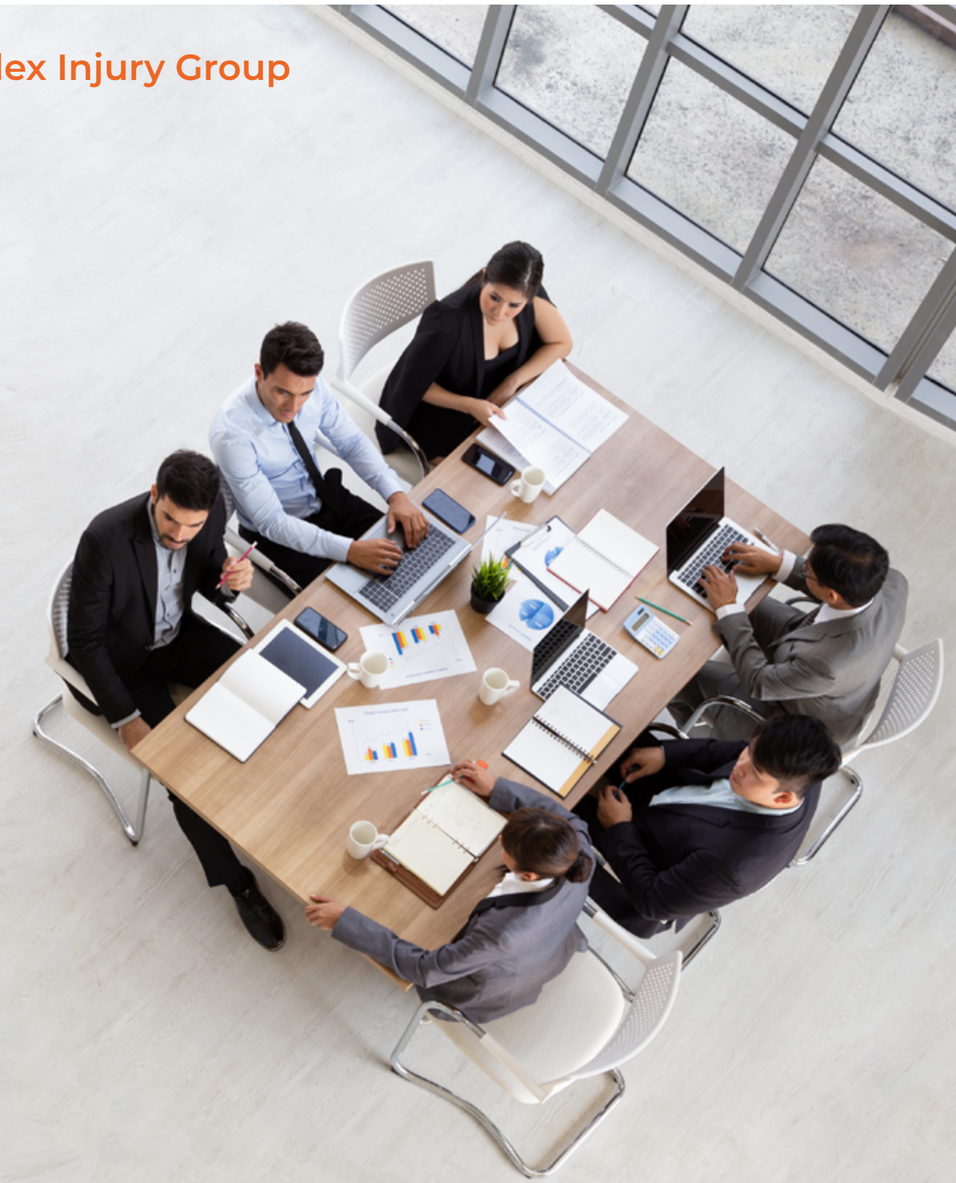
Insight 197

from Horwich Farrelly's Large & Complex Injury Group



WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on cases relating to:

- The Supreme Court's interpretation of an exclusion clause relating to "deliberate acts";
- The Court of Appeal review of the scope of the fraud exception to "without prejudice".

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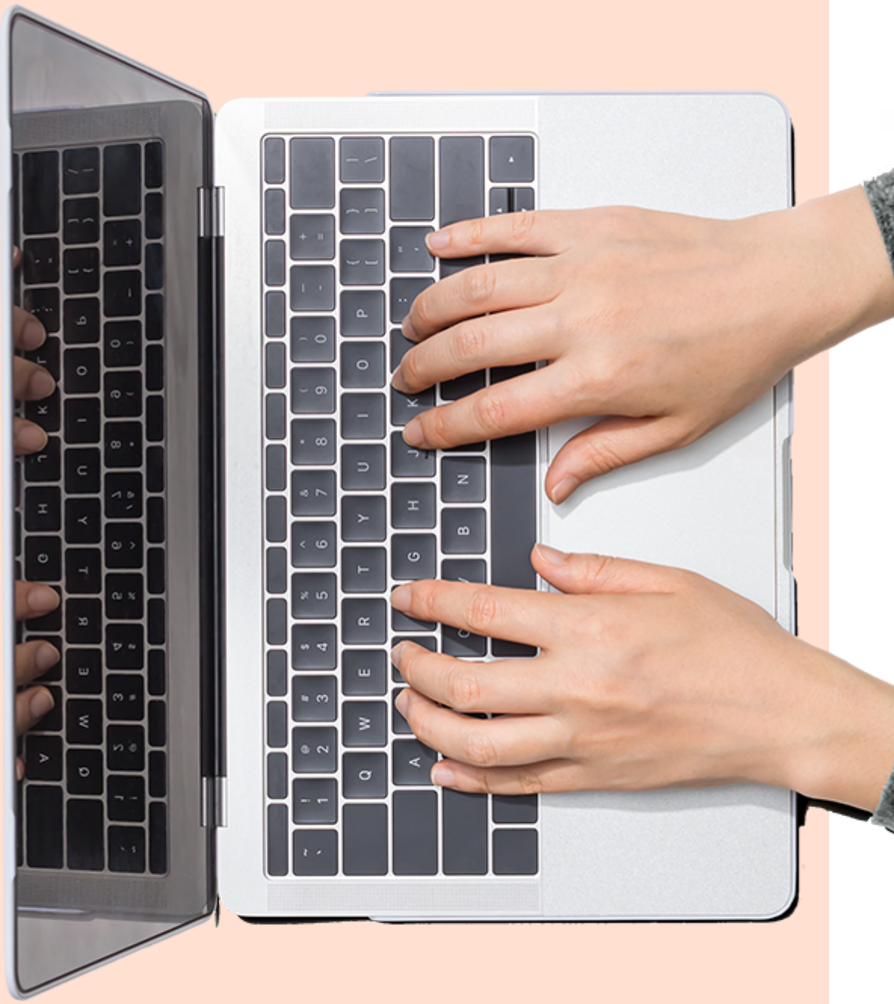

What are deliberate acts?

Burnett v International Insurance Company of Hanover Ltd (Scotland) [2021] UKSC 12

Background

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 ("PSL") to work at a bar in Aberdeen. This assault occurred during an incident following Mr Grant's ejection from the bar. 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 act of the neck hold. Mr Marcius was charged with murder. At the trail the jury did not accept that Mr Marcius had asphyxiated Mr Grant or caused his death. However, he was convicting of assault. The sentencing judge accepted that Mr Marcius' actions were badly executed, not badly motived and therefore imposied a non-custodial sentence.

Ms Burnett is the widow of Mr Grant. PSL had obtained public liability insurance coverage from Hanover ("the Insurer"). Ms Burnett claimed for damages in her capacity as Mr Grant's widow against a number of parties including Mr Marcius, PSL and the Insurer. The claim was ultimately discontinued against all defendants save for the Insurer.

Proceedings and earlier decisions

Ms Burnett claimed that the Insurer would be liable to indemnify PSL in respect of its vicarious liability for the wrongful acts of Mr Marcius, their employee, and that the right to be indemnified was transferred to and vested in her under the Third Parties (Rights Against Insurers) Act 2010 (the 2010 Act) . The Insurer sought to have the claim dismissed on the basis that it was not liable to indemnify PSL 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 which was limited to £100,000.

The Insurer submitted that its liability was wholly excluded under the terms of its Policy, which excludes liability for "deliberate acts, wilful neglect or default". Alternatively, the Insurer submitted that the door steward's actions qualified as a "wrongful arrest" under the Policy, for which liability is limited.

The Outer House of the Court of Session did not accept either submission. It held that the Insurer was obliged to indemnify PSL and that this right vested in Ms Burnett under the 2010 Act. The Outer House's finding was upheld by the Inner House of the Court of Session. The Insurer sought and obtained permission to appeal to the Supreme Court.

Supreme Court

On appeal to the Supreme Court, the issues were:

(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 his wrongful arrest by Mr Marcius under the terms of Extension 3 of the policy, with the effect that the insurer's liability to indemnify is limited to £100,000?

The matter came before the court, comprising Lord Reed (President), Lord Briggs, Lord Hamblen, Lord Leggatt and Lord Burrows on 8th February 2021. The court unanimously dismissed the appeal, Lord Hamblen giving the sole judgment which was handed down on 23 April 2021 and confirmed:

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. In the present case 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*) and;

- the fact that the policy is provided in respect of PSL'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;
- 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.

The critical issue dividing the parties was what is meant by "deliberate acts". The Insurer's case was that it means acts which are intended to cause injury, or acts which are carried out recklessly as to whether they will cause injury. Ms Burnett's case was 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.

The Court accepted the Insurer's argument that "deliberate acts" in clause 14 of the policy means acts which are intended to cause injury but rejected the contention that the clause extends to recklessness.

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. 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.

Lord Hamblen confirmed that clause 14 did not 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 was not able to produce any case in which "deliberate" had 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 the context.

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 PSL's business.

Applying these principles to this case, the Supreme Court held that the Insurer was unable to establish that the clause 14 exclusion applied on the facts as found:

- 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.

Even if "deliberate acts" included recklessness, the same conclusion would follow due to the sentencing judge's conclusion.

Issue 2 – the "wrongful arrest" extension

In light of the conclusion reached on issue 1, that clause 14 does not apply, the Supreme Court confirmed the Insurer had no defence to the claim made under the main insuring clause. It was therefore not necessary to determine the second issue. However, the Supreme Court agreed with the reasoning and conclusion of the Court of Session, whuch was that the losses claimed did not relate to wrongful arrest and the factual basis for such a claim was not made out.

Commentary:

This case serves as a reminder to insurers that where there is ambiguity, it is more likely to be resolved in favour of the insured or, as in this case, the claimant standing in their shoes via the Third Parties (Rights Against Insurers) Act 2010.

The court will give the disputed words their ordinary meaning within the specific context. Therefore, if insurers wish to restrict cover, it must be done in such a way that there is no room for ambiguity.

The without prejudice rule

Berkeley Square Holdings Ltd & Ors v Lancer Property Asset Management Ltd & Ors [2021] EWCA Civ 551

Background

The claimants, Berkeley Square Holdings Ltd and others ('the owners'), were offshore companies mainly beneficially owned by H.E. Sheikh Khalifa bin Zayed Al Nahyan, the Emir of Abu Dhabi and the President of the United Arab Emirates, who owned a £5 billion portfolio of properties in London. The first Defendant, Lancer Property Asset Management Ltd ("Lancer") managed the portfolio from 2004 to 2017. They dealt with and were instructed by H.E. Sheikh Khalifa's agent and appointed representative, Dr Mubarak Al Ahbabi, under powers of attorney granted to him by the owners.

Enhanced fees, details of whuch were set out in a side letter to the management agreement, were payable to Lancer if the values of managed properties increased above a set amount as a result of Lancer's management. By a deed of variation, the agent was permitted to authorise Lancer to make payments to third parties.

A dispute about the entitlement of Lancer to management fees was settled shortly after a mediation that took place in September 2012.

In September 2018, the claimants commenced proceedings against the defendants for their role in an alleged fraud. It was alleged that the defendants had conspired with the claimants' appointed representative to increase payments made to the defendants and had passed substantial payments to a company controlled by the claimants' appointed representative. The claimants contended that they did not know about these payments until 2017. The defendants' Defence asserted that the claimants had known and approved of the payments since at least 2012.

The defendants sought to rely on information in the description of the factual background from their position statement in the 2012 mediation. This referred to the payments being made. They argued that the admissibility of the statement fell within three of the established exceptions to the

'without prejudice' rule. They applied to amend their Defence, which was opposed by the claimants, who then sought to strike out parts of the Defence as an abuse of process.

The question was - were the defendants precluded from relying on the details from their own position statement or did the circumstances come within an exception to the without prejudice rule?

First instance judgment

Roth J decided that the mediation statements could be referred to in the proceedings under two of the six exceptions to 'without prejudice' privilege (WP privilege) set out in the judgment of Robert Walker LJ in the case of *Unilever plc v The Proctor & Gamble Co [2000] 1 WLR 2436*, known as the Unilever exceptions, as follows:

i. To set aside an agreement vitiated by a misrepresentation ("exception 2"), and

ii. Under the rule in Muller v Linsley & Mortimer (a firm) [1994] EWCA Civ 39, enabling 'without prejudice' information to be used to determine if losses had been reasonably mitigated in prior proceedings ("exception 6")

He made it plain that "justice clearly demands" that the claimants should not be permitted to put forward an argument that they were not aware of the payments until 2017 whilst excluding evidence that they were told of those facts five years earlier in 2012, because to do so would create a "serious risk" that the court would be misled.

Roth J gave permission to appeal.

Court of Appeal

David Richards LJ gave the sole judgment of the Court of Appeal and upheld Roth J's decision but on varied grounds. He explained the purpose of WP privilege and the six Unilever exceptions, analysing the two exceptions which were applied by Roth J.

On appeal, Lancer additionally sought to argue that exception 3, estoppel, should be used to uphold the earlier decision.

David Richards LJ held that exception 2 applied and therefore he did not need to determine the possible application of exceptions 6 or 3. His reasoning was:

"The purpose of without prejudice negotiations is to arrive at a compromise of the dispute. If a compromise is reached, a contract will be made. It is no different from any other contract. All the familiar issues as to its terms, meaning and validity may arise. Where without prejudice negotiations have achieved their purpose, there is no principled basis for excluding the content of those negotiations in resolving those issues. It would put such contracts into a special category …

In so far as his judgment amounted to an extension of exception 2, he went on:

"…it is a principled extension … it does not leave an unprincipled and undesirable asymmetry in the rule. The purpose for which the defendants may adduce evidence of the mediation statements is to determine the authority of Dr Al Ahbabi, which goes to the validity of the settlement deeds put in issue by the claimants. Just as the claimants could adduce such

evidence for that purpose, so can the defendants. It is the claimants' submission which would lead to an unprincipled asymmetry."

The facts in this particular case enabled the Court of Appeal to create a "principled extension" to exception 2 (misrepresentation), because it was not the receiver of the representation who relied on it, but the representor.

The purpose behind the extension of exception 2 did not subvert its principle, as its purpose was to allow without prejudice material to be used either to uphold or to invalidate a compromise contract. In the instant case, it was being used by Lancer to uphold the parties' settlement or to counter the owners' claim that it should be set aside.

It was material that the statements in question did not relate to the dispute which led to the earlier mediation. They were only "peripheral" to those issues and were exclusively statements made by the Defendants who were the same party trying to have them admitted in the present proceedings. The admission of the without prejudice material would not risk undermining the public policy justifying the without prejudice rule.

The appeal was unanimously dismissed, Henderson LJ and Popplewell LJ both agreeing with the judgment of David Richards LJ.

Summary

The Court of Appeal upheld Roth J's first instance decision that mediation position statements made during a successful mediation in one of the parties' confidential position papers were admissible in evidence; upholding an order directing that statements made "without prejudice" in mediation were disclosable and could be referred to in the Defence.

Commentary:

The judgment demonstrates that, in specific factual circumstances, without prejudice privilege does not necessarily provide protection. The courts' approach has demonstrated that it is prepared to extend the exceptions to the without prejudice rule, but in very limited circumstances.

This decision will not undermine the overarching policy of protecting without prejudice statements, as the Court of Appeal made it clear that this exception can apply only where a contract is challenged for lack of informed consent such as allegations of misrepresentation, fraud or undue influence or for want of authority.

It will be interesting to see if any attempt is made to rely on this limited extension to unravel any personal injury settlement post mediation.

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