23 April 2021

PRESS SUMMARY

Burnett or Grant (Respondent) v International Insurance Company of Hanover Ltd (Appellant) (Scotland)
[2021] UKSC 12
On appeal from [2019] CSIH 9

JUSTICES: Lord Reed (President), Lord Briggs, Lord Hamblen, Lord Leggatt, Lord Burrows

BACKGROUND TO THE APPEAL

On 9 August 2013, Craig Grant was killed as a result of an assault on him by Jonas Marcius, a door steward employed by the Prospect Security Ltd ("Prospect") to work at the Tonik Bar in Aberdeen. The assault occurred during an altercation which occurred following Mr Grant's ejection from the bar, during which Mr Marcius applied a neck hold to Mr Grant, who was later pronounced dead at the scene. The cause of death was mechanical asphyxia, caused by the application of the neck hold. Mr Marcius stood trial at the High Court in Aberdeen for the murder of Mr Grant. The jury did not accept that Mr Marcius had asphyxiated Mr Grant or caused his death, only convicting him of assault. The sentencing judge accepted that Mr Marcius' actions were badly executed, not badly motived, imposing a non-custodial sentence.

Prospect was insured by the Appellant in this appeal ("the Insurer"), under a policy covering public liability. The policy included an exclusion which provided that "liability arising out of deliberate acts" of an employee was excluded from the policy's coverage.

In March 2016, Mrs Grant, the Respondent in this appeal, brought a claim for damages in her capacity as Mr Grant's widow against a number of parties including Mr Marcius, Prospect and the Insurer. The claim was ultimately discontinued against all defendants save for the Insurer. Mrs Grant claims that the Insurer would be liable to indemnify Prospect, who is in liquidation, in respect of its vicarious liability for the wrongful acts of their employee, Mr Marcius, and that the right to be indemnified was transferred to and vested in her under the Third Party (Rights and Insurers) Act 2010. The Insurer sought to have the claim dismissed on the basis that it was not liable to indemnify Prospect under the policy as Mr Marcius' actions fell within the exclusion of "deliberate acts" in clause 14 of the policy. It was further argued that any liability to indemnify arose under Extension 3 of the policy, which provided coverage for public liability for wrongful arrest limited to £100,000. Mrs Grant's claim succeeded before the Lord Ordinary and the Insurer's appeal was dismissed by the Court of Session. On appeal to the Supreme Court, the issues are: (1) is the Insurer entitled to rely on an exclusion under the policy of "liability arising out of deliberate acts" of an employee; and (2) was the death of Mr Grant brought about by Mr Marcius' wrongful arrest of him under the terms of Extension 3 of the policy, with the effect that the insurer's liability to indemnify Mrs Grant is limited to £100,000?

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Hamblen gives the sole judgment.

REASONS FOR THE JUDGMENT

Issue 1 – the "deliberate acts" exclusion

The policy, like any other contract, is to be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they

entered into the contract, would have understood the language of the contract to mean. This involves a consideration of the words used in their documentary, factual and commercial context **[29]**. In the present case the relevant context includes that, whether the injury was "accidental" is to be considered from the perspective of the employer rather than the doorman (see *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18) **[30]**. It also includes the fact that the policy is provided in respect of Prospect's business, which it describes as "Manned Guarding and Door Security Contractors". There is a clear risk that door stewards will use a degree of force in carrying out their duties. As the Court of Session recognised, the required cover for public liability was that which would deal with such incidents at the door of bars. Otherwise, the policy would be stripped of much of its content **[31]-[33]**. Against that background, the critical issue dividing the parties is what is meant by "deliberate acts". The Insurer's case is that it means acts which are intended to cause injury, or acts which are carried out recklessly as to whether they will cause injury. Mrs Grant's case is that it means acts which are intended to cause the specific injury which results, in this case death or at least serious injury, but that on any view it does not include reckless acts **[34]**.

The Court accepts the Insurer's argument that "deliberate acts" in clause 14 of the policy means acts which are intended to cause injury, but rejects the contention that the clause extends to recklessness **[45]&[51]**. It is not the act which gives rise to the injury that has to be deliberate, but the act of causing injury itself. This is the most natural interpretation of the clause. The terms of the policy do not provide any support for an interpretation which draws distinctions between an intention to cause different kinds of injury, or serious and less serious injuries. Such distinctions would lead to unsatisfactory and arbitrary results, such that it is most unlikely to reflect the parties' intentions. **[35]-[37]**. Therefore, the application of the exclusion does not depend on the particular type or extent of injury involved. It is sufficient if the causing of the injury was deliberate **[39]**. Clause 14 does not, however, extend to reckless acts. The natural meaning of "deliberate" acts is the conscious performance of an act intending its consequences. This involves a different state of mind to recklessness. The Insurer has not been able to produce any case in which "deliberate" has been held to include recklessness. If, exceptionally, "deliberate" was intended to include recklessness, one would expect it to be made clear what that means in this context. Further, an exemption of reckless acts would seriously circumscribe the cover provided, as it would lead to a very wide and commercially unlikely exclusion, given the nature of Prospect's business **[51]-[57]**.

Applying these principles to this case, the Insurer is unable to establish that the clause 14 exclusion applies on the facts as found **[62]**. There was no finding by the courts below of intention to injure, or even recklessness. The conviction for assault does not establish any intention beyond an intention to perform the act of assault, namely the neck hold. The sentencing judge concluded that what was done was "badly executed, not badly motivated," which is inconsistent with such an intention **[58]-[61]**. Even if "deliberate acts" included recklessness, the same conclusion would follow due to the sentencing judge's conclusion **[63]**.

Issue 2 – the "wrongful arrest" extension

In light of the conclusion reached on issue 1, that clause 14 does not apply, the Insurer has no defence to the claim made under the main insuring clause and the appeal must be dismissed. While it is therefore not necessary to determine the second issue, the Court agrees with the reasoning and conclusion of the Court of Session that the losses claimed do not relate to wrongful arrest and the factual basis for such a claim is not made out **[65]-[66]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html