

Supreme Court unanimously dismisses appeal and rules in favour of Grant in a public liability insurance case (Burnett or Grant (Respondent) v International insurance Company of Hanover Limited (Appellant))

The Supreme Court, by decisions given on 23 April 2021, unanimously dismissed the appeal of International Insurance Company of Hanover Ltd, the insurers, relating to the ability of the insurer to rely on the exclusion under the policy of ‘liability arising out of deliberate acts’. Charlotte Stewart-Jones, solicitor at Reed Smith, comment on the Supreme Court’s judgement.

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Burnett or Grant (Respondent) v International insurance Company of Hanover Limited (Appellant), [\[2021\] UKSC 12](#)

Background

Craig Grant was killed on 9 August 2013 as a result of an assault by Jonas Marcus, a door steward employed by Prospect Security Ltd (Prospect) to work at the Tonik Bar in Aberdeen. Grant was pronounced dead at the scene following an altercation in which Marcus applied a neck hold on Grant. The cause of death was determined to be mechanical asphyxia, caused by the neck hold. In its judgement the High Court in Aberdeen accepted that Marcus actions were badly executed, but not badly motivated and imposed a custodial sentence. The jury, during the trial, found that asphyxiation and the death of Grant was not caused by Marcus and only convicted him of assault.

Prospect was insured by International Insurance Company of Hanover Ltd (the Insurer), under a policy which covers public liability. The policy encompassed an exclusion which provided that ‘liability arising out deliberate acts’ of an employee was excluded from the policy’s coverage.

As her capacity as a widow, Mrs Grant brought a claim for damages in March 2016 against Marcus, Prospect and the Insurer. The claim was discontinued against all defendants except for the Insurer. In her claim, Mrs Grant holds that the Insurer would be liable to indemnify Prospect, in respect of vicarious liability for the wrongful acts of their employee, Marcus, and that the right to be indemnified was transferred to and vested under the Third Party (Rights and Insurers) Act 2010. The Insurers were unsuccessful in seeking to have the claim dismissed on the basis that it was not liable to indemnify Prospect under the policy, as Marcus’ actions fell within the clause 14 exclusion of ‘deliberate acts’. It was argued that any liability to indemnify arose under Extension Three of the policy, which provided coverage for public liability for wrongful arrest limited to £100,000. Mrs Grant was successful in her claim before the Lord Ordinary and the Insurer’s appeal was dismissed by the Court of Session.

The following issues has been addressed by the Supreme Court:

- is the Insurer entitled to rely on an exclusion under the policy of ‘liability arising out of deliberate acts’ of an employee
- was the death of Grant brought about by Marcus’ wrongful arrest of him under the terms of Extension Three of the policy, with the effect that the insurer’s liability to indemnify Mrs Grant limited to £100,000?

Judgement

The Supreme Court unanimously dismissed the appeal with Lord Hamblen giving the sole judgement.

The 'deliberate acts' exclusion

On the 'deliberate acts' exclusion, the Supreme Court highlights that the policy is to be interpreted objectively by asking what a reasonable person, with 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. The Supreme Court emphasises that in identifying whether the injury was 'accidental' is to be considered from the perspective of the employer as opposed to the doorman.

In respect to the exclusion, the Supreme Court found that there is a clear risk that door stewards will use a degree of force when carrying out their duties and as the Court of Session recognised, the required cover for public liability was one that deals with incidents such as incidents at the bar doors. In considering 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, whereas in Mrs Grant's case it means acts that are intended to cause specific injury, such as death or at least serious injury, as in this case (para [34]).

The Supreme Court accepts the Insurer's argument that 'deliberate acts' in clause 14 of the policy means acts which are intended to cause injury, however rejects the argument that the clause extends to recklessness (para [45] and [51]). In the most natural interpretation of the clause, the Supreme Court highlights that it is not the act which gives rise to the injury that has to be deliberate, but the act of causing injury itself. The policy terms do not provide any support for an interpretation which draws differentiation between an intention to cause different kinds of injury, or serious and less serious injury. It was found that the application of the exclusion does not rely on the extent or particular type of injury involved, but it is adequate that the causing of the injury was deliberate (para [39]). The Supreme Court also states that the natural meaning of 'deliberate' acts is the conscious performance of an act intending its consequences, involving a different state of mind to recklessness. In this case, the Insurer has not been able to produce any examples in which 'deliberate' has been held to include recklessness. It was found by the Supreme Court, that the exemption of reckless acts would seriously limit the cover provided, as it would lead to a very wide and commercially unlikely exclusion (para [51]–[57]).

The Supreme Court, in applying these principles to the case, found that the Insurer is unable to establish that the exclusion in clause 14 applies on the facts (para [62]) and found that there was no findings by the courts below of intention to injure, or even recklessness. The conviction for assault does not establish intention beyond the intention to perform the act of assault, the neck hold. The Supreme Court refers to the High Court conclusion of what was done was badly executed, not badly motivated, which is inconsistent with there being such an intention (para [58]–[61]). The Supreme Court accepts 'the insurer's argument that "deliberate acts" in clause 14 of the policy means acts carried out with an intention to injure', but the insurer is unable to establish that there was such an intention carried out on the facts. However, the Supreme Court rejects the argument that 'deliberate acts' include recklessness, and if it did it would not make a difference to the facts. It is established that clause 14 does not apply.

The 'wrongful arrest' extension

The Supreme Court found clause 14, considering the conclusion reached in issue one, does not apply and the Insurer has no defence to the claim made under the main clause. The Supreme Court concluded that the appeal must be dismissed. While it is not necessary to determine the second issue, the Supreme Court agrees with the reasoning and conclusion of the Court of Session that the losses claimed does not relate to wrongful arrest and the factual basis for such a claim is not made out (para [65]–[66]).

'Reasoning of the Supreme Court may be persuasive'

Speaking on the Judgement, Stewart-Jones had the following to say:

'The case raises important questions of construction as deliberate acts are commonly excluded from insurance policies. The construction of an exclusion clause will always depend on the wording of the cause and commercial context, taking into account the nature of the insured risk and the industry in question. However, the reasoning of the Supreme Court here may be persuasive in other cases and in light of this decision, deliberate acts exclusion clauses are likely to apply only when there was an intent to cause injury (or loss or damage depending on context) of the type insured. It is worth noting that there may be evidential difficulties in establishing the requisite intent'.

Written by Akaliya Balakrishna

Source: [Burnett or Grant \(Respondent\) v International Insurance Company of Hanover Limited \(Appellant\)](#)

Charlotte Stewart-Jones is a solicitor at Reed Smith. She particularly focuses on a broad range of litigation and arbitration matters, including professional negligence and anti-bribery and corruption.

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