

Commercial Litigation and Disputes



Case comment: *Burnett or Grant v International Insurance Company of Hanover Ltd* [2021] UKSC 12

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“Deliberate” in an exclusion in a public liability policy required there to be an intention to injure, rather than an intention to inflict a specific injury. An insurer could not establish that this exclusion applied where no facts had been found as to the intention of a door steward who had inflicted fatal injuries on a customer in the course of an assault. The insured pursuer, represented by Robert Weir QC of Devereux Chambers, was therefore entitled to an indemnity for the injuries accidentally inflicted by the insured’s employee.

Background

The point arose in the context of a dispute over the construction of an exclusion to a public liability policy. The widow of Mr Grant, who had died after being restrained using a dangerous neck hold imposed by a bar door steward, sought an indemnity for the security company’s liability for the acts of its employee from their public liability insurer.

Following the incident, the steward had been convicted of assault but acquitted of murder. In sentencing, the High Court in Aberdeen had accepted that the steward’s actions were badly executed, not badly motivated. The parties agreed that the steward did not intend to kill Mr Grant.

The security company was insured under a policy including public liability cover in the following terms:

“The INSURERS will indemnify the INSURED against all sums which the INSURED shall become legally liable to pay as compensatory damages and claimant’s costs and expenses arising out of accidental

- a. INJURY to any person
- b. Physical loss of or physical damage to material property
- c. Obstruction trespass nuisance or interference with any right of way light air or water”

“INJURY” was defined as “bodily injury death injury disease or shock causing bodily injury”

The policy excluded liability for deliberate acts in the following terms:

“Liability arising out of deliberate acts wilful default or neglect by the INSURED any DIRECTOR PARTNER or EMPLOYEE of the INSURED other than as set out in Extension 1 (if such Extension is operative) and Extension 2 (if such Extension is operative).”

Neither of the stated Extensions were relevant to the claim.

The insurer sought absolver of the case (summary dismissal) on the basis that the steward's actions were a deliberate act and were therefore excluded. The insurer also claimed that its liability was limited in accordance with an extension for wrongful arrest. That application failed at first instance, with the Lord Ordinary holding that the exclusion for deliberate acts "applies only when the outcome giving rise to liability, namely death, was the intended objective".

The insurer appealed to the Inner House of the Court of Session. Lord Carloway, the Lord President, held that "For the exclusion to operate, the employee must have deliberately intended to cause the death of, or at least serious injury to, the deceased." The remaining two Judges agreed, with Lord Drummond Young holding that "The use of the word 'deliberate' in the exclusion indicates that the employee's act should be intended to cause the type of harm suffered by the victim."

The Inner House held that there had been no deliberate act on the facts. The insurer appealed further to the Supreme Court.

The Supreme Court decision

Lord Hamblen, giving the unanimous judgment of the Supreme Court, dismissed attempts by Mrs Grant to argue that "deliberate acts" meant acts which are intended to cause the specific injury that results, or at least serious injury.

Instead, it was held that "deliberate acts" in the policy means "acts which are intended to cause injury". There was no need for the intention to be as to the type of injury suffered, merely the type of liability covered under the policy:

"... the relevant intention relates to the liability covered under the policy, namely "injury". The same would apply to the other types of liability covered, such as for "physical damage" or "nuisance". The application of the exclusion does not depend on the particular type or extent of damage or nuisance intended. As in the case of "injury", it is sufficient if the causing of the damage or nuisance was deliberate."

The insurer also argued that "deliberate" should be construed as including reckless acts, on the basis that "deliberate" and "wilful" should be interpreted as synonymous given the way that each was used in the exclusion. Lord Hamblen rejected that interpretation, noting that "an exemption of reckless acts would lead to a very wide and commercially unlikely exclusion, given the nature of the [security company's] business."

On the facts, Lord Hamblen noted that there was no finding of the court below that the steward had any intention to injure, and nor could any support for such a finding be drawn from the conviction for assault or the sentencing remarks made following that conviction. There was thus no basis on which the Supreme Court to find that the exclusion for deliberate acts applied on the facts.

Comment

Although the insurers succeeded in establishing that the exclusion was sufficiently broad to encompass any intention to injure, rather than an intention to cause the specific injury which in fact resulted, this was a truly pyrrhic victory in that they could not make out that case on the facts. It is a timely reminder that attempts to remedy factual gaps in a case on appeal rarely succeed.

The point of more general importance to be drawn from the case is that intention to cause a result will ordinarily be established where there was an intention to cause a result of the type of liability which is excluded, rather than an intention to cause the specific result which in fact came about. Although that distinction had no effect on the outcome of the case, this broad interpretation of an exclusion for deliberate acts clarifies that such exclusions will operate in circumstances including where there is an intention to cause damage of the requisite type, even if that intention is limited to causing far less serious consequences than in fact result. Ultimately, the judgment will bolster insurers' reliance on such exclusions in the future.

Sam Way accepts instructions in all of Chambers' core practice areas, including employment, commercial litigation, insurance, tax and personal injury. He has a busy advocacy and paperwork practice across the High Court, County Court, Employment Tribunal and First-tier Tribunal (Tax Chamber). He prides himself on his practical and strategic approach to his advice, and has been praised by clients for his efficient and responsive style.

*Robert Weir QC represented the successful insured pursuer in *Burnett or Grant v International Insurance Company of Hanover Ltd*. His practice focuses on all aspects of personal injury and clinical negligence and the impact of the Human Rights Act on those areas.*