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# Different states of mind in the insurance world

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# Objectives

- *Burnett or Grant v International Insurance Company of Hannover Limited*
- Differences and similarities between various states of mind, both pre and post inception
- Be able to distinguish between language used in the Insurance Act 2015 and CIDRA 2012
- Application of the above to example scenarios

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## Different states of mind (natural meanings)

- Recklessness - *lack of regard for the danger or consequences of one's action*
- Deliberate - *done consciously and intentionally*
- Carelessness - *failure to give sufficient attention to avoiding harm or errors*
- Negligence - *failure to take proper care over something*
- Dishonesty - *deceitfulness shown in someone's character or behaviour*
- Reasonable - *having sound judgement, fair and sensible*
- Knowledge - *awareness or familiarity by experience of a fact or situation*

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# Burnett or Grant v Inter Hannover Ltd - background

## Background

- Mr Grant was sadly killed on 9 April 2013 following an assault by Mr Marcius, a door steward employed by Prospect Security Limited, who was working at a bar.
- At trial, the jury did not accept that Mr Marcius had caused Mr Grant's death and convicted him of assault, not murder.
- It was accepted by the sentencing judge that Mr Marcius' actions were "badly executed, not badly motivated".

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# Burnett or Grant - the exclusions

## Public Liability - Injury

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

“**INJURY**” is defined as “bodily injury death illness disease or shock causing bodily injury”.

## Exclusion

### “DELIBERATE ACTS

Liability arising out of deliberate acts wilful default or neglect by the INSURED any **DIRECTOR PARTNER** or **EMPLOYEE** of the INSURED...”

## Public liability - Wrongful arrest

“The INSURERS will indemnify the INSURED in respect of all sums which the INSURED shall become legally liable to pay as compensatory damages arising from or out of **WRONGFUL ARREST** committed or alleged to have been committed by the INSURED any **DIRECTOR PARTNER** or **EMPLOYEE** of the INSURED ...”

“**WRONGFUL ARREST**” is defined as “any unlawful physical restraint by one person on the liberty of another and includes 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 overt attempt to escape by a person under arrest before such person has been or could be placed in the custody of the police or an officer of the court ...”

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## Burnett or Grant - background

- Inter Hannover sought to have the claim dismissed as it was not liable to indemnify Prospect as Mr Maricus' actions fell within the exclusion of “**deliberate acts**”.
- Further, Inter Hannover argued that liability for wrongful arrest was limited to £100,000.
- Mrs Grant succeeded in her claim before the Lord Ordinary who concluded that there had been no deliberate acts on the facts and, the wrongful arrest extension was inapplicable.
- Inter Hannover appealed and the case was heard by the Supreme Court on 8 February 2021.

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## Burnett or Grant - issues

Issues before the Supreme Court 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 by Mr Marcius’ wrongful arrest of him under the terms of Extension 3 of the policy, with the effect that the insurer’s liability to indemnify Mrs Grant is limited to £100,000?

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## Burnett or Grant - deliberate acts

### Issue 1 - the “deliberate acts” exclusion

#### **Hannover’s case:**

“acts which are intended to cause injury, or acts which are carried out recklessly as to whether they will cause injury”

#### **Mrs Grant’s case:**

“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”



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# Burnett or Grant - deliberate acts

## Issue 1 - the “deliberate acts” exclusion

- Court accepted “deliberate acts” means “acts which are intended to cause injury” but rejected argument that clause extends to recklessness.
- The application of the exclusion does not depend on the particular type or extent of injury involved. Deliberately causing the injury was sufficient for the exclusion to bite.
- Natural meaning of deliberate “conscious performance of an act intending its consequences”
- Exclusion did not apply in this instance as the courts found Mr Marcius did not intentionally injure Mr Grant. Mr Marcius’ actions were “*badly executed, not bad motivated*”

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## Pre-insurance cover

- Insured duties when taking out insurance cover
- Insurance Act 2015 (IA 2015)
- Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA 2012)

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# IA 2015 - duty of fair presentation

- Duty of fair presentation

*“A fair presentation is a presentation that discloses, in a manner that is reasonably clear and accessible, every material circumstance which is known or ought to be known... following a reasonable search... or if it provides sufficient information to put a prudent insurer on notice that it needs to make further enquiries.”*

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## IA 2015 - knowledge and reasonableness

- “*Known or ought to be known*”
  - actual knowledge of an insured’s senior management
  - “*those individuals who play significant roles in the making of decisions about how the insured’s activity are to be managed or organised.*”
  - This includes those responsible for arranging the insured’s cover
  - Matters they suspected and would have been in their knowledge
- “*Reasonable search*” - no definition under the Act
  - Circumstance and risk dependent
  - Proportionate to the size, nature and complexity of the business

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## IA 2015 - remedies

- Breach of fair presentation
  - If a breach is deliberate/reckless, insurer may avoid the policy and retain the premium
  - In all other instances, the remedy will be dependent on what would have happened had the duty been complied with -
    - i.e. would the insurer have entered the contract on the same terms

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## IA 2015 - deliberate or reckless

- A qualifying breach is either:
  - a) deliberate or reckless; or
  - b) neither deliberate or reckless.
- A qualifying breach is deliberate or reckless if the insured:
  - a) knew that it was a breach of the duty of fair presentation; or
  - b) did not care whether or not it was in breach of that duty.
- Deliberate or reckless will include fraudulent behaviour.

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## CIDRA 2012 - duty and remedies

- Duty to take reasonable care not to make a misrepresentation
- Consumer acted -
  - Reasonably - insurers required to pay
  - Deliberately or recklessly - insurers can avoid the policy
  - Carelessly - insurers are entitled to a compensatory remedy

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## CIDRA - reasonable care

- All relevant circumstances are to be taken into account
  - type of consumer insurance
  - relevant explanatory material
  - how clear and how specific the questions were
  - how clear the insurer communicated the importance of answering any renewal or variation questions
  - whether the consumer had an agent acting for them
- Objective test
  - the standard of care of a reasonable consumer



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## CIDRA - deliberate/reckless or careless

- Deliberate/reckless -
  - a) knew that it was untrue or misleading
  - b) knew that the matter was relevant to the insurer, or did not care whether or not it was relevant.
- Careless -
  - A qualifying misrepresentation is “careless” if it not “deliberate or reckless”

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# Insurer/broker checklist

- Make sure the questions being asked at the outset are clear and specific
- Make sure you can show if the information was provided accurately you would have done something different
- Know your industry
- As the broker you need to be sure you are providing the insurer with everything they need or asking the insured for more information

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## Post insurance - points to consider

Does an exclusion, pertaining to an Insured's state of mind, apply?

- Narrow interpretation.
- Plain and ordinary language should be used where possible.
- Consider the natural meaning of the words deliberate, recklessness, wilful etc.
- What would a reasonable person, with all the background knowledge which would have reasonably have been available to the parties when they entered into the contract, would have understood the language of their contract to mean? (*Wood v Capita Insurance Services [2017] AC 1173*).
- Commercial purpose of the policy.
- Fact specific.

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## Post insurance - reasonable precautions

- An insurer can only rely on a reasonable precautions clause where it can demonstrate an insured has acted recklessly (*Fraser v Furman* [1967]1 WLR 898).
- Does not include careless or negligent actions.
- Note the difference between reasonable precautions and positive obligations.

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## Example scenario - home cover

- Sophie took out a home insurance policy and when asked if she had any claims in the last 5 years, she only reported 1 claim.
- Following a claim, the insurer discovered the insured had actually had 2 claims.
- Sophie said she had forgotten about the other claim 3 years' prior.
- Only 60% premium paid.

Careless misrepresentation - insurer can pay claim proportionately

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## Example scenario - cyber cover

- James, part of the senior management of a small business, takes out cyber cover.
- Insurers asked if the company had in place and in force appropriate malware software. James confirmed they did have malware software.
- James disclosed a large volume of documents, including:
  - an invoice for malware software clearly labelled and set out in a summary of other documents
  - a very long unnamed internal email chain between various employees, including James, on another point of disclosure, but with a note that the software hadn't been installed
- Following a claim, insurers sought to deny cover noting that the insured had breached their duty of fair presentation.

Reckless breach - insurer can avoid policy

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# Example clauses

1. Buildings & Contents Insurance “*You must take reasonable precautions to prevent loss or damage to Your Property...*”

Insured lights a bonfire during a heatwave. Fire rapidly spreads and damages house. Insured makes a claim to repair damage. Are they covered?

2. Public liability Insurance exclusion “*Liability for any claims arising from deliberate acts...*”

Doorman punches a patron in self defence during an altercation as he was being removed a bar. The patron falls to the floor, breaks his leg and suffers long term damage. Doorman convicted of GBH. Does the exclusion apply?

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# Questions and Answers

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