



# ALARM

embrace risk

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## Never wear socks with QOCs:

The extent of employers liability and the new reality of claims funding...

Rory Jackson, Kennedys Scotland

Kennedys

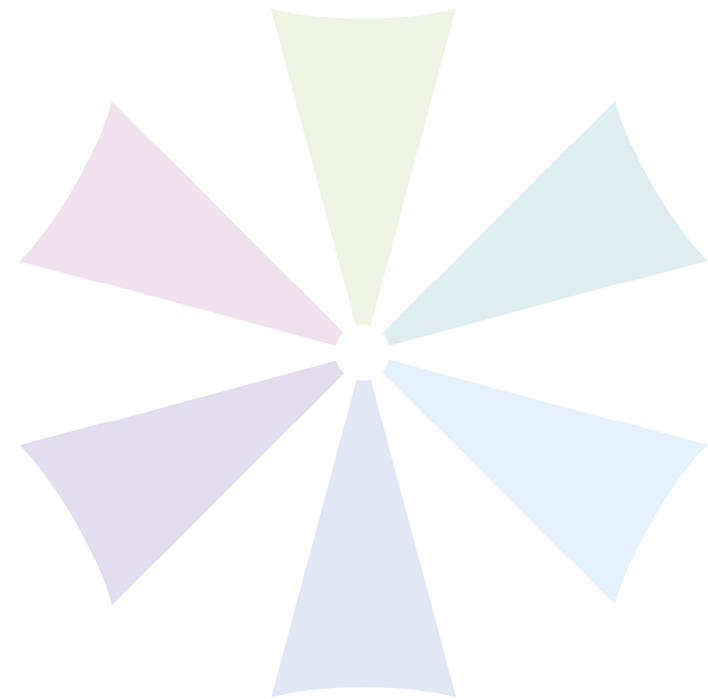
# Vicarious Liability

Employers beware

# The extent of employers liability and the new reality of claims funding...

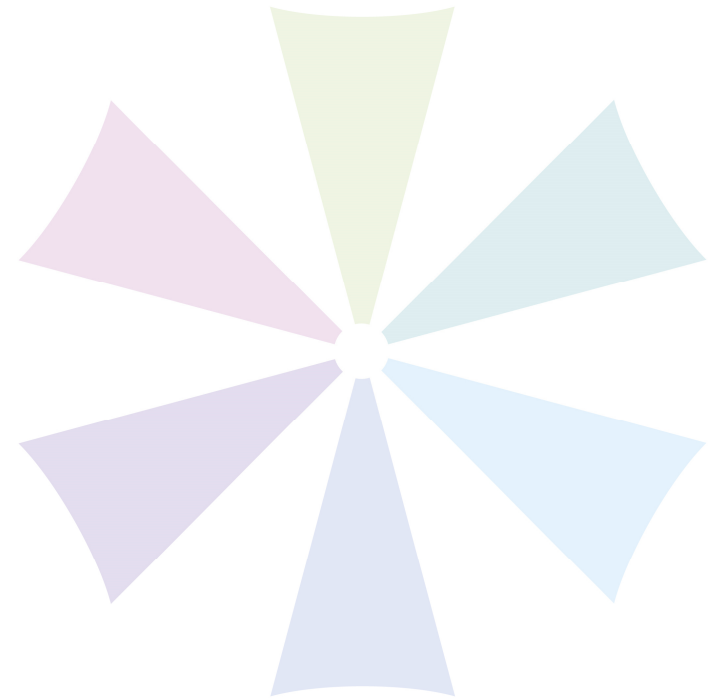
## Introduction

- Vicarious Liability
- QOCs
- The new reality



# Vicarious Liability

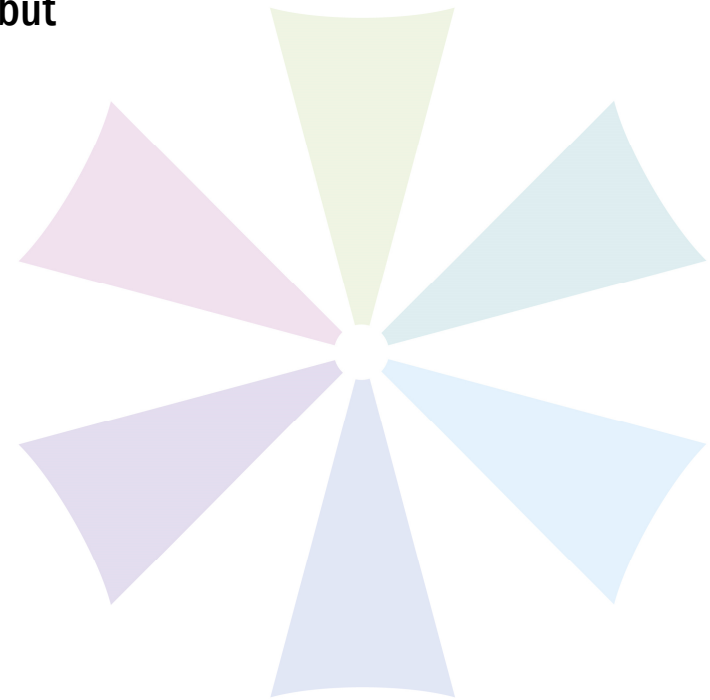
- **What is vicarious liability?**
  - Liability for something that someone else does
  
- **Vicarious Liability for the actions of employees**
  - Both employee and employer liable
  - Broad agreement not to sue employees



# VAICKUVIENE v J SAINSBURY PLC [2013] CSIH 67

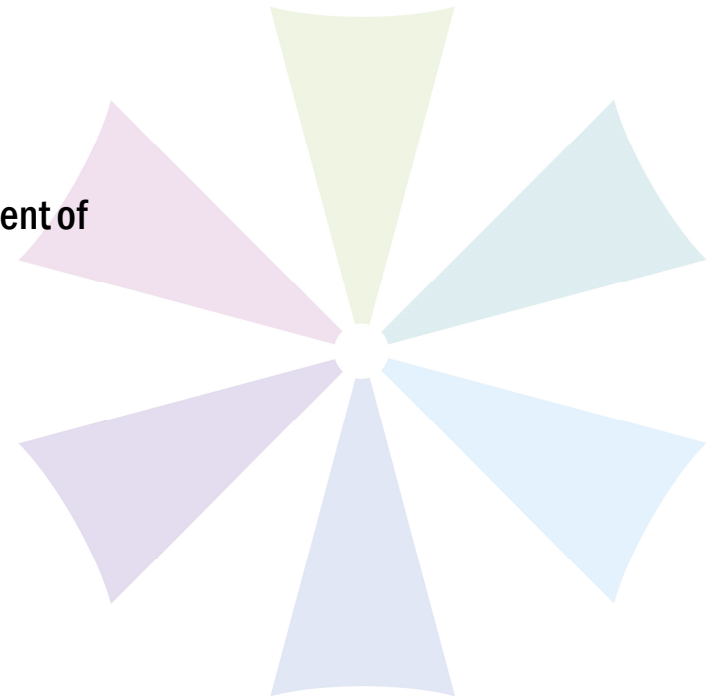
- Roman Romasov murdered by co-employee Robert McCulloch on 15 April 2009 in Aberdeen
- McCulloch member of BNP with extreme opinions regarding Easter European migrant worked
- Romasov reported anti-migrant comments to line manager but no action taken
- McCulloch aware of comment and stabbed deceased in supermarket using knife from kitchenware section

Vicarious Liability?



# VAICKUVIENE v J SAINSBURY PLC [2013] CSIH 67 cont.

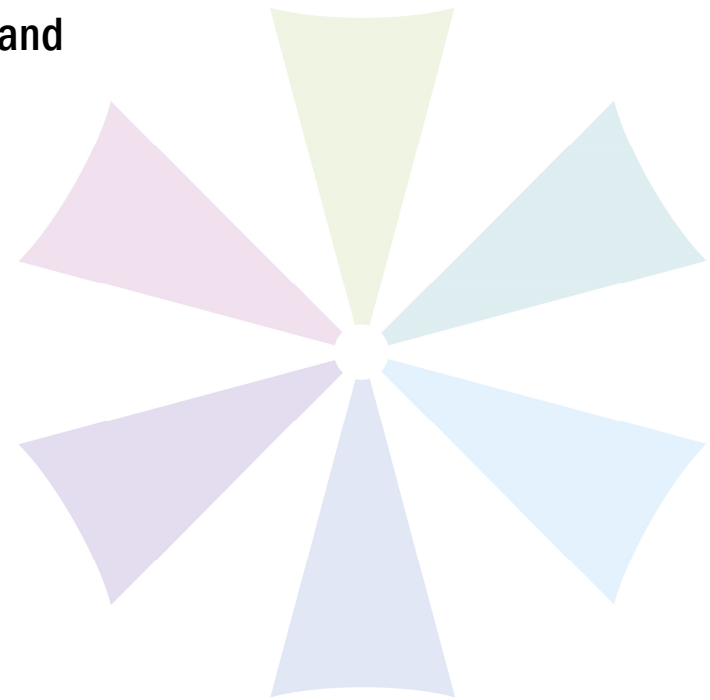
- Depends on close connection between employee actions and employment to make it fair, just and reasonable that employer liable:
  - Merely bringing together people as employees not enough
  - Not sufficiently closely connected; harassment and employment of stacking shelves



# Mohamud v Wm Morrison Supermarkets plc [2016] AC 677

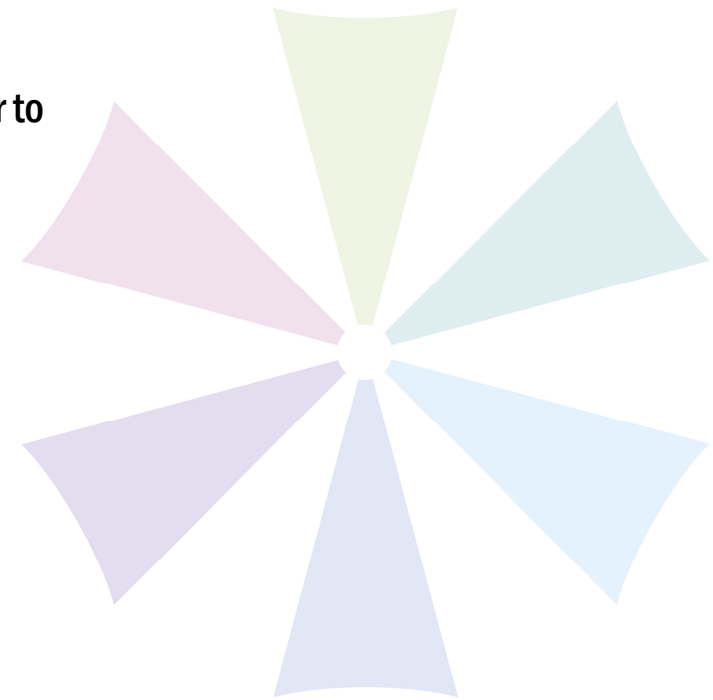
- Ahmed Mohamud at petrol kiosk made request to print from USB stick
- Ordered to leave by Amjid Khan in a foul and racist manner and to never come back.
- Khan followed him out to car park and assaulted Mohamud

Vicarious Liability?



# Mohamud v Wm Morrison Supermarkets plc [2016] AC 677 – Cont.

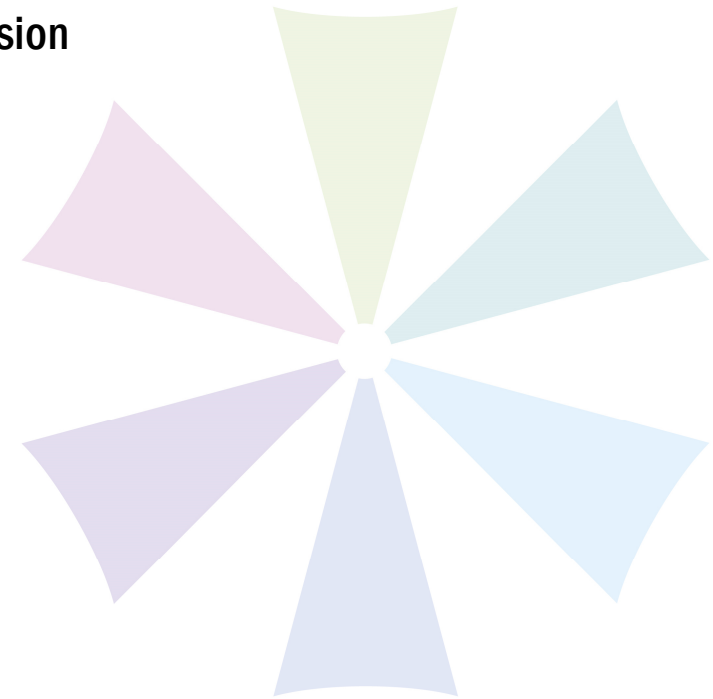
- **Confirmed established test:**
  - Inquire as to nature of job and ask whether sufficient connection between job and wrongful conduct to make it right, as a matter of social justice, for there to be vicarious liability
- **There was liability:**
  - Job was to attend to customers and respond to inquiries
  - Unbroken sequence of events of following and ordering never to return and violence to reinforce
  - Therefore there was a sufficient connection





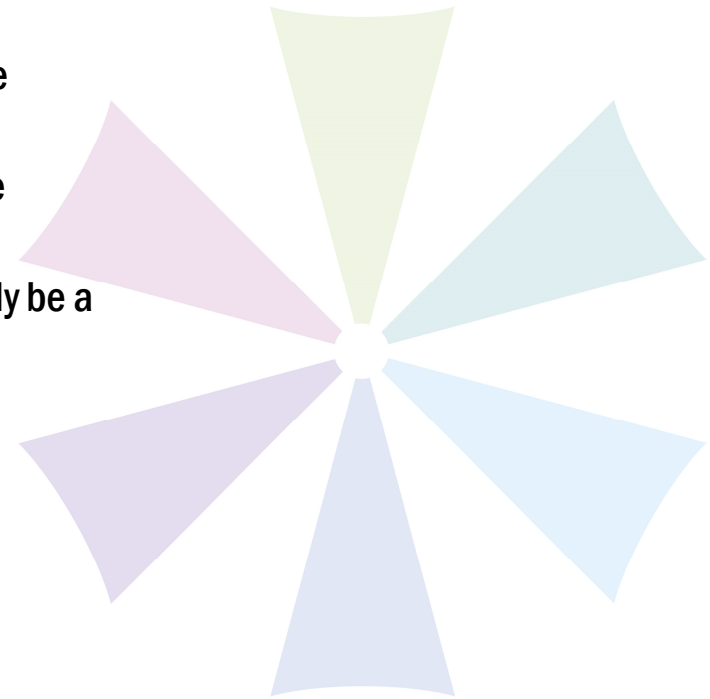
# The Trend

- All the recent case law is trending in the direction of widening the scope of what employers will be considered vicariously liable *for*
- The recent developments are primarily rooted in policy decision rather than legal principles
- No longer restricted to 'Master' – 'Servant' scenario, not restricted to employees and not restricted to commercial activities



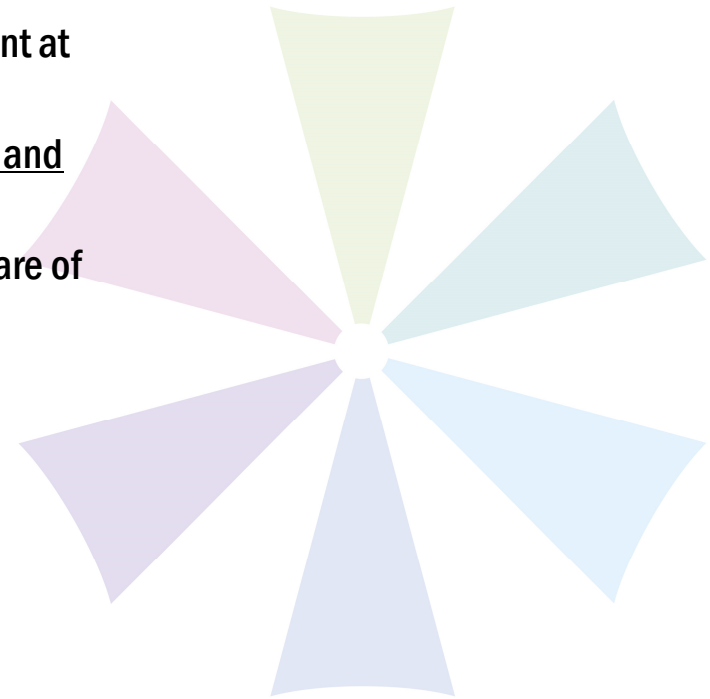
# Policy

- **Abuse cases – policy very important**
  - Generally not any criticism of the organisations assessment of its employees.
  - The only ‘wrong’ committed by the organisation is to allow the employee unsupervised access to children.
  - The Court wishes to compensate the innocent victims and the organisations are best placed to do so.
  - Recent changes in terms of time bar mean that there will likely be a relatively high volume of abuse cases in the coming years



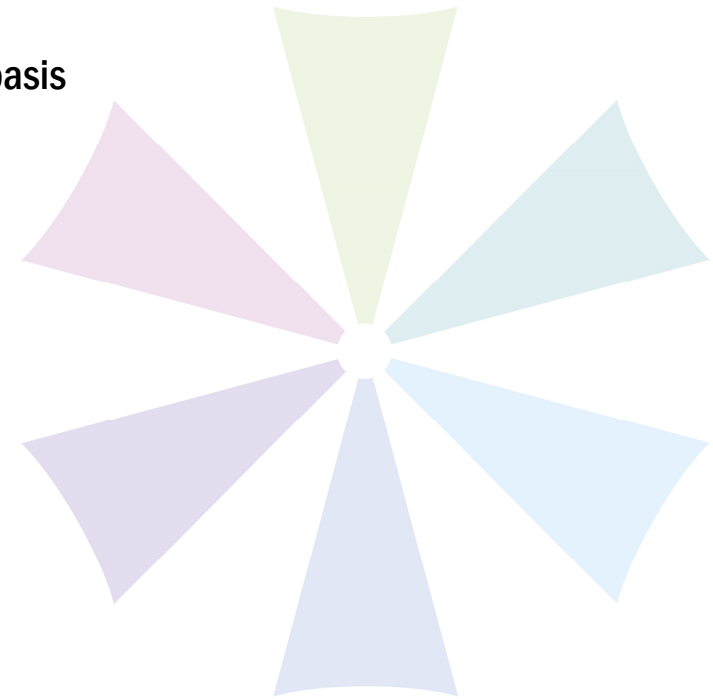
# Responsibility

- *Armes v Nottinghamshire County Council 2018*
  - NCC were found to be liable for abuse suffered by the Claimant at the hands of their foster family.
  - The CC had placed the child in care and retained supervision and control.
  - As such were deemed to be responsible for the care and welfare of the child.



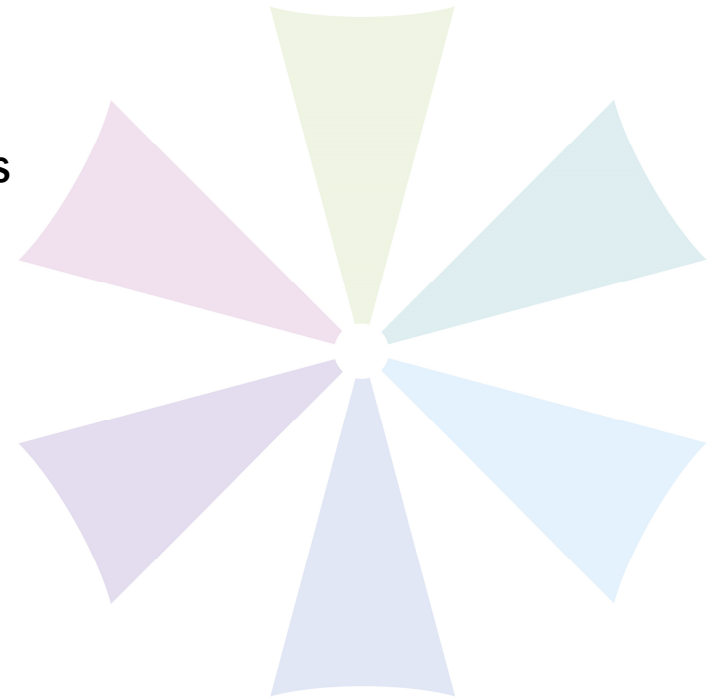
# Relationship akin to employment

- ***Various Claimants v Barclays Bank*** – going to the Supreme Court
  - Independent medical examiner assaults employees sent to him by the Bank.
  - The Court of Appeal found in favour of the Claimants on the basis that the relationship was one akin to employment.
  - This is under appeal which is due to be heard this year.



## Careful on a night out...Bellman –v- Northampton Recruitment Limited

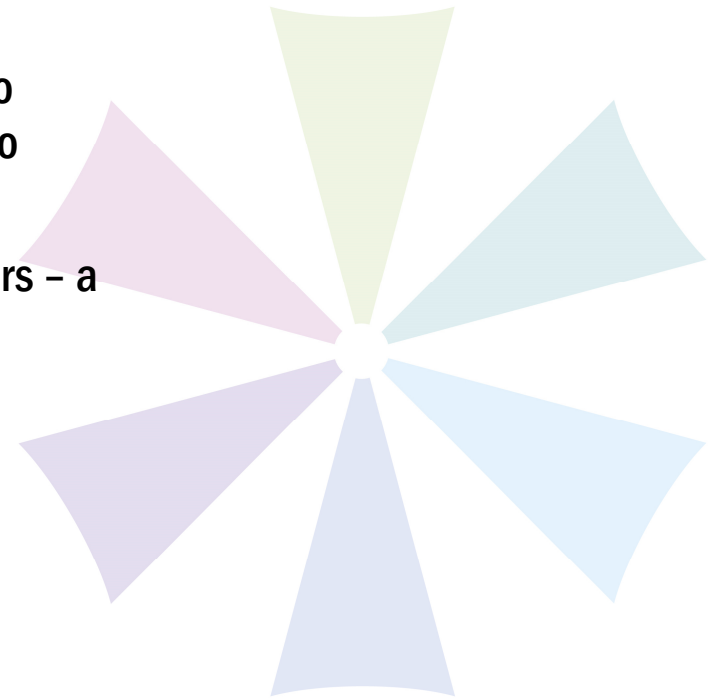
- Clive Bellman employed by NRL.
- 16 December 2011 Christmas Party.
- All got drunk – by 2.45am Mr Major lost temper and control and assaulted Mr Bellman
- Held there was a sufficient connection between Mr Major's activities and the assault. NRL were vicariously liable for his actions.



# Conclusions

- From the Defender's perspective there is no positive news and indeed matters are likely to get worse before they get better.
- Worthwhile considering cases involving agency workers and 'labour only' contractors where Pursuers' agents are likely to lean on the principle of "relationship akin to employment" to widen the scope of duties owed to the Pursuer.
- More often will bad behaviour be laid at the feet of employers – a reputation risk!

Has it been socked to employers?



# Qualified One Way Cost Shifting

The new regime for pursuers.

# The Expenses Act

- **The Civil Litigation (Expenses and Group Proceedings) Scotland Act 2018**
- **Royal Assent 5 June 2018**
- **Success Fee Agreements**
- **Damages Based Agreements**
- **Qualified One Way Costs Shifting – “QOCS”**
- **Third Party Funding and CMCs**





# The Expenses Act

- The Civil Litigation (Expenses and Group Proceedings) Scotland Act 2018
- No award of expenses against the pursuer in a personal injury claim
- Unless...
  - Fraudulent representation
  - Unreasonable behaviour
  - Abuse of process
- Concerns...
  - High tests
  - No fundamental dishonesty
  - Tenders?

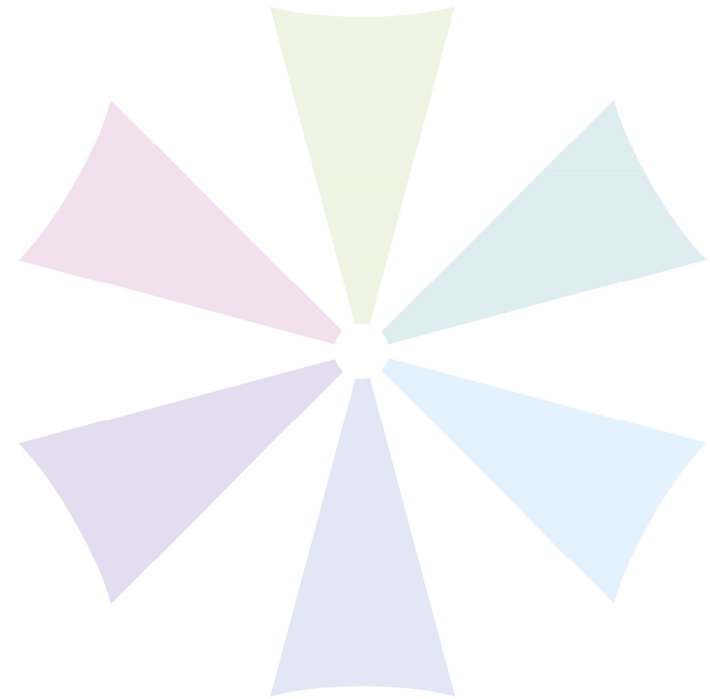


# The Expenses Act – some conclusions

- **Grub – what is Fundamentally Dishonest?**
  - Circumstances of that case
  - Court reticent about making that finding

## Other:

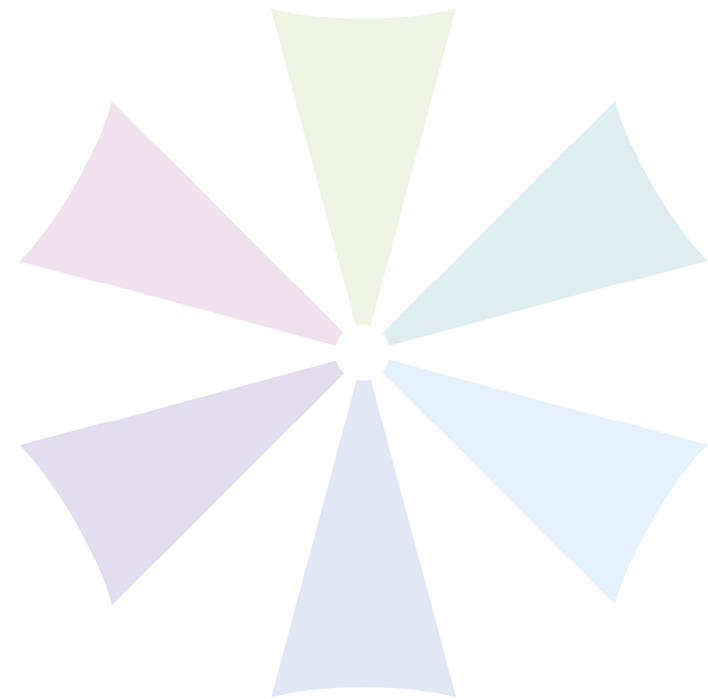
- Unmet legal need may be met?
- More litigation – arguably not good
- Less able to pressure pursuers to settle
- Overall cost of ‘doing business’ in Scotland is increasing



# Overall conclusions

## Socks with QOCs not cool

- The extent of employer's liability is greater than perhaps previously expected
- Pursuers shall be able to litigate with, perhaps, less risk
  
- The consequences?



# Thank you

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