

IT BYTES

ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

WHAT IS THE DIFFERENCE BETWEEN 'GROSS' NEGLIGENCE AND 'NORMAL' OR 'MERE' NEGLIGENCE UNDER AUSTRALIAN LAW?



WHEN DOES THIS QUESTION TEND TO ARISE?

It is common for the parties to an IT contract to want to limit or exclude their liability under the contract in some way. However, typically there will also be exceptions where the parties accept that their liability should not be limited or excluded, such as in cases of fraud or deliberate breach. Occasionally a party will suggest that there should be an exception for negligence. However, such a broad exception may fundamentally undermine the purpose of the limitation of liability clause, as it will often be a simple matter to recast a breach of contract claim as a claim for negligence thereby leading to unlimited liability. In that case, a compromise may be to confine the exception to 'gross negligence' instead. This will then present the question of how 'gross' negligence should be distinguished from 'normal' or 'mere' negligence.

WHAT DOES THE LAW SAY?

The tort of negligence is made out if one party owes a duty of care to another party, they fail to fulfil that duty by falling below the standard of care required, and the other party suffers loss or damage as a result.

From the perspective of a claim in negligence, any difference in meaning between 'gross negligence' and any other type of negligence is inconsequential, as the tort will be made out whenever there is a failure to meet the standard of care, irrespective of whether it is a gross failure or otherwise.

The position in contract is different, though in that context the term 'gross negligence' has been described as being 'at worst, meaningless, and at best, vague'. Nonetheless, while it is not a term of art, it has been accepted that when used in a contract the term 'gross negligence' is different to 'mere negligence'. The courts have generally held that the question whether conduct amounts to 'gross negligence' is to be determined objectively, in accordance with ordinary rules of contractual construction, taking into consideration relevant contextual considerations.

In *GR Engineering Services Ltd v Investment Ltd* [2019] WASC 439 the meaning of 'gross negligence' was held to be a matter of constructing the contract to identify the objective intentions of the parties at the time of contracting. It was noted that Australian courts have tended to follow the English authority of *Red Sea Tankers Ltd v Papachristidis (The 'Hellespont Ardent')* [1997] 2 Lloyd's Rep 547, in which it was said that:

... the concepts of 'gross negligence' here appears to me to embrace serious negligence amounting to reckless disregard, without any necessary implication of consciousness of the high degree of risk or the likely consequences of the conduct on the part of the person acting or omitting to act.

If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. 'Gross' negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence seems to me to be capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or an indifference to an obvious risk.

In other words, the court in that case was saying that gross negligence did not require conscious risk taking, but did require a serious failure to meet a relevant duty of care.

At the same time, the court in *GR Engineering* approved comments in other cases to the effect that the meaning of the phrase was context-specific, and in some circumstances 'gross negligence' would be more than 'mere negligence' and in others it would be the same. If, in the circumstances, a distinction is to be drawn between 'mere' and 'gross' negligence, the distinction is typically 'one of degree and not kind'. In 2021, the WA Supreme Court of Appeal upheld the primary judge's finding in *GR Engineering*, saying that 'in the context of the present case, gross negligence required more than mere negligence and connoted a serious or significant departure from the standard of care required'.

Based on these precedents, the difference between 'mere negligence' and 'gross negligence' is to be determined on a case-by-case basis, looking to the objective intentions of the parties at the time of contracting and the conduct of the parties within the context in which it took place. However, the difference will always be one of degree and not kind, and the point at which conduct crosses from being 'merely negligent' to 'grossly negligent' will often be a matter of impression.



WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

- The term 'gross negligence' does not have a set meaning, and its interpretation may be highly context specific. As such, the distinction that may be drawn between 'mere negligence' and 'gross negligence' may in some circumstances be hard to predict.
- That may be acceptable if you feel that you are more likely to want to rely upon any liability carve out for gross negligence, as you will be able to argue for a broad interpretation. However, if you are more concerned about your own exposure, you may prefer either to push back on any such carve out (on the basis that the scope will be too uncertain) or to propose including an explicit definition in order to leave less room for doubt.
- While an infinite variety of definitions could be proposed, many will include elements of recklessness or wilfulness as a way of distinguishing from 'mere negligence'. In any case, the definition will need to be carefully crafted in order to accurately reflect how far above the standard measure of tortious negligence (that is, above a mere failure to meet a relevant standard of care) you wish to set the bar. While there is no one right answer, you could consider:
 - A definition that invokes the familiar duty of care concept but focuses on matters of degree, such as 'conduct that goes beyond mere carelessness or a failure to take reasonable care and involves a failure to exercise even a minimal level of care in order discharge a duty owed to another'.
 - Drawing inspiration from the Australian Consumer Law and Fair Trading Regulations 2022 (Vic), which defines the concept as an act or omission 'done or omitted to be done with reckless disregard, with or without consciousness, for the consequences of the act or omission'.
 - A definition that emphasises more conscious risk taking (while still falling short of an intention to cause harm), such as 'conduct that involves a reckless or deliberate disregard for a risk of causing harm that was known or ought to have been apparent at the time'.

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