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Introduction

It is often standard industry practice for the party performing the services or carrying out the work (the Contractor) to request and obtain from the other party (the Principal) a clause limiting or excluding the Contractor's liability for, as an example, indirect or consequential loss.

If the Principal accepts this, the Principal will in turn require the limitation clause to exclude certain situations where it would be unjust for the Contractor to obtain the benefit of that exclusion of limitation. Typically, these situations include liability for fraud or criminal acts or for 'gross negligence'.

An example of such a clause is:

The total liability of the Contractor to the Owner under this contract will not exceed the contract price. This clause does not limit the liability of the Contractor in cases of:

(a) fraud

(b) gross negligence

(c) illegal or unlawful acts.

The term “fraud” is well defined and understood. Similarly, the law is clear on what constitutes “illegal or unlawful acts”. However, the term “gross negligence” does not currently have a settled meaning.

What is 'gross negligence'?

The Concept of Negligence

Since the term “gross negligence” is clearly meant to cover something more than just ordinary negligence, it is useful to summarise the legal definition of “negligence”.

Negligence is the failure by a party to fulfil its duty of care owed to another party, to the standard of care legally required, such that material damage results.[1]

A duty of care arises:

- where there is a risk of harm, and this risk is foreseeable by a reasonable person;[2]
- where there is a legally recognised relationship of proximity between the parties.[3]

The standard of care that is required to be met, in order for that party to fulfil its duty of care, is assessed “objectively”. This means that the standard of care is what a hypothetical “reasonable person” of ordinary prudence,[4] or of ordinary care and skill,[5] engaged in the type of activity[6] in which the defendant was engaged in, would be expected to adhere to.

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1 *Vaughan v Taff Vale Railway Co* (1860) 157 ER 1351 (Willes J); *Heaven v Pender* (1883) 11 QBD 503, 507; *Cunnington v Great Northern Railway Co* (1883) 49 LT 392.

2 *Donghue v Stevenson* [1932] AC 562, 619 (Lord Macmillan); *Glasgow Corporation v Muir* [1943] AC 448.

3 *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618 (Lord Bridge).

4 *Vaughan v Menlove* (1837) 132 ER 490, 497 (Tindal CJ).

Is there a higher standard of care for gross negligence?

The term "gross negligence" has been commonly used and accepted in criminal cases, however, there is no consensus as to what the term actually means in civil cases.

There are two contrary views:

- There is no distinction between negligence and "gross negligence". The prefix "gross" is superfluous.
- There is a distinction between negligence and "gross negligence". "Gross negligence" in the civil context is akin to the very high standard of negligence or recklessness required to establish criminal responsibility.

View 1: No Distinction

Under English and Australian law, the first (and traditional) view was enunciated in *Hinton v Dibber* [7], where Lord Denman famously stated in the English High Court that *"it may well be doubted whether between gross negligence, and negligence merely, any intelligible distinction exists."*[8]

This decision was followed by Pentecost and Anor v London District Auditor and Anor,[9] where the High Court stated that it was meaningless to attach an epithet to negligence, as a person is either guilty of negligence, or they are not guilty of negligence. The Court went so far as to say that "gross negligence is not known to the English common law so far as civil proceedings are concerned."[10]

View 2: There Are Different Categories of Negligence

In England, the Privy Council has long held that there are degrees of negligence and that it would be a mistake not to observe this distinction merely because of the difficulty entailed in drawing a strict line between negligence and "gross negligence".[11]

The English courts distinguish "gross negligence" from ordinary negligence in situations where the negligent conduct is particularly severe and offensive.

In Australia, the courts have never expressly enunciated that there are different categories of negligence but they have used the term "gross negligence" to describe negligence which is worse than ordinary negligence.

The modern position

Contractual and Statutory Use

Despite the fact that the courts see no great distinction between negligence and gross negligence, when parties use the term "gross negligence" the courts will try to give effect to the intention of the parties. This means that the courts will, on the merits of each case, attempt to distinguish between "mere" negligence and "gross"negligence.[12] In other words, they attribute a sensible meaning to the phrase.[13]

For example, in the English case of *The Hellespont Ardent*[14] the effect of indemnity and exemption clauses was considered. This case involved a clause expressly indemnifying or exempting a party from liability in the event

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5 *Heaven v Pender* (1883) 11 QBD 503, 509 (Brett MR).

6 *Wilsher v Essex Area Health Authority* [1987] QB 730, 750-751 (Mustill LJ).

7 (1842) 2 QB 646.

8 Ibid.

9 [1951] 2 KB 759

10 Ibid, 764 (Lynskey J)

11 *Giblin v McMullen (1868) LR 2 PC 317* (Lord Chelmsford), citing *Beal v South Devon Railway Company* (1864) 159 ER 560.

12 *Armitage v Nurse* [1997] 2 All ER 705.

13 English Trust Law Committee, UK Parliament, *Trustee Exemption Clauses* (2000), [2.10].

14 *Red Sea Tankers Ltd and Others v Papachristidis and Others Henderson, Baarma and Bouckley (Third Parties) (The 'Hellespont Ardent')* [1997] 2 Lloyd's Rep 547, 586 (Mance J).

of negligence. The question was whether the immunity provided by the exemption clause covered gross negligence, or whether only ordinary negligence was exempted. The High Court held that the distinction between negligence and gross negligence was potentially material, as the contractual term was clearly intended to represent something more than a failure to exercise the standard of care that would ordinarily constitute "mere" negligence.[15] The Court found that "gross" negligence includes conduct undertaken with actual apprehension of the risks involved and serious disregard of or indifference to an obvious risk.[16]

Conclusion

In negotiating contracts, a Contractor will be unlikely to agree to a liability clause that does not limit its liability for negligence but may, however, agree to be liable for "gross negligence". If a reference to gross negligence is included it is likely that the courts will impose a higher burden of proof on the Owner to show negligence. In other words it will be harder to argue that, for example, the Contractor's liability should not be capped. However, because there is no accepted legal meaning of gross negligence in civil law the results may be arbitrary and therefore unforeseeable.

As a result of the lack of a clear definition of "gross negligence" and the need for certainty in a business relationship, we recommend that the term be avoided if possible.

Under English law, aggravated and punitive damages are not available for breach of contract,[17] so the use of the word "gross" will not be of any extra benefits.

15 Ibid.

16 Ibid.

17 *Kralj v McGrath* [1986] 1 All ER 54.

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