FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 9
PD4/16

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion

in the cause

MRS FIONA ELSIE BURNETT or GRANT

Pursuer and Respondent

against

INTERNATIONAL INSURANCE COMPANY OF HANOVER LTD

Fourth Defenders and Reclaimers

Pursuer and Respondent: Milligan QC, Hastie; Lefevre Litigation
Fourth Defenders and Reclaimers: McBrearty QC, Cleland; Clyde & Co

22 February 2019

Introduction

[1] This is a reclaiming motion against an interlocutor of the Lord Ordinary dated 5 April 2018 granting a declarator that the fourth defenders are bound to indemnify the pursuer in respect of the death of her husband on 9 August 2013. The deceased was killed as the result of an assault upon him by a door steward (bouncer). The door steward was employed by a company who carried public liability insurance which excluded liability

arising out of "deliberate acts" by the insured or their employees. The issue is whether this exclusion applied to the death.

Facts

[2] The pursuer is the widow of Craig Grant, who died on 9 August 2013. The former first defender, against whom the action has been abandoned, was employed as a door steward by the second defenders (Prospect Security Services Ltd (in liquidation)) at the Tonik Bar in Aberdeen. The second defenders have not entered appearance. The bar was leased by the former third defenders (Blu Inns Ltd), against whom the action has also been abandoned. The fourth defenders were the insurers of the second defenders. The pursuer seeks to enforce the second defenders' rights against the fourth defenders under the Third Parties (Rights against Insurers) Act 2010.

[3] The deceased had been drinking in the bar. He had fallen asleep. He was intoxicated as a consequence of excessive alcohol and cocaine consumption. He was woken up by the first defender and ejected from the bar. He returned to confront the stewards, of whom there were three, by making two underhand swiping motions at them. The first defender seized the deceased around the neck from behind and spun him around. He put him on, and pinned him to, the ground whilst continuing to hold him by the neck. The two other stewards were involved in restraining the deceased, but it was the first defender who had continued to hold him around the neck for about three minutes. The deceased was being held pending the arrival of the police, who had been phoned. Shortly after he was released, the deceased was pronounced dead. The cause of death was mechanical asphyxia.

[4] The first defender was tried on a charge of murder. He was convicted only of assaulting the deceased by seizing him by the neck, forcing him to the ground, placing him

in a neck hold and restricting his breathing. A lengthy sentencing statement prepared by the trial judge was agreed to be "an accurate summary of the evidence". This contained the following narrative:

> "... [The deceased] was pinned down on his front on the ground with you continuing to hold him around the neck area. [A second door steward] held [the deceased's] arms behind his back and a third door steward restrained [the deceased's] legs. Apart from one or two kicks with his legs from that prone position, which the third door steward had no difficulty in restraining, [the deceased] did not struggle further.
>
> ... [A]s soon as [the deceased] was on the ground he did not shout or struggle at all. He was described as going blue very quickly and choking and coughing. ... [Y]ou were leaning on [the deceased] with all of your weight, or ... putting as much pressure on [the deceased's] windpipe as possible. ... You maintained your hold for a little short of three minutes.
>
> ... [A]s a door steward you had undergone a period of training ... [A] door steward is a licenced occupation and in respect of which certain standards are expected. This included training in minimising conflict and avoiding violence. This also included training on acceptable methods of restraint. A neck hold was not one of these. Indeed, so dangerous is that hold regarded to be, that it is not even demonstrated in a classroom setting. ... [You should] never detain someone like that because it was dangerous.
>
> [T]hat night you ignored this training. You used the hold described when taking down and restraining [the deceased]. All of this was part of a chain of events that ended with [the deceased's] tragic and untimely death. ...
>
> There was a conflict of medical evidence as to the cause of [the deceased's] death and the jury have resolved this in your favour. By reason of the verdict of the jury, you are not in law responsible for [the deceased's] death. Your culpability extends to the assault being carried out in the manner found by the jury.
>
> ...
>
> It was said on your behalf that what you did was badly executed, not badly motivated ... I accept what is said on your behalf in this regard."

Insurance policy

[5] The relevant insurance policy covers the second defenders in relation, to *inter alia*, both public and employer's liability. The policy notes that the second defenders' business was that of "Manned Guarding & Door Security Contractors". The annual premium was £2,875.55. The number of "door supervisor" employees was recorded at 57 with their wages

totalling £287,438. The policy provides that the fourth defenders will indemnify the second defenders against all sums which they shall become legally liable to pay as "compensatory damages ... arising out of accidental ... injury to any person". There are a number of express exclusions. One of these (clause 14) is liability arising out of "deliberate acts wilful default or neglect by the INSURED any DIRECTOR PARTNER or EMPLOYEE of the INSURED" (the clause contains no punctuation). Liability arising out of wrongful arrest is also initially excluded (clause 20), but then included by extension. The relevant clause (3) provides that indemnity will be provided for any liability "to pay as compensatory damages arising from or out of WRONGFUL ARREST". It is defined as meaning:

> "any unlawful physical restraint by one person on the liberty of another and includes ... assault and battery committed ... at the time of making or attempting to make an arrest or in resisting an overt attempt to escape by a person under arrest before such person has been or could be placed in the custody of the police ...".

Liability in respect of a wrongful arrest is limited to £100,000.

The Lord Ordinary's decision

[6] The fourth defenders maintained that they were not liable to indemnify the second defenders in respect of the death of the deceased because the death had been caused by a "deliberate act" on the part of an employee; that is an assault (of which the first defender had been subsequently convicted). Alternatively, what had been involved had been a wrongful arrest and liability was limited to £100,000. The pursuer submitted that the onus was on the fourth defenders to show that the exclusion clause applied. It ought to be construed *contra proferentem*, since there was ambiguity about what acts should be considered to be deliberate.

[7] The Lord Ordinary recognised that what he required to decide was a pure question of construction. He reasoned that it was important that the action was a derivative one arising out of the death of the deceased. Its basis was a failure on the part of the first defender to exercise reasonable care for the safety of the deceased; ie fault and negligence. The pursuer did not seek to prove a wilful act. Applying the *contra proferentem* rule, and adopting the approach in *Hawley* v *Luminar Leisure* [2006] PIQR P17, the exclusion clause only applied when the outcome giving rise to liability, ie the death, was the intended objective. In this case, death had been an unintended consequence of the assault. Intention to kill was not irrelevant. The Lord Ordinary disagreed with the view of the Court of Appeal of England and Wales in *CP (a child)* v *Royal London Mutual Insurance Society* [2006] 1 CLC 576 (at paras 13-17) that a reckless act could be classed as wilful.

[8] There was no suggestion in the pursuer's pleadings that the deceased had been unlawfully arrested. A case of that type could not have been brought by the pursuer in her personal capacity. Accordingly, the Lord Ordinary held that the fourth defenders were obliged to indemnify the second defenders in respect of their liability to the pursuer arising out of the death. This right had been transferred to, and vested in, the pursuer in terms of sections 1 and 3 of the 2010 Act.

Submissions

Fourth Defenders and Reclaimers

[9] The fourth defenders submitted that, as the case proceeded under the 2010 Act, the pursuer stepped into the shoes of the second defenders, as the insured. All of the defences, which would have been available against the second defenders, were available against the pursuer (*The "Padre Island"* [1984] 2 Lloyds Rep 408 at 414; *Post Office* v *Norwich Union Fire*

Insurance Society [1967] 2 QB 363 at 373-4, 376). The Lord Ordinary had attached weight to the way in which the pursuer had opted to plead her case in negligence. It was the policy that determined liability and not the manner in which the case had been pled.

[10] In relation to the Lord Ordinary's disagreement with the *dicta* in *CP (a child)* v *Royal London Mutual Insurance Society* (*supra*), in the field of insurance law, and especially as this policy had an English choice of law clause, a decision of the Court of Appeal ought to have been regarded as highly persuasive (*Cowan* v *Jeffrey Associates* 1998 SC 496, at 502-3). The courts in England and Wales had a uniform approach to the phrase "wilful default or neglect".

[11] In the construction of insurance contracts, the words of the policy should be given their ordinary meaning, in their context. The construction should reflect the intention of the parties and accord with commercial common sense. A literal construction that led to an absurd result should be rejected. In the event of ambiguity, the construction more favourable to the insured should be adopted (*Yorkshire Water* v *Sun Alliance & London Insurance* [1997] CLC 213 at 221; see also *Arnold* v *Britton* [2015] AC 1619 at paras 15-20).

[12] On the proper interpretation of "deliberate acts wilful default or neglect", the facts in *Hawley* v *Luminar Leisure* (*supra*) were similar, but the wording of the policy, which covered "accidental bodily injury", was different. In *Hawley* there was no exclusion of deliberate acts. The acts of the doorman had to be construed from the perspective of the insured employer, to whom the employee's state of mind could not be attributed. The policy in the present case had probably been drafted with *Hawley* in mind. In Interpreting "wilful act", *CP (a child)* v *Royal London Mutual Insurance Society* (*supra*) had focussed on the intention of the person to cause the particular damage sustained. What was required was something blameworthy; not just a deliberate or intentional act. Recklessness could suffice. In the

present case, the first defender's actions had been reckless, given his training not to adopt a choke hold. In *In re City Equitable Fire Insurance Co* [1925] 1 Ch 407, "wilful misconduct" was contrasted with "accident or negligence" and likened to "reckless carelessness" (*ibid* at 433 and 434, 517; see also *Kenyon Son & Craven v Baxter, Hoare & Co* [1971] 1 Lloyd's Rep 232 at 240; *Swiss Bank Corp* v *Brink's-MAT* [1986] 2 Lloyd's LR 79 at 93). Default or neglect involved failure or omission. Deliberate was a lower threshold than wilful. It was sufficient if the act was blameworthy or reckless.

[13] There was a blameworthy act here as the first defender had been convicted of assault. Whether the assault had been intended to kill was irrelevant. The first defender had committed a deliberate act which had caused the death. There was no liability for such an act unless it came within the wrongful arrest extension. If the act was not to be classified as deliberate, it was, in any event, within the extension as the first defender had been restraining the deceased pending the arrival of the police. Where both the exclusion and the extension applied, the clause limiting liability to £100,000 would operate.

Pursuer and Respondent

[14] The pursuer accepted that she had stepped into the second defenders' shoes for the purposes of the action. The words in the policy ought to be construed according to their ordinary meaning, in their context. The principles in *Yorkshire Water* v *Sun Alliance & London Insurance* (*supra*) were not in dispute. It was accepted that the cause of death was the first defender's assault on the deceased, but not that the proximate cause of the pursuer's claim was a wrongful arrest. Wilful had to mean deliberate and not merely reckless. The claim here was not for damages arising out of a wrongful arrest but for a negligently caused death. The way in which the claim had been presented was relevant (*Bell* v *Lothiansure* 1993 SLT

421 at 427). The Lord Ordinary had been entitled to disagree with the comments in *CP (a child)* v *Royal London Mutual Insurance Society* (*supra*). Wilful could mean different things in different contexts. There was no finding of recklessness by the Lord Ordinary. The sentencing statement had described the first defender's actings as badly executed and not badly motivated.

[15] If the fourth defenders were correct and all assaults were excluded, the policy would have little value. The definition of wrongful arrest assumed that it was unlawful. This was not a wrongful arrest. The Lord Ordinary had been correct in his approach.

Decision

[16] The principal question is whether, as a matter of the proper construction of the insurance contract, the death of the deceased, which (despite the jury's verdict) was admittedly a result of the first defender's assault upon him, was caused by the "deliberate acts wilful default or neglect" of the first defender.

[17] There is no dispute about the approach to construction which must be taken. The principles are summarised in *Yorkshire Water* v *Sun Alliance & London Insurance* [1997] CLC 213 (Stuart-Smith LJ at 221) *viz.*:

> "1. The words of the policy must be given their ordinary meaning and reflect the intention of the parties and the commercial sense of the agreement. They must be construed in their context…
>
> 2. A literal construction that leads to an absurd result or one otherwise manifestly contrary to the real intention of the parties should be rejected, if an alternative more reasonable construction can be adopted without doing violence to the language used.
>
> 3. In the case of ambiguity the construction which is more favourable to the insured should be adopted; this is the *contra proferentem* rule."

[18] One important element of the context in this case is simply that this is an insurance contract. Its focus is on the loss claimed and whether it is covered by the policy. The loss is the death of the deceased. The question is whether it is covered, but the answer cannot, contrary to the Lord Ordinary's reasoning, depend on the manner in which the case is pled (eg as an assault or a negligent act). Liability in respect of the loss must exist (or not) equally in the case of an injury causing death as it does to one causing pain and suffering (*solatium*) or other personal damage.

[19] The other important contextual element is that the policy was undoubtedly intended to cover the acts and omissions of the door stewards who were employed by the second defenders. The second defenders were engaged in the business of door security. The actions of their employees were thus largely those of their door stewards. Although some purely accidental incidents might occur as a result of carelessness, the public liability cover which would obviously be required was that which would deal with incidents at the doors of bars. These would commonly involve acts preventing persons entering, or removing them from, the premises; all of which would be almost bound to involve deliberate physical acts of one kind or another.

[20] The general cover offered in the policy is "accidental injury". That is contrasted with the excluded "deliberate acts wilful default or neglect". In order to understand what is meant, the nature of these contrasting descriptions has to be considered. The cases cited do throw some light on the matter, but each is distinguishable on its facts, notably the wording of the particular policy.

[21] *Hawley* v *Luminar Leisure* [2006] PIQR P17, so far as relevant, turned upon looking at "accidental … injury" from the perspective of the assured and not the assured's employee (Hallett LJ at 237). A deliberate punch by an employee was "accidental" within the meaning

of the policy, rather than a deliberate act of the assured; it being a basic rule of insurance law that loss caused by the assured's deliberate or wilful acts are not normally covered. This is helpful in explaining that what clauses of the type under consideration are generally intended to exclude are losses deliberately inflicted by the person who has taken out the policy. No doubt this could include losses created by deliberate acts by an employee who is, or is instructed by, the controlling mind of the company. This is quite different from a loss which is accidentally caused, albeit by a deliberate physical act.

[22] *CP (a child)* v *Royal London Mutual Insurance Society* [2006] 1 CLC 576 is also instructive. The policy excluded liabilities arising from "any wilful, malicious or criminal acts". The act, which had caused a partly derelict mill to burn down, had been that of an 11 year old setting fire to a den which he had built in the mill. He had not intended the mill to burn down. It was held that the use of the words "malicious" and "criminal" lent colour to what was meant by "wilful". What was contemplated was a "blameworthy" act involving something more than a deliberate or intentional act. As Tuckey LJ said (at para 15):

> "… [S]omething more than a deliberate or intentional act is contemplated. If that is all the word meant, the wide cover apparently provided by the extension would largely be taken away by the exclusion. Most acts, including negligent acts, are deliberate and intentional".

Recklessness as to the consequences might suffice, but that had not been made out in the circumstances. The focus was on conduct deliberately intended to cause the loss for which indemnity was claimed. That is the correct approach in the context of an insurance contract. What is being excluded is an act deliberately causing particular losses otherwise covered by the policy.

[23] Approached at in this way, the phrase "deliberate acts" in the policy is intended to cover acts which involve the insured, or his employees, doing something with the deliberate

intention of bringing about a particular objective, notably the creation of liabilities for losses covered by the policy. Seen in this light, the exclusionary phrase does not cover a deliberate act of an employee, intended as one of restraint, which "accidentally" causes injury or death to the person restrained. For the exclusion to operate, the employee must have deliberately intended to cause the death of, or at least serious injury to, the deceased. That is not the situation in this case.

[24] I reserve my opinion on whether recklessness may be sufficient for the purposes of the exclusion clause. Suffice it to say, the *dicta* in *CP (a child)* v *Royal London Mutual Insurance Society* (*supra*) may be highly persuasive where there is a deliberate act which courts obvious dangers leading to losses for which there is liability under the policy. The Lord Ordinary has not made a finding of recklessness. Although it may be possible to argue a case for recklessness based on the trial judge's description of the first defender's acts as objectively dangerous, her sentencing statement did not extend that far. The description of the first defender's acts as badly executed, rather than badly motivated points away from their amounting to recklessness as that concept is normally understood.

[25] The wrongful arrest exclusion and extension clauses do not apply to the present circumstances. Wrongful arrest, or detention, is a claim for damages to compensate for an interference with, and loss of, a person's liberty and any consequent affront to the person's dignity (see generally Norrie: *Interference with Liberty: Wrongful Detention* in Stair Memorial Encyclopaedia Vol 15 *Obligations* para 435 *et seq*). The losses claimed are not of this type. There is no basis upon which a claim for wrongful arrest might have been made. In all these circumstances, the reclaiming motion should be refused and the court should adhere to the interlocutor of the Lord Ordinary dated 5 April 2018.

Postscript

[26] The parties are to be commended for agreeing so much of the evidence. This obviated the necessity of hearing oral testimony. However, the case raises an issue about the appropriate form of a joint minute. The manner in which the trial judge's sentencing statement was dealt with was to agree it as "an accurate summary of the evidence" at the trial. The effect of such an agreement is uncertain. The fact that the statement is an accurate summary of the evidence given in the course of the criminal trial is, at least strictly, irrelevant. What seems to have been intended was an agreement that the statement was an accurate account of the facts surrounding the death of the deceased. If that is correct, the joint minute should have so stated.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 9
PD4/16

Lord President
Lord Brodie
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OPINION OF LORD BRODIE

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MRS FIONA ELSIE BURNETT or GRANT

Pursuer and Respondent

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INTERNATIONAL INSURANCE COMPANY OF HANOVER LTD

Fourth Defenders and Reclaimers

Pursuer and Respondent: Milligan QC, Hastie; Lefevre Litigation
Fourth Defenders and Reclaimers: McBrearty QC, Cleland; Clyde & Co

22 February 2019

Nature of the action

[27] This is an action for damages proceeding under chapter 43 of the Rules of Court but, more important for present purposes, it is also proceedings to enforce what are said to be rights against an insurer as provided for by section 1(3) of the Third Parties (Rights against Insurers) Act 2010. As is familiar, sections 1(3) and 3 of the 2010 Act permit a third party to bring proceedings to enforce the rights of a relevant person under a contract of insurance without the relevant person's liability to pay damages to the third party having been

established, and that by way of declarator as to the insurer's potential liability to indemnify the relevant person. The pursuer is such a third party. It is admitted that the second defenders are relevant persons for the purposes of the 2010 Act. The fourth defenders are the insurer.

[28] There were originally four defenders convened as parties to the action. There are now two. The first and third defenders were assoilzied on 28 June 2017. The remaining defenders are therefore the second defenders and the fourth defenders. The second defenders have not entered the process.

[29] The second defenders are a limited company which formerly carried out business as manned guarding and door security contractors. They are however now in creditors' voluntary liquidation. In so far as the action relates to damages the pursuer, as an individual and the legal representative of her son, seeks to establish the liability of the second defenders to make reparation to her in respect of her loss and injury arising from the death of her late husband, the deceased. She founds on the fault of the first defender whom it is admitted was at the material time acting in the course of his employment with the second defenders as a door steward at licensed premises in Aberdeen. It is admitted that the second defenders are vicariously liable for the acts and omissions of the first defender whilst acting in the course of his employment with them. The fourth defenders were at the material time the public liability insurer of the second defenders in terms of policy number SEC-HAN12/1250 ("the Policy"). It is the pursuer's contention that the second defenders' vicarious liability to the pursuer by reason of the fault of the first defender is a risk insured by the Policy. As their primary position the fourth defenders dispute that they have any liability to indemnify, given the circumstances of the case. As their alternative position the

fourth defenders contend that their obligation to indemnify the second defenders for their liability to the pursuer is limited to the sum of £100,000.

[30] On 28 June 2017 proof was allowed, to proceed on 3 October 2017 but restricted to the issues of liability, contributory negligence and the indemnity of the second defenders by the fourth defenders. In para [3] of his opinion the Lord Ordinary describes the case as having called before him for debate. The hearing before the Lord Ordinary was no doubt in substance a debate but, the interlocutor of 4 October 2017 making *avizandum* records the Lord Ordinary as "having taken the proof as adduced" and that, strictly, is what occurred. No oral evidence was led but parties had entered into an extensive joint minute of agreement which, together with the admissions on Record, was intended to provide the agreed factual circumstances by reference to which the Policy might be construed and applied. In the course of his submissions before this court Mr McBrearty QC, who appeared for the fourth defenders, described the hearing before the Lord Ordinary as a proof before answer on agreed facts and in his note of argument Mr McBrearty refers to "an agreed factual matrix, some of which is reflected in the pleadings."

[31] As appears from para [22] of his opinion, the Lord Ordinary saw his task simply in terms of construction of the Policy. That would seem to lose sight of the issues of liability and contributory negligence, but I do not suggest that the Lord Ordinary failed to do what was required of him. I take the parties either to be agreed that actually there are no issues between them as to liability and contributory negligence or, in the unlikely event that there are such issues, that parties have agreed to defer their resolution to a later date, notwithstanding the terms of the interlocutor allowing proof.

The factual matrix

[32] Returning to the factual circumstances by reference to which the Policy is to be construed and applied (Mr McBrearty's "agreed factual matrix"), I would respectfully associate myself with the observations of your Lordship in the chair in the postscript to your opinion. At least by the date fixed for the proof, parties appear to have been in agreement that it was unnecessary to lead oral evidence or to require the Lord Ordinary to make findings in fact. That being so, one would expect that any joint minute of admissions intended as a substitute for the leading of evidence at proof would have taken the form of an articulate list of concisely stated primary facts and, if agreement between the parties had gone that far, the appropriate characterisation of these primary facts and any inferences to be drawn from them. Some of the paragraphs of the joint minute in the present case (1 to 17, 20, and 28 to 30) take that form but others do not. For example, paragraph 18 is as follows:

> "18. Production 6/2, document number 10 of process is the post mortem report following examination [of the deceased] in Aberdeen on 9th August 2013 and can be treated as evidence without being spoken to"

A similar formulation is adopted in paragraphs 22 to 27 (police interviews and judicial examinations), 31 and 32 (insurance contracts) and 33 (CDs containing CCTV footage). Now such a formulation may be appropriate where primary facts are still at issue between the parties and therefore require to be determined at proof. In such a case where there are documentary sources of evidence which parties are agreed can be referred to without their provenance being established by a witness, entering into a joint minute of admissions in terms such as are adopted in paragraph 18 is good practice and will be encouraged by the court. But in such circumstances if it is intended to agree more than the provenance of a document, as it may be, then that should be made clear. In the present case, the purpose of referring to the report on post mortem examination is obviously to establish that the

deceased died of asphyxia as a result of the first defender having compressed his neck. That is indeed described in the report as the "the most compelling pathological interpretation" but it remains uncertain from the terms of the joint minute as to whether parties have gone the distance of agreeing that as a fact. That uncertainty is continued in paragraph 19 of the joint minute which states (it might be said redundantly given the terms of paragraph 18): "The post mortem [report] noted the cause of death as mechanical asphyxia". I appreciate that the joint minute may have been entered into at a time when parties had not yet finalised their positions as to the scope of the proof, but once parties had agreed to forgo oral evidence it would have been better if they had revisited the joint minute with a view to stating in terms what was agreed as primary fact and not leaving that to be guessed at.

[33] As your Lordship in the chair has pointed out, paragraph 34 of the joint minute (which touches most closely on the facts upon which the fourth defenders found upon as bringing the exclusion clause in the Policy into play) is also less than satisfactory if, as I can only assume was the case, its purpose was to obviate the need to lead oral evidence and to avoid the need for the Lord Ordinary to make findings of primary fact. Paragraph 34 is in these terms:

> "34. That 6/30 [of process] is the sentencing statement in respect of the first defender given by [the trial judge] on 14th January 2015 and may be referred [to] as an accurate summary of the evidence heard at the first defender's trial without being spoken to by any witness."

Your Lordship in the chair has quoted the material parts of the trial judge's sentencing statement. While not summarising all the evidence heard at trial, it does summarise what I take to be the salient parts of the evidence relating to how the first defender's actions came to be "part of a chain of events that ended with [the deceased's] tragic and untimely death", to borrow the words of the trial judge's sentencing statement. As your Lordship in the chair

observes, that the sentencing statement contained an accurate summary of evidence is strictly speaking irrelevant. What was required was a formulation which made clear what were agreed as the facts. As it is, read literally, the effect of paragraph 34 is obscure: what was the Lord Ordinary to make of evidence not accepted by the jury and what weight was he to give to what was said by the trial judge in her sentencing statement but which went beyond a summary of the evidence? I have in mind the jury's apparent rejection of the Crown case that the direct cause of the deceased's death was compression of the deceased's neck by the first defender, and the trial judge's acceptance of what does not appear to have featured in the evidence but which was said by counsel on behalf of the first defender: that what the first defender did was "badly executed, not badly motivated"?

[34] I acknowledge that what I would see as the deficiencies in the joint minute do not appear to have given rise to any obvious difficulty at the hearing before the Lord Ordinary. That was similarly so before the Inner House. However, the fact remains that this court has been invited to come to a decision on the application of the Policy to what it understands to be the facts as opposed to a comprehensive list of findings either as made by the Lord Ordinary or as set out in a joint minute of admissions. That being so, I will identify what I take the material facts to be:

(1) at the relevant time the first defender was acting in the course of his employment with the second defenders as a door steward at licensed premises;

(2) the duties of a door steward may include the use of a degree of physical force towards a member of the public;

(3) such physical force may include restraining a member of the public with a view to preventing harm either to himself or to others, until the police are able to intervene;

(4) here the deceased was such a member of the public;

(5) the first defender had undergone a period of training in the duties of a door steward which included training in acceptable means of restraint;

(6) the deceased was wrestled to the ground by three door stewards of whom the first defender was one, and restrained face down pending the arrival of the police (joint minute paragraph 12);

(7) the three door stewards (the first defender and his two colleagues) all participated in restraining the deceased on the ground;

(8) the part played by the first defender was to apply a neck or choke hold to the deceased for up to three minutes (joint minute paragraph 14);

(9) the first defender held the deceased's head under his right arm with his leg stretched out;

(10) the first defender's purpose was to restrain and subdue the deceased in circumstances where the deceased had offered some (ineffectual) violence to the door stewards and where the police had been called;

(11) the first defender was aware of and must be taken to have intended his physical actions, including the application of the neck hold;

(12) the effect of the neck hold was to put pressure on the deceased's windpipe;

(13) the application of the neck hold by the first defender to the deceased was the direct cause of the deceased's death;

(14) the first defender had not been trained to use a neck hold as a means of restraint;

(15) a neck hold is dangerous in that it impedes and may prevent breathing, the relevant danger therefore includes the risk of death;

(16) a trained door steward (and therefore the first defender) would have been aware of that;

(17) by restraining the deceased in the way that he did (seizing him by the neck, forcing him to the ground, placing him in a neck or choke hold and restricting his breathing) the first defender committed the criminal offence of assault (joint minute paragraph 21 and Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 section 10);

(18) notwithstanding the awareness of risk which can be imputed to the first defender, there was no direct evidence that he intended to kill or otherwise significantly harm the deceased, nor are there any agreed primary facts from which such an actual intention can be inferred;

(19) at least for the purposes of this reclaiming motion, it is to be taken that the death of the deceased was directly caused by the fault of the first defender for which the second defenders are vicariously liable to pay damages to the pursuer;

(20) the business description of the second defenders in the schedule to the Policy is manned guarding & door security contractors.

Construction of the Policy

Structure of the Policy

[35] It is uncontroversial that a third party, such as the pursuer here, can have no higher or more extensive (or indeed different) rights against the insurer by virtue of the 2010 Act than the relevant person has against the insurer by virtue of the policy of insurance. If the insurer has no obligation to indemnify the relevant person under the policy then there are no rights for the third party to enforce. Similarly if the insurer’s obligation to indemnify the

relevant person is in some way limited under the policy then the rights which the third party is entitled to enforce by virtue of the Act are also limited.

[36] For present purposes three provisions of the Policy are relevant: first, an obligation to indemnify; second, an exclusion from that obligation of "liability arising out of deliberate acts wilful default or neglect by the insured any director partner or employee of the insured"; and, third, an extension of the obligation to indemnify in respect of all sums which the insured becomes liable to pay as "compensatory damages arising from or out of wrongful arrest".

[37] The obligation to indemnify appears at the beginning of the Public and Products Liability Insurance section of the Policy. It is preceded by certain definitions including definitions of "injury" and "wrongful arrest". Following the obligation to indemnify are numbered exclusions, all of which are stated to be "subject to all other terms conditions and Exclusions of the Policy". Exclusion number 14 is the exclusion headed "Deliberate Acts". Following the exclusions are certain extensions. Extension number 3 is headed "Wrongful Arrest".

[38] The Policy contains other sections, general conditions and general exclusions. It has not been suggested that any of these provisions are of relevance to the issue as to whether the fourth defenders are liable to indemnify the second defenders in respect of their liability to the pursuer.

[39] A feature of the drafting of the Policy is that defined terms appear in upper case (I have not reproduced that when quoting from the Policy). Punctuation is omitted.

The obligation to indemnify arising out of accidental injury

[40] In so far as relevant for present purposes, the obligation to indemnify

is 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 …arising out of accidental
>
> (a) injury to any person …"

The definitions section of the Policy includes a definition of "injury" as meaning: "bodily injury death illness disease or shock causing bodily injury".

[41] The fourth defenders do not take the point that for the purposes of the obligation to indemnify the death of the deceased was not "accidental". That position is consistent with the decision of the Court of Appeal in *Hawley* v *Luminair Leisure Ltd* [2006] PIQR P17.

[42] Procedurally and on its facts *Hawley* v *Luminair* has some similarities to the present case. The claimant had been seriously injured as a result of having been deliberately punched and knocked to the floor by a nightclub doorman. The claimant's skull had been fractured in the fall and he had suffered severe brain damage. The doorman was convicted of causing grievous bodily harm to the claimant. The doorman was employed by a company, ASE, which had gone into liquidation with no assets but which had the benefit of a public liability insurance policy indemnifying it against liability for "accidental bodily injury to any person". The claimant sought a declaration pursuant to the Third Parties (Rights Against Insurers) Act 1930 that the insurers were liable to indemnify ASE in respect of its vicarious liability for the acts of the doorman and were accordingly liable to pay the claimant the assessed damages. It was argued that an obligation to indemnify in respect of liability for accidental bodily injury did not cover the consequences of a deliberate punch delivered with the intention to inflict bodily injury. At first instance it was decided that the injury was indeed "accidental" or "fortuitous" within the meaning of the policy. That decision was upheld on appeal and thus the claimant could recover against the insurer.

That was because in considering whether the injury caused to the claimant was "accidental" or "fortuitous" one had to look at the matter from the perspective of the insured, ASE, and not the doorman. He was to be treated as separate from ASE for the purposes of the policy and therefore his intention in causing the bodily injury was not to be imputed to ASE.

Extension 3: Wrongful Arrest

[43] It is convenient to look at extension 3 before going to exclusion 14. As has already been noted, it is the fourth defenders' position that if their liability to the second defenders is not excluded entirely by virtue of exclusion 14 then their liability is limited by virtue of extension 3.

[44] I respectfully agree with your Lordship in the chair that extension 3 has no application to the circumstances of this case. There is therefore no question of limitation of liability. That is not to say that there may not be a complete exclusion of liability by virtue of exclusion 14 but I shall defer consideration of that question until I have given my reasons for concluding that the obligation to indemnify (and the consequent limitation of that obligation) provided by extension 3 does not apply to the circumstances of this case.

[45] By virtue of exclusion 20 the insurers will not be liable for any liability arising from or out of wrongful arrest other than as set out in extension 3.

[46] The Policy states that "wrongful arrest" means:

> "any unlawful physical restraint by one person on the liberty of another and includes
>
> 1) assault and battery committed ... at the time of making or attempting to make an arrest or in resisting an overt attempt to escape by a person under arrest before such person has been or could be placed in the custody of the police ...
>
> 2) libel or slander false imprisonment malicious prosecution either
>
>   a) committed …directly in connection with an arrest or
>
>   b) arising out of the investigation of acts of shoplifting or theft".

While "arrest" most immediately suggests the action of a police officer, and therefore by extension that of someone making a "citizen's arrest", in apprehending a suspected criminal, the expression "wrongful arrest" is habile to describe any interference with the liberty of another which, if not justified, might render the person who is guilty of such interference liable in damages. Indeed "wrongful arrest" is one of the terms used by Norrie to describe the delict giving rise to such liability in the article in the Stair Memorial Encyclopaedia cited by your Lordship in the chair. The essence of the wrong (and, as I would understand it, its English equivalent, the tort of false imprisonment – see Clerk & Lindsell on Torts (22nd edit, 2017) para 15-23) is any unlawful constraint on freedom of movement of another person, the consequent direct loss suffered by the affected person being "lost liberty and the affront caused", as Norrie puts it. A wrongful arrest may also carry with it the implicit assertion that the person arrested is a wrongdoer or at least someone who has been so behaving as to require restraint, and therefore if carried out in public or if coming to public attention a wrongful arrest can give rise to a claim for damages in respect of injury to reputation. Thus, although a wrongful arrest may involve a degree of physical force, liability does not depend on the infliction of personal injury or even bodily contact. That, in my opinion, points to the purpose of extension 3: it is dealing with a specific type of legal liability and therefore a specific risk which is distinct from the risk of liability arising out of accidental injury to any person. Were it not for the extension, as is made clear by exclusion 20, the Policy would not provide indemnity against the insured being found liable in damages for deprivation of liberty, which one might suppose to be a far from remote possibility in the present case given the nature of the business of manned guarding and door security.

[47] The indemnity provided by extension 3 is in respect of all sums which the insured becomes liable to pay as compensatory damages "arising from or out of wrongful arrest". It

is true that the definitions section of the Policy, which sets out what wrongful arrest "means", states that it includes "assault and battery" but, as with "libel and slander", in this context I construe these references as being to subsidiary or incidental wrongs which may be committed in the course of what falls principally to be regarded as the wrong of unjustified restraint on the liberty of another. It would seem that in *Hawley* v *Luminair* the Court of Appeal took much the same view of the purpose and drafting of an extension in different but similar terms to that with which we are concerned here. The policy of insurance in that case had an extension providing indemnity against liability "in respect of any unlawful physical restraint …and shall include …assault and battery committed … at the time of making or attempting to make an arrest". Giving the judgment of the Court of Appeal Hallett LJ had this to say about the extension at paras 112 and 113 (emphasis added):

> "We consider it perfectly possible that, when extending the public liability cover …to wrongful arrest by extension (c), it was thought prudent to make it clear that the bodily injury cover …was also extended. In any event, the concept of 'assault and battery' is by no means identical to 'accidental bodily injury'. …as appears pretty clear from extension (c), the policy was intended to cover [the insured] for assault and battery committed …*in the context of* an unlawful physical restraint ...".

Exclusion 14: Deliberate Acts

[48] The exclusions section of the Policy begins:

> "These Exclusions apply in addition to other Exclusions in this Section and the General Exclusions."

It continues:

> "The insurers will not be liable for"

There follow various numbered risks, of which number 14 is as follows:

> "14. Deliberate Acts
>
> liability arising out of deliberate acts wilful default or neglect by the insured any director partner or employee of the insured"

Thus, the Policy seeks to exclude liability arising out of, on the one hand, "deliberate acts" and, on the other, "wilful default or neglect"; acts on one hand, omissions to act (in breach of duty) on the other.

[49] According to the fourth defenders' note of argument, the phrase "wilful default or neglect" constitutes well-trodden ground in insurance contracts. That may well be correct, although none of the three cases to which we were referred in order to explain the meaning of the phrase (*In re City Equitable Fire Insurance Company Ltd* [1925] Ch 407, *Kenyon Son & Craven* v *Baxter Hoare & Co* [1971] 1 Lloyd's Rep 232 and *Swiss Bank* v *Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79) relates to an insurance contract. However, as I understood Mr McBrearty's argument, "wilful default or neglect" is no more than part of the documentary context to which regard may be had in construing the more critical phrase: "deliberate acts ... by ... [an] employee of the insured". It was because it arose out of deliberate acts of the first defender that, according to Mr McBrearty, any purported liability to indemnify is excluded by exclusion 14. It is put this way in the fourth defenders' note of argument:

> "[That] the jury at his trial found the first defender not guilty of murder ...is not to say that his *actions* were not deliberate. They were certainly blameworthy. He did not accidentally place [the deceased] in a choke hold. It was a deliberate action, and one which 'ignored' his training. It was highly dangerous. At the very least it was grossly careless or reckless. There is no challenge to the conviction for assault or the terms of the trial judge's summary. Assault is an offence which requires intention or (in England) recklessness. It follows that any liability arising from this action is excluded by the Policy."

Mr McBrearty supported his submission by reference to *Hawley*. There, the obligation was to indemnify the assured "against legal liability for damages … arising from accidental bodily injury to any person". That is not very different from the obligation to indemnify in the present case. However, in *Hawley* there was no equivalent to exclusion 14. The argument centred on whether the injury to the claimant was "accidental" (defined in the

policy as "sudden, unforeseen, fortuitous and identifiable") when it was caused by a deliberate punch. The Court of Appeal considered that the infliction of injury could not be described as "accidental" or "fortuitous" from the point of view of the doorman (*Hawley* para 104) but for the purpose of construing the policy, the relevant perspective was that of the assured employer and not the employee who delivered the punch. It was likely, suggested Mr McBrearty, that exclusion 14 had been included in the Policy here with an eye to the outcome in *Hawley* in order to make clear that deliberate infliction of loss was not covered by the Policy, irrespective of whether the deliberate act in question was that of the insured, any director or partner of the insured, or of any employee of the insured. The different perspectives as to what is accidental as between employer and employee which were available given the terms of the policy in *Hawley*, are not available in the present case because here the Policy specifically addressed the perspective of an employee and provided that if liability arose out of his deliberate act then indemnity was excluded.

[50] Whether liability for the death of the deceased is an excluded risk under the Policy depends first on determining the proper construction of exclusion 14 and then on an application of that construction to the facts of the case as they can be taken to be. As Mr McBrearty acknowledged, the step of construction is not just a question of attributing their ordinary meaning to the words found in the Policy (important as that is). Words must be construed according to their context with a view to ascertaining the objective intention of the parties and the commercial sense of the document. That can be seen from the three principles set out in the passage in *Yorkshire Water Services Limited* v *Sun Alliance & London Insurance plc* [1997] CLC 213 which have been quoted by your Lordship in the chair and which are accepted and discussed in *Hawley* at paras 100 to 102. It also appears from the opinion of Lord Neuberger, speaking for a majority of the Supreme Court in *Arnold* v *Britton*

[2015] AC 1619 at paras 15 to 20, a passage to which Mr McBrearty referred. At para 15 of *Arnold* Lord Neuberger said this:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the [particular] clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

Factual and commercial context and commercial common sense are of importance here. As I took Mr McBrearty to recognise, an overly literal construction of "liability arising out of deliberate acts... by the insured [or] any director …[or] employee of the insured" would deprive the obligation to indemnify of all content in that it is virtually impossible to conceive of a liability being incurred by a corporate insured which could not be said to arise from an act (in the sense of doing something or choosing not to do something) of a director or employee. That is simply not a commercially acceptable construction. Parties must be taken as having intended that the Policy should provide some material degree of cover in respect of liability for personal injury to third parties; that being what it purported to do. As your Lordship in the chair has indicated, that is the point made by Tuckey LJ in *CP (a child)* v *Royal Mutual Insurance* [2006] 1 CLC 576 at para 15 and the reason why, in that case, he gave a more restricted meaning to "wilful" (in the phrase "wilful, malicious or criminal") than simply "deliberate".

[51] In order to identify the intention of parties in the present case it is relevant to consider the nature of the second defenders' business and the sort of risks against which a

company engaged in that business might be expected to require indemnity. That is part of the commercial context. The second defenders were engaged in the business of "manned guarding and door security contractors". That is a business which involves the deployment of physical force in circumstances which are likely to be close to the cusp between lawful and unlawful behaviour. As it is put in paragraph 6 of the fourth defenders' note of argument, "Regrettably, door stewards occasionally assault customers or restrain them unlawfully". A reasonable person having all the background knowledge which would have been available to the parties would know that and, accordingly, although there might be a question of degree, would expect a public liability policy to cover the risk of liability arising from such events.

[52] Of course exclusion 14 must have some purpose and that purpose must be to restrict the extent of cover to some extent, irrespective of the expectations of the reasonable person. But, as Mr McBrearty conceded, its purpose cannot be to exclude liability arising out of *all* "deliberate acts" and certainly not all deliberate actions, which is how Mr McBrearty interpreted "acts". That result would be contrary to commercial common sense, if not simply absurd. Mr McBrearty sought to pull back from an absurd conclusion by suggesting a construction which inserts the requirement that the relevant act should not only be deliberate (in the sense of intentional) but also unlawful or at least blameworthy. I see no reason to adopt Mr McBrearty's suggestion. As a matter of language, there is nothing in "deliberate" (or its near equivalent "wilful") to suggest "unlawful" (see *CP (a child)* at paras 11 and 12 discussing *Young and Harston's Contract* (1885) 31 ChD 168 at 174 to 175). In *CP (a child)* it was because Tuckey LJ thought that the words "malicious or criminal" lent colour to "wilful" in a clause excluding liability for "any wilful, malicious or criminal acts" that "in this context", as he put it, a "wilful" act must be blameworthy and therefore, in his

view, at least reckless. Assuming Tuckey LJ to be correct in his construction of the particular policy before him, it does not follow that "wilful" will always imply blameworthiness or necessarily comprehend recklessness wherever it is found, irrespective of context; taking the meaning of a word used in one context and applying that meaning in another context is just the approach that the Court of Appeal warns against in *Hawley* at para 105.

[53] Your Lordship in the chair proposes, as the proper construction of "deliberate acts" where it appears in exclusion 14, the doing of something with the deliberate intention of bringing about a particular objective, namely the loss liability for which there would otherwise be a liability to indemnify. I respectfully agree. It appears to me that that construction gives full weight to the ordinary meaning of the various words in the expression "liability arising out of deliberate acts". It avoids absurdity without the need to read in words which do not appear in the text. It is commercially sensible in that it provides cover against risks incidental to the insured's business while being consistent with "a basic rule of insurance law", namely, "that a contract of insurance does not cover an assured against his deliberate or wilful infliction of loss, at any rate in the absence of express stipulate or necessary implication": *Charlton* v *Fisher* [2002] QB 578 at para [51] (quoted in *Hawley* at para 106).

Conclusion

[54] In my opinion, respectfully agreeing with your Lordship in the chair, the liability of the second defenders to the pursuer is a liability in respect of which the second defenders are entitled to indemnity from the fourth defenders under the Policy. Liability is not limited

by virtue of extension 3 because that extension has no application to the facts of the case. Neither is it excluded by exclusion 14. On the facts as they appear to be, the first defender clearly intended to restrain the deceased. In order to do so he clearly intended to apply a neck hold, because that is what he did. That may have been a dangerous action and, as a matter of law, may have involved the use of a degree of force which was unjustifiable in the circumstances and therefore constituted an assault, but it cannot be said that the first defender intended significantly to harm the deceased and it cannot be said that the first defender intended to kill the deceased. What is excluded by exclusion 14 is "liability arising out of deliberate acts". The liability in question here is liability for causing the death of the deceased. The relevant act therefore is causing death. On the facts as agreed the first defender caused the death of the deceased but he did not do so deliberately; his causing of the death was not a deliberate act. Your Lordship in the chair reserves his position on whether exclusion 14 would exclude liability in respect of an act which, on objective assessment, was found to be reckless. As your Lordship has indicated, this does not arise for decision in this case in the absence of any finding of recklessness, but I acknowledge that there might be a case where the circumstances were such that the relevant act might be regarded as "deliberate" notwithstanding the absence of subjective intention to do the harm in respect of which liability has arisen.

[55] I agree that the reclaiming motion should be refused.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 9
PD4/16

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF LORD DRUMMOND YOUNG

in the Reclaiming Motion

in the cause

MRS FIONA ELSIE BURNETT or GRANT

Pursuer and Respondent

against

INTERNATIONAL INSURANCE COMPANY OF HANOVER LTD

Fourth Defenders and Reclaimers

Pursuer and Respondent: Milligan QC, Hastie; Lefevre Litigation
Fourth Defenders and Reclaimers: McBrearty QC, Cleland; Clyde & Co

22 February 2019

[56] The fundamental issue in this case is the application to the facts of the insurance policy concluded between the second defenders, the employers of the door steward whose actings brought about the death of the pursuer's husband, and the fourth defenders, the insurers under that policy. The policy provides for indemnification of the insured (the second defenders) against "all sums which the INSURED shall become legally liable to pay as compensatory damages … arising out of accidental injury to any person" in connection with the insured's business. That indemnity is, however, subject to a number of exclusions,

two of which are relevant to the present case. The first of these is exclusion 14, which relates to deliberate acts. That exclusion applies to "liability arising out of deliberate acts wilful default or neglect by the INSURED any DIRECTOR PARTNER or EMPLOYEE of the INSURED", subject to extensions that are not relevant to the present case. The second relevant exclusion is exclusion 20, dealing with wrongful arrest, read together with extension 3 of the policy. Exclusion 20 excludes any liability arising from wrongful arrest other than as set out in extension 3. Extension 3 provides indemnification for wrongful arrest carried out by any employee of the insured, but the schedule to the policy limits liability in respect of wrongful arrest to £100,000.

[57] The critical questions are first, whether exclusion 14 excludes the liability of the insurer for the death of the deceased, and secondly, whether the door steward's actions against the deceased amounted to wrongful arrest, thus limiting the insurers' liability to £100,000. I agree with your Lordships that exclusion 14 does not operate to exclude liability for the death of the deceased. I further agree that the door steward's actions did not amount to wrongful arrest, with the result that the insurers' liability is not limited.

The construction of insurance policies

[58] The general principles that apply to the construction of insurance are similar to those that apply to the construction of contracts generally, and are conveniently summarized in *Yorkshire Water Services* v *Sun Alliance & London Insurance PLC*, [1997] CLC 213, at 221, per Stuart-Smith LJ. The words used in the policy must be given their ordinary meaning. They must, however, be construed in context. Two different contexts can be said to be relevant. First, the words used in a particular clause must be set in the context of the policy as a whole. Secondly, the words used, and indeed the policy itself, must be set in the wider

context of the insured's commercial or other activities. Insurance is provided against liabilities that may arise in the course of those activities, and the policy should be construed in such a way that it provides a reasonable level of effective cover against such liabilities.

[59] Moreover, a purposive approach to interpretation should be followed; the construction given to the contractual wording should reflect the intention of the parties and the commercial sense of the agreement. As in any other form of commercial contract, commercial common sense is an important factor in construction of the contractual wording. An example of this principle is found in cases where literal construction of the contractual wording leads to an absurd result or one that is otherwise manifestly contrary to the intention of the parties. In such cases, as indicated in *Yorkshire Water*, if an alternative more reasonable construction is available without doing undue violence to the language used, that construction should be adopted. Finally, in cases of ambiguity, the *contra proferentem* rule applies, and the construction more favourable to the insured should be adopted.

[60] The importance of context was emphasized in the later decision of the Court of Appeal in *Hawley* v *Luminar Leisure Ltd*, [2006] PIQR P17, at paragraphs [100]-[102]. It had been argued that the words "accidental" and "fortuitous" should be given their ordinary meaning, but this contention was rejected. Hallett LJ stated:

> "However, virtually every word in the English Language is capable of having more than one meaning, and most can have many different shades of meaning. The precise meaning to be ascribed to a word or phrase in a particular contract must therefore ultimately be decided by reference to its linguistic and here its commercial context.
>
> The three principles identified [in *Yorkshire Water*] also serve to underline the caution which a court, seeking to identify the meaning of a word in a particular contract, must adopt when considering what assistance can be derived from either the word's acontextual meaning, or judicial decisions as to the meaning of the same word in a different contract. Because the contractual and commercial circumstances of each case are inevitably different, it can be positively dangerous to draw assistance from the acontextual meaning or from decisions of other courts as to the meaning of a

> particular word, when context is so important on issues of interpretation. Of course, very different considerations may apply where a particular word or phrase has a specific well-established meaning in a certain type of contract".

The last comment applies to words that have in effect acquired the status of a term of art. Otherwise, however, the two contexts referred to above, the particular context of the parties' contract and the wider commercial context in which that contract has been concluded, are of fundamental importance to any contractual analysis. For this to be so it is not essential that any specific ambiguity should be identified; the important point made in *Hawley* is that the meaning of <u>any</u> word or expression is unclear in the absence of context.

The application of exclusion 14 of the present policy

[61] Exclusion 14 applies to "liability arising out of deliberate acts wilful default or neglect". In legal usage, the word "deliberate" normally means intentional; a deliberate act is something that the actor intended to do. The notion of a deliberate act, however, is in one respect ambiguous. This can be illustrated by the example of a road accident caused by a driver's carelessness. The driver responsible for the accident obviously intended to drive his car. Thus the driving that led to the accident can be described as a "deliberate act", and that deliberate act was a cause of the accident, at least in the sense of a *causa sine qua non*. Nevertheless, it would be contrary to common sense to describe the accident as arising out of the driver's "deliberate act". The accident arose from his carelessness, and it is manifest that any exclusion of liability in his insurance policy for "any deliberate act" would be inapplicable. The reason for this conclusion is that, in an insurance policy at least, any reference to a "deliberate act" must normally be construed as a reference to a deliberate act of the insured, or the insured's employee, that is a proximate or immediate cause of the loss claimed or the liability on which a contractual claim is based. A proximate or immediate

cause must be distinguished from a *causa sine qua non*, that is to say, a causative event that is a necessary condition of the loss or liability but does not bear a close causal relationship to it. Generally speaking, it is only a deliberate act that amounts to a proximate or immediate cause of the loss or liability that will be the subject of an exclusion clause.

[62] An analogous ambiguity occurs in the present policy. Exclusion 14 refers to deliberate acts of the insured's employees. The wording used must be construed in context, however. An important part of that context is the fact that the policy was effected by a security company which employed door stewards such as the first defender; the schedule to the policy refers expressly to the insured's business as that of "Manned Guarding & Door Security Contractors". Door stewards are employed to deal with troublesome customers or would-be customers. It is obvious that in the course of his employment a door steward may require to engage in acts involving physical restraint and some degree of force in order to deal with the more troublesome customers. Even the use of reasonable force may result in injury, however, and in some cases injury may result from negligence on the part of the steward, or from the use of force that goes beyond what is necessary or reasonable. It is in cases of this sort that claims are likely to be made against the second defenders as the employers of the door steward, on the basis that they are vicariously liable for the steward's failure to exercise reasonable care in carrying out his duties. As a matter of common sense, it is plain that this is precisely the sort of case where the indemnity provided by the policy is likely to be relevant. If there is no negligence, and only reasonable and necessary force is used, it is unlikely that there would be any ground of action against the insured. In any such case, however, the actings of the door steward can be described as "deliberate" in the sense that the steward intends to restrain or otherwise deal with a troublesome customer. That is analogous to the intention to drive in the case of the road accident; it is a necessary

condition of the resulting injury, but it is not a sufficient condition for liability. What gives rise to liability is the existence of negligence, as with the road accident, but the negligence is not an intentional or deliberate act but merely careless. As with the road accident, the intention to restrain a troublesome customer cannot be regarded as a proximate or immediate cause of the loss; it is the fact that the restraint was carried out in a negligent manner that is the proximate or immediate cause.

[63] In some cases, of course, the inference may be drawn that a door steward intended to cause an injury of the type suffered by a customer. In my opinion the application of exclusion 14 should be confined to cases of that nature, where there is a deliberate decision to use excessive force to cause injury. Exclusion 14 is not intended to deal with the case where a door steward attempts to restrain a customer or would-be customer but in doing so negligently, or even recklessly, goes beyond a reasonable level of force. 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. Even if that harm results from a deliberate act of the employee, such as punch or choke hold, unless the harm suffered was of the general nature intended by the employee, it cannot be said that the liability for that harm arose out of the "deliberate" act of the employee.

[64] It is essential in my opinion to construe exclusion 14 in this way in order to give effect to the fundamental purpose of the insurance policy in the context in which the policy operates. The primary purpose of the policy is self-evidently to provide the insured, the employer of door stewards and other staff, with an indemnity against liabilities that may be incurred to customers or would-be customers as a result of the actings of the staff employed by them. As already noted, the duties of door stewards will inevitably involve the use of some force. Consequently the intention to use force against a customer cannot be a bar to

liability; otherwise the policy would be deprived of a major part of its obvious commercial purpose.

[65] Exclusion 14 applies not merely to deliberate acts but also to "wilful default or neglect" by among others any employee of the insured. The word "wilful" points to the active exercise of the will; in other words it indicates intentionality. On that basis, the expressions "wilful default" and "wilful neglect" must signify a deliberate or intentional failure to act. It is difficult to make sense of the provision in any other way. Indeed, if the word "neglect" is not qualified in this manner, the policy would not cover many, and possibly most, cases of mere negligence on the part of a door steward. That would be commercially absurd; as I have already indicated, in cases where necessary or reasonable force is used against a customer there can be no liability that would be indemnified by the policy, and the policy would have no practical effect. Thus the policy, construed in context, must be intended to cover cases where there is some level of blame on the part of the door steward. Consequently wilful default and wilful neglect must signify something more precise than mere blame or fault. That additional content is provided in my opinion by the word "wilful", which indicates an intentional failure to act.

[66] The word "wilful" was construed in *CP* v *Royal London Mutual Insurance*, [2006] 1 CLC 576, a case where a fire in a partly derelict mill was caused by the actings of a child who built a den within the mill and then set fire to paper within his den. The facts of the case are obviously significantly different from those of the present case, and thus for the reasons given by Hallett LJ in *Hawley* v *Luminar Leisure Ltd*, *supra*, at paragraph [102], it cannot be regarded as a helpful precedent. In *CP*, however, Tuckey LJ, who delivered the main opinion, stated at paragraph [16] that for an act to be "wilful" it was not necessary that the act should be deliberate and intended to cause damage of the kind in question. It would

be enough to show that the insured was "reckless as to the consequences of his act". Recklessness for this purpose meant that the insured should be aware that what he was about to do risked damage of the kind that gave rise to the claim, or did not care whether there was such a risk or not. In agreement with the Lord Ordinary, I do not think that the word "wilful" can be given such an extended meaning except perhaps in a very specific context. In general, "wilful" signifies that an act is deliberate or intentional, or is deliberately or intentionally intended to bring about a certain consequence. Recklessness is a different concept: it involves awareness of risk of consequences but not caring about whether that risk eventuates. In my opinion the reference in exclusion 14 to "wilful" default or neglect signifies a failure to act with the intention that a particular type of consequence should result. The precise consequence that eventuates need not be intended, but harm of that nature should. Mere recklessness as to the consequences does not in my opinion satisfy that requirement.

[67] The critical question is accordingly whether on the facts of the case the first defender's assault on the deceased disclosed an intention to cause serious injury to the deceased. It is a matter of agreement that the sentencing statement provided by the judge who presided over the trial of the first defender represents an accurate statement of what occurred. The first defender was charged with murder but was acquitted of that offence and was found guilty of assaulting the deceased, by seizing him on the neck, forcing to the ground, placing him in a neck or choke hold compressing his neck and restricting his breathing. In her sentencing statement, the trial judge described the evidence recorded by CCTV. She further noted that in the training undergone by licensed door stewards a neck hold was not regarded as an acceptable method of restraint, and stated that the first defender appeared to have ignored his training. There had been a conflict of medical

evidence as to the causes of the deceased's death, and the trial judge observed that the jury appeared to have resolved that conflict in the first defender's favour. The result of the verdict of the jury was that the first defender was not responsible for the death of the deceased. The trial judge accepted the submission made in mitigation that what the first defendant did "was badly executed, not badly motivated". On that basis she imposed a non-custodial sentence.

[68] In the light of the trial judge's description of what happened and the verdict of the jury, I consider that it cannot be said that the first defender intended to cause the death of the deceased, or indeed to inflict serious injury on him. What the first defender did is rather to be considered as an attempt to restrain the deceased in a manner that went well beyond what was reasonable and proportionate. On that analysis, the fatal injuries suffered by the deceased resulted from gross carelessness, or possibly recklessness, but not from a deliberate act on the part of the first defender. That means that the exclusion for liability arising out of "deliberate acts" does not apply. The fact that the first defender deliberately restrained the deceased is irrelevant for this purpose, because that is not the proximate or immediate cause of the deceased's death. A similar analysis applies to the exclusion for wilful default or neglect. While the first defender's actings might readily be described as involving default or neglect for the safety of the deceased, it cannot in my opinion be said that such default or neglect was "deliberate", in the sense that there was a wilful or intentional failure to act that brought about the death of the deceased. In short, the agreed facts disclose a serious degree of carelessness, and possibly recklessness, on the part of the first defender, but it cannot be said that the first defender brought about the death of the deceased through a deliberate act or wilful neglect or default that went beyond the intention

to restrain a troublesome customer. For these reasons I consider that exclusion 14 does not apply.

Exclusion 20 and "wrongful arrest"

[69] Exclusion 20, taken together with extension 3, has the effect of limiting the liability of the fourth defenders as insurer to £100,000 in respect of all sums which the insured, the second defenders, should become legally liable to pay as compensatory damages arising from or out of wrongful arrest committed or alleged to have been committed by among others any employee of the insured. As with exclusion 14, the words of the policy must be construed in a purposive manner having regard to the context, and in particular to the fact that the policy was intended to provide an indemnity for the actings of door stewards employed by the insured. Furthermore, in my opinion the principle that exclusions in an insurance policy should be construed *contra proferentem* is relevant; that points to a relatively restricted meaning for the expression "wrongful arrest".

[70] In legal usage the word "arrest", in relation to persons, normally signifies apprehension by legal authority. The expression "wrongful arrest" signifies an attempt to apprehend a person without reasonable justification or displaying malice or using excessive force. In the policy, "wrongful arrest" is defined as meaning "any unlawful physical restraint by one person on the liberty of another". The definition is extended to include assault and battery committed or alleged to have been committed at the time of making or attempting to make an arrest or in resisting an attempt to escape before such person could be placed in the custody of the police. Two features of the definition appear to me to be important. First, the first part of the definition indicates that what is covered is unjustified physical restraint, rather than acts of excessive violence. Secondly, the extension indicates

that the arrest is contemplated as ending with the handing over of the victim to the custody of the police. That strengthens the view that what is covered is restraint rather than violence. On that basis, what is covered by this provision is an attempt to apprehend a person, as in a typical arrest, but without the authority that renders the arrest lawful.

[71] In the present case, I am of opinion that the acts of the first defender, as described in the sentencing statement of the judge who presided over his trial, cannot be described as attempted apprehension; nor can they be described as acts of restraint rather than acts of physical violence. Nor does there appear to have been any attempt to restrain the deceased until he could be handed over to police custody. The claim made by the pursuer is rather based on the use of excessive force, not any attempt to arrest the deceased.

[72] It was contended on behalf of the insurers that the claim made against them was a claim under the policy and hence was a claim of the insured, the second defenders. Consequently the claim was limited by the second defenders' rights under the policy, not by the claim that the pursuer made against the second defenders. Nevertheless, what is indemnified under the policy is "all sums which the INSURED shall become legally liable to pay as compensatory damages" arising out of injury to any person. This means that before there is any liability on the part of the insurer a third party, in this case the pursuer, the deceased's widow, must have a valid legal claim against the insured; otherwise there is no legal liability to make payment, and hence the essential condition of the indemnity is not satisfied. For this reason it is necessary to consider the nature of the pursuer's claim, and in my opinion the Lord Ordinary was quite correct in doing so. So far as exclusion 20 is concerned, the pursuer's claim is not based on wrongful arrest; it is a claim for compensation for the death of the deceased based on the fault and negligence of the first

defender as an employee of the insured party. This in my opinion provides a further reason for holding that exclusion 20 is not applicable to the facts of the present case.

Conclusion

[73] For the foregoing reasons I agree with your Lordships that the reclaiming motion should be refused.