**OUTER HOUSE, COURT OF SESSION**

**[2018] CSOH 34**

**PD4/16**

OPINION OF LORD UIST

In the cause

MRS FIONA ELSIE BURNETT or GRANT

Pursuer

against

(FIRST) JONAS MARCIUS aka JONAS MELNIKOVAS;
(SECOND) PROSPECT SECURITY LIMITED (In Liquidation);
(THIRD) BLU INNS LIMITED; and
(FOURTH) INTERNATIONAL INSURANCE COMPANY OF HANOVER LIMITED

Defenders

**Pursuer: Milligan QC, Hastie; Lefevre Litigation**
**Fourth Defenders: Sheldon QC, Clelland; Clyde & Co**

5 April 2018

**Introduction**

[1] The late Craig Simpson Grant ("the deceased") was born on 6 October 1986 and died on 9 August 2013. The pursuer is his widow. She was born on 7 December 1986. At the material time the first defender was employed as a door steward at the Tonik Bar, Langstane Place, Aberdeen by the second defenders. They are now in liquidation and have not entered appearance in this action. The third defenders were at the material time the tenants, occupiers and operators of the Tonik Bar. The action has been abandoned in so far as

directed against them. The fourth defenders were at the material time the public liability insurers of the second defenders, who are relevant persons for the purpose of the Third Party (Rights against Insurers) Act 2010 ("the 2010 Act"). In this action the pursuer seeks to enforce the second defenders' rights under the policy against the fourth defenders.

**The death of the deceased**

[2] The pursuer avers that the deceased entered the Tonik Bar alone in the late hours of 8 August 2013. He purchased a drink, sat at a table near the DJ area and fell asleep. He was awakened by a door steward who escorted him to the main exit doors. The deceased offered no resistance. A second steward followed the deceased and the first steward. Once the deceased was outside the main exit doors and in Langstane Place the two stewards remained at the door. The deceased, who was unsteady on his feet, walked back to the doors and made two underhand swiping motions towards the stewards. The first swipe was deflected by a steward by the name of Hauley, who at the second swipe struck out towards the deceased's head. The other steward, the first defender, then grabbed the deceased around the neck from behind, spun him around, put him to the ground and pinned him to the ground on his front, while continuing to hold him around the neck. The first defender, Hauley and a third steward (Morely), all of whom were acting in the course of their employment with the second defenders, continued to hold the deceased on the ground. Hauley held the deceased's arms behind his back, the third steward held the deceased by his legs and the first defender continued to hold the deceased around the neck for about three minutes. When the first defender released his hold the deceased remained motionless on the ground and was pronounced dead at the scene shortly thereafter.

[3] Following upon a post mortem examination the cause of death was certified as mechanical asphyxia. The first defender was subsequently charged with the murder of the deceased but, following a trial at Aberdeen High Court, he was convicted of assaulting the deceased by seizing him on the neck, forcing him to the ground, placing him in a neck or choke hold and restricting his breathing. On 14 January 2015 he was sentenced to a community payback order with an unpaid work element of 250 hours. In her sentencing remarks, which are agreed as an accurate summary of the evidence at the first defender's trial, the trial judge, Lady Wolffe, stated as follows:

> "In placing your own actions that night into context I note the evidence led at trial that as a door steward you had undergone a period of training and that a door steward is a licensed occupation 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. This evidence came from the same lecturer who taught the course you attended a year or so before. This is borne out by the evidence of one of the door stewards who came out from one of the nearby establishments. Tellingly, what struck him from his observation of you while you were on the ground at Mr Grant's head were the very particular features of your holding Mr Grant's head under your right arm with your leg stretched out. His evidence was that you would never detain someone like that because it was dangerous.
>
> However, that night you ignored this training. You used the hold described when taking down and restraining Mr Grant. All of this was part of a chain of events that ended with Mr Grant's tragic and untimely death. There was evidence from your police interview that you believed you were acting in defence of your fellow door stewards and to minimise the danger you felt Mr Grant posed to others.
>
> There was a conflict of medical evidence as to the cause of Mr Grant'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 Mr Grant'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 was said on your behalf in this regard."

The pursuer goes on to aver that the death of the deceased was caused by the fault and negligence of the first defender at common law for which the second and third defenders are both vicariously liable and that she claims against the fourth defenders in terms of the 2010 Act. The fourth defenders aver in answer that they are not obliged to indemnify the second defenders under the policy of insurance. The case, which proceeds under Chapter 43 of the Rules of Court, called before me for debate on that point.

**The terms of the indemnity**

[4] The second defenders were insured by the fourth defenders under a policy of public liability insurance for a period of twelve months from 27 November 2012. The fourth defenders maintain that their liability to indemnify the second defenders in respect of the death of the deceased is wholly excluded by the terms of exclusion 14 of the schedule to the policy. In the proposal form the second defenders' business description is given as "manned guarding and door security contractors". The policy (Schedule, p7) provides that

> "the insurers will indemnify the insured against all sums which the insured shall become legally liable to pay as compensatory damages … arising out of (a) injury to any person".

The terms of exclusion 14 are as follows:

> "The insurers will not be liable for …
> **DELIBERATE ACTS**
>
> Liability arising out of deliberate acts wilful default or neglect by the **INSURED** any **DIRECTOR PARTNER** or **EMPLOYEE** of the **INSURED** other than as set out in Extension 1 (if such Extension is operative) and Extension 2 (if such Extension is operative"). "

Neither Extension 1 nor Extension 2 was operative.

[5] Clause 20 of the Schedule provides that

> "any liability arising from or out of wrongful arrest other than as set out in Extension 3 (if such extension is operative)"
>
> is excluded.

Extension 3 was operative under the policy. It provides (Schedule Cover Sheet 23 November 2012) for indemnification for

> "wrongful arrest committed or alleged to have been committed by the insured … or employee of the insured …".

Wrongful arrest is defined in the policy (Schedule, Policy Coverage Section, p6) 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 ..".

The limit of liability in respect of wrongful arrest is £100,000 (Schedule, 23 November 2012).

[6] As the burden of establishing that liability is excluded or restricted by the terms of the policy rests upon the fourth defenders, I shall first set out their submissions and thereafter deal with the submissions for the pursuer.

**Submissions for the fourth defenders**

[7] The principal submission for the fourth defenders was that their liability to indemnify was wholly excluded by clause 14. It was clear that the first defender's actions amounted to an assault. Whether or not he intended to kill the deceased was irrelevant. He intentionally committed a blameworthy act which, on the pursuer's averments, caused the death of the deceased. Such an act was clearly and unambiguously excluded by the terms of the policy. Alternatively, if liability were not wholly excluded by clause 14, it was limited to the sum of £100,000 because the actions of the second defenders' employees amounted to wrongful arrest in terms of Extension 3. It was clear that, whatever else the first defender

was doing, he was applying unlawful physical restraint to the deceased. The way in which the pursuer framed her case was irrelevant to the rights and obligations arising under the policy. She required to take the second defenders' rights under the policy as a whole, including its exclusions and limitations.

[8] The leading modern case in this area was *Hawley* v *Luminar Leisure Ltd* [2006] PIQR P17, in which the factual background and legal issues arising were similar to those in the present case. The policy in that case was written to cover the business of "manned guarding and door security contractors" and the security company was covered for liability arising as a result of "accidental bodily injury" to any person. The insurers were held liable to indemnify the insured for one of their door stewards having, apparently without provocation, punched a bystander so hard that he had suffered severe brain injury. Nevertheless, there were a number of crucial points of distinction between *Hawley* and the present case: indeed, it seemed likely that the policy in the present case was drafted with *Hawley* in mind. The present case was essentially the opposite of *Hawley*. There were two critical distinctions. The first was that the present case excluded liability for "deliberate acts wilful neglect or default". The second was that the policy in *Hawley* included liability to indemnify in respect of "any unlawful physical restraint by the assured or his employees on the liberty of persons and shall include … assault and battery committed or alleged to have been committed at the time of making or attempting to make an arrest …".

[9] The expression "deliberate acts wilful neglect or default" required to be read, grammatically and as a matter of common sense, as "wilful neglect or wilful default". It was not accepted that this would cover every type of circumstance except automatism. That would be going too far. It would be odd to say that all cases of negligence arose from a deliberate act, but that point might not be required to be considered directly in the present

case. The phrase was well trodden ground in contracts of insurance. The authorities indicated that what was meant by it was an action which was blameworthy (*CP* v *Royal London Mutual Insurance* [2006] 1 CLC 576, [2007] Lloyd's Rep IR 85 sub nom *Ronson International Ltd* v *Patrick*), actions amounting to "deliberate and conscious neglect or default or reckless carelessness " (*In re City Equitable Fire Insurance Ltd* [1925] 1 Ch 407; *Kenyon son & Craven Ltd* v *Baxter Hoare & co Ltd* [1971] 1 Lloyd's Rep 232; and *Swiss Bank Corp* v *Brink's Mat Ltd* [1986] 2 Lloyd's Rep 79). There was no ambiguity in the phrase which had to be resolved against the fourth defenders. The clause was easily capable of construction under the first leg of Stuart-Smith LJ's summary in *Yorkshire Water Services Limited* v *Sun Alliance & London Insurance plc (No 1)* [1997] 2 Lloyd's Rep 21, [1997] CLC 213, where he summarised the principles of construction of insurance contracts under English law as follows:

> "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. Thus, they must be construed in their context, or, as Lord Mustill put it in *Charter Reinsurance Co Ltd v Fagan* [1996] CLC 977 at p981E: 'the words must be set in the landscape of the instrument as a whole'.
>
> 2. A literal construction that leads to an absurd result or one otherwise 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.
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> 3. In the case of ambiguity the construction which is more favourable to the assured should be adopted; this is the *contra proferentem* rule."

The statement in the first principle enunciated by Stuart-Smith LJ above accorded with more recent authority on contractual interpretation (*Arnold* v *Britton* [2015] AC 1619, Lord Neuberger at paras 15-20). The *contra proferentem* rule applied only where there was ambiguity: there was no ambiguity here, standing the terms and purpose of the policy. It was not for the court to find ambiguities in order to re-write the contract. Much depended on the context and purpose of the policy, as well as the precise terms of the clause. It had

been said that, since the wording of the clause is essentially conclusive, precedent is unhelpful, and can be disregarded if the wording is not the same as that in the case under consideration (*Smith* v *Cornhill Insurance Co* [1938] 3 All ER 145 at 150B-C).

[10] The clause had to serve some purpose: it could not simply be ignored. It was written as part of a commercial contract for the insurance of manned guarding and door security contractors. The *Hawley* case had been decided fairly recently. Door stewards occasionally assaulted customers or restrained them unlawfully. Clause 14, given its natural construction, operated to exclude or limit liability for criminal or otherwise unlawful acts committed by a door steward. That could not be said to be an absurd construction or one manifestly contrary to the intention of the parties: if it applied to cover someone deliberately burning down premises why would it not cover a frank assault?

[11] The jury had acquitted the first defender of the crime of murder on the basis of conflicting medical evidence as they did not accept that his actions had caused the death of the deceased. It was only because the jury were not satisfied beyond reasonable doubt that his actions had resulted in the death of the deceased that he was convicted of the far lesser crime of assault. That is not to say that his actions were not deliberate: they were certainly blameworthy. He had not accidentally placed 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 reckless. There was no challenge to the conviction for assault or to the terms of the trial judge's summary. Assault required intention. It followed that any liability arising from the first defender's act was excluded by the terms of the policy.

[12] So far as the issue of wrongful arrest was concerned, the first defender had been helping to restrain an aggressive individual who had assaulted one of his colleagues. The stewards called the police for assistance at the outset of the incident and again during it. The

police were on their way when the fatal injuries were inflicted. The intention of the stewards was clearly to restrain the deceased until he could be placed in the custody of the police. This was apparently an attempt to make a citizen's arrest. The first defender had restrained the deceased because the deceased had been actively committing the crime of assault. The deceased had been restrained pending the arrival of the police: it could not be said (setting aside altogether any issue of restraint) that this was a case of simple assault, but, if it was, it clearly fell foul of the "deliberate acts" clause. There was no requirement in either Scotland or England for a person executing or attempting to execute a citizen's arrest to say what he was doing: there was no need to "read the accused his rights". That would be an absurd and unreasonable requirement. Most people executing a citizen's arrest would have no knowledge or at least no accurate knowledge of what would require to be said. If there were such requirements the first defender's apparent failure to fulfil them only emphasises the point that this was an example of unlawful physical restraint. It could not in any event have been a lawful citizen's arrest because unreasonable force was clearly used. In any event comparison with the law of criminal procedure was redundant as the term "wrongful arrest" was defined under the policy, not under the common law relating to wrongful arrest, in terms of which it covered a situation where there had been no arrest, namely, "libel or slander … arising out of the investigation of acts of shoplifting or theft". It would be patently absurd if that were to be construed with reference to the common law of wrongful arrest. The principal clause of the policy definition provided that any "unlawful physical restraint" amounted to wrongful arrest under the policy. The fact that the deceased died and the first defender was convicted only of assault is conclusive evidence, in the absence of any challenge to the conviction under section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, that unlawful physical restraint was applied. The sub-clause used the

English criminal law term of art "assault and battery", but the first defender's conduct in restraining the deceased would amount to assault and battery in Scots as well as in English law.

**Submissions for the pursuer**

[13] It was submitted for the pursuer that the onus of showing that the exclusion in clause 14 applied was on the fourth defenders and that the clause must be read *contra proferentem*: McBride on Contract (3rd Ed) at 8-38 and 8-43; *Life Association of Scotland* v *Foster* (1873) 11M 351; *Kennedy* v *Smith* 1975 SC 266; *Laidlaw* v *John M Monteith & Co* 1979 SLT 78; and *Davidson* v *Guardian Royal Exchange Assurance* 1979 SC 192. Here there was ambiguity about what acts have to be deliberate or wilful. The clause applied only when the outcome giving rise to liability was the intended objective. In other words, it applies only if the door steward intended to kill the deceased. There was no evidence that the death was intentional, as confirmed by the result of the criminal trial. The more obvious explanation was that the first defender was simply over-zealous in his actions and caused the death negligently. The ambiguity had to be resolved against the fourth defenders because of the *contra proferentem* rule. Support for this interpretation could be found in the fact that exclusion 14 did not refer to extension 3, which dealt with wrongful arrest. If exclusion 14 applied then extension 3 would never arise as a wrongful arrest is itself an assault and a deliberate act. That would make extension 3 redundant, which could not be correct.

[14] A similar situation was considered by the Court of Appeal in *Patrick* v *Royal London Mutual Insurance Society Ltd* [2006] 1 CLC 576. In that case a fire was started by the assured's 11 year old son who had built a den in the derelict part of the insured mill, the other part of which was used for commercial purposes. He set fire to paper inside the den but did not

think that the mill would burn down. The insurance policy covered the child for accidental damage to property but excluded claims arising from "any wilful malicious or criminal acts" carried out by the assured's immediate family, including children. The insurers sought to exclude liability under the policy on the ground that the fire had been caused by the wilful act of the assured's son. The judge at first instance held that the insurers could not rely on the exclusion. They appealed, arguing that in its context "wilful" simply meant deliberate. Tuckey LJ at pps 580-581, paras 13-17 stated:

> "13. The legal dictionaries show that wilful is used in many contexts. One can safely say that it always means deliberate and that it will take its further meaning from the word or words which it qualifies and its context, but beyond that one cannot go.
>
> 14. So, unaided by authority or dictionary definitions, what is the proper construction of the liability extension in this policy? It provides indemnity to the insured against legal liability arising from incidents resulting in accidental damage to property. This wide cover is excluded if the incident giving rise to the liability involves any wilful, malicious or criminal act. The adjectives qualify or characterise the excluded acts and look to the quality of the act and the state of mind of the actor.
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> 15. It is tolerably clear what malicious or criminal acts are and I think these words lend colour to what is meant by a wilful act. In this context it must be some act which is blameworthy. If so, something 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.
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> 16. Obviously if the act is deliberate and intended to cause damage of the kind in question it will be within the exclusion. It will be wilful, as the judge held, and might also be malicious or criminal. But for an act to be wilful I do not think it is necessary to go as far as this. It will be enough to show that the insured was reckless as to the consequences of his act. Recklessness has been variously defined but if someone does something knowing that it is risky or not caring whether it is risky or not he is acting recklessly. Put more precisely for present purposes, if the insured was aware that what he is about to do risks damage of the kind which gives rise to the claim or does not care whether there is such a risk or not, he will act recklessly if he goes ahead and does it. I think such conduct was intended to be included in the exclusion and I would equate a wilful act with a reckless act for this purpose. This approach focuses upon the state of the insured's mind when he does the act rather than its intended consequences. Defined in this way the exclusion does not require the insured to intend to cause damage of the kind in question.

> 17. Equating wilfulness with recklessness is consistent with the dictionary definition of wilful, which includes obstinate and headstrong conduct. That is the essence of recklessness as well. … If I light a bonfire in my garden which gets out of control and burns down my neighbour's house would I be covered by this policy? On the insurer's construction I would not because I had started the fire deliberately; on the judge's construction I would be covered because I had not intended to burn down my neighbour's house. But if I was reckless in the sense that I have explained cover would be excluded and rightly so. My act could properly be characterised as wilful."

In the present case there was no evidence of the type of intention envisaged in para 16. On the contrary, the trial judge's sentencing statement confirmed that the first defender's conduct was badly executed rather than badly motivated.

[15] In similar vein was the decision of the Court of Appeal in *Revill* v *Newbery* [1996] QB 567. The defendant owned a shed on an allotment and slept there at night in order to protect his property from the attentions of vandals and thieves. Among other items in the shed the defendant, aged 76 at the time, kept a 12-bore shotgun and cartridges. One night the plaintiff and another man attempted to break into the shed intending to steal from it. The resultant noise woke the defendant who, intending only to frighten them, loaded the shotgun and fired it through a hole in the door. The shot injured the plaintiff, who was standing about five feet away from the door. In subsequent criminal proceedings he admitted attempted burglary of the premises. He brought an action for damages for personal injuries against the defendant, alleging that the latter was negligent in firing the shot. The judge at first instance, Rougier J, found that the defendant had been negligent in firing the shot. He made the following relevant findings of fact:

> "(1) The defendant believed, though mistakenly, that there was no one in front of the door. (2) When he fired the gun the defendant had no means of knowing for sure whether it was pointed at anyone; the defendant was effectively blindfold. (3) When he fired the gun the defendant's perception and judgment were clouded by fear. (4) The defendant was carrying out a preconceived contingency plan."

The Court of Appeal upheld Rougier J's finding of negligence, confirming his view that the defendant certainly did not intend to hit the plaintiff, but that he was in breach of a duty of care towards him and therefore negligent.

[16] The decision in *Revill* was a good illustration of how even a negligent act may be a deliberate and intentional one. In the present case liability did not arise out of any deliberate or wilful act but rather out of a careless or negligent one with the result that the exclusion clause did not apply.

[17] So far as extension 3 was concerned, wrongful arrest was defined in the policy. The definition was consistent with the common law definition of an arrest. Jowitt's Dictionary of English Law gave the primary definition as "the restraining of a person's liberty in order to compel obedience to the order of a court of justice, to prevent the commission of a crime or to ensure that a person charged or suspect of a crime may be answerable for it." Stroud's Judicial Dictionary (8th Ed, 2nd supplement, 2014) stated: "An arrest is constituted when any form of words are used which, in the circumstances, are calculated to and do bring to the notice of a person that he is under compulsion to which he thereafter submits." Reference was made to what Lord Cameron stated in *Swankie* v *Milne* 1973 JC 1 at p6 about the distinction between arrest and detention. Similarly, article 5(2) of the European Convention on Human Rights provided that everyone arrested shall be informed promptly, in a language he understands, of the reasons for his arrest and any charge raised against him. In *Fox* v *UK* (1991) 13 EHRR 157 it was held at para [40] that this meant the arrested person had to be told the essential legal and factual grounds for arrest, so that he was in a position to challenge its lawfulness before a court.

[18] For there to be a wrongful arrest there first had to be an arrest. Here there was no attempt to arrest the deceased. There had simply been an attempt to restrain him until the

police arrived and to prevent him further punching. He had not been told that he was under arrest. None of the important legal consequences of arrest mentioned by Lord Cameron had been engaged. The first defender simply owed the deceased a common law duty of reasonable care. It was a breach of that duty that was the basis of the action, not a wrongful arrest.

[19] Furthermore, the arrest had to be wrongful. Wrongful arrest was a term of art which required a number of preconditions, most notably malice. Malice was not averred by either party because this was not a claim for wrongful arrest. Even if there had been an arrest (which was denied) it was not wrongful in light of the actions of the deceased.

[20] Finally, the exclusion clause applied only where the liability purported to be excluded arose "from or out of wrongful arrest". In *British Waterways Board* v *Royal & Sun Alliance Insurance plc* [2012] EWHC 460 (Comm) the court considered what was meant by "arising out of" and held that the question was whether the proximate cause of the accident fell within the exclusion. In the present case the proximate cause of the pursuer's claim was not wrongful arrest but breach of the common law duty of reasonable care. It would be stretching the meaning of the clause to allow it to include a simple assault and as a matter of construction such a meaning could not be allowed.

[21] In summary, the death of the deceased was caused by the negligence of the first defender, who was at the material time acting in the course of his employment with the second defenders, who were insured by the fourth defenders. His actions were not "wilful or deliberate" in terms of the policy as he did not intend to kill the deceased and there was no evidence that he was reckless. The pursuer's claim did not arise from wrongful arrest but from a breach of duty at common law. There was no arrest, let alone a wrongful arrest. The proximate cause of the claim was breach of the duty of care rather than deprivation of

liberty. Since neither of the exclusion clauses applied, the fourth defenders were obliged to indemnify the second defenders and declarator should be granted in terms of the first conclusion.

**Discussion**

[22] The question which I have to decide is a pure question of construction of the policy of insurance entered into between the second and fourth defenders, and in particular of the expression "deliberate acts wilful neglect or default". In approaching this task I must apply the principles of construction set out above, in particular the *contra proferentem* rule. In my view it is important to bear in mind what this action is about and the legal basis for it. The claim is a derivative claim by the widow of the deceased arising out of his death. The basis of the action is that the first defender failed in his duty of reasonable care for the safety of the deceased and so caused his death. The pursuer avers as follows in statement 11:

> "The deceased's death and the consequent loss, injury and damage suffered by the pursuer as an individual and as legal representative *(sic)* was caused by the fault and negligence of the first defender at common law for which the second and third defenders are both vicariously liable. As condescended upon the pursuer claims against the fourth defenders in terms of the Third Party (Rights against Insurers) Act 2010."

The pursuer does not aver, and therefore would not seek to prove should the action proceed to proof, that there was any wilful act, wilful neglect or default on the part of the first defender causing the death of the deceased. In my opinion, applying the *contra proferentem* rule and adopting the approach of the court in the case of *Hawley*, the submission for the pursuer that the clause applies only when the outcome giving rise to liability, namely death, was the intended objective is correct. It is quite clear, and, I think, accepted by both the pursuer and the fourth defenders, that the first defender did not wilfully, intentionally or

deliberately set out to cause the death of the deceased. The death was an unintended and unfortunate consequence of his assault upon the deceased. Contrary to the submission made on behalf of the fourth defenders, I do not accept that whether or not he intended to kill the deceased is irrelevant. Nor do I accept that the way in which the pursuer has framed her case is irrelevant. The case pleaded by the pursuer is that the death of the deceased was caused by the fault and negligence of the first defender. There is no suggestion in her case that he intended to kill the deceased. Neither is there any suggestion in her case that the deceased was subject to unlawful arrest as defined in the policy. An unlawful arrest could not competently form the basis of a derivative action of the type pleaded by the pursuer. In my opinion the references by the fourth defenders to unlawful arrest are wholly irrelevant: an action based on unlawful arrest would have to have been brought by the pursuer in a different capacity, as a representative of the deceased.

[23] It is appropriate that I should record that I do not agree with the comments of Tuckey LJ in the case of *Patrick* that a reckless act can properly be classified as wilful. There is a distinction which falls to be drawn between a wilful act and a reckless one. For example, no one would say that a driver who had caused death by reckless driving under the previous terms of section 1 of the Road Traffic Act 1972 had caused it wilfully, deliberately or intentionally. Intentionally causing death by the use of a motor vehicle constitutes the crime of murder, whereas causing death by reckless driving does not, although it could simultaneously amount to the crime of culpable homicide. Applying the *contra proferentem* rule to a policy of insurance, a wilful, deliberate or intentional act cannot, in my opinion, include a reckless one.

[24] For the reasons given above I conclude that the fourth defenders are obliged to indemnify the second defenders in respect of their liability to the pursuer arising out of the

death of the deceased and that the second defenders' right to indemnity has been transferred to and vests in the pursuer under sections 1 and 3 of the 2010 Act.

**Decision**

[25] I shall grant decree of declarator in terms of the first conclusion and otherwise appoint the cause to call at a By Order hearing on a date suitable to the parties for determination of further procedure, if required.