SHERIFF APPEAL COURT

2021 SAC (Civ) 6
GLW-PD144-18

Sheriff Principal M M Stephen QC
Sheriff Principal D L Murray
Sheriff Principal C D Turnbull

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in appeal by

MICHAEL GEMMELL

Pursuer and Appellant

against

KSL HAIR LIMITED

First Defender

and

DR FRANCISCO MAURICIO BERRIOS MERINO

Second Defender

and

DR VIKAS KUNNURE

Third Defender

and

AXA INSURANCE UK PLC

Fourth Defender and Respondent

Appellant: Crawford, Advocate; Jones Whyte, solicitors
Respondent: O'Brien, Advocate; DAC Beachcroft LLP

18 December 2020

[1] The appellant appeals the interlocutor of the sheriff at Glasgow dated 13 September 2019, pronounced following debate, granting decree of dismissal in favour of the respondent.

[2] The sheriff reached the view that the action against the respondent was irrelevant. The debate focussed solely on the case against the respondent who is the public and business liability insurer of the first defender. The issue is whether the first defender falls to be indemnified by the respondent for loss, injury and damage caused to the appellant who had contracted with the first defender to have hair transplantation procedures carried out. The sheriff was of the opinion that the claim by the appellant against the first defender did not fall within the terms of the policy of insurance and therefore any indemnification, which the respondent had contracted with the first defender to provide, did not extend to the appellant's claim for damages.

Background

[3] The appellant and the first defender entered into a verbal contract at some point in 2014 whereby the first defender would supply hair transplantation treatment to the appellant at a cost of £8,000. The first defender's director and its advertising promised that the first defender could supply hair transplantation treatment with 100% satisfaction and the appellant was promised replacement of 90% of his hair loss.

[4] The appellant had his initial appointment or treatment on 3 March 2015 at the first defender's clinic in Glasgow. He was treated by the second defender. It is averred that the second defender had no right to practice medical procedures in Scotland but the appellant was not at the time made aware of this. A procedure was undertaken which involved

harvesting hair from a donor area on the appellant's scalp (behind his left ear) and transplanting it into areas of hair loss on the crown of the appellant's head. To achieve this an invasive procedure was performed which included injections. By January 2016 the appellant became aware that the hair in the transplanted area was not growing and the first defender confirmed that the procedure had been unsuccessful. Further procedure was arranged for February 2016 when the third defender undertook the procedure. This, too, was unsuccessful. The first defender offered to supply the appellant with a third course of treatment in January 2017 which the appellant declined.

[5] The appellant seeks damages in respect of (a) solatium; (b) expenditure on the unsuccessful treatment; (c) additional expenditure for micro pigmentation; (d) inconvenience; and (e) out of pocket expenses. In his pleadings at Article 4 of condescendence the appellant avers that the procedures carried out by the second defender amount to fraud; *esto* they were not undertaken fraudulently they were not carried out in good faith; the procedures undertaken by the second and third defenders were carried out without the appellant's informed consent. The procedures were, therefore, a breach of the appellant's bodily integrity and an assault although not carried out with the intention of causing injury. In support of that contention the appellant avers that he was treated by the second defender who was not registered with the GMC and had no right to practice medical procedures in Scotland but who did not advise the appellant of that nor did he properly discuss the risks which might arise from the treatment. The procedures undertaken by the second and third defenders at the clinic were carried out without the appellant's informed consent. As such they constituted an assault. The first defender's promise of a 90% replacement of hair constituted a negligent misrepresentation to the appellant. The first defender's failure to provide the appellant with replacement of 90% of his hair was also a

breach of contract; the action is based on the first, second and third defender's common law fault or negligence. They are alleged to have failed to take reasonable care for the appellant's health and safety all to his injury (Article 6 of condescendence).

[6] The appellant also makes averments of personal bar. However insofar as these averments are directed against the respondent a concession was made before the sheriff that such averments in Article 2 of condescendence were historic in nature and would not be relied upon by the appellant to support a plea of personal bar. On that basis the sheriff did not require to consider the relevancy of the appellant's averments in Article 2 of condescendence on personal bar.

Procedural history

[7] The appellant's case is for damages against the defenders jointly and severally for loss, injury and damage caused by the second and third defenders who undertook the hair transplantation procedures on behalf of the first defender who is vicariously liable for their acts and omissions. The appellant had contracted with the first defender to have the hair transplantation procedures undertaken. The respondent is the insurer of the first defender under various policies including AXA 100062 – a public and employer's liability policy which commenced on 13 March 2014.

[8] The first defender is a company now in liquidation. It operated a private hair loss clinic in Glasgow. It went into liquidation in October 2017. The proceedings against the respondent are in terms of the Third Parties (Rights against Insurers) Act 2010 ("the 2010 Act") (sections 1 and 3). There is no dispute between the parties that the first defender is vicariously liable for the acts and omissions of the second and third defenders.

[9] Decree in absence was granted against the first and second defenders on 11 June 2018. The third defender was released from the action on 15 November 2018.

[10] The action proceeds under Chapter 36 of the Sheriff Court Ordinary Cause Rules 1993 ("OCR"). The abbreviated pleadings under Chapter 36 do not contain pleas in law (see OCR 36.E1(4)(5) and (16)). The respondent sought dismissal of the action on the basis that the case pleaded against it is irrelevant. The first defender was not insured under any policy of insurance with or underwritten by them which provided cover for any liability as condescended upon by the appellant. The appellant, on the other hand, sought proof before answer. In simple terms the respondent's position is that the appellant's claim for damages does not fall within the scope of the insurance cover provided by them to the first named defender.

Matters of agreement

[11] Both before the sheriff and in advance of the appeal the parties agreed that whilst a number of insurance policies are mentioned in Article 2 of condescendence the relevant policy for the purpose of the 2010 Act and upon which the appellant relies is policy AXA 100062 "Offices and Surgeries Policy". Nos 6/1, 6/2 and 6/3 of the sheriff court process are copies of that policy for the years ending 12 March 2015, 13 March 2016 and 13 March 2017 respectively (these form numbers 3, 4 and 5 of the Appendix to the Appeal Print). The terms and conditions which apply at the commencement of policy 6/1 are lodged as No 6/12 of process and the terms and conditions which applied to the following two years cover are lodged as No 6/4 of process (numbers 14 and 6 of the Appendix respectively).

[12] The sheriff sets out the relevant extracts from the policy at paragraphs [18] to [24] of her judgment.

[13] Certain parts of the policy documents have particular relevance to this case and are set out below. Page 49 (Page 261 of the Appendix) of the policy document:-

"**Awards of damages cover**

We will pay the amount of damages which you, or any of the additional persons insured are legally liable to pay as the result of accidental

(i) bodily injury to any person
(ii) ……..
(iii) ……..
(iv) ……..

…….during the period of insurance in connection with your business.

"Bodily injury" is defined at page 48 of the document as "death, bodily injury, illness or disease". The term "business" is defined by reference to the policy schedule (item 6/1) as "consultant surgeon/specialist".

[14] Certain claims are excluded and these are set out at pages 53 to 54 of the policy document (pages 265 - 266 of the Appendix). These include:

"**Contractual liability exclusion**

We will not cover claims:
(1) where the terms of any contract or agreement made by you, prevent us from taking over the full defence or settlement of the claim;
(2) to pay liquidated damages, or any contractual fines or amounts payable under contractual penalty clauses.

Design and Advice and Malpractice Exclusion

We will not cover any claims caused by or arising from any breach of professional duty in relation to:
(1) advice, instruction, consultancy, design, formula, specification, inspection, survey, valuation, certification or testing undertaken or given for a fee;

(2) (a) medical or dental practice
(b) nursing care
(c) healthcare advice, diagnosis or treatment

> (d) food, drink, medicine or medical preparation supplied or given."

[15] Subsequent policies on renewal incorporated the September 2014 Edition of the terms and conditions as set out at paragraphs [21] and [22] of the sheriff's judgment. In that edition the indemnity clause refers to "*accidental injury to any person*" happening in the course of the Business or caused by the Products. The exclusions are set out at page 30 (page 77 of the Appeal Print) as follows:-

> "The company shall not be liable for any claim in respect of…(g) lack of care or skill in the giving of professional or other advice or treatment…(m) anything (other than the Products) that the insured has sold or supplied."
>
> "Products" are defined at page 7 as:
>
> "(a) office equipment and motor vehicles the property of the insured (other than stock in trade) have become surplus to the insured requirements
> (b) non-medical food or drink sold or supplied as a service to employees, visitors or patients
> (c) proprietary branded non-medical sundries."

The sheriff's judgment

[16] The sheriff deals with the canons of contractual interpretation and then examines the meaning of the important clauses in the contract including the clause "Awards of Damages Cover" which states:- "*We will pay the amount of damages which you, or any of the additional persons insured are legally liable to pay as a result of accidental bodily injury to any person*." The sheriff at paragraph [45] considers the ordinary meaning of this phrase and concludes that the injury averred by the appellant was not accidental or unintentional as it (ie the hair transplantation procedure) was planned, intended and deliberate. The appellant attended at

the defender's clinic in order that he would receive this invasive treatment. The outcome may not have been as the appellant had hoped for but there is no suggestion that the making of incisions; insertion of hair follicles and the damage to the donor area are not part of the process of hair transplantation. The sheriff observes that there is a conspicuous lack of any reference to professional indemnity insurance or medical or clinical negligence. The policy schedules make no mention of such provision. The cover in the public liability section relates to ordinary risks which might be expected generally in business concluding that accidental and bodily injuries tend to relate to injuries sustained in the course of the operation of a business being a surgery or clinic such as trips, slips or falls but not medical negligence which appears to be subject to the exclusion clause. The exclusion clause is expressed in very general terms. It is sufficiently wide to include all types of medical and indeed dental practice. The terms of the exclusion clause fit with the meaning of 'accidental bodily injury' in the indemnity clause. The cover was not intended to extend to claims arising from medical or clinical negligence. "*To conclude otherwise would be to render the exclusion clauses meaningless and would be manifestly contrary to the real intention of the parties*" (paragraph [53]).

[17] Doctors require to have professional indemnity insurance in terms of the Medical Act 1983. That is a separate insurable risk (paragraph [55]).

[18] The sheriff concluded that, even if she was wrong as to the correct interpretation of the general cover clause and the meaning of "*accidental bodily injury*", the appellant's claim would be excluded by virtue of operation of the exclusion clause(s). These contain no ambiguity and therefore the court does not require to construe them *contra proferentem*.

[19] The sheriff then proceeds from paragraph [59] onwards to analyse the remaining causes of action as averred by the appellant and why none of them disclose a relevant case against the respondent.

The Appeal

Grounds of Appeal

[20] The appellant argued that the sheriff erred in granting decree of dismissal and ought to have allowed proof before answer based on the following grounds:

(1) That the sheriff erred in finding that the appellant had failed to aver a relevant case of liability on the part of the first or second defender arising "as a result of accidental bodily injury".

(2) That the sheriff erred in law in finding that the injuries complained of were excluded from the insurance policies issued by the respondent in respect of the first defender's business.

(3) That the sheriff erred in finding that the exclusion clauses within the policy ought not to have been construed *contra proferentem*.

(4) In paragraph [59] of her judgment the sheriff referring to the *dicta* of Rix LJ in *Charlton* v *Fisher* states 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 (this should be stipulation according to the original) or necessary implication*."

It will be contended that the sheriff thereby implies that the second defender's act amounted to deliberate or wilful infliction of loss. In so doing, the sheriff erred by determining an issue which should have been a matter for proof.

(5) The sheriff erred in law in finding that the appellant's averments in respect of fraud and fraudulent misrepresentation were irrelevant due to lack of specification.

(6) The sheriff erred in considering the appellant's averments of breach of contract were irrelevant. The cover provided by the policy for liability "as a result of accidental injury" is consistent with the first and second defenders' breach of contract by assault.

Appellant's submissions on construction of the contract of insurance

[21] The appellant contends that the respondent is bound to indemnify the first defender in respect of the decree granted in favour of the appellant on 11 June 2018 in the sum of £30,000. The respondent insures the first defender for risks of the type which arose in connection with the appellant's treatment by the first defender and its employee or employees. The first defender was insured for such risks under policy number AXA 100062. The first defender had renewed that policy for the three years covering the current treatment.

[22] Counsel for the appellant outlined his approach:

(a) The acts of the employees of the first defender constitute an assault for which the first defender was vicariously liable;

(b) Whilst the acts were intentional, harm or injury was not the objective;

(c) The relevant terms of the respondent's indemnity clauses are accordingly engaged.

The policy fell to be interpreted by specific reference to the indemnity clause and any exclusion clauses. A proof before answer would be necessary.

[23] Counsel for the appellant presented the appeal essentially under two chapters:-

(1) Indemnity. That the sheriff erred in dismissing the action due to the appellant (who is a third party for the purpose of the 2010 Act) not falling within the scope of the policy's indemnity clause as the claim did not involve an 'accidental injury'. Grounds of appeal 1, 2 and 5 support that contention.

(2) The Exclusion Clauses. The sheriff erred in law in finding that the injuries complained of by the appellant were excluded from indemnification under the relevant policies by operation of the exclusion clauses. See grounds of appeal 3, 4 and 6.

[24] The wording of the indemnity clause is expressed in slightly different terms over the relevant period of the treatment and cover. The version in force as at the beginning of March 2015 when the appellant's treatment began covers "accidental bodily injury to any person…. During the period of insurance in connection with your business". The wording of the indemnity clause for the subsequent periods ending March 2015 and March 2016 is in similar terms omitting the word "bodily".

[25] Although the wording is slightly different these policies provide significant public and employers' liability cover more than sufficient to satisfy any decree against the first defender. The policy covers, unless specifically excluded, all negligent acts and omissions and assaults by employees of the first defender causing injury to others. The injury must be accidental. The appellant does not contend that the actings of second defender were intended to cause harm or injury to the appellant. Although the procedure was undertaken deliberately as part of the contract, the consequential injury was caused accidentally, see *Grant* v *International Insurance Company of Hanover Ltd* 2019 SC 379.

[26] Counsel for the appellant did not take issue with the respondent's approach to contractual interpretation. However, he sought to argue that the indemnity provided by the respondent extended to negligent acts and omissions of employees for which the first defender would be vicariously liable. This would include criminal acts such as assault and also fraud which even though wholly prohibited by the first defender would, none the less, satisfy the close connection test (see *Mohamud* v *William Morrison Supermarkets PLC* 2016 AC 677 and the other authorities referred to in paragraph [31] of the sheriff's opinion).

[27] Counsel for the appellant also argued that the exclusions to the cover ought to be construed *contra proferentem* (by reference to volume 12 of the Stair Memorial Encyclopaedia at pages 420 – 423 and *Wood* v *Capita Insurance Services Limited* [2017] UKSC 24). The manner in which the exclusion clause is expressed is vague and lacking in specification. It was argued that the acts giving rise to the injury to the appellant arose from a breach of the appellant's bodily integrity without consent and amounted to an assault. The appellant offers to prove that the first defender's employees did not act in good faith; that he had been misled by them; that they had inferred that there would be no risk at all and that he was provided with drugs by an unqualified member of staff without advice.

The respondent's submissions on construction of the contract of insurance

[28] Counsel for the respondent submitted that applying the ordinary principles of contractual interpretation the appellant's claim does not fall within the scope of the policy. The principles of contractual interpretation are summarised in *Wood* v *Capita Insurance Services Limited supra* by Lord Hodge at paragraphs [10] – [13]. These principles of contractual interpretation also apply to insurance contracts: see *Grant* v *International Insurance Company of Hanover Limited supra* in which the Inner House cited with approval

Stuart-Smith LJ's dicta in *Yorkshire Water Services Ltd* v *Sun Alliance & London Insurance plc* [1997] CLC 213 at 221. Although the insurance policies were intended specifically for a surgery they were not intended to provide cover against the range of professional indemnity claims which doctors might require. It could be assumed that doctors would have a separate and specific professional indemnity insurance policy as required by section 44C of the Medical Act 1983. The terms of the indemnity and exclusion clauses in the policies are clear. They are presented in relatively plain English and are designed for offices and surgeries. There is no ambiguity which the court requires to resolve and therefore no room for the application of the *contra proferentem* rule. In so far as the appellant seeks to rely on the use of the term "accidental injury" in the indemnity clause of the policy counsel submitted that such an injury must either occur in the course of the business or be caused by the non-medical products. This is consistent with an intention that claims arising from medical treatment are not to be covered. The policy makes it clear that it is not intended to provide cover against medical negligence claims when the various exclusions from cover are examined and interpreted.

[29] The Inner House decision in *Grant* provides guidance as to the proper construction of a contract of insurance. That depends on the wording of the individual policies not the particular cause or causes of action advanced by the appellant. It was the nature of the insured's loss that would determine whether it was covered by the policies. Context is important. In this case the policies are concerned with the general business requirements of a surgery or clinic. The policies are intended for offices and surgeries. A relevant feature of context in this case is that the insured would be expected to have separate professional indemnity insurance in respect of their business as consultants engaged in hair transplantation treatment. There is no need to strain the wording of the policy to encompass

medical negligence claims because it would be expected that these would be covered by a separate professional indemnity insurance policy. The contents page of the policy No 6/4 of process shows clearly that it is not a professional indemnity insurance policy. Instead, it is concerned with buildings, contents, business interruption and so forth. The "business liability" section has two sub sections: the first concerning liability to employees which has no relevance here and the second which is public indemnity liability which is relied upon. The general insuring or liability clause extends to accidental injury to any person (or accidental bodily injury). The remaining categories under the insurance clause cover general public liability matters and are not concerned in any way with medical negligence.

[30] The appellant's pleadings advance various causes of action but none fall within the scope of the cover. The appellant alleges that the injury resulted from the carrying out of planned medical treatment. The wording of the exclusion clause makes it unambiguously clear that the policy is not intended to cover against medical negligence claims. The appellant's pleadings can only be read in a manner which excludes liability. If the appellant has suffered an actionable "accidental… bodily injury" through the procedures in question then by definition his claim was "caused by or arises from [a] "breach of professional duty in relation to… medical… practice" or "health care advice, diagnosis or treatment" (according to the terms of schedule 6/12 and likewise the terms of schedule 6/4 exclusion (g)). The appellant's own express averments take his claim outwith the terms of the policy.

[31] The meaning of the insuring and exclusion clauses is clear based on conventional principles of interpretation. There is no need to deploy the *contra proferentem* rule which is used only as a last resort where conventional processes of interpretation still lead to ambiguity. There is no such ambiguity here.

Decision on construction of the insurance contract

[32] Section 1 of the 2010 Act provides that where a relevant person incurs a liability against which that person is insured under a contract of insurance, the rights of the relevant person under the contract against the insurer are vested in the third party to whom the liability is incurred. As this case proceeds under the 2010 Act the appellant, in effect, steps into the shoes of the first defender as the 'insured' in terms of the relevant policy. The appellant is the third party and the first defender became a 'relevant person' when it entered liquidation in 2017. Section 3 of the 2010 Act provides that the third party may raise an action against the insurer and seek declarator as to the insurer's liability to the third party.

[33] However, to succeed against the respondent under the 2010 Act the appellant must prove (i) that the first defender was under a liability to him; and (ii) that liability was insured under a contract of insurance between the first defender and the respondent. If any such liability is excluded by an exclusion clause within the insurance policy (or contract of insurance) the appellant's claim will fail.

[34] The principal issue in this appeal is whether any liability which the first defender is under to the appellant is insured. That issue requires consideration of the contract of insurance and its proper construction. There does not appear to be any dispute that the ordinary principles of contractual interpretation apply also to insurance contracts. In this case, as in *Grant* v *International Insurance Company of Hanover Limited* (*supra*), it is necessary to focus on the loss claimed and whether it is covered by the policy. In this case, according to the appellant's pleadings, the loss related to the hair transplantation treatment which was unsuccessful.

[35] The principles of contractual interpretation set out by the Lord President in his opinion in *Grant* (at page 384) are worth repeating:

"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."

[36] The policy is a public and employer's liability policy underwritten by the respondent. It incorporates the respondent's offices and surgeries policy (August 2013 and September 2014 Edition). In order to understand fully the context to the provision of cover it is necessary to understand the terms "business" and "products" referred to within the indemnity clauses. "Business" is defined as consultant surgeon / specialist in both editions; and "products" as office equipment; motor vehicles; non-medical food or drinks sold or supplied as a service to employees, visitors or patients and proprietary branded non-medical sundries. Here, in contrast with *Grant* where there was a special context to the policy, namely, covering risks associated with insuring the business of door security at licensed premises, the policies are concerned with offices and surgeries. It appears that the contract provides liability insurance cover for the ordinary risks in operating the business of an office or clinic. There is no reference to professional indemnity insurance within the policy schedule. This is the business or commercial context to the policy against which we consider the exclusion clauses.

[37] In terms of the policy in force when the appellant's treatment began the exclusion clause states

> "we will not cover any claims caused by or arising from any breach of professional duty in relation to…
>
> (2)(c) healthcare advice, diagnosis or treatment (pages 53 to 54 policy schedule no 6/12 of process, page 265 of the Appendix)"

When the policy was renewed in 2015 and then in 2016 the exclusion clause was in the following terms:

> "The company shall not be liable for any claim in respect of…
>
> (g) Lack of care or skill in the giving of professional or other advice or treatment…
>
> (m) Anything (other than the products) that the insured has sold or supplied." (page 30 of policy schedule 6/4 of process, page 77 of the Appendix).

[38] In our opinion the meaning of the exclusion clause (whichever version) is clear, namely, that the policy is a general business risks policy which excludes claims arising in connection with medical advice and treatment. Having regard to the nature of the business and the terms of the policy this exclusion does not strike us as being in the slightest unusual. Professional indemnity insurance for those practising as doctors or offering treatment of a cosmetic nature would be covered by separate professional indemnity insurance. The sheriff was correct to interpret the exclusion clause in the manner she did and her observations at paragraphs [55] and [56] are sound and rational.

[39] Accordingly, we consider that there was no error in the sheriff's approach to the interpretation of the exclusion clause. The *contra proferentem* rule only applies where the

accepted and conventional approach to construction of the contract leaves ambiguity. We find no ambiguity such as to invoke the *contra proferentem* rule.

[40] Our approach to the interpretation of this contract follows that in *Grant* (*supra*). The court requires to consider the contract of insurance rather than the causes of action advanced by the appellant in his pleadings. Nevertheless the pleadings merit consideration. The appellant's case pleaded against the respondent relates to the planned hair transplantation treatment. He expressly avers that his loss arises from the hair transplantation treatment and procedures carried out by the second and third defenders on behalf of the first defender. As liability for medical treatment is excluded by the relevant contract of insurance the appellant's claim must fail.

[41] Leaving to one side the appellant's ground of appeal which relates to his averments that the treatment constitutes assault, our decision determines the appeal. It is strictly unnecessary to consider and interpret the insuring or indemnity clause. However, it was argued on behalf of the appellant that his claim falls under "accidental bodily injury" or "accidental injury".

[42] Although *Grant* was concerned with the question whether the claim fell within an exclusion for 'deliberate act, wilful default or neglect', in the context of the business of employing door stewards, the Inner House provided more general guidance on the construction of contracts of insurance in a case brought under the 2010 Act. Specifically, cases will turn on the wording of individual policies rather than the cause or causes of action. Context is important when construing the contract. The context in *Grant* carried particular weight given the nature of the business insured which in ordinary course would involve deliberate physical acts towards members of the public. A purposive approach to the exclusion clause was required as a literal approach would lead to a result which was

contrary to the real intention of the parties, namely to provide cover for incidents and physical interaction both within and outside licensed premises. In *Grant* the door steward's act was deliberate as it involved restraint. However, it was a deliberate physical act which accidentally caused the death of Mr Grant. The Lord President, having considered *Hawley* v *Luminar Leisure Limited* [2006] EWCA Civ 18 (also cited in this appeal) and *CP (a child)* v *Royal London Mutual Insurance Society Limited* [2006] EWCA Civ 421 (which was not cited), concludes at paragraph [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."

[43] Of course, we accept that *Grant* turned on the construction of a particular policy of insurance with particular business considerations, nevertheless, the approach of the court to the issue is instructive when the liability or indemnity clause falls to be interpreted in this case. The sheriff at paragraph [45] takes a straightforward, perhaps literal, approach contrasting the term "accidental bodily injury" with the reality of the appellant's pleadings:-

> "If one examines the natural and ordinary meaning of the language used in the general cover, out of context and on its own, one would not naturally use the expression 'accidental bodily injury' to describe the injury said to have been inflicted upon the pursuer. It was not fortuitous, unexpected nor was it unintentional. Indeed it was quite the opposite; it was planned, intended and deliberate."

It is not suggested that the second or third defenders intended to cause injury; indeed this is specifically disavowed in Article 4 of condescendence. The appellant's case involves hair transplantation procedures with invasive treatment which turned out to be unsuccessful. By

parity of reasoning with *Grant*, there are no pleadings to suggest that the second or third defenders deliberately set out to botch the treatment and create a liability for the clinic at common law. It is, however, at least arguable that injury to the appellant was an accidental consequence of the treatment administered, whether as a result of negligence or otherwise. Nevertheless, the issue now depends on the terms of the policy of insurance rather than liability at common law. However, it is not necessary for us to reach a concluded view on the extent of the indemnity clause and whether any liability which the first defender may have had to the appellant falls within that clause. It is clear to us that the claim for loss and injury falls squarely within the exclusions to the indemnity provided by the policy.

[44] We also observe that the appellant's pleadings base his claim on the first, second and third defenders' performance of hair transplantation treatment. It is difficult to find averments which might found a relevant case of "accidental bodily injury". He makes specific averments as to the procedures involved in the treatment such as injections; incisions; and insertions of items into the scalp. In Article 4 of condescendence the appellant avers that these procedures carried "material risks including but not restricted to irreparable damage to the scalp and scarring". If these known risks might arise as a consequence of the planned treatment it would stretch language and logic to categorise them as accidental bodily injury.

Ground of Appeal 3 – Relevancy of the appellant's averments that the treatment amounted to an assault.

Appellant's submissions

[45] This ground of appeal argues that the sheriff erred in finding at paragraph [61] of her judgment that

> "a failure to obtain informed consent, in the present circumstances, must arise as a result of the second and third defender's breach of a professional duty in relation to healthcare advice or a lack of care or skill in the giving of professional advice. It therefor (sic) falls squarely within the terms of the exclusion clauses."

Instead, the sheriff ought to have found that there were relevant averments to support the proposition that the treatment amounted to assault. These averments, if proved, would be sufficient to remove the claim from the ambit of the exclusion clauses.

[46] The relevant averments are found in Article 4 of condescendence. They are set out above – however for the sake of convenience they are that the procedures were carried out without the appellant's informed consent. They constitute a breach of the appellant's bodily integrity – an assault if so proved. This is a different and distinct proposition from a breach of professional duty or lack of care or skill which would fall within the contractual exclusions.

[47] Counsel for the appellant accepted that in certain circumstances an assault can be consented to and consent must be distinguished from "informed consent" the lack of which would usually only give rise to a civil claim in negligence. Counsel referred to the dicta of Mustill LJ in *R* v *Brown* [1994] 1 AC 212 at pages 258 to 259. The actions of the second defender constitute an assault. Firstly, he had no right to practice medical procedures in Scotland. He was not registered with the General Medical Council ("GMC"); he was not acting in good faith and failed to explain to the appellant the nature of the treatment to which the patient was consenting or discuss the risks associated with hair transplantation. In these circumstances there was no true consent and any apparent consent was vitiated rendering the treatment an assault on the appellant. Where the qualifications of the person carrying out the procedure or treatment are inextricably linked to his identity consent to the

act is probably vitiated where, as here, the second defender was not registered as a medical practitioner (*R* v *Melin* (Ozan) [2019] EWCA Crim 557).

[48] Counsel for the appellant submitted that performing incisions and injections on a person without their consent would ordinarily be an assault. Although it is not suggested that the harm caused was deliberate if the appellant is to prove an assault he must show an intention to injure. However an intent to injure is not essential to vitiate consent. Once consent is removed the actings of the second defender become an assault rather than treatment and therefore do not fall within the ambit of the exclusion clause. The appellant is entitled to proof of his averments relating to the second defender who was not registered with the GMC and had no right to practice medical procedures in Scotland. He failed to advise the appellant that he had no such registration and he did not discuss the risks of hair transplantation with the appellant. It was represented to the appellant that the second defender was a doctor leading the appellant to believe that he was properly entitled to practice such procedures in Scotland. It was contended that these were relevant averments entitling the appellant to proof on the issue of assault and consent.

Respondent's submissions

[49] Counsel for the respondent, in reply, observed with reference to the pleadings that the appellant relies on a lack of "informed consent" such as to breach his bodily integrity. A lack of informed consent or a failure to obtain informed consent does not in itself vitiate consent (*Shaw* v *Kovac* [2017] EWCA Civ 1028 at paragraph [48]). The appellant's case on record, based as it is on informed consent alone, render his pleadings on assault irrelevant.

[50] Counsel for the respondent analysed the Medical Act 1983 and its requirements in the context of the appellant's argument that there must be a "doctor patient relationship"

before consent can provide a defence to assault. The 1983 Act contains certain provisions and requirements in respect of registration but does not render it unlawful to provide medical treatment without being a registered and licensed doctor. Thus, registration is not a pre-requisite for a doctor / patient relationship to exist. The appellant's contention that if the second defender is not registered then he could not have been a professional is not supported either by reference to the 1983 Act or by reference to authority. In any event, by reference to *R* v *Richardson* [1999] QB 444 consent was only vitiated where it had been induced by a mistaken belief in a pursuer as to the identity of the person doing the act or as to the nature or quality of the act but not as to the person's qualifications and attributes. This follows the decision in *Sidaway* v *Bethlem Royal Hospital Governors* [1984] QB 493 where the Master of the Rolls deals with the question of whether apparent consent is true consent or not.

[51] Counsel for the respondent submitted that the real question is whether the activities alleged to have taken place constitute a breach of "professional duty" within the meaning of the exclusion clause in 6/12 or breach of "professional or other duties" within the meaning of the exclusion clause in 6/4. These expressions have no special meaning. They mean what they say, namely, duties arising from undertaking the role of a professional (see *R* v *Bateman* (1927) 19 Cr App R 8 at page 12 – "if a person holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment"). The appellant's argument fails to address what is meant by "or other duty" in the exclusion clause. In any event, unlawful treatment does not cease to be "treatment" merely because it is administered unlawfully or by someone unregistered.

[52] The sheriff did not err in her assessment of the appellant's averments relating to assault. Instead, she found that even if the second defender's treatment of the appellant amounted to an assault that would still make no difference to the position *vis a vis* the respondents and the policy of insurance. The treatment would still fall within the exclusion clauses.

Decision on Ground of Appeal 3

[53] This chapter or ground of appeal involved not only extensive submissions but citation of English authorities civil and criminal on consent and whether consent is vitiated due to fraud. However, this ground of appeal truly turns on the appellant's averments in relation to his proposition that the appellant's treatment by the second defender amounted to assault which, if proved, must mean that the second defender's treatment ceased to fall within the ambit of the exclusion clause. We have already decided that "professional duty" in the policy excludes claims arising in connection with medical treatment. Such claims would normally fall within professional indemnity insurance. The policies with which we are concerned are of a quite different character and purpose.

[54] The relevant averments are that the procedures undertaken by the second and indeed the third defender on behalf of the first defender were carried out without the appellant's informed consent. They were a breach of the appellant's bodily integrity and assault. They were not carried out with the intention of causing injury. The failure to obtain informed consent does not vitiate the consent itself. Because consent is uninformed does not mean it is vitiated. A failure to obtain informed consent does not vitiate consent itself although it may sound in damages (*Shaw* v *Kovac supra*). By predicating this part of the

appellant's case on informed consent (or the lack of it) the appellant's pleadings are essentially irrelevant.

[55] However, several English criminal authorities were cited which we will comment on. We do so with the caveat that care must be taken with these cases as they involve statutory criminal offences under the Offences against the Person Act 1861 which has no application in Scotland. Counsel for the appellant cited *R* v *Brown* and the dicta of Mustill LJ as authority for the proposition that a doctor / patient relationship is required before consent could provide a defence to assault. The House of Lords did not require to consider the issue of a doctor / patient relationship as has been considered in other cases cited including *R* v *Richardson* (*supra*); *Sidaway* (*supra*) and *R* v *Melin* (*supra*). We do not consider *R* v *Brown* to be of assistance. In any event, Lord Justice Mustill at the passage cited to us was dealing with the degree or level of surgical treatment or the quality of the invasive act rather than the doctor/ patient relationship. *R* v *Brown* was not concerned with surgical treatment by doctors but the infliction of bodily harm in the context of consensual sadomasochistic practices. Counsel for the respondent properly observed that Lord Justice Mustill was delivering a dissenting opinion although that in itself does not derogate from his opinion.

[56] *R* v *Melin* cited by the appellant is the Botox case in which the defendant who administered the Botox was also charged with offences contrary to the Offences against the Person Act 1861. On appeal, the question arose as to whether the complainant's apparent consent to treatment had been vitiated by the defendant's deception as to his medical qualifications. That case turned on its own facts and although there was partial success on appeal in respect of one of the complainants, nevertheless, as regards the other, the trial judge as a matter of fact found that there had been positive false representations that the defendant was a doctor. *Melin* can be distinguished from *R* v *Richardson (*and *vice versa)*, a

case involving a dentist who had been suspended by the General Dental Council but who had continued to practice. In that case it was held that fraud vitiated consent to an act which would otherwise be an assault only where it had induced a mistaken belief as to the identity (our emphasis) of the person doing the act or as to the nature or quality of the act emphasising that a mistake as to identity did not extend to a belief as to a person's professional qualifications and attributes. That statement of the law follows the Master of the Rolls' dicta in *Sidaway* (at page 511), a civil action for damages based on professional negligence.

[57] Accordingly, the appellant's submissions run contrary to these authorities. The Medical Act 1983 does not require a doctor to be registered to be acting in a professional capacity. Nor does it impose a blanket restriction on the ability of one individual to provide medical care to another in the United Kingdom. Registration is not a prerequisite for a doctor or medical professional to administer medical treatment. It is not necessary for a doctor to register with the GMC to be acting in a professional capacity. Accordingly, the appellant's averments relating to registration are irrelevant.

[58] The issue, however, is not simply the relevance of the pleadings but whether, taking the pleadings at their highest and accepting that the actions of the second and the third defender amount to an assault, alters the character of the treatment such as to avoid falling within the ambit of the exclusion clauses. If the appellant proves that the second and third defenders acted unlawfully in providing the treatment the appellant's case is still based on the treatment he received from the second and third defenders in connection with hair transplantation. Even if the treatment administered by them was unlawful the procedures complained of still fall to be characterised as treatment whether lawfully or unlawfully carried out. We find the appellant's submissions under this chapter to be misconceived. The

sheriff was correct to find that the treatment administered to the appellant still fell squarely within the terms of the exclusion clauses. On the hypothesis that there was a failure to obtain consent, informed or otherwise, amounting to an assault this arose as a result of the second and third defenders' breach of either a professional duty in relation to health care advice or a lack of care and skill in the giving of professional advice. We therefore see no error in the sheriff's approach.

[59] The remaining grounds of appeal (5 and 6) were not argued with any great vigour. The seventh ground of appeal relating to breach of contract was not insisted upon. Having regard to ground of appeal 5 the sheriff at paragraph [59] makes observations on the appellant's averments relating to fraud. She was entitled to reach the conclusion that the pleadings fall short of what is required to plead a relevant case based on fraudulent misrepresentation (ground of appeal 6). The pleadings fail to aver the essential elements of a case based on fraud. In any event, that paragraph of the sheriff's judgment is incidental to her decision and the real issue is whether any claim fell within the scope of the insuring clauses of the contract of insurance or outwith the exclusion clauses.

[60] This action proceeds in terms of the 2010 Act sections 1 and 3. The appellant, as a third party, seeks to establish this claim against the respondent's by standing in the shoes of the insured, namely the hair loss clinic. The appellant can have no higher or better or indeed different rights against the insurer than the relevant person or insurer. (See the dicta of Lord Brodie in *Grant* paragraph [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 had no obligation to indemnify the relevant person under the policy then there are no rights for the third party to enforce*.").

The appellant requires to prove that the first defender has a liability to him and that such liability is insured under the particular contract of insurance in force between the first defender and respondents at the relevant time or over the appropriate period of treatment. Even if liability is proved the appellant's claim will fail if the liability claimed is excluded by virtue of the exclusion clauses in the policies. In this case, we are of the opinion that the exclusion clause (in both versions of the policy terms and conditions), properly construed, clearly operates to exclude the appellant's claim however framed in his pleadings. The sheriff was correct to find the appellant's case as pleaded against the respondent to be irrelevant and to dismiss the action. We will refuse the appeal and adhere to the sheriff's interlocutor of 13 September 2019. The appellant will be found liable to the respondent in the expenses of the appeal. We shall also certify the appeal as suitable for the employment of junior counsel.