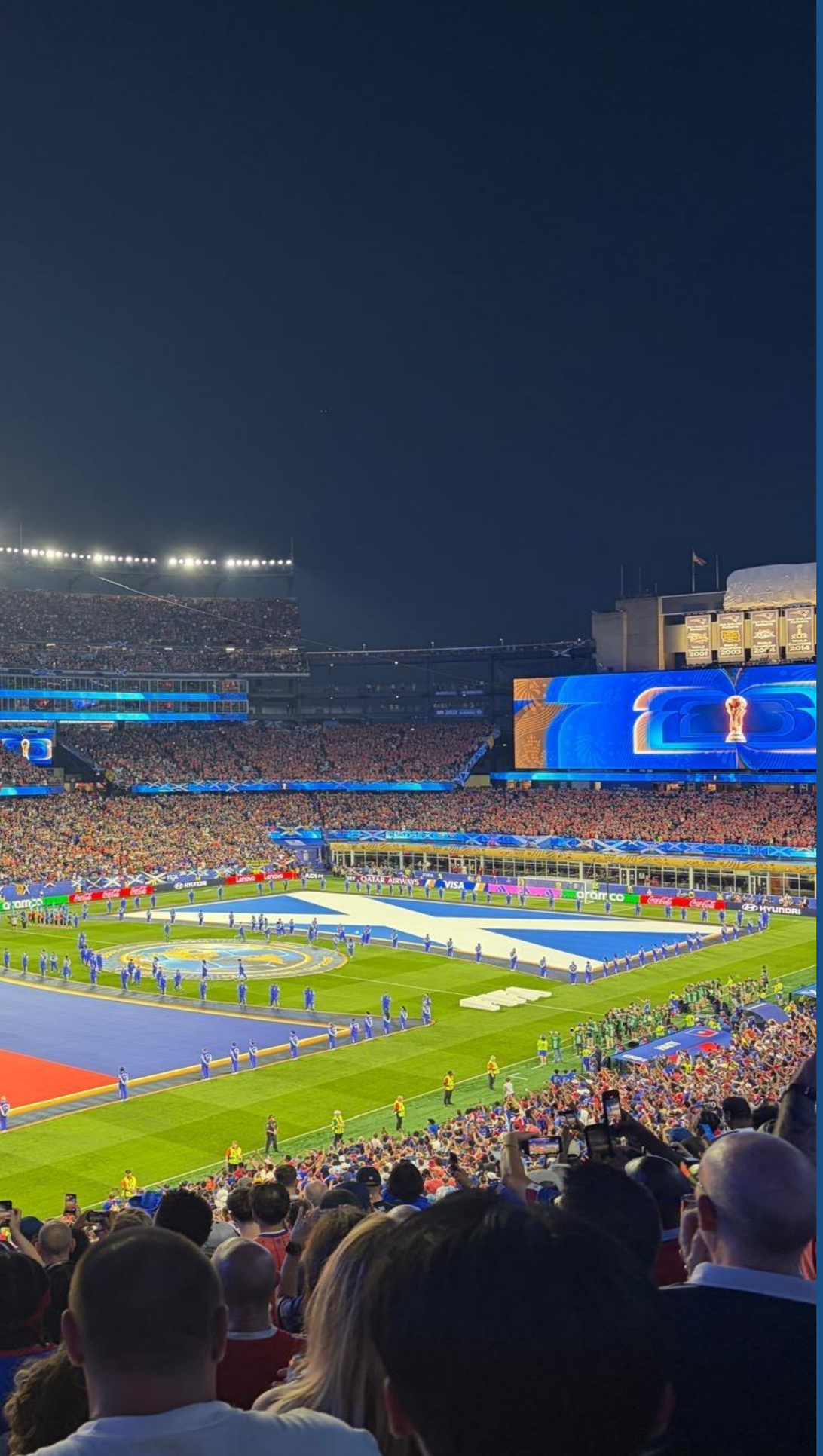
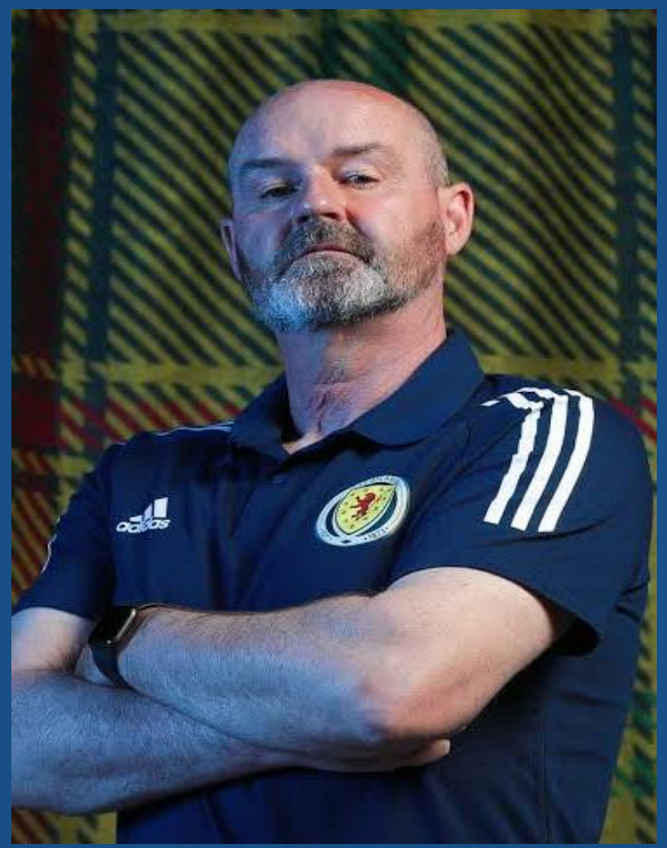




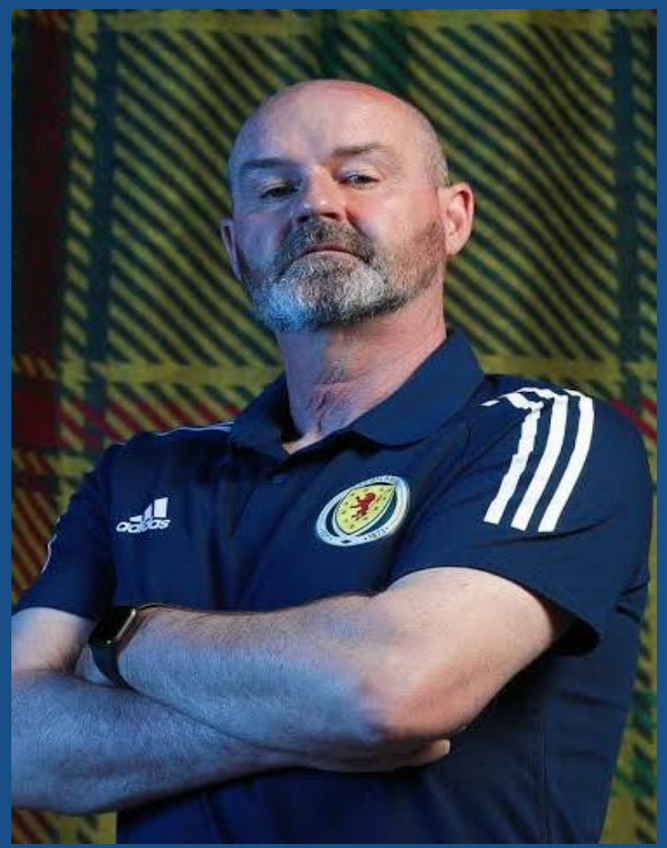
No Scotland, No Podcast

The fourth annual festive Thornley / Laing Personal Injuries Podcast



Steve Laing

NOT Steve Clarke



Steve Laing

NOT Steve Clarke



Gavin Thornley

NOT Sebastien Pocognoli

Children (Scotland) Act 1995, section 11
- Court orders relating to parental responsibilities

s11(7B) (a) – "need to protect the child from
(i) any abuse; or
(ii) the risk of any abuse
which affects, or might affect, the child."

s11(7C) – " 'abuse' includes
violence, harassment,
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and any other conduct giving rise,
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Does the ”certainty” of the current legal world cause lethargy and a lack of thinking “outside the [penalty] box”??

- *lack of legal debates*
- *“tariffs” of JC Guidelines on solatium*
- *well-known ranges for “loss of society” awards*
- *reliance on Ogden Tables*
- *many ex tempore opinions, rather than written opinions*
- *QOCS hurdles to overcome for insurers if they get assoilzied*

No breach of duty OR *volenti non fit injuria?*

No breach of duty OR *volenti non fit injuria?*

Heskin v Reynolds & Mackerron 2026 SC EDIN 60

- Dog trainer bitten by "Mac" (a working collie dog) with history of aggressive behaviour and biting owners on multiple occasions
- Pursuer knew of history but made conscious and informed decision to proceed anyway
- Sheriff Walls
- Keepers exempt from strict liability as Pursuer had "willingly accepted risk of injury" in terms of Animals (Sc) Act 1987, s2(1)(b)



No breach of duty OR *volenti non fit injuria?*

Heskin v Reynolds & Mackerron 2026 SC EDIN 60

- Keepers had disclosed sufficient information to enable Pursuer to appreciate the risk, so no breach of common law duty

- Plea of *volenti* only available when breach of duty and Defender otherwise liable but Pursuer accepts or voluntarily assumes the risk

- So defence of *volenti* does not arise



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Kenny Dog-leash



Clark v Elbanna [2025] EWCA Civ 776
Czernuska v King [2023] EWHC 380 (KB)

- Rugby co-participant cases - tackles resulting in serious spinal injuries
- "Recklessness" not required; too high and stringent a test
- Test is whether player failed to exercise such degree of care as was appropriate in all the circumstances
- Not liable simply because tackle was illegal or dangerous within laws of the game – simply a factor to take into account
- Players consent to inherent physical risks of a contact sport – but that not *volenti*; that's no breach of duty



Lamplough v Edinburgh & District Motor Club [2026] CSOH 111

- Off-road motorcycle event; competitor collided with travelling marshall riding against flow of competitors

- Organiser's risk assessment failed to consider obvious and reasonably foreseeable risk of collision

- Reasonably practicable control measures available
  - marshalls to approach bends at lower speeds & adopting a wider road position;
  - expressly warning competitors that marshalls might be travelling in opposite direction.

- Pursuer exceeded speed limit at corner
  Contributory negligence 1/3rd



(HOME AT EXCESSIVE SPEED)

Gavin
“your defence
is terrified”
Thornley
in Boston



Gavin “your defence is terrified” Thornley in Boston

The Pursuer





Penalty check by Video Assistant Referee
a.k.a. Covert Surveillance

Penalty check by Video Assistant Referee
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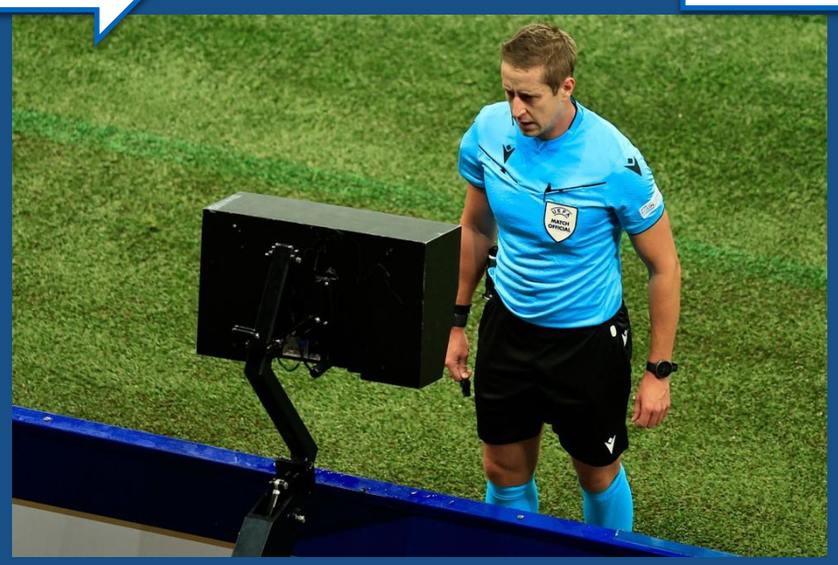




Penalty check by Video Assistant Referee
a.k.a. Covert Surveillance



- *Identifying "red flags" before instructing surveillance if Defs or before receiving it as Pursuer*

- *How to deal with surveillance footage, whether for Pursuer or Defender?*

- *Valid explanations?*
"Good day"
Mistaken identity? Twin?
A.I. generated?

Reaction of Pursuers?

McSeveney v Aviva Insurance [2026] CSOH 18

- Brain injury and orthopaedic injuries in RTA; Liability admitted
- Pursuer consistently reported severe disability to expert medical witnesses – needed significant assistance; unable to drive; just sat and watched TV
- Surveillance showed driving and carrying a heavy container unassisted
- Also lied about previous criminal convictions; was serving a prison sentence for drugs offence
- Pre-proof motion to dismiss on grounds of fraudulent dishonesty
- Defs argued that conduct was persistent and flagrant fraud, designed to frustrate a fair trial



McSeveney v Aviva Insurance [2026] CSOH 18

- Lord Braid

- Dismissal of action before evidence is a competent remedy but only exercised in exceptional circumstances (eg. pursuing an entirely fraudulent claim)

- Not sufficient to show that the Pursuer has been dishonest in relation to some aspect of claim

- Court had inherent power when action blatantly an abuse of process and where Pursuer's behaviour made a fair hearing at proof impossible

- Task of persuading the court more difficult when pursuer had an admittedly genuine claim

- Could not be a fair trial where evidence advanced for pursuer based on admitted or palpable untruths

McSeveney v Aviva Insurance [2026] CSOH 18

- Couldn't be inferred from footage that Pursuer fit for work
- Pursuer could have a genuine, although seemingly exaggerated, loss of earnings claim
- Essential that pursuer gave expert witnesses an honest account of his capabilities, and at very least they must have opportunity to comment on their previous reports
- Motion refused *in hoc statu*
- Defs can renew motion if pursuer not candidly disclose his capabilities to expert witnesses and to the court



FIFA = “Funds In Foreign Accounts”??

“Scandalous” sources of income?



FIFA = “Funds In Foreign Accounts”??

“Scandalous” sources of income?





FIFA = "Funds In Foreign Accounts"??
"Scandalous" sources of income?



Challenges in relation to wage loss?

- *Employed but paid "cash in hand'*

- *Self-employed with substantial income but no HMRC records or tax/NI paid*



- *Self-employed with no HMRC records but earnings below Personal Allowance*

- *Employed by limited company of which he is sole director but regarded it as "his" own business so "his money"*

Taylor v Forth Valley Health Board [2025] CSOH 103

- Action for Somatic Symptom Disorder developed after an operation
- Pursuer was a landscaper and groundsworker
- Failure to account to HMRC for tax on earnings
- Lord Ericht
- Examined Newman v Folkes [2002] EWCA Civ 591

  - claim for loss of earnings “little short of scandalous”

  - foundation of claim being a “concoction of lies”

  - but not paying tax or NI not debar loss of earnings claim

Taylor v Forth Valley Health Board [2025] CSOH 103

- This type of dishonesty not result in refusal of loss of earnings claim

- Lack of accounting to Inland Revenue and lack of books/records give rise to “challenges” when assessing quantum

- Assessed loss of earnings based on conservative figures from ASHE figures for relevant occupation



“I may have been unemployed and on benefits at the time of the accident but I was just about to sign for Napoli / Tottenham / Bologna / {insert randomly picked team}!!!!”







Lamplough v Edinburgh & District Motor Club [2026] CSOH 111

- Pre-accident, Pursuer had set-up limited company with intention of working as a motorcycle tour guide (company had never traded)

- But pursuer had made some progress with establishing and marketing the business and achieving bookings for a tour that had to be cancelled

- Bookings demonstrated a genuine market interest in the tours

- Pursuer had expertise and experience in running similar tours before setting up company

- Court held that company "would have made some profit though for how long and by what margins is uncertain"

- Lump sum award of £70k given the uncertainties

Life expectancy

"Super" John McGinn v average Scotland supporter





Ogden Tables

- Ogden Tables based on reasonable estimate of future mortality likely to be experienced by average members of UK population as a whole, from Office of National Statistics (para 7, Explanatory Notes)

- Average in Tables includes smokers, non-smokers, drinkers, teetotallers, people who are overweight and people who have an ideal BMI (para 12)



No further evidence on life expectancy required,

unless

"clear evidence that the claimant is 'atypical'

and can be expected to experience
a significantly shorter or longer
than average lifespan, to an extent
greater than would be encompassed
by reasonable variations
resulting from place of residence,
lifestyle, educational level, occupation
and general health status" (para 8)



Life expectancy



What is “atypical”??

Use of Scottish ONS figures??

In mesothelioma cases, is expert’s LE reduction for deceased’s smoking history excessive when smokers already factored into average?

Recovery of medical records?
If deceased, does Post Mortem report show “atypical” results?

Clarke v Poole [2025] EWCA Civ 447
-Invasive medical examination of brain-injured claimant for pre-existing genetic disorder (Muscular Dystrophy) which causes progressive muscle weakness

“It’s the hope that kills you”

- quantifying loss of a chance





“It’s the hope that kills you”

- quantifying loss of a chance





World Cup winner 2030

Spain 4/1 ; France 6/1; England 7/1

Palestine 4,000/1; Indonesia 4,500/1

Scotland ?????

“It’s the hope that kills you”

- quantifying loss of a chance





World Cup winner 2030

Spain 4/1 ; France 6/1; England 7/1

Palestine 4,000/1; Indonesia 4,500/1

Scotland 250/1

“It’s the hope that kills you”

- *quantifying loss of a chance*

Gough v Cannons Law Practice
[2025] CSOH 28

- Two pilots raised actions for failure to timeously raise action against employers for ATS (aerotoxic syndrome) caused by daily exposure to toxic fumes by instructing English solicitors

- Lost undoubted advantages in investigating and prosecuting claims as part of English collective proceedings against various airlines as a result



Gough v Cannons Law Practice
[2025] CSOH 28

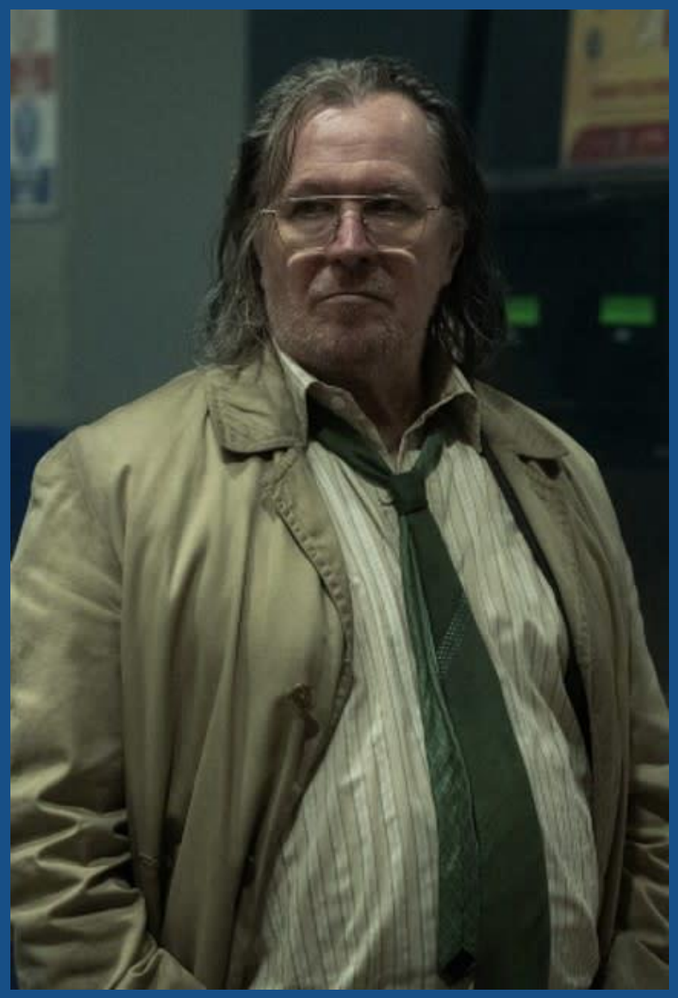
- Lord Richardson

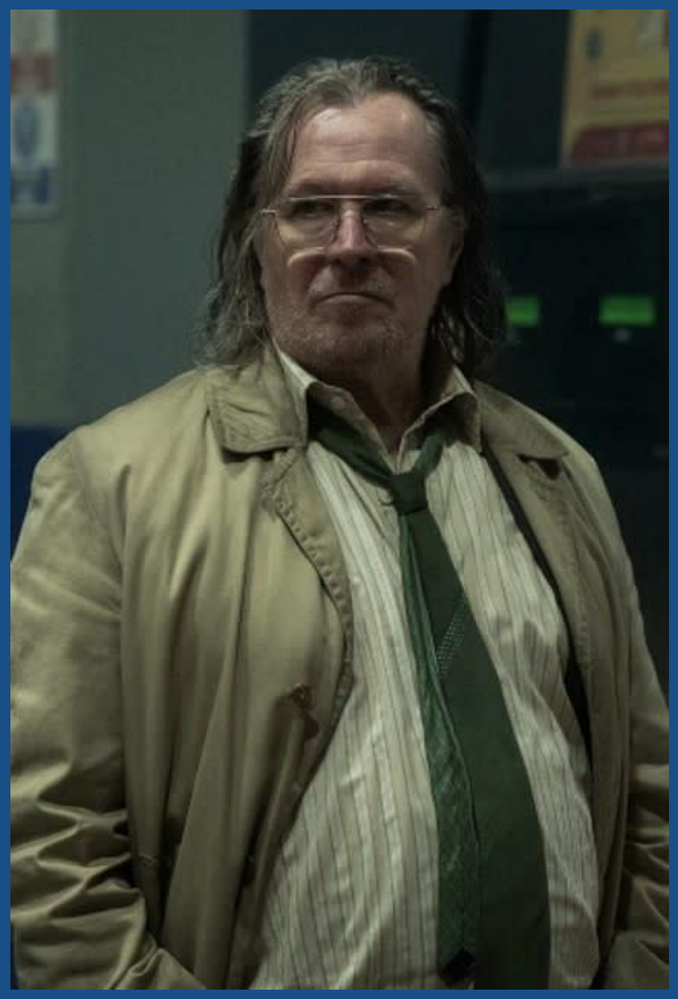
- Generally, a pursuer claiming loss of a chance to pursue litigation ought not to be required to establish his underlying claim in a trial within a trial

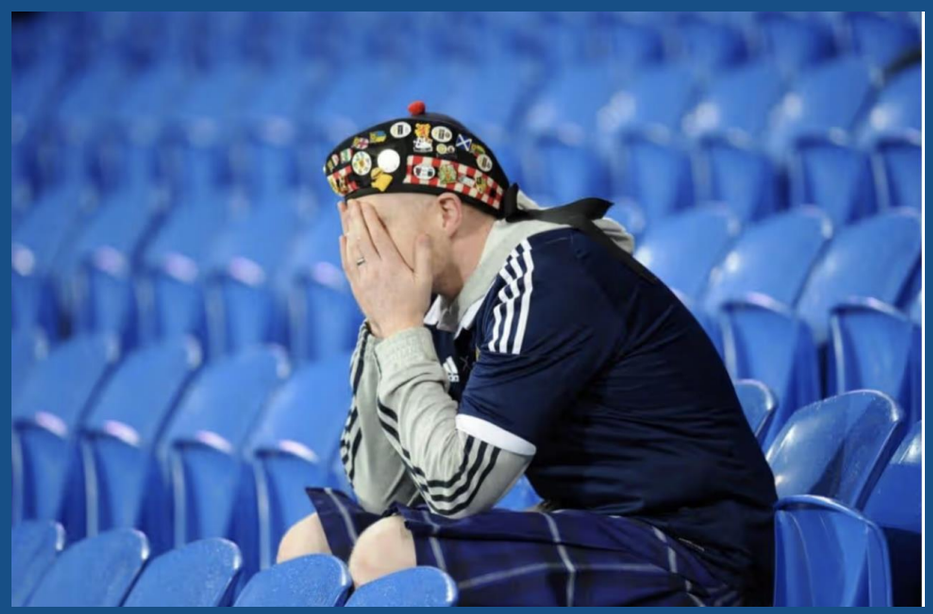
- Unfair for Pursuer to do so as difficulties caused by passage of time, absence of the third party defender, recovery of documents, memories of witnesses,etc

- Pursuer argued 80% lost chance; Defs argued 20% lost chance

- Not negligible or merely speculative chances of success but considerable uncertainties on foreseeability, breach of duty and causation – chances of success assessed at 40%







"The only reason for the
absence of a sign requiring
entrants to abandon
all hope is that,
as every office worker knows,

it's not the hope that kills you.

It's knowing it's the hope
that kills you that kills you.”

Mick Herron, ‘Real Tigers’

The Scottish rollercoaster





Post-match analysis and refreshments – Pie, Pint & Bovril time



