Gross negligence, negligence and other phrases

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Gross negligence is a civil law concept that has been imported into the common law.

Concept of negligence

Before examining the meaning of gross negligence it is useful to summarise the legal definition of negligence.

Negligence is the failure by a person or body to observe a legally recognised standard of care to another party resulting in material damage. Such a duty of care arises where:

- there is a risk of harm and this risk is foreseeable by a reasonable person; and
- there is a legally recognised relationship of proximity between the parties.

The standard of care is objective and is what a hypothetical reasonable person of ordinary prudence or of ordinary care and skill engaged in the type of activity in which the defendant was engaged would be expected to adhere to.

The term "gross negligence" is often used to describe a higher degree of negligence than what is often called ordinary or "mere" negligence.

There is no clear consensus as to what the term "gross negligence" means in trust law. The Privy Council has long held that there is a difference between degrees of negligence.

The modern position under English law was defined in *Armitage v Nurse* a 1998 case before the Court of Appeal. In this case, a clause in a trust instrument sought to exclude the trustees liability for negligence. The clause in question provided that:

"no trustee shall be liable for any loss or damage at any time or from any cause whatsoever unless caused by his own actual fraud".

The Court of Appeal held negligent conduct could be excluded from liability and that this immunity extended to instances of gross negligence.

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The Court at that time considered the distinction between negligence and gross negligence under English law coming to the conclusion that there is a difference in kind between fraud and negligence (including gross negligence). The difference between negligence and gross negligence is merely a matter of degree.

This implies conscious wrongdoing – necessary for a finding of fraud – is not an element of gross negligence. It would appear to be the case that where parties use the term "gross negligence" the Court will try to give effect to the intention of the parties on a case by case basis distinguishing between mere negligence and gross negligence.

The main impetus behind the use of the word "gross" appears to be to describe conduct worse than ordinary negligence.

The recent Privy Council case (on appeal from the Court of Appeal of Guernsey) of *Spread Trustee Company Limited (Appellant) v Sarah Ann Hutcheson and others (Respondent)* discussed, inter alia, the concept of gross negligence. Lord Clarke cited the case of *Armitage v Nurse* in particular the passage between PP253E and 254E of the judgment of Millett LJ.

"It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud, bad faith and wilful misconduct on the other. The doctrine of the common law is that "gross negligence may be evidence of mala fides but is not the same thing" see *Goodman v Harvey* (1836) 4 A & E 870, 876 per Lord Denman CJ. But while we regard the difference between fraud on the one hand and mere negligence, however gross on the other as a difference in kind, we regard the difference between negligence and gross negligence as merely one of degree".

Lord Clarke also said:-

"to describe negligence as gross does not change its nature so as to make it fraudulent or wilful misconduct".

Millett LJ also in *Armitage v Nurse* sought to define the term "wilful default" in the context of an exclusion clause. He put it as follows:

"Nothing less than conscious and wilful misconduct is sufficient. The trustee must be conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not.

A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk occurs he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing the

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risk is one which ought to be taken in the interests of beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default.".

The following was cited as a definition of "wilful misconduct" by Bramwell LJ put it in *Lewis v Great Western Railways* [1877] 3 QBD 195, at P206

"wilful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct, must be wilful."

In *Spread Trustee*, Lord Mance cited *Walker v Stones* [2001] QB 902 which concluded that dishonesty could include an objective element, embracing conduct such that no reasonable person could have believed it honest.

Sir Robin Auld in *Spread Trustee* made some useful comments in relation to the terms "negligence" and "gross negligence":

"On the plain meaning of the words and as a matter of logic and commonsense, the terms "negligence" and "gross negligence" differ only in the degree or seriousness of the want of due care they describe. It is a degree of difference, not of kind, as stated by Millett LJ in *Armitage v Nurse* [1998] CH241. Gross negligence, like negligence not so qualified, may be committed in good faith and, therefore, without dishonesty or willfulness. Indeed, dishonesty – an inherent ingredient of fraudulent or wilful misconduct – is the antithesis of negligence, an inadvertent falling short of a duty to take reasonable care in the circumstances. To describe such inadvertence, as "gross" does not turn it into fraudulent or wilful misconduct".

It would appear therefore that there continues to be a clear distinction between "negligence" on the one hand and misconduct of a dishonest and/or wilful nature on the other.

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