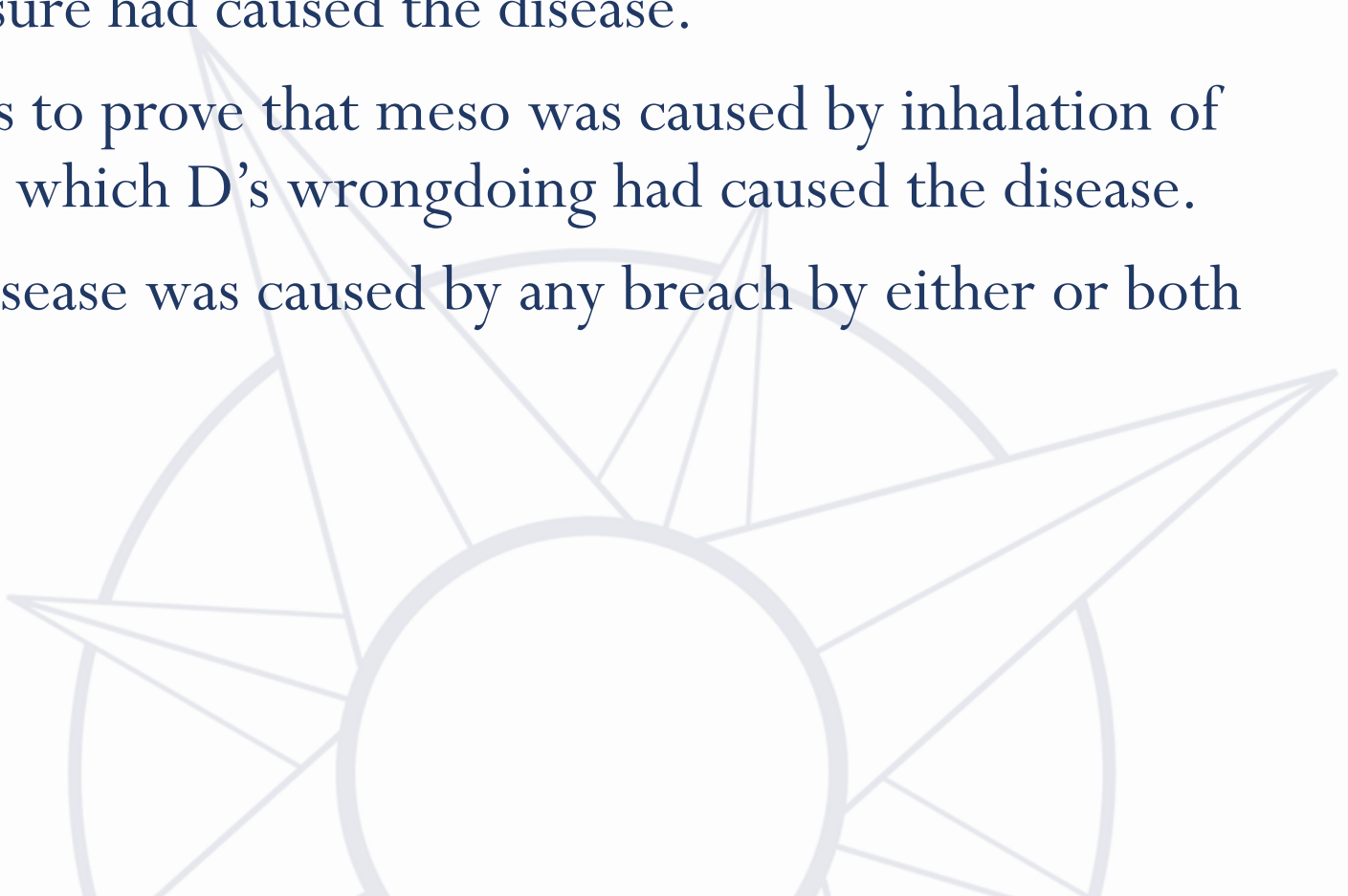


## *Kerr*

- P argued that exposure to asbestos was conduct capable of causing her an injury.
  - The loss is that of contributing to the risk of developing the cancer. Not whether the exposure has caused it.
  - P must prove the injury was caused by the eventuation of a risk created by D's conduct, and must be caused by the same agency as D's wrongdoing.
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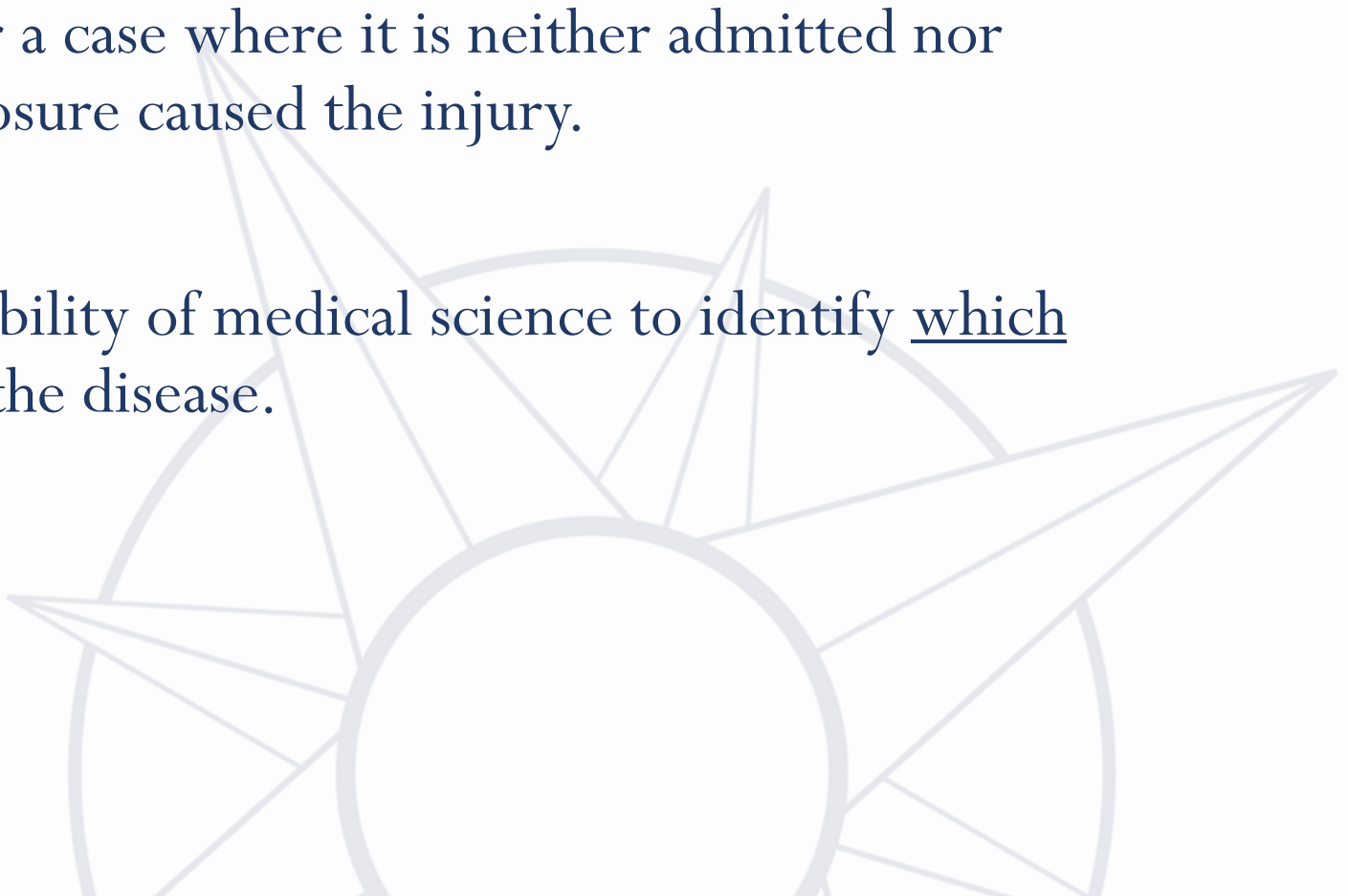
## *Kerr*

- D argued that the attempt to extend the *Fairchild* exception was flawed: P had failed to prove that any exposure had caused the disease.
  - In *Fairchild*, the first stage was to prove that meso was caused by inhalation of fibres. It could not be proved which D's wrongdoing had caused the disease.
  - In *Kerr*, it was not said that disease was caused by any breach by either or both employers.
- 



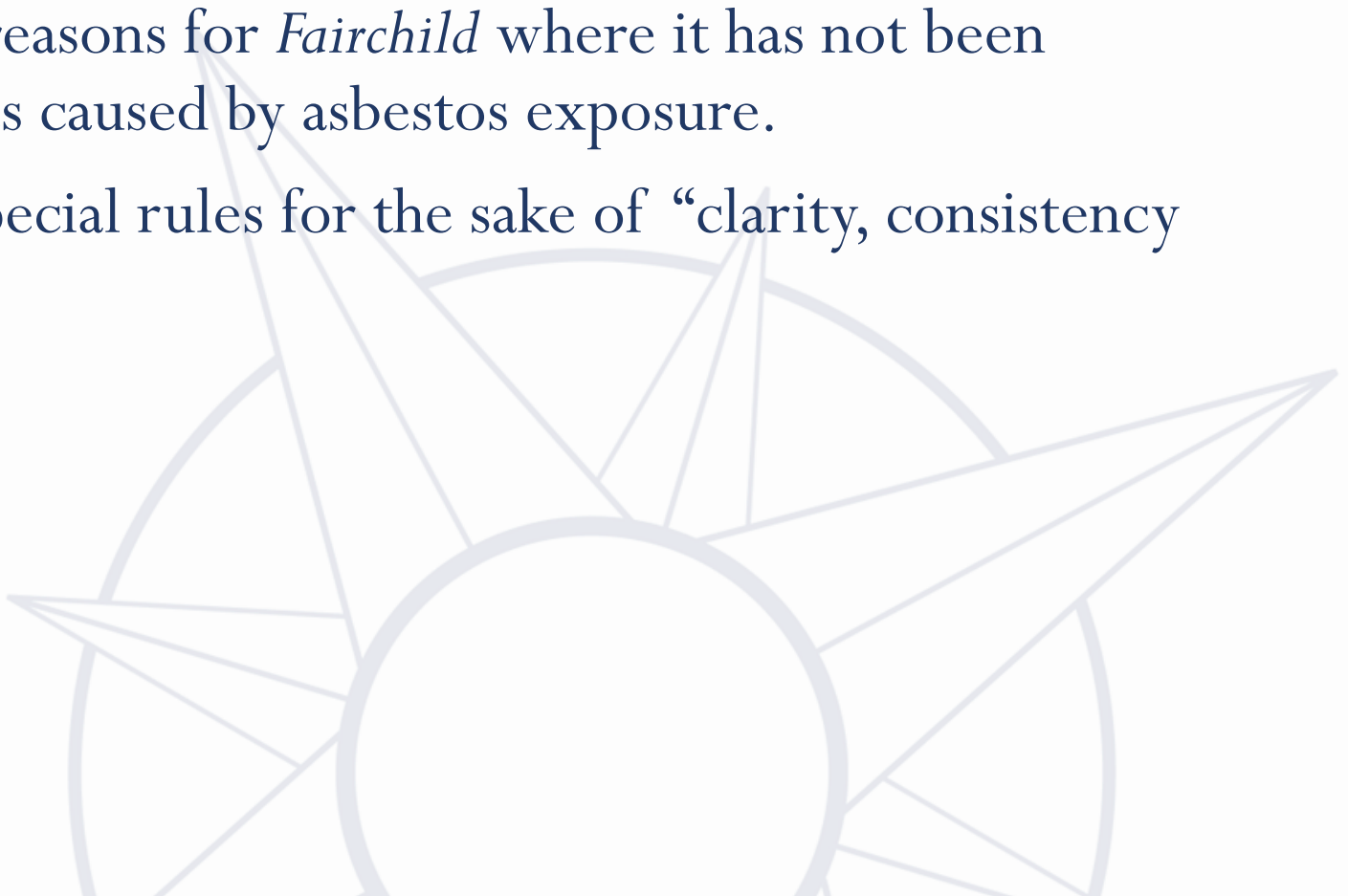
## *Kerr*

Lord Malcolm:

- *Fairchild* was not designed for a case where it is neither admitted nor established that asbestos exposure caused the injury.
  - The exposure was *de minimis*.
  - *Fairchild* is justified by the inability of medical science to identify which exposure to asbestos caused the disease.
- 




## *Kerr*

- Lord Malcolm relied heavily on *Sienkewicz*:
  - Difficult to apply the policy reasons for *Fairchild* where it has not been established that the injury was caused by asbestos exposure.
  - Counselling against further special rules for the sake of “clarity, consistency and certainty”
- 



*Rehman v SS for Health and Social Care*  
[2026] EWHC 6

- Fatal Covid-19 infections in care homes.
  - Initially: material increase in risk (*Fairchild*).
  - “Material contribution to injury” (*Bonnington*).
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# *Rehman*

The dilemma:

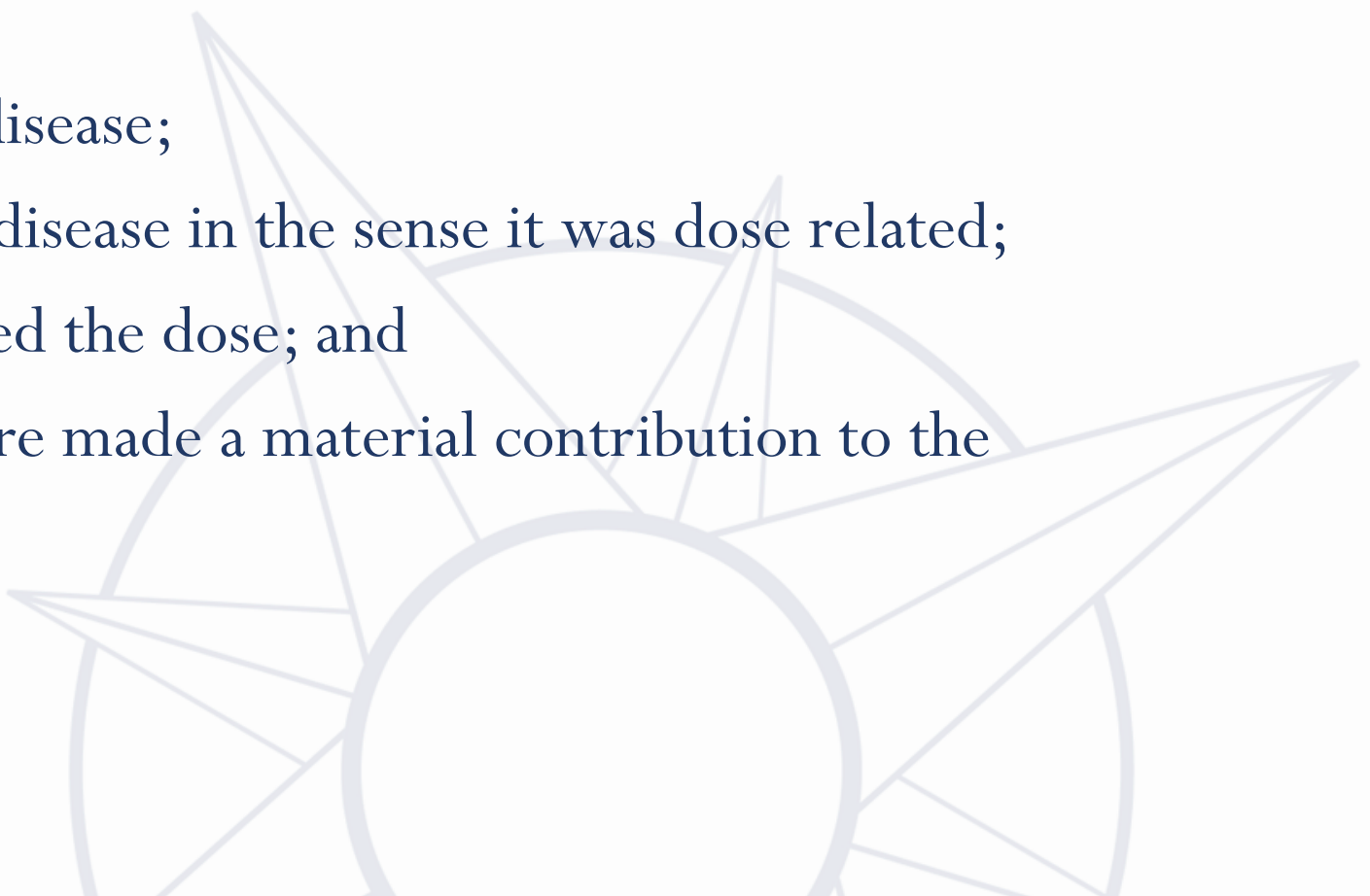
- (a) Where Covid-19 was ubiquitous;
- (b) C cannot identify source of individual infection;
- (c) Alleged that care providers failed to follow guidance.

Multiple exposures, some “innocent” and some not.





# *Rehman*

- C argued:
  - Covid-19 was an indivisible disease;
  - It was a cumulatively caused disease in the sense it was dose related;
  - The “guilty” particles increased the dose; and
  - The “guilty” particles therefore made a material contribution to the “mechanism of injury”
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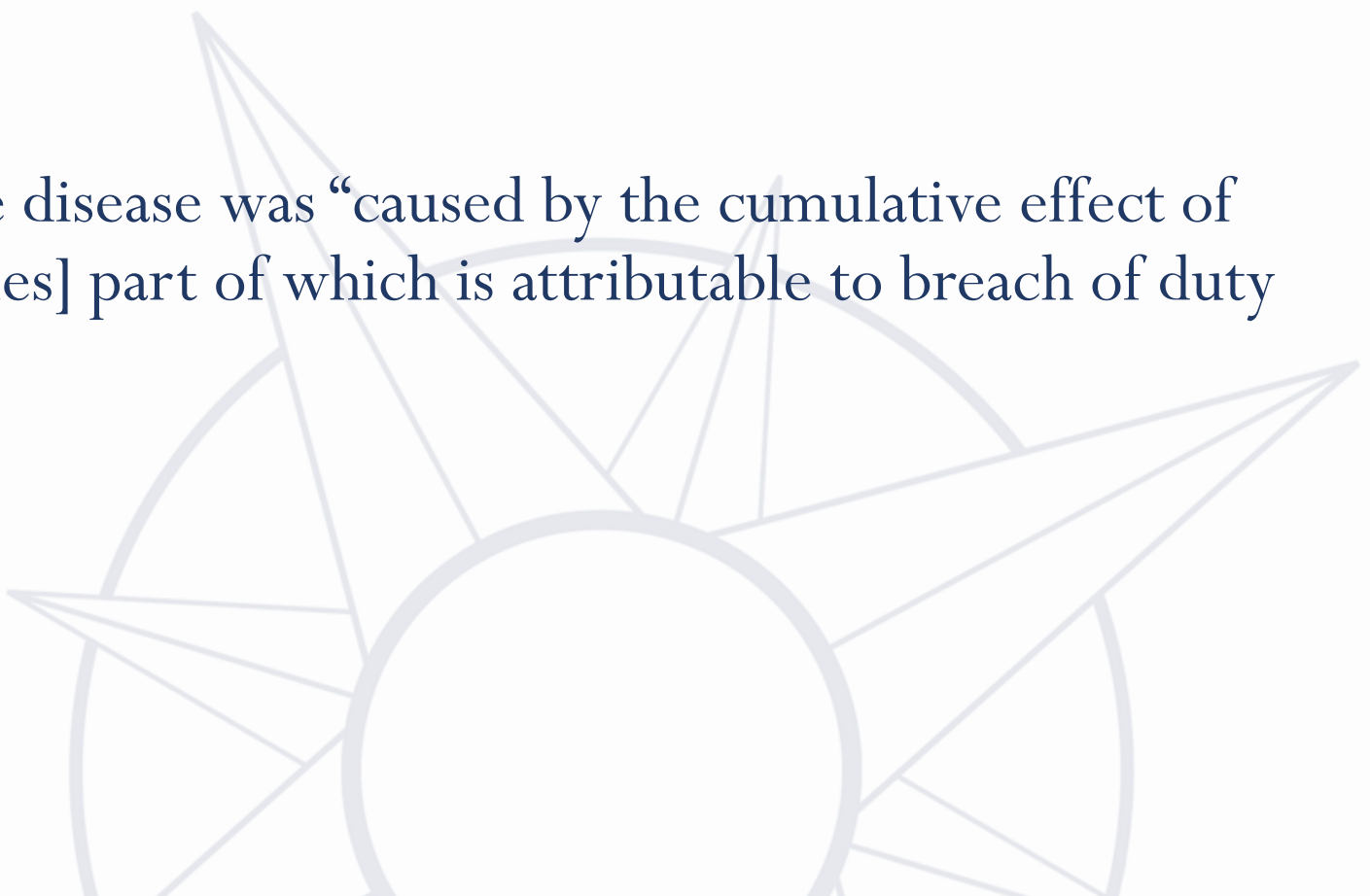
## *Rehman*

*Sienkiewicz:*

- A single harmful agent, e.g. malaria.
- Dose related, after a threshold of exposure, the disease is caused, e.g. lung cancer and smoking.
- Dose related and divisible: asbestosis and silicosis.

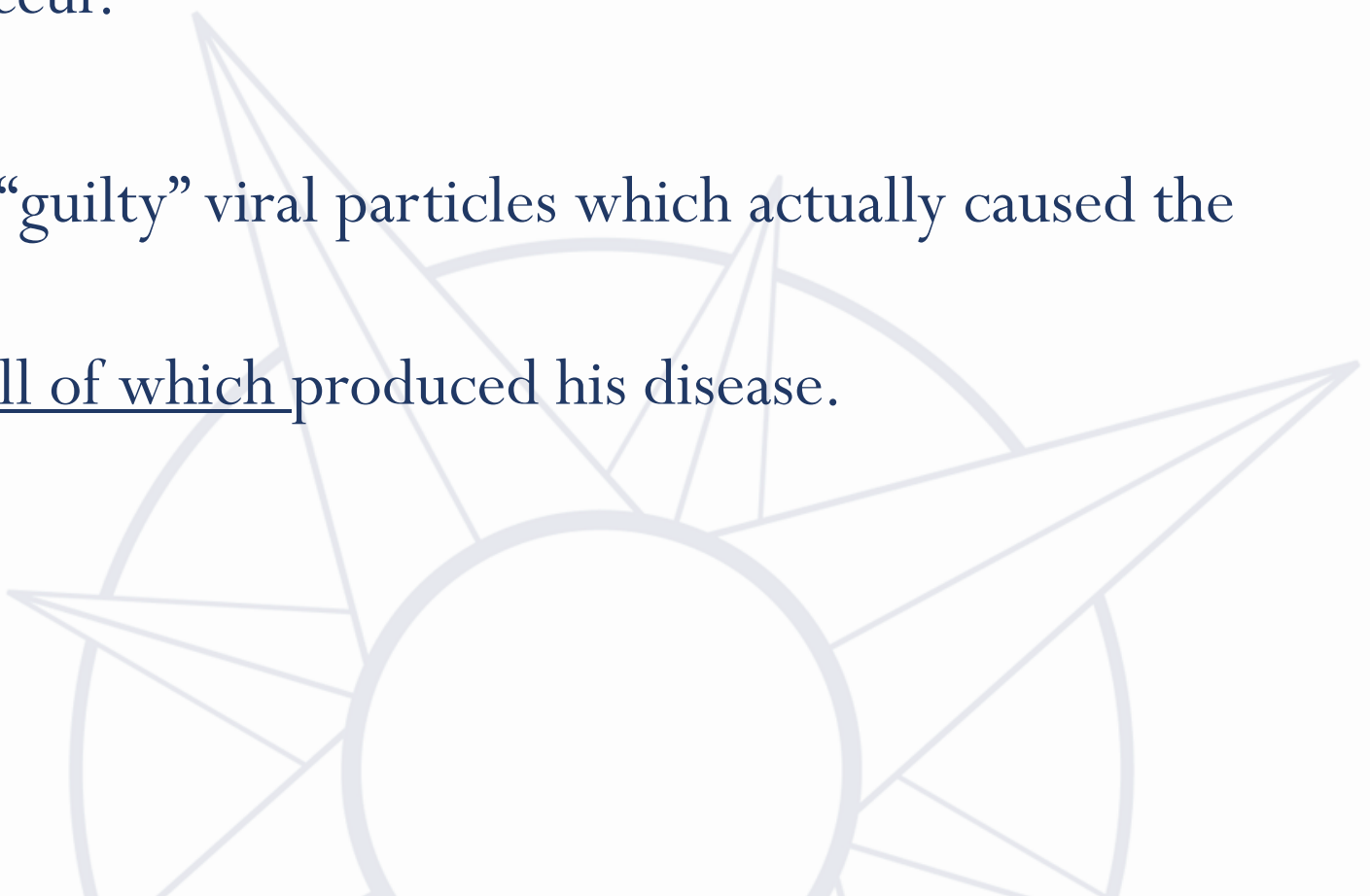


## *Rehman*

- Basic rule: C must prove that D's tort caused the disease in respect of which compensation is claimed.
  - For *Bonnington*, C must prove disease was “caused by the cumulative effect of the inhalation of [viral particles] part of which is attributable to breach of duty by D.
- 



## *Rehman*

- Assume that Covid-19 is a cumulative condition, requiring a threshold dose before infection is likely to occur.
  - Fundamental problem:
    - (a) C cannot prove that it was “guilty” viral particles which actually caused the disease, even in part.
    - (b) Bonnington: inhaled dust all of which produced his disease.
- 



*Rehman*

“To show a culpable increase in the environment of a circulating virus and a corresponding increase in the risk of disease is not the same as showing that that agent caused or partly caused the disease.”

Generality of disease cases within *Fairchild*, but without the *Fairchild* control mechanisms.





*Edwards v. 2 Sisters Food Group*  
*[2025] EWHC 1312*

Application of ordinary principles of causation:

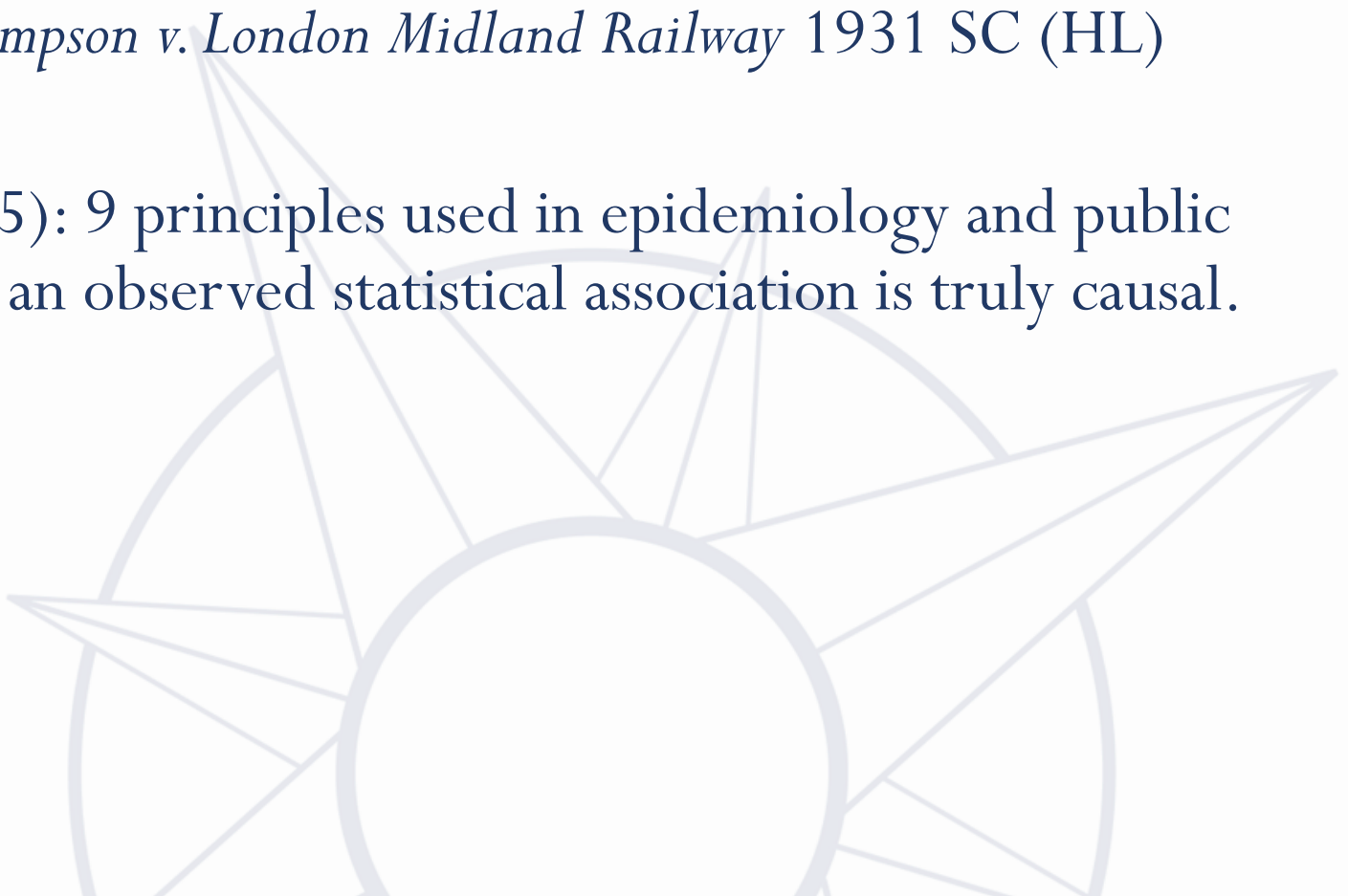
- Surge in infections in a short time
- Likely tortuous route of infection
- Excluding or minimizing other sources

Difficulty is not, in truth, scientific impossibility; it is lack of evidence.



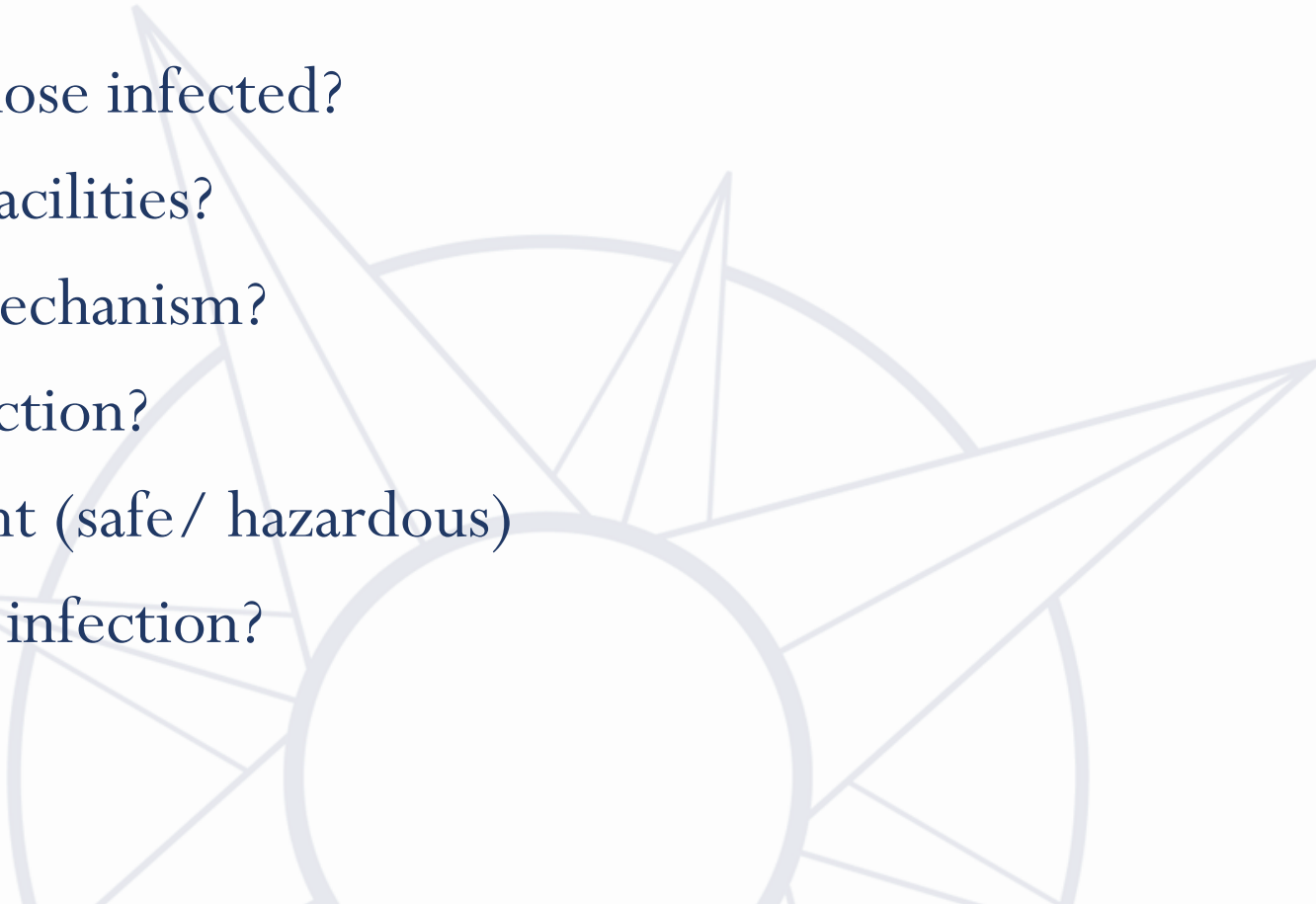


# Bradford Hill criteria

- An inferential finding, based on relevant and admissible evidence.
  - Must not be a speculation (*Simpson v. London Midland Railway* 1931 SC (HL) 15).
  - Sir Austin Bradford Hill (1965): 9 principles used in epidemiology and public health to determine whether an observed statistical association is truly causal.
- 




# Bradford Hill: Some thoughts

- Was there a cluster of infections (*Wood v. MOD* [2011] EWCA Civ 792, Smith LJ at [77]).
  - Was there close proximity to those infected?
  - Was there sharing of the same facilities?
  - Is there a plausible biological mechanism?
  - Is there a close temporal connection?
  - Is there a dose-response gradient (safe/ hazardous)
  - More than a doubling of risk of infection?
- 



# MCIF

- Environmental nuisance
  - Industrial disease
  - Chemical and noxious substance exposure
  - Certain traumatic injuries: CTE
  - Infectious disease
- 

# Compass Chambers



## Practical Takeaways

For the practitioner





# 1. Plead the right test

- Plead but-for and MCIF in the alternative in every contested-causation case
- Plead MCTR only if the case is mesothelioma

**After Kerr v Midlothian Council [2024] CSOH 112 and Rehman v SoS [2026] EWHC 6:**

*MCTR by analogy is closed.*





## 2. Establish indivisibility carefully

- MCIF cannot be engaged unless the outcome is indivisible
- Use the Stuart-Smith LJ definition from *Holmes v Poeton* [2024] KB 521
- The whole MCIF case rests on this threshold — pin it down at proof

Divisible → apportionment (*Holtby*)

Indivisible → full recovery on MCIF





### 3. Distinguish wrongful from background exposure

#### **The Rehman trap — Rehman v Secretary of State [2026] EWHC 6**

- Show on the balance of probabilities that the relevant exposure was attributable to the defender's breach — not the general environmental background
- Applies in chemical-exposure, infectious-disease, and trauma cases alike

**The doctrine is available. It will be won or lost on the evidence.**



## 4. Brief experts on the right question

**Material contribution in fact — not whether something is a “risk factor”**

- Holmes v Poeton: Mr Holmes lost not on doctrine but on the medical evidence
- The Court of Appeal found that exposure was a risk factor — but the evidence stopped there
- A report that gives you only a risk factor will not establish material contribution

***Risk factor ≠ material contribution in fact***





## 5. Keep MCIF and MCTR rigorously apart

### **MCIF — the Wardlaw line**

- Contribution to the injury in fact — indivisible outcome proved on balance of probabilities

### **MCTR — the Fairchild line**

- Contribution to risk — mesothelioma only — Compensation Act 2006, s.3


***Conflating them is the route to losing in Rehman territory***





# The Roadmap

**A practical decision-making tool — see your handout**

- Stage 1 — But-for satisfied? → standard causation
  - Stage 2 — Mesothelioma? → MCTR / Fairchild
  - Stage 3 — Is the outcome divisible? → Holtby apportionment
  - Stage 4 — MCIF criteria all met? → full recovery
- 



# Where We Stand

- Born: *Buccleuch v Cowan* (1866) — the river North Esk
- Modern form: *Wardlaw v Bonnington Castings* (1956) — Leith
- Clarified: *Fairchild* [2002] separated MCIF and MCTR
- Frontier: *Rehman* [2026] — wrongful cause must contribute in fact, not merely be a risk factor

**Plead it. Brief your experts correctly. Distinguish wrongful from background exposure. Remember the foundation: a polluted river, six paper mills, and the common sense of the Court of Session.**

# Compass Chambers



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