THE EVOLVING CONCEPT OF GROSS NEGLIGENCE

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The concept of ‘gross negligence’, if not necessarily the meaning, is familiar to lawyers. Transactional lawyers regularly come across the term in contracts, often in the context of an exclusion clause (and normally, as a carve out from the exclusion) or indemnity provisions.

Equally, disputes lawyers are often asked to advise on liability for potential gross negligence claims arising out of contracts. Commonly, the concept of gross negligence will not be defined in the agreement itself, no doubt in part because it is difficult to particularise the full gamut of potentially gross negligent scenarios which could arise.

In the absence of a contractual definition, parties must rely on courts to provide guidance on how to interpret the term.

So what is gross negligence? It is clearly more serious than ordinary negligence, but what is the threshold that elevates negligence to it being ‘gross’ and what other considerations may be relevant? While it is fair to say that ‘gross negligence’ has been somewhat of a nebulous concept, the recent High Court decision of Federal Republic of Nigeria v JP Morgan Chase Bank (2022) provides further guidance on the approach the courts will take when interpreting this term.
The court’s attempts to articulate ‘gross negligence’

Any discussion of this topic usually starts by noting that there is no concept of gross negligence in English law distinct from negligence, as reflected in the oft-cited 1843 decision in Wilson v Brett, which concluded that gross negligence is simply negligence with a “vituperative epithet”. This differs from the position in other jurisdictions, such as Germany, which distinguish between negligence and gross negligence.

Beyond the distinction being one of degree, courts have traditionally struggled to clearly articulate the distinction and the factors that might elevate a mere negligence to a gross negligence. What guidance can be gleaned from the authorities tends to be fact-specific, with particular considerations identified by courts tailored to the fact pattern of the case before it. The struggle can be highlighted by three authorities relied upon by the parties in FRN v JPMC, in which the court has had to grapple with the concept of gross negligence.

In a decision involving a trust deed limiting liability to actual fraud – Armitage v Nurse (1998) – the Court of Appeal held that it was not contrary to public policy to exclude a trustee’s liability for gross negligence because: (i) it was far too late in the evolution of English law to suggest that a contractual exclusion for liability for ordinary negligence was contrary to public policy; and (ii) it would be very surprising if the law drew the line in terms of what was acceptable as a matter of public policy between limiting liability for ordinary negligence and liability for gross negligence. In this respect, English law had always drawn a sharp distinction between negligence, however gross, on the one hand and fraud, bad faith or wilful misconduct on the other. While fraud and negligence were differences in kind, the difference between negligence and gross negligence was merely one of degree.

The leading authority on the interpretation of gross negligence in a contractual context is Red Sea Tankers Ltd v Papachristidis (The Hellesport Ardent) (1997), a case actually decided under New York law, in which the court held that gross negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and care constituting negligence; and includes not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk.
The approach in *Hellespont* was affirmed in *Camarata Property v Credit Suisse Securities* (2011), which concerned an exclusion clause in a contract between a bank and an investment company for investment advice governed by English law. However, the court also noted that: (i) the distinction between gross negligence and mere negligence was one of degree and not of kind; and (ii) it is not easy to define or even describe the concept of gross negligence with any precision.

**The test in FRN v JPMC**

The factual background to *FRN v JPMC* lends itself to a storyline from a blockbuster Hollywood film. It is a case of some factual complexity, but we set out a very brief summary of the pertinent facts below.

On the instruction of authorised representatives of FRN, JPMC remitted payments totalling approximately $1bn from FRN’s depository account with JPMC to accounts held by a Nigerian company associated with a disgraced former oil minister of FRN. FRN alleged that JPMC was on notice that the payments were made to facilitate an alleged fraud on FRN and that in making the payments JPMC had been grossly negligent.

It was common ground between the parties that FRN was required to prove that JPMC had been grossly negligent because of the contractual terms governing FRN’s depository account. Specifically, those terms included a clause excluding JPMC from liability for any loss suffered by reason of its actions
or omissions except for in the case of fraud, gross negligence or wilful misconduct.

The court categorised gross negligence as a “notoriously slippery concept” being something that “requires something more than negligence but it does not require dishonesty or bad faith and indeed does not have any subjective mental element of appreciation of risk”. The court ruled that liability for gross negligence involves a multi-faceted consideration of the following factors (also approved in Hellespont). First, the likelihood of the risk (i.e., the extent to which signs of fraud were glaring and obvious). Second, the ease of mitigating that risk (by making practical enquiries or applying back to court. Finally, the seriousness of the consequences for the customer if the risk eventuated (having regard to the enormous sums at stake).

The court then adapted the Hellespont test into a twofold test to establish gross negligence: whether there was an obvious risk of FRN being defrauded and whether JPMC’s conduct illustrated a serious disregard for that risk.

Ultimately, the court decided that there was a risk of FRN being defrauded, but it was not an obvious risk. The evidence illustrated that the risk was “no more than a possibility based on a slim foundation”. Accordingly, JPMC was not found to be grossly negligent.

Analysis of the approach

While the FRN v JPMC decision appears to endorse previous tests for gross negligence, both the tone and application to the facts suggest that the court imposed a higher threshold.

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Significantly, the court disagreed that gross negligence could be established by demonstrating that the bank fell seriously below the standard to be expected of the reasonable banker, noting that it would be possible to fall seriously below the standard required and act neither with actual appreciation of the risks involved nor in serious disregard of an obvious risk.

The court also cautioned against eliding opinion evidence on best or ordinarily competent practice with the gross negligence test. This approach appears driven by the judge’s concern that expert evidence had not focused sufficiently on the
narrow issue of the risk of fraud in the particular transactions but rather on failures to comply with best practice more generally.

However, in our view, there is no reason why an assessment of the extent to which a party falls below the standard expected in relation to a particular risk should not form part of the relevant inquiry. A focus solely on whether there was a serious disregard of an obvious risk seems to unnecessarily narrow gross negligence and risks it becoming too rigid. Conversely, the concept of falling seriously below a relevant standard of care intuitively fits with the recognition in English law that the difference between negligence and gross negligence is a difference of degree and will depend on the particular facts.

What does the court’s approach mean in practice?

The decision makes clear that the court is likely to impose a high threshold in finding gross negligence in a particular set of circumstances and that even a serious lapse in judgment by itself may well not meet the threshold for an act of gross negligence. Moreover, the court will have to conduct a multifaceted investigation of the particular facts of the case overlain by the court’s own interpretation of what would constitute a serious disregard for an obvious risk in the given circumstances in reaching a conclusion on whether there has been ‘gross negligence’.

Given the uncertainty of establishing liability for gross negligence, any beneficiary of a clause that references ‘gross negligence’ would be best advised to define the term and identify a list of behaviour that would constitute gross negligence (on a non-exhaustive basis).

The ability to do so, however, is likely to turn on relative bargaining strengths between parties, particularly given the likely complications in trying to articulate what might constitute a grossly negligent act – parties do not often wish to examine in close detail at the outset where things may go wrong in the future.

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Robert Javin-Fisher  
Partner  
Humphries Kerstetter  
T: +44 (0)20 7438 1129  
E: rjf@humphrieskerstetter.com

Harriet Bush  
Associate  
Humphries Kerstetter  
T: +44 (0)20 3929 3183  
E: hb@humphrieskerstetter.com

Sinead O’Brien  
Associate  
Humphries Kerstetter  
T: +44 (0)20 7438 1124  
E: so@humphrieskerstetter.com