EXCLUSIONS FROM IMMUNITY: GROSS NEGLIGENCE AND WILFUL MISCONDUCT

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INTRODUCTION

1. Construction projects invariably call for the delivery of complex fabrications, made up of numerous items (often themselves the subject of complex arrangements for sub-assembly), at significant cost, and taking significant time. At heart therefore, construction contracts are designed to (a) distribute risk in respect of the standard, cost and time of delivery, and (b) regulate the parties’ relationship whilst that delivery is taking place.

2. Understandably therefore, in negotiation it is standard practice for the contractor to demand from the employer a specific distribution of risk in respect of certain dangers to the standard of delivery, the timing of that delivery, and its cost. Such clauses generally either define the risk as lying with the employer; or they will provide that the contractor will only carry the risk on terms (i.e. a limitation or exclusion clause). What risks are excluded as against the contractor must, of course, fall on the employer; there is nowhere else for them to go.\(^1\)

3. Inevitably contractors do not have things all their own way; in the pushmi-pullyu of negotiations between competing contractor and employer interests, the employer will agree to exclusions or limitations, but only up to a point. Two carve outs to exclusions or limitations that are often insisted upon by employers and that we consider in this paper are agreements that the contractor will have no liability (or only limited liability) in respect of certain risks, unless the excluded loss occurs because of the contractor’s ‘gross negligence’ or his own ‘wilful misconduct’.\(^2\)

4. The rationale for including such ‘carve outs’, or ‘exclusions to the immunity’ is obvious – the employer may agree the contractor will not be liable for (for example) ordinary carelessness, but he wishes it to be clear that there are, sensibly, limits to this concession; thus the employer agrees to take the risk of loss from negligence, but not gross negligence. Similarly, he will wish to make it clear that deliberate conduct causing the loss – ‘wilful default’ or ‘wilful misconduct’ – will not be caught by

\(^1\) Except in those rare instances where the contract provides that the risk is to be covered solely by third party insurance, as in the JCT Joint Names provisions.

\(^2\) Or sometimes referred to as ‘wilful default’. We discuss both terms below.
the concession. In a sense therefore, clauses which exclude liability save in the case of gross negligence or wilful default are as much a negative definition (i.e. defining the limits of how far an otherwise-operative exclusion will apply) as they are a positive definition (i.e. setting out specific categories of risk which are not excluded). This potential way of viewing the terms – i.e. as defining the outer limits of something otherwise in place, rather than necessarily discrete categories in their own right – may be important in some cases, for reasons we come to later.

5. Because the terms ‘gross negligence’ and ‘wilful misconduct’ are almost exclusively used in the context described above – i.e. as ‘carve outs’ to exclusion clauses, or ‘exclusions to the exclusion’ – we will refer to them as clauses giving ‘exclusions from immunity’ (although such drafting could easily take the form of an exclusion from a clause limiting liability to a set amount, for example; we simply use the term ‘exclusion from immunity’ as a convenient shorthand to describe when and how the terms tend to appear).

6. The prevalence of these terms in construction contracts has increased dramatically in the past few decades to the extent that now, in some standard forms and in some in-house industry forms at least where the contract is not a standard form, one or other of these terms will appear, at least once but more likely throughout the contract, typically as a route by which a wrongdoer’s limited or otherwise excluded liability is unlocked. Identifying exactly when and how these terms entered common use is not clear, but it seems likely the trend has been abetted by the increasingly international nature of construction and engineering projects, the comparative dominance of English law as the choice of the law in contracts for those projects, and the cross-pollination of legal concepts which occurs when negotiators from other jurisdictions make amendments to contracts governed by English law.

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3 The JCT and ICE standard forms of contract do not refer to these terms, although ‘wilful default’ does now appear in the new NEC4 (for example, in the new alliance contract, all liabilities are shared between the Client and the Partners, save for losses caused by a Partner’s wilful default). Also, the FIDIC ‘rainbow’ of contracts provides (at clause 17.6 in most of the forms) that the contractor cap on liability does not apply where there is ‘deliberate default’ or ‘reckless misconduct’. This may derive from the fact that the FIDIC forms are drawn up by a body in which European civilian law systems are well represented; in many civilian systems attempts to exclude liability for gross negligence/wilful misconduct face public policy objections, which may account for the draftsman’s inclusion of the exceptions to the immunity. We have not considered the civil law position in this paper; our objective is to discuss how such terms (whatever their genesis/history) are to be interpreted under English law. However, in writing this paper and in particular in considering some of the arguments which arise in relation to gross negligence and wilful misconduct under the FIDIC form we were assisted by some very useful observations by Paul Cowan, barrister at 4 New Square.

4 Though not always – the terms often appear as grounds for termination, for instance.

5 In some civil law systems for example, it is contrary to public policy to try to exclude liability for gross misconduct or wilful default, with the result that without some exclusion to the immunity wording there is the risk that the whole clause is struck down
7. Despite the significance of these terms, which are often the key to unlocking unlimited liability on the part of the wrongdoer, they are almost never defined. One may posit this is (a) because neither is a term of art with a clear meaning in law; (b) because no thought is given to the consequences of not defining it; or (c) because the parties recognise the lack of a clear meaning but are unable to agree a suitable definition. To compound the problem, clear authority on how to apply the terms in the absence of any scripted meaning is hard to find. Frequently the authorities seem only to illustrate the concepts rather than provide a clear definition.

8. This paper analyses the authorities that have addressed the tort of gross negligence and wilful misconduct in one way or another. We suggest those authorities and applied business common sense allow us to derive definitions to be sculpted and incorporated into contracts, or at least provide guidance and criteria by which it is possible to assess whether an action or inaction falls within the auspices of these terms. Finally, we offer some thoughts on problems that may arise in practice before concluding.

EXCLUSION FROM IMMUNITY: GROSS NEGLIGENCE

Development of the case law

The move away from the tort of gross negligence

9. The tort of negligence dates back to Roman times. It is the most well-known and pervasive cause of action in England and Wales. Put simply it imposes, in certain circumstances, a duty to take reasonable care. This duty may arise under statute, under contract or at common law. To succeed in an action for negligence at common law, it is necessary for a claimant to establish that (i) the defendant owed a duty of care to the claimant; (ii) the defendant breached the duty owed to the claimant; and (iii) the defendant’s breach of duty caused the claimant to suffer recoverable loss.

10. Gross negligence (or crassa negligentia) is thought to have its genesis in Roman law. Up until relatively recently, the concept was applied in numerous circumstances, including the liability of a lawyer to his client, or of a doctor to his patient; whether the holder of a bill of exchange would be affected by a defect in the bill; and whether a tenant was barred from relief against forfeiture. However, for reasons that are as void on policy grounds.

6 The well-known three-part test for establishing the duty is that the damage which occurs is foreseeable, there is a sufficiently proximate relationship between the parties and it is fair, just and reasonable in all the circumstances to impose a duty of care. See Caparo Industries Plc v Dickman [1990] UKHL 2, [1990] 2 AC 605, [1990] 1 All ER 568; Henderson v Merrett Syndicates Ltd [1994] UKHL 5, [1995] 2 AC 145, [1994] 3 All ER 506; and Murphy v Brentwood District Council [1991] UKHL 2, [1991] 1 AC 398, [1990] 2 All ER 908.
unclear, the tide turned against the concept of gross negligence in tort, and indeed any rule of law that sought to demarcate degrees of negligence, such that by the mid-19th century it did not find favour with the courts of England and Wales.

‘It was formerly customary to state, and old editions of this work did state, that the duty of care owed by a gratuitous agent was one of such skill and care as persons ordinarily exercise in their own affairs. This idea, which is similar to the diligentia quam suis rebus of Roman law (where different contracts had different prescribed levels of care) was derived in English law from old cases on bailment, which suggested (in like manner) that whereas a contractual bailee was liable for negligence, a gratuitous bailee was only liable for gross negligence. But as Rolfe B remarked in 1843,\(^7\) gross negligence can be said to be no more than negligence with a vituperative epithet; and the determination of fixed standards for different types of care is not a technique now used by English law.\(^8\) [emphasis supplied]

11. The most frequently cited case marking the start of this shift is that of *Hinton v Dibber*,\(^9\) where Denman CJ held that, ‘It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists,’ and a year later in *Wilson v Brett*,\(^10\) Baron Rolfe famously defined gross negligence as simply, ‘negligence with vituperative epithet’. That view was endorsed two decades later in *Grill v The General Iron Screw Collier*,\(^11\) where the court said that the term is only a description, not a legal definition. Thus, probably by the middle of the 19th century and certainly by the end of it, the idea that the tort of negligence could be carved into different degrees was abandoned.\(^12\)

12. During the 20th century, every so often parties in litigation attempted in vain to resurrect this distinction and carve out gross negligence as a sub-species of negligence in order to unlock a door to the defendant’s liability where mere negligence had been excluded or limited. However, by then the ship had sailed, the orthodoxy was set, and the best judicial response that these submissions received was bewilderment and frustration, followed swiftly by rejection. In the courts’ view, a party had either met the requisite duty of care or it had not. If it had not, distinguishing between levels of negligence was not necessary, as

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\(^7\) *Wilson v Brett* (1843) 152 ER 737.


\(^9\) *Hinton v Dibber* (1842) 2 QB 646.

\(^10\) *Wilson v Brett* (1843) 152 ER 737. In other words, a particularly egregious form of negligence.

\(^11\) *Grill v The General Iron Screw Collier Company Ltd* (1865–1866) LR 1 CP 600.

\(^12\) Although in the Court of Appeal case of *Re City Equitable Fire Insurance* [1925] Ch 407, para [198], albeit in the context of directors’ duties, Romer J drew a distinction between negligence and gross negligence.
explained by the judge in the 1950’s case of *Pentecost v London District Auditor*:\(^{13}\)

‘The use of the expression “gross negligence” is always misleading. Except in the one case of the law relating to manslaughter, the words “gross negligence” should never be used in connection with any matter to which the common law relates, and for this reason: negligence is breach of duty. If there is a duty and there has been a breach of it which causes loss, it matters not whether it is a venial breach or a serious one: a breach of a legal duty in any degree which causes loss is actionable.’

13. In the late 1990s, the Court of Appeal considered gross negligence in the context of a breach of trust case.\(^{14}\) The matter concerned a clause in a settlement agreement which, the appellants argued, did not exclude the liability of the defendants for breach of trust where the breach arose from, *inter alia*, gross negligence. The court held that:

‘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 … we regard the difference between negligence and gross negligence as merely one of degree … civilian systems draw the line in a different place. The doctrine is *culpa lata dolo aequiparatur* [gross negligence is equal to fraud]; and although the maxim itself is not Roman the principle is classical. There is no room for the maxim in the common law.’\(^{15}\)

14. The court went on to reject the contention by the appellant that a clause which purported to exclude liability for gross negligence should be void or struck out for public policy reasons.

15. Again, in the 2007 Court of Appeal case of *Tradigrain SA v Intertek Testing Services*, the court held that gross negligence had a recognisable meaning under German law (the contract in that case was subject to German law) but noted that gross negligence, ‘has never been accepted by English civil law as a concept distinct from simple negligence’.\(^{16}\)

**Recent developments and case law**

16. Whilst in tort these statements are obviously binding up to Supreme Court level, over the past 20 years there appears to have been a resurgence of the concept of gross negligence in English law. Why exactly this is the case is unclear. However, what is clear is that the term is now appearing in a different context; whilst as discussed above gross

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\(^{13}\) *Pentecost v London District Auditor* [1951] 2 KB 759, para [766].


\(^{15}\) *Armitage v Nurse*, note 14, [1997] 3 WLR 1046, para [254].

\(^{16}\) *Tradigrain SA v Intertek Testing Services Ltd* [2007] EWCA Civ 154, para [23].
negligence has no place in the law of general obligations (ie tort), it is now being adopted by the parties in the context of specific obligations (ie contracts). It is being used in particular in contracts to qualify the allocation of risk between parties to ensure that particularly egregious acts are not covered by a general exclusion of risk.\textsuperscript{17} It is also being used in contracts entered into between two international parties where the law of the contract is English law, but where the domestic law of at least one of the international parties does recognise gross negligence as a concept. Thus, where parties to a contract have used the term gross negligence and where there is a dispute as to whether a party is liable for gross negligence, it has been necessary for the courts to consider what it means.

17. This obviously presents a difficulty. The parties are masters of their contractual fate. They are entitled to use whatever terminology they wish and the courts must interpret and give effect to that. But the parties are (at least from an English law point of view) adopting an anachronistic term which has not had popular use in English law since at least the early 19th century.

18. The starting point for the analysis of gross negligence as a contractual term, and also arguably the leading case, is \textit{Red Sea Tankers v Papachristidis (The Ardent)}.\textsuperscript{18} Red Sea was a Cayman-based fund established for the purpose of investing in oil tankers. It (together with the other plaintiffs, who were all subsidiaries of Red Sea) owned four tankers, one of which was The Ardent. The defendants were brokers who sold the tankers to Red Sea. The agreement under which the brokers did so excluded liability save in the case of damage caused by ‘gross negligence’ or ‘wilful misconduct’ (of which more below). The tankers sold to Red Sea by the brokers were found to be defective after purchase. Red Sea spent some $71 million repairing and upgrading them. Red Sea sought to recover that loss from the defendants. In order to do so, they had to take on the exclusion clause. Thus, they had to argue the defendant brokers had been either grossly negligent and/or guilty of wilful misconduct in, \textit{inter alia}, failing to arrange adequate inspection of the tankers pre-purchase.

19. Although the agreement, and therefore submissions put to the judge, were based on New York law, in providing his judgment the judge set out his view of the meaning of the concept of gross negligence, as he put it, ‘whether one looks to the authorities decided and the principles identified in the context of New York public policy or to the simple

\textsuperscript{17} The suggestion made by Mrs Justice Gloster DBE in \textit{JP Morgan Chase Bank v Springwell Navigation Corporation} [2008] EWHC 1793 (Comm), para [205] is that gross negligence began to appear ever more frequently in US commercial contracts and the use of the term may have proliferated from there.

\textsuperscript{18} \textit{Red Sea Tankers Ltd v Papachristidis (The Ardent)} [1997] 2 Lloyd’s Rep 547 (Comm).
meaning of the words without attributing to them any special meaning under New York law at all’. 19

20. The judge said:

‘Gross negligence here appears to me to embrace serious negligence amounting to reckless disregard,\(^{20}\) 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. ...

“Gross” negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and care and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also a serious disregard of or indifference to an obvious risk.\(^{21}\) ... Whether [the relevant clause is] interpreted according to United States or English principles, the conclusion which I reach is that the concept of gross negligence in these clauses does not involve, necessarily, any subjective mental element of appreciation of risk. It may therefore include ... conduct which a reasonable person would perceive to entail a high degree of risk of injury to others coupled with heedlessness or indifference to or disregard of the consequences. The heedlessness, indifference or disregard need not be conscious.’\(^{22}\) [emphasis supplied]

21. However, the judge said it was not necessary for that heedlessness, indifference or disregard to relate to the probable consequences of serious injury or that there must be a complete absence of any attempt to avoid or minimise the serious risk of injury.

22. The judge identified that (a) the seriousness or otherwise of any injury which might arise, (b) the degree of likelihood of it arising and (c) the extent to which someone takes any care at all may all potentially be

\(^{19}\) Red Sea Tankers: note 18.

\(^{20}\) We confess that we have some difficulty with the reference to ‘reckless disregard’ in this context. Recklessness usually connotes an advertent state of mind in the actor in question, who decides to act/not to act with the subjective view that he does not care one way or the other what harm may result. There is thus some tension between the judge’s use of the term ‘recklessness’ — at least if it was meant in that conventional sense — and the remaining parts of this judgment, which say that such a state of mind does not need to be deliberate or conscious. We suggest that the judge’s use of the term ‘reckless’ in this context may be shorthand for the tribunal drawing the inference that the risk of harm was so obvious to a reasonably competent and skilled person could not help but foresee it as blatantly obvious, and so the decision to proceed would be so foolhardy as to justify a finding of recklessness which could be equiparated with gross negligence. That would be consistent, we suggest, with the similar approach taken in Great Scottish & Western v BRB: see note 25 below.

\(^{21}\) Red Sea Tankers, note 18, page 586, col 2.

\(^{22}\) Red Sea Tankers, note 18, page 587, col 2.
material when considering whether particular conduct should be regarded as so aberrant as to attract the epithet of ‘gross’ negligence. However, the judge was clear that it was not necessary for each of these factors to be present in order to find gross negligence. It may be that obvious steps had been completely omitted to guard against or cater for a risk that could have very serious consequences. In that case, even if the risk was not likely to materialise, there may still be gross negligence. Overall, he said:

‘All the circumstances must be weighed and balanced when considering whether acts or omissions causing damage resulted from negligence meriting the description of “gross”.’

23. In the result, the judge found that what occurred was not more than negligence and that the shortcoming in the defendant’s duties was not so serious that they should be categorised as gross.

‘The present case, although it reveals significant misjudgements and shortcoming in approach and in the observance of proper standards in relation to Ardent, does not in my view involve negligence of so grave a nature as to fall outside the intended sphere of immunity.’

24. Were it not for more recent case law (as to which see below), *The Ardent* would at best be of comparative interest because the contract between the parties was subject to the law of New York state (although the judge indicated that he would have come to the same conclusion had he been ruling on a point of English law), and thus the comments on gross negligence we have quoted above were therefore strictly *obiter dicta*. Nevertheless, the case attracted a reasonable amount of attention after the judgment was handed down and is now viewed as the starting point for a series of decisions in which the English courts developed a set of considerations as to when gross negligence may be taken to have occurred, and thus to allow a claimant to pierce a contractual exclusion or limitation clause.

25. A few years later, the Court of Appeal decided the case of *Great Scottish & Western Railway v British Railways Board*, which concerned two agreements between the parties. The first agreement permitted the Great Scottish & Western to store rolling stock, in particular the rolling stock that formed the well-known train *The Royal Scotsman*, in British Railways Board sheds. The second agreement allowed the British Railways Board to move the rolling stock. The first agreement contained an exclusion clause for damage, except damage caused by gross negligence. The second contained no such exclusion clause.

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25 *Great Scottish & Western Railway Co Ltd v British Railways Board*, unreported, Court of Appeal, 10th February 2000.
26. On the morning of 26th May 1992, The Royal Scotsman was due to be collected from the Millerhill Depot by the Board’s locomotive crew. The rake of the train (that is, the group of coaches) had not then been completed. The wooden dining car was in the plant shed for maintenance. The state car was on another line. Shunters were employed to move trains and carriages around in a depot, and were often (and as in this case) used to form a rake. When carriages are uncoupled, it is necessary to use scotches\(^\text{26}\) to prevent them from moving. The shunter being used to form the rake in this case was being operated by a Mr Reed and a Mr Tyhurst. Mr Reed was a fully trained and experienced shunter. Mr Tyhurst was an apprentice. Mr Reed uncoupled the state car, but Mr Tyhurst did not scotch it; he had taken the scotches back to the shed because he thought Mr Reed did not want them. Mr Reed, thinking that Mr Tyhurst had scotched the state car, left the carriage. As a result, the state car was left uncoupled. Regrettably, it was on an incline. Within a few moments the state car started to move down the hill towards the shed where the dining car was being stored and crashed into it, causing significant damage. Great Scottish, who owned the coaches, therefore sued British Rail, who had been storing the coaches (under the first agreement) and who had been permitted to move them about (under the second agreement).

27. Great Scottish succeeded at first instance. The British Railways Board appealed, relying on the exclusion clause in the first agreement which rendered them immune from liability for damage to coaches stored by them save in the case of gross negligence, which they said had not occurred. The Court of Appeal held that the shunting and securing of the train was negligent and fell under the second agreement (which contained no exclusion at all) and so the appeal failed. But the Court of Appeal also said that even if the loss had been covered by the first agreement, the British Railways Board would still have lost. It was standard practice to ensure that the carriages were secure before they were left so to leave them without checking that had occurred was so obvious a failing as to be grossly negligent. The exclusion clause would not have helped them; the exclusion to the immunity would have ‘bitten’ on the relevant loss.

28. In its relatively succinct decision, the Court of Appeal interpreted the meaning of gross negligence in this way:

‘In the context of [this clause], the words “gross negligence” take their colour from the contrast with “wilful neglect” [also referred to in the clause] and refer to an act or omission not done deliberately, but which in the circumstances would be regarded by those familiar with the circumstances as a serious error. The likely consequences of the error are clearly a significant factor. Thus, whether negligence is gross is a function of the nature of the

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\(^\text{26}\) A piece of equipment clamped to a rail used to ensure that stationary railway vehicles do not move.
error and the seriousness of the risk which results from it.’  
[emphasis supplied].

29. Curiously their Lordships chose not to refer to the decision in The Ardent at all, but the approach is, we suggest, broadly the same; whether there has been ‘gross negligence’ sufficient to allow a claimant to avoid an otherwise blanket exclusion clause is a pre-eminently factual question. The tribunal is obviously therefore likely to have uppermost in its mind the seriousness of the error, and whether the damage likely to be caused by it was so strikingly obvious that any competent person could and would have taken steps to avoid it by elementary, industry-standard steps as a matter of course.  

30. Just over a decade later, gross negligence was in the headlights again, this time in a banking case. The case was Camerata Property v Credit Suisse. It concerned a claim by Camerata, an investment company and vehicle for a wealthy Greek businessman. Camerata alleged that the defendant (Credit Suisse) had given advice that was negligent and in breach of contract in relation to a loan note issued by Lehman Brothers which, due to the collapse of Lehman Brothers, lost all value. The contract between the parties excluded liability, save for losses caused by gross negligence. Camerata thus alleged that the advice provided by Credit Suisse was grossly negligent, specifically by not highlighting the risk of counterparty default. The bank inevitably argued that its conduct was, at worst, merely negligent, and thus liability was excluded. Camerata made an ingenious response to this; it said that there was a wealth of authority which demonstrated that English law drew no distinction between negligence and gross negligence. The exclusion of liability clause excluded liability save in the case of ‘gross negligence’; thus since that was synonymous in law with negligence simpliciter, all Camerata has to show to nullify the exclusion clause was a simple failure to exercise reasonable care.  

31. Perhaps not surprisingly, the court rejected this ingenious argument in the following terms:

‘The relevant question, however, is not whether generally gross negligence is a familiar concept in English civil law, but the meaning of the expression in these paragraphs of the Terms and Conditions. I cannot accept that the parties intended it to connote mere negligence: in paragraph 1.2 and also in paragraph 1.3 both the expression “gross negligence” and the expression “negligence” were used, and some distinction between them was clearly intended … I therefore accept that, as a matter of interpretation,

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27 Great Scottish & Western Railway Co Ltd v British Railways Board, note 25, para [37].
28 Or, as the judge put it in The Ardent: note 18, ‘conduct which a reasonable person would perceive to entail a high degree of risk of injury to others coupled with heedlessness or indifference to or disregard of the consequences’.
29 Camerata Property Inc v Credit Suisse Securities (Europe) Ltd [2011] EWHC 479 (Comm).
paragraphs 1.1 and 1.2 provide that, in order to establish liability, Camerata have to show more than mere negligence on the part of [Credit Suisse].

32. Importantly, the court also accepted Mance J’s characterisation of gross negligence in *The Ardent*:

‘... as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk.’

33. However, the court found that there had not been gross negligence (or even negligence) on the part of the bank and even if there had, Camerata were unable to show that the bank’s failure caused loss.

34. This case was followed shortly thereafter by *Winnetka Trading Corporation v Julius Baer International*. The court in that case referred to the contract, which contained limitation and exclusion provisions, both of which referred to gross negligence and negligence. Gross negligence was not defined. Agreeing with the approach in *Camerata*, the court held that where the parties had referred to ‘negligence’ and ‘gross negligence’ in their contract (excluding liability for one and providing for unlimited liability for the other) they obviously cannot have intended as a matter of contractual construction for those terms to have the same meaning. Instead, their respective meanings must be interpreted by reference to the objective of the contract as a whole against the commercial backdrop in which context the contract was made. Underlining the support given in *Camerata* for the judgment of Mance J, the judge went on to decide that it was appropriate to apply the approach applied in that decision to this case.

35. *Marex Financial v Creative Finance* was a dispute relating to monies alleged to have been due to a broker (Marex) from two clients. Marex claimed commission; the two clients counterclaimed for alleged negligent trading by the broker. Marex defended the counterclaim by, inter alia, relying on the terms of the brokerage contracts which excluded liability save in the case of gross negligence. Analysing the meaning of gross negligence, the judge said this:

“Gross negligence” means something different than “negligence”. It connotes in my opinion a want of care that is more fundamental than a failure to exercise reasonable care. The difference between the two concepts is one of degree. In reaching this

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30 *Camerata Property v Credit Suisse Securities*, note 29, paras [161]–[162].
31 *Camerata Property v Credit Suisse Securities*, note 29, para [161].
33 *Marex Financial Ltd v Creative Finance Ltd [2013] EWHC 2155 (Comm).*
conclusion I adopt the persuasive reasoning of Mance J in Red Sea Tankers Ltd & Ors v Papachristidis & Ors [1997] 2 Lloyd’s Rep 547 and Andrew Smith J in Camerata Property Inc v Credit Suisse Securities (Europe) Ltd [2011] EWHC 479 (Comm).[^34] [emphasis supplied]

36. In the circumstances of the case it was held that Marex was not liable. On a proper reading of the contracts it was simply obliged to deal with the securities rationally, rather than owing any wider duty to act with reasonable care. Marex had acted rationally. It did not therefore have any liability, whether for gross negligence or at all. The judge did not therefore have to go any further than noting that ‘gross negligence’ ought, as a matter of contractual construction, to require a ‘fundamental failure’ to exercise reasonable care. What this means is not clear; but we suggest that it probably (a) re-emphasises the point that the enquiry is essentially fact and context-based, and (b) would mean in practice for a similar approach to that taken in The Ardent and Great Scottish & Western Railway v British Railways Board – ie what is required is conduct which a reasonable person would perceive to entail a high degree of risk of injury to others, coupled with heedlessness or indifference to or disregard of the consequences.^[35]

37. Finally, the most recent case to have considered gross negligence is Torre Asset Funding v Royal Bank of Scotland.^[36] This claim arose out of structured lending to a property company, Dunedin Property Industrial Fund (Holdings) Ltd (‘Dunedin’). There were various tiers of lenders. The ‘Junior Mezzanine’ level of lenders had been arranged by RBS as agent for Dunedin. Torre was one such junior lender.

38. Unfortunately, Dunedin encountered difficulties and it went into administrative receivership in September 2008. The lending was called in, and the security realised at a level well below the amount of the lending outstanding, with the result that lenders at several tiers, including the Junior Mezzanine level, did not recover their loans.

39. Torre were amongst those who did not recover their loans. They brought a claim against RBS alleging that RBS failed to inform them of material developments in relation to Dunedin’s performance, and RBS had made negligent misstatements to them, but for which non-disclosure and misstatements Torre would have avoided the relevant losses. However, membership of the Junior Mezzanine level had required Torre to become party to an agreement with RBS and Dunedin under which, inter alia, they agreed that RBS was entitled to an indemnity against any loss other than that caused by RBS’s own gross negligence.

[^34]: Marex Financial v Creative Finance, note 33, para [67].
[^35]: The Ardent: note 18, and Great Scottish & Western Railway Co Ltd v British Railways Board: note 25.
[^36]: Torre Asset Funding Ltd v Royal Bank of Scotland Plc [2013] EWHC 2670 (Ch).
40. The thrust of Torre’s factual complaint was that through discussions with Dunedin, RBS had become aware that the investment was underperforming and that it might eventually not have sufficient funds to continue, but RBS did not pass this information to Torre. Torre claimed that RBS, in its capacity as agent, should have informed it of the discussions because they constituted an event of default and that it would then have sold its interest in the loans before Dunedin collapsed in 2008.

41. The claims against RBS failed for many reasons, but on its interpretation of the exclusion clause, the court held that:

‘... even if the Claimants made out the basic elements of their case for the Event of Default claim and the Business Plan claim, they would have failed to establish liability on the part of RBS by reason of this provision.’

42. The court’s rationale was simple: although in retrospect RBS at times may not have considered whether the events that unfolded in this transaction gave rise to an obligation on their part to act (setting aside whether in fact such an obligation was triggered in this case), that failure did not equate to gross negligence on their part. As Sales J observed, adopting the approach used in *The Ardent*: ‘There was no “serious disregard of or indifference to an obvious risk” to others, including the Claimants, on the part of [RBS as agent].’

43. Had RBS received notice of a Default from Dunedin, a failure to pass that notice onto lenders might well ‘amount to gross negligence’. If so, this would have removed the protection afforded by the exclusion clauses. But that had not occurred, and so the exclusion clause applied.

**GROSS NEGLIGENCE: TOWARDS A WORKING DEFINITION**

44. Having analysed the relevant authorities addressing gross negligence, it is now appropriate to consider (1) the process one might follow in order to determine whether the action or inaction amounts to gross negligence and (2) having done that, consider whether it is possible to establish a definition that may be of use to parties who wish to refer to gross negligence in their agreements.

45. In our view, the following process is the right approach (or perhaps ‘a’ right approach; our suggestions are not intended to be prescriptive or exhaustive).

46. The starting point must surely be to determine the baseline against which the wrongdoer’s act must be assessed. This will be determined by reference to the duties placed upon him in the contract or the law more widely, either by reference to express duties set out in the contract,

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37 Torre Asset Funding, note 36, para [200].
38 Torre Asset Funding, note 36, para [201].
applicable standards, codes of practice, or (as in the British Railways Board case) an employee rulebook, or by reference to industry custom, or where there is no such custom, by reference to an anthropomorphic assessment of what should have been done by someone in the wrongdoer’s position given the information and knowledge that the individual knew, or ought to have known.

47. In other words, the first step is to decide ‘what the defendant should have done’ – or perhaps more accurately in the context of professionals; what was the range of non-negligent acts or omissions that were open to the party faced with the relevant circumstances at the time, or what was the range of responses that might be expected of the reasonable professional in the alleged wrongdoer’s position.

48. We suggest this is the right approach even where the standard to be expected of the defendant otherwise relying on the exclusion is a lower or different standard than that of reasonable care and skill (as was the case in Marex where the broker was merely under a duty to act rationally). It is difficult to establish whether an act is ‘grossly negligent’ without first establishing, even if only as a matter of theory, whether the limits of negligence simpliciter do or would lie in a given case, even if in that case there was no relevant duty to act with reasonable care and skill. After all, as the authorities point out, the term is not one of art but must have been intended to have some legal meaning other than negligence. Defining grossly negligent conduct thus necessarily involves deciding what ‘ordinarily negligent’ conduct would be, we suggest, even if there is no relevant duty of care. 39

49. The law of negligence is complex and a detailed discussion of it is obviously outside the scope of this paper, but it may be briefly characterised as an obligation placed on a person to act with reasonable skill and care so as to ensure that another person or entity to whom that person owes a duty does not suffer injury, harm or loss. The central pillar is reasonableness. In other words, is what the wrongdoer did or did not do unreasonable in all the circumstances:

‘The person concerned is sometimes described as “the man in the street”, or “the man in the Clapham omnibus” ... Such a man taking a ticket to see a cricket match at Lord’s would know quite well that he was not going to be encased in a steel frame which would protect him from the one in a million chance of a cricket ball dropping on his head.’ 41


41 Hall v Brooklands Auto-Racing Club [1933] 1 KB 205, para [224] (Greer L).
50. Where in the eyes of the law an individual is carrying out a professional trade, the standard that the professional will be judged by that of an ordinary skilled person exercising and professing to have that particular professional skill. The test may become more stringent still if that professional asserts that he will bring a higher standard than those in his profession, such as an expert architect. Thus, the threshold for professionals will always be more exacting than the threshold for a generalist.

51. Assuming that negligence simpliciter has been made out – ie that it has been shown that the relevant conduct lacked reasonable care and caused loss – the next stage is to consider whether the degree of negligence observed deserves the epithet ‘gross’. We suggest this will depend first of all on whether and if so how gross negligence is defined in the contract. If it is defined, then the assessment must always be by reference to that definition, not to some abstract notion of where the line is to be drawn, nor by reference to authority.

52. However, where the term is not defined (which seems to be more usual), then we suggest the authorities identify the following seven factors as relevant to determining whether ‘gross’ negligence has occurred:

(i) Was the nature of the error serious, involving a high degree of risk?

(ii) Was the conduct undertaken with an appreciation of the risks, but with a blatant disregard of or indifference to an obvious risk?

(iii) That disregard or indifference need not be conscious, or deliberate; it is sufficient that the reasonably competent professional in the defendant’s position would have considered the action or inaction to amount to a blatant disregard of or indifference to the relevant risk. Conscious disregard/recklessness will however be a likely aggravating factor, and more likely to lead to a finding of gross negligence.

(iv) Were the potential consequences of the action or inaction serious? The more serious the consequences, the more likely the negligence will be gross.

(v) Had the same or similar consequences arisen out of the same or similar action or inaction before? In other words, was it a repeat error?

(vi) How likely was it that the consequence would occur? Again, the more objectively likely it was to occur, the more likely a finding of gross negligence.

42 Bolam v Friern Hospital Management Committee [1957] 1 WLR 1095, [1957] 2 All ER 118.

43 Some of these stages may well apply where the contract contains a definition – it will depend on the definition. Furthermore, this list of factors is not intended to be definitive.
(vii) What precautions were taken (if any) to prevent the consequence occurring? The more obvious and modest the steps, and the greater and more likely the risk, the more likely it is that the conduct in question will veer towards gross negligence.

53. We suggest that the answers to factors (ii) and (iii) are likely to be the most important in many cases. If the risk of harm was so obvious and serious to a reasonable professional such that the decision to act or not act in a certain way verges on the inexplicable, then a finding of gross negligence may well follow. But each of those seven factors interrelates to all the others and none has dominance; everything will depend on the facts. Thus, we suggest, just as with negligence simpliciter, gross negligence may well arise where there is an obvious but small risk of very serious harm which only a small step would have guarded against. In such circumstances a very serious consequence and the modest care required to avoid it will probably weigh more heavily in the balance than the fact that the risk was small.

54. Although not strictly part of the legal test, it is probably important from a practical point of view to observe that a successful claim will be able to identify clearly and cogently the reasons which separate a merely negligent action from the gross negligent action relied on. As with negligence, the test of whether gross negligence has occurred is by reference to the reasonable (professional) man, taking into account all the circumstances, the background facts and the knowledge that the parties had available to them at the time.

55. What then of a contractual definition? First of all, consider whether it is necessary to refer to gross negligence at all. Most standard form construction contracts make no mention of gross negligence. Where negligence is raised, the phrase is often ‘any negligence’. This no doubt is intended to reflect the court’s view that there is either negligence or there is not and that gross negligence is not a recognised concept under English law.

56. However, if it proves necessary to refer to gross negligence, we suggest it will often be desirable to define it; it is obviously not a recipe for contractual certainty to refuse to define something because it is too hard to do so. Whilst we postulated a test above, that alone may not satisfy sophisticated entities because what they usually seek is as much certainty of their rights and obligations as possible. Where the contract does not make express provision as to the precise meaning of gross negligence, there will be manifest uncertainty as to exactly what is required before it can be said that there has, or has not been an act of

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44 Although draftsmen’s uncharacteristic reticence in defining gross negligence to date probably owes something to the fact that the term has not undergone any significant modern consideration. As we have noted above, the concept seems to have fallen out of favour in the early 19th century at the latest, and detailed judicial expositions of what the term meant necessarily fell away with that.
gross negligence. That uncertainty will inevitably lead to a difference of opinion between the contracting parties, which may formalise into a dispute. Clearly this is not in either party’s interests.

57. On the assumption that a definition is to be preferred over no definition, the following considerations may well arise. First, in what circumstances will the term be deployed? Usually, it will be the case that gross negligence is the exception to the exclusion. In that case, the first question is, can gross negligence be excluded? It was once suggested that, if the breach by one party evinces ‘a deliberate disregard of his bounden obligations’, it will not be covered by an exemption clause anyway. But there is no rule of law to prevent the exclusion or restriction of liability arising from even a deliberate act or omission by one party or his servants if the contract so provides. In *Suisse Atlantique Societe d’Armament v NV Rotterdamsche Kolen Centrale*, the court held:

‘some deliberate breaches … may be, on construction, within an exception clause (for example, a deliberate delay for one day in loading). This is not to say that “deliberateness” may not be a relevant factor: depending on what the party in breach “deliberately” intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited.’

58. So, how do we define it? Quite what the definition should be will depend on the particular circumstances of the contract and so there is unlikely to be a ‘one size fits all’ definition. Because the definition is contractual, there is no right or wrong answer because in English law at least, the autonomy afforded to the parties is almost unbridled. However, drawing on the authorities and the analysis above, we suggest a copacetic definition might read as follows:

“Gross negligence” means an error which is a serious error in all the circumstances, and in particular where an action or inaction is undertaken with an objective appreciation of the high degree of risk of action or inaction as the case may be, and which action or inaction the reasonably competent professional in the [contractor’s] position would consider to be in blatant disregard of

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46 *Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442.
48 The position may be different in other jurisdictions, not only because the degree of autonomy may be more or less restrained, but also because in many jurisdictions it is impossible to exclude gross negligence. Thus, where the parties insert a definition into their contract, that definition must be no more restrictive that the definition (such as it exists) upon which the common law or statutory constraint rests, or it will risk being amended by a tribunal (where that is possible), or struck out entirely.
or indifference to that risk, and where the likelihood of the harm occurring is material and/or the consequences of the error are significant.’

EXCLUSION FROM IMMUNITY: WILFUL MISCONDUCT OR DEFAULT

Development of the case law

59. What then of exclusions of immunity where the claimant seeks to prove the relevant loss or damage was caused by ‘wilful misconduct’ or ‘wilful default’?

60. Authority demonstrating how to interpret such a term is, if anything, even thinner on the ground than in the case of ‘gross negligence.’ Moreover, it is inherently harder to try to define; at least an attempt to define ‘gross negligence’ stands on the solid bedrock of contradistinction to negligence *simpliciter*, which is a legal term of art. ‘Wilful misconduct’ has no such obvious anchorage. Plainly, ‘wilful’ contemplates some kind of *deliberate* act, no matter how foolish the actor.49 But beyond that there are no obvious answers; ‘misconduct’ and ‘default’ are terms open to multiple interpretations.

61. Nonetheless some guidance can be obtained from the cases. A convenient starting point is *Lewis v Great Western Railway*.50 In this case the GWR offered a reduced price for carriage if the sender agreed that he would relieve the GWR, ‘of all liability of loss, damage or delay; except on proof that such loss, damage or delay arose from wilful misconduct on the part of [GWR’s] servants.’ 51 Lewis sent a consignment of Cheshire cheese from London to Shrewsbury at the reduced rate (and thus of course at increased risk). Inappropriately packed by the GWR and exposed to the weather, the cheeses were crushed and broken to pieces. Cheshire railwaymen knew that Cheshire cheese was unusual in that it could only safely be packed on the flat side and in a single layer; but London railwaymen did not do this. But because of the terms on which he had consigned the cheese, Lewis had to argue that the loss arose from ‘wilful misconduct’ by GWR’s London personnel if he was to recover.

62. Lewis lost. Brett LJ held that the inappropriate packing of the cheese was not wilful misconduct; the London railwaymen had not known what

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49 See eg *Re Young & Harston’s Contract* (1885) 31 Ch D 168 (CA) Bowen LJ, paras 174–175, where he said that the word ‘wilful’, ‘generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent’.

50 *Lewis v Great Western Railway Co* (1877) 3 QBD 195 (CA).

51 *Lewis v Great Western Railway Co*, note 50, para [196].
they were doing was wrong. Therefore, there was not ‘wilful misconduct’:

‘... where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or omit; and it involves the knowledge of the person that the thing which he is doing is wrong … also … if it is brought to his notice that what he is doing, or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and … as he does it intentionally, he is guilty of wilful misconduct. … wilful misconduct … import[s] a knowledge of the wrong on the part of the person who is supposed to be guilty of the act or omission.’

63. Cotton LJ agreed:

‘... wilful misconduct is something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross, or howsoever denominated. There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning or without care, regardless whether it will or will not cause injury to the goods carried or other subject-matter of the transaction. It was asked by counsel in argument would it not be wilful misconduct on the part of the servants of the Great Western Railway Company to put a horse into an open truck? Certainly it would, because every one must be aware that putting a horse into an open truck, out of which he could jump, would, in all probability, lead to the consequence that as soon as the train started the horse would try to jump out and be seriously injured. We have now to deal with the servants of the railway company loading cheese, but it is not every one who knows that cheese of this description will be injured if packed as these cheeses were packed. Nobody could say that all cheese would be damaged by the mode of packing adopted in this case.’

64. Four things emerge from this case:

(i) First, an emphasis on the fact that what is required is ‘wilful misconduct’, not simply ‘wilful conduct’. Thus for the definition to apply, the wrongdoer has to deliberately engage in what he

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52 Lewis v Great Western Railway Co, note 50, paras [210]–[211].
53 Lewis v Great Western Railway Co, note 50, para [213].
knows to be the culpable act or omission; ie there must be an advertent decision to proceed in a wrongful way.

(ii) Second, the alleged wrongdoer does not however need to foresee that his misconduct will definitely cause the harm; it is sufficient that he is reckless as to whether harm will occur (i.e. he foresees the loss as one of a range of possible outcomes and carries on anyway). This is not surprising; generally, a decision to proceed not caring one way or the other is treated as conduct on a par with deliberate wrongdoing rather being a form of carelessness.

(iii) Third, the court may infer wilful misconduct if it concludes the defendant’s conduct is so obviously foolish that it justifies a finding of fact that he must have foreseen the risk of harm from it (eg Cotton LJ’s example of the horse that would obviously bolt if left in an open carriage). In this sense, although Cotton LJ said that gross negligence and wilful misconduct were ‘entirely different’, it seems they may, on appropriate facts, shade into one another; ie there can be negligence so gross that it leads to a finding of wilful misconduct because it justifies a finding of recklessness.

(iv) Lastly, failure to heed a warning against a particular course may turn negligence into wilful misconduct. This may be simply an example of recklessness. A man may behave in a thoughtless way (and that might be mere negligence); but if he receives an accurate and timely warning against that thoughtless conduct, he may then sensibly be taken (at least in most cases) to thereafter be proceeding deliberately, ie with an advertent state of mind and having discounted the risks warned of, which may well take his conduct from negligence to wilful misconduct/wilful default.

65. A similar set of (tentative) conclusions can, we suggest, be drawn from In Re: City Equitable Fire Insurance, where the clause under consideration referred to ‘wilful default’. The City Equitable Fire Insurance Company was wound up in 1922. Some £1.2m in funds was found to be missing. The managing director, Bevan, was quickly

54 See eg Derry v Peek (1889) 14 App Cas 337 (HL) 1, para [73], ‘I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states.’

55 Which may be what Lord Denman CJ meant when he said that, ‘Gross negligence may be evidence of mala fides, but is not the same thing.’ Goodman v Harvey 111 ER 1011 (KB), (1836) 4 A & E 870, para [876]. It is worth pointing out that this passage from an otherwise rather elderly authority was referred to without disapproval in Armitage v Nurse: note 14.

56 In Re: City Equitable Fire Insurance Company Ltd [1925] Ch 407 (CA).

57 About £6.71 billion in today’s money.
identified as having perpetrated a fraud leading to the loss, and he was convicted and sentenced. So the Official Receiver (‘OR’) brought proceedings against the auditors and the other directors under section 215 of the Companies (Consolidation) Act 1908 in order to try and retrieve the money that had been lost. 58 There was no suggestion that any of them had acted with Bevan or were otherwise dishonest. The Articles of Association gave them personal immunity for any loss to the company, ‘unless the same should happen by or through their own wilful neglect or default’. 59

66. Naturally, both the directors and the auditors relied on this clause in the Articles. Romer J was therefore called on to decide what would amount to ‘wilful neglect or default.’ He held:

‘... the difficulty is not so much in ascertaining the meaning of the adjective “wilful,” as in ascertaining precisely what is the noun to which the adjective is to be applied. An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty.’ 60

[emphasis supplied]

67. Romer J held there was no wilful default by either the directors or the auditors; they had been careless, but that (by its very nature) was not deliberate. So he dismissed the OR’s claims. The OR was not satisfied with that, at least insofar as it applied to the auditors, who Romer J had found had taken an advertent decision not to inspect securities, but just to take the brokers’ word that they were in place, which Romer J held was negligence rather than a deliberate default. 61

68. The OR therefore appealed to the Court of Appeal on the basis that the deliberate decision not to inspect the securities was a ‘wilful neglect or default’. The Court of Appeal disagreed, Pollock MR holding:

‘I then come to consider whether or not within that meaning of “wilful”, the conduct of Mr Lepine was wilful so as to render him responsible, or is he relieved by the terms of article 150? The auditor was confronted with a lot of deceit. Year by year he fulfils his duty in a manner which has certainly received the praise of those who have given evidence about it, and of the learned judge

58 The modern equivalent of which would probably be the Insolvency Act 1986, s212 (fraudulent trading).
59 In Re: City Equitable Fire Insurance, note 56, para [407].
60 In Re: City Equitable Fire Insurance, note 56, para [434].
61 In Re: City Equitable Fire Insurance, note 56, para [499].
who heard the whole of the facts. On a number of occasions he was successful in putting what was wrong, or attempting to put what was wrong, right, and therefore so far as his will and volition went, he was attempting to do his duty. In those circumstances, when you find a default which has been made, and an error of judgment in accepting as trustworthy what is now proved to be untrustworthy, can you say, within the definition, that he has been guilty of wilful neglect or default? For my part, for the reasons I have indicated, and upon the evidence to which I have called attention, it seems to me impossible so to characterise Mr Lepine’s conduct. *He did not, to my mind, shut his eyes to conduct which he thought needed criticism; what he did was that, in common with a great number of other persons, he thought the persons with whom he was dealing were trustworthy*, and, as pointed out again and again in the cases cited to us, in such circumstances he was entitled to accept the statements which were made to him by those whom he was entitled to trust when he had no reason or call for suspicion. In my opinion the learned judge has quite rightly and accurately applied the law to the facts when he says: “If in certain matters he fell short of his real duty, it was because in all good faith, he held a mistaken belief as to what that duty was.”62 [emphasis supplied]

69. This decision is consistent with *Lewis v Great Western Railway*:

   (i) What must be deliberate is not the conduct, but the misconduct.

   (ii) Recklessness is a form of deliberate conduct.

   (iii) A deliberate failure by the auditors to enquire because they were afraid of what they might find – ie shutting one’s eyes to the obvious – would have amounted to wilful misconduct, but failure to perceive matters did not. In other words, it appears obtaining ‘Nelsonian knowledge’ and failing to act on it would be ‘wilful default’ or ‘wilful misconduct’, but that had not happened in this case.

70. Modern cases take a similar line. In *Circle Freight v Medeast Gulf Exports* the claimant’s driver left a van unattended on Fleet Street.64 The defendants’ dresses, of which the claimant was bailee, were stolen from the van. The defendant claimed for the value of the lost goods. The claimant relied on an exclusion clause in its standard terms, specifically clause 18, which excluded liability for negligence, ‘unless such loss or damage is due to the wilful neglect or default of the Company or its own servants’. The claimant admitted that the driver

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62 *In Re: City Equitable Fire Insurance*, note 56, paras [517]–[518].
63 For ‘Nelsonian’ or ‘constructive’ knowledge see generally *The Star Sea* [2001] UKHL 1, [2003] 1 AC 469.
64 *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd’s Rep 427 (CA).
was negligent, but no more than that. The trial judge disagreed, holding that the driver:

‘... must have had in mind the risk of theft and that, in fact, he took a deliberate choice to leave the van unattended with the key in the ignition, possibly with a view to making a quicker getaway when he got back to the van. In so doing he was disobeying his instructions from his employers and he knew that he was disobeying his instructions. It seems to me that he took a deliberate risk that he could get out of the van, make the delivery and get back again before there was any trouble. Trouble, in this context, meant not only trouble with the police, but risk of theft, either of the van or from the van. In my judgment, Mr Huggins was guilty of wilful neglect or default.’65 [emphasis supplied]

71. The Court of Appeal upheld the trial judge; the driver’s conduct was squarely within Romer J’s approach in In Re: City Equitable Fire Insurance.66 He had known that he was committing, and intended to commit a breach of his duty, not caring one way or another as to the risks of that.

72. A similar approach was applied in TNT Global SpA v Denfleet International, although with a different result.67 It was another case about carriage of goods. The contract of carriage was based on CMR terms,68 which limited the carrier’s liability save in the case of ‘wilful misconduct’. The driver fell asleep at the wheel and crashed. The goods were destroyed. The consignor sued, and the carrier relied on the CMR terms. The trial judge held that falling asleep at the wheel was ‘wilful misconduct’; the driver must have appreciated that he was sleepy and deliberately chose not to pull over. The Court of Appeal disagreed. It agreed with the trial judge that the driver must have felt sleepy and decided to carry on regardless; but it thought the driver was merely grossly negligent to believe he could ‘beat the sleep’. Gross negligence was not enough to support a finding of wilful misconduct. The court said it would have been different if the driver had decided to carry on after it had been demonstrated to him that he could not ‘beat the sleep’, such as hitting the side of the road. Deciding to carry on in the face of that evidence would have been sufficient to support a finding of wilful misconduct. But there was no evidence of that so the limitation clause applied.

73. TNT v Denfleet demonstrates two further things about wilful misconduct/wilful default:

66 In Re: City Equitable Fire Insurance: note 56.
68 CMR is the abbreviation for the Convention Relative au Contrat de Transport International de Marchandises par Route, and is a standard form of agreement which is used to govern the rights and obligations of parties involved in road transport.
First, there does not seem to be any difference in approach to clauses which exclude from the immunity loss based on ‘wilful neglect or default’ and ‘wilful misconduct’. Save in very rare circumstances, it seems to us this ought to be right. Although ‘default’ might be thought to be language more closely related to a breach of a specific term, whereas ‘misconduct’ has a more general flavour to it, we suggest it is difficult to think of behaviour which would amount to ‘misconduct’ but which would not involve at least some type of ‘neglect or default’ and vice versa. Even if the misconduct is wholly voluntary, it still involves in this context a deliberate and conscious decision to ignore (ie to neglect, or to default upon) rules which the actor in question knows he ought to follow. To put the point another way, save on a very clear and unusually worded clause, we think a tribunal would be unlikely to find that there was ‘wilful misconduct’ by a contractor, but that he should nevertheless retain his exclusion/limitation on his liability because that ‘misconduct’ was not also a ‘default’ as specifically required by the clause, or vice versa.

Second, it makes it clear that whilst gross negligence may be evidence of recklessness amounting to wilful misconduct, equally it may not be. On the particular facts of this case it was not.

Authority on what wilful misconduct/wilful default might mean in the context of a construction contract is more difficult to come by; as may be clear from the earlier discussion, it seems that where construction contracts include an exclusion from immunity, it tends to be for gross negligence. It is reasonably obvious why that might be. Construction contracts generally seek ultimately to secure outcomes rather than regulate ongoing relationships, and so the risk of ‘wilful misconduct’ has less of a likely role.

Nevertheless, since an exclusion from immunity for ‘wilful misconduct/default’ is now commercially commonplace, particularly in contracts which regulate ongoing relations, it is worth drawing the threads of the above together and seeing whether it is possible to set out

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69 Although as we have already noted, the term ‘wilful default’ is now used in the NEC4 family of building contracts. A ‘wilful neglect’ clause did however come under consideration in a construction context in Bovis International v Circle Limited Partnership (1995) 49 Con LR 12 (CA), but the clause was badly drafted, each member of the Court of Appeal gave different reasons (and Ward LJ dissented) and the point seems to have been relatively academic, at least at the stage when the CA considered it, the appeal relating only to preliminary issues. It is however instructive that the contract under consideration, although relating to construction works, was essentially a construction management contract – ie an agreement which at least in some respects was concerned with regulating a relationship as much as securing works.

70 Such as the construction management agreement in Bovis International v Circle Limited Partnership: note 69.
some conclusions as to how, as a matter of first principles, such wording ought to be interpreted.

76. We therefore suggest as follows:

77. Logically, the first steps when construing such an exclusion to the immunity and whether it applies is to decide the following:

   (i) What was the conduct ordinarily to be expected of the alleged wrongdoer in the relevant circumstances? One cannot decide if there has been misconduct until the relevant ‘benchmark’ of the relevant (ie proper) conduct has been established.71

   (ii) When deciding what the ‘benchmark’ of proper conduct is, if the relevant act or omission is one that is subject to an obligation to act with reasonable care and skill, then the question is easily resolved. If it is not, it may well be that the standard to be expected of the wrongdoer is that degree of care and skill which it would exercise if it was acting for its own account.72

   (iii) Against that test, was there misconduct?

   (iv) If so, did the relevant person(s) engage in that misconduct wilfully – that is did they: (a) know the act done, or that which he is omitting to do, was a wrong thing to do or omit?73 or (b) conduct themselves recklessly – that is, act indifferently, not caring one way or the other whether what they were doing was acceptable conduct and not caring what the results of that carelessness may be?74

   (v) When addressing those questions, it is important to remember that what must be wilful is the misconduct, not the conduct. That is to

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72 See eg JP Morgan v Springwell Navigation [2008] EWHC 1793 (Comm), para [194] (although note this arose from an agreement between counsel). It is also debatable whether, at least in most situations, a wrongdoer could argue credibly that it ought to be that he would assumed to be willing to conduct matters in its own interest with anything less than reasonable care and skill.

73 Lewis v Great Western Railway Co: note 50.

74 See Forder v Great Western Railway Co [1905] 2 KB 532, para [536], adopted by Gloster J in JP Morgan v Springwell Navigation, note 72, para [206]. NB: it appears that recklessness may require both indifference as to whether the conduct is wrongful and indifference as to the likely results of that wrongful conduct; see also PK Airfinance SARL v Alpstream AG [2015] EWCA Civ 1318, para [270] and National Semiconductors (UK) Ltd v UPS Ltd [1996] 2 Lloyd’s Rep 212, para [214]. Where there is actual intention to do the wrongful act there is no such additional requirement – see the footnote immediately above. This is not surprising. A person who deliberately engages in what he knows to be misconduct will obviously be deemed liable for (ie to have foreseen) the results of his actions. Query however whether this additional requirement is likely to make a great deal of difference in practice. Save on very unusual facts, it seems unlikely that a tribunal would find a wrongdoer engaged in reckless misconduct without also finding that he was reckless as to the possible consequences of that misconduct, we submit; indeed, indifference to consequences is probably one of the key indicators of misconduct in the first place, at least in many situations.
say, there must be a deliberate or at least reckless intention to engage in the wrongdoing itself.\(^7\)

(vi) A failure to heed a warning or advice may turn merely careless conduct into wilful misconduct.\(^6\)

78. It goes without saying that all of our suggested points as to how to construe a ‘wilful misconduct’ or ‘wilful default’ clause are general ones; the proper meaning of any particular contract is of course to be decided by what the terms ‘wilful misconduct’ or ‘wilful default’ and so on would mean to the ordinary commercial man in possession of the background facts and knowledge that the parties had available to them at the time.\(^7\)

79. Since these questions are ultimately ones of contractual construction, we also think there is useful guidance on the proper approach to such clauses from the Irish Supreme Court in *ICDL GCC Foundation v European Computer Driving Licence Foundation.*\(^8\) Again, this concerned a contract limiting the defendant’s liability for any breach of contract, save insofar as the claim was caused by a wilful act or gross negligence. Fennelly J giving the leading speech said of such a clause:

‘It is of course the case that when viewed in isolation, the words “wilful act” can be understood as meaning no more than intentional, voluntary, or willed and not automatic, inadvertent or accidental. But those words have to be viewed in the context in which they are used. It also carries a connotation of self-will, perversity, and being headstrong and even obstinate … what must be intended, or willed or be the subject of obstinacy, is a breach of contract (or other wrong giving rise to a cause of action arising out of the contract). This is not only consistent with what I consider to be the natural meaning of the words, but also the structure of the clause, and with the limitation in clause 25.1 being disapplied only in exceptional circumstances. The line which is drawn is a logical one and furthermore consistent with the distinction being made in the context of gross negligence. In this way there is a continuum of the type of conduct which will lead to the limitation clause not being applied. This conduct runs from intentional breach, though headstrong conduct, recklessness and gross negligence. In each

75 See *Lewis v Great Western Railway Co*: note 50. *Lewis* was applied in a modern context in *Barnsley v Noble* [2016] EWCA Civ 799, para [39].

76 *Lewis v Great Western Railway Co*: note 50 and *TNT Global SpA v Denfleet*: note 67.

77 See eg Bowen LJ in *Re Young & Harston’s Contract*, note 49, para [174], ‘the term “wilful default” – though one in common use in such contracts – is not a term of art, and to pursue authorities with a view to define it for all time what is its meaning in a contract like this one appears to me to press citation far beyond the point at which it ceases to be useful’.

78 *ICDL GCC Foundation FZ-LLC v European Computer Driving Licence Foundation Ltd* [2012] IESC 55 (Supreme Court of Ireland).
case the conduct must relate to the possibility of a breach of contract.\textsuperscript{79}

80. The more extended discussion of what that particular clause meant was necessary because it referred to the benefit of the limitation clause being lost where the cause of action derived from a ‘wilful act’ by the wrongdoer. It was therefore necessary for the Irish Supreme Court to discuss what kinds of wilful acts the exception was intended to refer to (since almost all acts in performance of a contract are, at some level, ‘wilful’ in the sense of being the product of free agency). Leaving that on one side, the Irish Supreme Court’s interpretation is surely indicative of the correct approach to be adopted more generally. Whether the exception is for ‘wilful default’, ‘wilful neglect’ or even simply ‘wilful acts’ what all of these clauses are trying to say, at a very basic level, is that a party may bargain for a limitation or exclusion of liability for things which, whilst unfortunate and whilst potentially loss-making, are always foreseeable as things that might happen during performance (eg negligent building design; negligent project management). An exclusion of liability for a set of risks reflects a simple recognition that a building project whilst underway is ultimately a complex system which cannot help but generate ‘friction’.\textsuperscript{80} An exclusion or limitation clause thus pre-allocates the risk of damage from that friction – ie loss which is agreed to be legally blameworthy. The exclusion of wilful misconduct/wilful default on the other hand is intended to make it clear that deliberate (‘wilful’) and arguably morally culpable acts (‘misconduct’) are of a different order, and outside the scope of any such agreed protection.

81. Who could argue against that? An express exception to any agreed immunity from limitation of liability for morally blameworthy deliberate conduct is entirely in line with the expectation of reasonable commercial people.\textsuperscript{81} It is worth noting that other jurisdictions take a very similar approach to this issue.

\textsuperscript{79} ICDL GCC Foundation v European Computer Driving Licence Foundation, note 78, para [24].

\textsuperscript{80} ‘Everything … is simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction … Countless minor incidents – the kind you can never really foresee – combine to lower the general level of performance, so that one always falls short of the intended goal … everything … is basically very simple and therefore seems easy to manage. But we should bear in mind that none of its components is of one piece: each part is composed of individuals … the least important of whom may chance to delay things or somehow make them go wrong … This tremendous friction, which cannot, as in mechanics, be reduced to a few points, is everywhere in contact with chance, and brings about effects that cannot be measured, just because they are largely due to chance’ – Carl von Clausewitz, On War (1832) 119-132. Or, in less elegant but more modern terms: ‘Stuff just happens.’

\textsuperscript{81} Indeed, in other instances the court has shown itself willing to hold that deliberate wrongdoing is outside the scope of a clause even without such wording; an exclusion of liability for misrepresentation will not be held to extend to fraudulent misrepresentation, for example (\textit{S Pearson v Dublin Corporation} [1907] AC 351 (HL), para [357]).
approach as to how to define wilful misconduct to the one we have described above.  

82. Those points bring us neatly back to the point that we made at the outset of this paper. In a very real sense the term ‘wilful misconduct’ is at least as much a negative definition as a positive one. Where it is used to define the exception to the immunity otherwise agreed in an exclusion/limitation clause, it is attempting to set the outer limits on that clause. Thus, a working definition of what amounts to ‘wilful misconduct’ is not only important to tell you when the exclusion/limitation clause does not apply, it also tells you by a process of reductive reasoning where the clause does apply, where the same is otherwise not clear.  

83. So, how do we define ‘wilful misconduct’ or ‘wilful default’? As with gross negligence, we suggest that a workable contractual definition will depend on the particular contract and there is unlikely to be a ‘one size fits all’ definition. However, drawing on the authorities and the analysis above, we suggest one workable, basic definition might read as follows:  

“Wilful misconduct” means (i) a voluntary or deliberate act or omission outside, or contrary to the conduct ordinarily to be expected of the [contractor] in all the relevant circumstances, (ii) which conduct the [contractor] undertakes (a) knowing it is outside, or contrary to the conduct to be expected of him; or (b) where the contractor is reckless as to whether he is acting or not acting outside or contrary to the conduct to be expected of him.’  

PARTICULAR PROBLEMS AND SCENARIOS IN PRACTICE  

84. Neither gross negligence nor wilful misconduct are causes of action. In both cases the cause of action is contractual and will be based on a breach of another term (express or implied). It is relevant therefore to consider particular problems which may arise in practice by reference to particular components of a typical claim.

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82 Eg in McDuffie v Watkins Glen International 833 F Supp 197 (WDNY Sept 3, 1993) a New York court took the view that a finding of wilful misconduct required showing an, 'intentional act of unreasonable character performed in disregard of a known or obvious risk so great as to make it highly probable that harm would result,' and in Illinois it was said that, 'Illinois law recognises that wilful and wanton conduct may consist of either intentional behaviour or conduct that is unintentional but reckless' (Ziurko v Soo Line R Co 641 NE 2d 402 (Ill 1994)).

83 Where a clause excludes or limits liability for negligence but not gross negligence or wilful default this will not be very important; any lawyer can tell you what negligence means. But where the scope of the exclusion/limitation is otherwise not clear we suggest that an essentially negative definition – ie that the clause covers everything short of wilful default/gross negligence – this will be a useful aid to contractual construction, provided one can properly define those two concepts.
85. At the simplest level, a cause of action will arise as a result of a clause which requires a party not to commit gross negligence such that, where gross negligence is committed, that party is in breach of contract. Alternatively (and more often, as the cases we have discussed above demonstrate), it will arise in the context of an exclusion or limitation which is released, or a right which is triggered (such as a right to termination or a right to claim loss) upon the occurrence of gross negligence or wilful default. The cases which we have discussed above invariably fall into this latter category.

**Causation**

86. We suggest that it is very likely that the claimant will have to show a causative link between the loss suffered and the gross negligence/wilful misconduct complained of. It is unlikely that save on the most unusually worded clauses that gross negligence/wilful misconduct which is merely incidental to the loss will allow recovery. This is consistent with the purpose of these ‘exclusions to the immunity’ as we have discussed above; the exclusion to the immunity will only ‘bite’ where there is loss suffered which falls outside the agreed distribution of risk. Causation will thus be an essential element of the cause of action.

87. However, it seems to us that an over-emphasis on causation might lead to strange results, particularly in the case of gross negligence where, *ex hypothesi*, there might well be a concurrent breach of a concurrent express or implied term to take reasonable care and skill (ie ‘contractual negligence’). It would run counter to the commercial purpose of the ‘exclusion to the immunity’ if, for example, the wrongdoer could argue that the exclusion was not engaged because, although there was gross negligence, the loss would have occurred even if he had been merely careless, and thus the exclusion does not ‘bite’. For this reason, in particular, we suggest that it is sufficient that gross negligence or wilful default is ‘a’ cause, rather than ‘the’ cause of the loss, or that it only needs to make a material contribution to the loss or its severity.

**Multiple breaches**

88. We suggest that the most difficult claims will be those where numerous acts have occurred which each in themselves do not amount to gross negligence, but together meet the required threshold; a ‘death by a thousand cuts’ argument. In theory, the claimant may be able to claim as a result of a series of the individual acts; whether it can do so (and satisfy the threshold of ‘gross negligence’) may, we suggest, depend on whether it can draw the relevant duty sufficiently widely to bring into play *all* of the relevant complaints, *and* show that individually or collectively the failure to remedy those complaints was ‘gross’ negligence. However, this is likely to be a difficult claim to succeed on and will only be available where it is impractical or impossible to prove the specific causal link and where there is no material causative factor
for which the defendant is not liable. Furthermore, such an approach may well be seen as an indication of a weak or exaggerated claim.

89. An alternative way of putting such a claim might, on appropriate facts, be to say that gross negligence arose at a particular point when the defendant failed to act in the face of multiple linked events. Take, for example, a situation where a supplier of motor engines fails to react to a recurrent problem in the goods it supplies; to fail to investigate and remedy one fault might not be negligence at all; to fail to investigate after the same problem was reported on multiple occasions, after which a competent professional would conclude that there was a real and serious risk of a design or manufacturing fault might, on the other hand, amount to gross negligence. But in truth, we suggest, such a claim is not based on multiple breaches at all; a claimant arguing for gross negligence to invoke an exclusion to the immunity in these circumstances is, we suggest, more accurately portrayed as saying that the previous failures mean that a ‘tipping point’ was reached, only after which the manufacturer was grossly negligent in not taking any steps. Such an argument is perfectly permissible – although of course it does mean that it is only damage sustained after that ‘tipping point’ that the exclusion to the immunity will operate, and thus only after that point will unlimited damages be recoverable.84

Delay

90. The allegation of gross negligence and wilful misconduct in the context of delays to projects is an interesting problem. Let us say that the contractor was responsible for failing to take the necessary steps in advance of the commencement of a project to ensure the project proceeded as planned, the result of which was immediate and serious delay to the project and considerable loss for the employer. One could envisage, given the right circumstances, that the action(s) or inaction(s) which led to that delay pass through the threshold for gross negligence. Might the threshold be crossed where the preparation of the project time schedule was done in such a way as to ignore obvious risks, failing to take account of obvious project activities or regulatory requirements that affect the progress of the works? Alternatively, what if the programme was shown to be deliberately manipulated at contract bid stage in order to shorten the period of the project at bid stage to improve its prospects of a successful bid, or it was deliberately manipulated during the project to hide the actual delays being suffered? Surely those scenarios would at least provide some prospect of a successful wilful misconduct claim.85

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84 This scenario is obviously also relevant to the discussion we have set out above on causation; it is only those losses which come after the relevant act or omission which will be recoverable – ie at least on most forms of wording, any loss of contractual immunity as a result of gross negligence/wilful misconduct will not be retrospective.

85 Each would arguably amount to the tort of deceit, or at least an attempt at it, which is obviously so close to being a form of wilful misconduct or wilful default (the ‘default’ in question being the obvious general duty not to lie, which does not rest on any ‘special relationship’ – see eg Noel v Poland [2002] Lloyd’s Rep IR 30 (Comm), para [48]
Finally, what if the contractor, knowing that the employer needs the project complete by a certain date in order to secure a tenant or receive the benefit of a government grant, or knowing that the liquidated damages cap had been reached such that it would attract no additional financial penalty for further delay, reduces its workforce which in turns slows the progress of the project?\textsuperscript{86}

91. These scenarios are encountered all too often on construction and engineering projects and yet there is no reported case that we can find where a claimant has sought to recover beyond the cap because it alleges gross negligence or wilful misconduct.\textsuperscript{87}

**Vicarious liability and wilful misconduct**

92. We think this is potentially the most interesting problem. Conventionally, contractual liability is strict and requires no *mens rea*. As we have discussed above however, wilful misconduct does involve an advertent state of mind (the misconduct either being deliberate or reckless). What then when a contractor subcontracts a relevant element of construction such that it is the subcontractor who commits the wilful misconduct? It might be argued that liability in contract is strict, and the contractor cannot be any better off than if he had had the work carried out by his own employees – i.e. the exception to the immunity ‘bites’, and the benefit of it is lost even where it is the subcontractor, rather than the contractor himself, who engages in the relevant wilful misconduct. Equally it might be argued that given the intention of the exception to the immunity is only to catch morally culpable acts, nothing less than wilful misconduct by the contractor himself will do.

93. Furthermore, it is easy to see how very fine distinctions might arise in practice. To take the example of the manufacturer of faulty engines referred to above, say that the fault was down to defective steel which was sold to the manufacturer by a fraudulent supplier who faked the relevant paperwork. In such circumstances, a finding of wilful misconduct (Toulson)\textsuperscript{()} that a finding that any relevant exclusion to the immunity was applicable would very probably follow, we suggest. It also seems likely that a fraudulent programme either included with a tender, or which was published to the employer during the course of the job would be material and therefore a finding of inducement would usually follow. Query however whether a finding that a fraudulent programme which was not relied upon by the employer would be sufficient to trigger the immunity. We suggest that it probably would, at least on most clauses. The fact that the fraud was not successful seems unlikely to us to detract from the fact that it amounted to ‘wilful misconduct’ or ‘wilful default.’

\textsuperscript{86} At least under most standard forms, we suggest that this would be, at least very arguably, a deliberate breach of the usual, express obligation to proceed regularly and diligently, and as such wilful misconduct or wilful default.

\textsuperscript{87} Although experience suggests that in confidential arbitration over eg the FIDIC forms of contract – where there is a specific exclusion to the limitation on the contractor’s liability for damages where he commits ‘deliberate default’ or ‘reckless misconduct.’ – such arguments are more commonplace.
misconduct would be unlikely, we suggest, so long as there was nothing in the paperwork to arouse the manufacturer’s suspicions. 88

94. On the other hand, say that the manufacturer subcontracted on ‘back-to-back’ terms the whole of his main contract obligation to supply the motors, and say also now the subcontractor’s procurement manager (in order to cut costs) deliberately purchased inadequate-quality steel, and faked the paperwork to be supplied with the motors. In such circumstances the answer is less clear; arguably the manufacturer had subcontracted the whole of his obligations and he ought to take the risk of that. Here, there would be more scope for arguing that, as against the ultimate customer, the manufacturer could not rely on his decision to subcontract as giving him immunity from a finding of wilful misconduct. The customer might well argue that, if it were otherwise, the exclusion from immunity he bargained for can be rendered toothless by extensive subcontracting.

95. Depending always on the relevant terms of the exclusion clause in question, whether wilful misconduct by someone in the subcontractor/supplier chain is to be attributed to a contractor for the purposes of an exclusion clause containing a relevant exclusion to the immunity may depend, we suggest, on whether the subcontractor’s personnel’s knowledge of the relevant misconduct is to be attributed to the contractor. Thus, a supplier who fakes documents will be treated as doing so for his own account under the contract of sale and his knowledge will probably not be attributed to the contractor, whereas on the other hand the wilful misconduct of a subcontractor who fakes documents may well be attributed to the contractor, because the creation of the false documents was in the course of also performing a main contract obligation, and thus deprive the contractor of immunity. 89

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88 Unless and until the multiple faults were reported, in which case a blatant disregard for that (entirely different) source of information might be gross negligence – see above.

89 See eg Meridian Global Funds v Securities Commission [1995] 2 AC 500 (PC), para [511] (Hoffman LJ): ‘Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing. Their Lordships would therefore hold that upon the true construction of section 20(4)(e), the company knows that it has become a substantial security holder when that is known to the person who had authority to do the deal. It is then obliged to give notice.’ It seems to us that the position would have been the same in that case if, for example, the person who had authority to do the deal had been an independent contractor acting on behalf of Meridian.
Termination and wilful misconduct

96. A further obvious issue is in what circumstances, assuming an appropriately worded clause, will a contractor’s exclusion or limitation on liability be lost where his employment is terminated. It is easy to foresee circumstances where an employer will say that the termination was caused by the contractor’s ‘wilful misconduct’ or that a contractor’s wrongful termination was also a ‘wilful default’.\(^{90}\)

97. Whether the termination was the result of a wilful default or amounted to wilful misconduct is obviously highly fact sensitive, but we suggest that the following might well be key considerations in many cases.

(i) Whether the contractor terminated further performance on the basis of legal advice that he was entitled or obliged to do so.

(ii) Whether the termination of further performance was a *bona fide* exercise of what the contractor thought (*ex hypothesi*, mistakenly) were his legal or common law rights.

(iii) Whether the contractor utilised a contractual termination provision (even if it did so erroneously; it may be harder, we suggest, to establish wilful misconduct/wilful default where there is a mistaken invocation of a contractual termination regime).

(iv) The manner of termination. It will be easier, for example, for a contractor to defend a careful and orderly demobilisation as opposed to a peremptory ‘walk-off’.

(v) Motive. Although conventionally motive is irrelevant in contract, surely this is one of the areas where it might well be relevant. If (for example) the tribunal were to find that the contractor’s reason for wrongfully terminating was because the contract insufficiently profitable, then a finding of wilful default/wilful misconduct would, we suggest, be very likely; a decision to walk off site and abandon known, binding obligations on the basis that liability for loss and damage was capped or excluded would, we think, be precisely the kinds of circumstances in which a tribunal would be likely to find that the cap did not apply.

CONCLUSION

98. The terms gross negligence and wilful default are likely to continue to find their way into construction contracts as parties (typically employers) seek to find carve outs from a limitation or exclusion for egregious or deliberate acts or omissions.

99. The reticence to define those terms is, however, surprising; normally, if anything, contract draftsmen prefer to over-elaborate rather than leave

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\(^{90}\) As discussed above, we do not think there is likely, in practice, to be much difference between whether and when the two terms will apply in most cases.
important terms undefined. The disinclination to do so in the case of these two terms is, we suggest, probably down to the difficulty in providing a definition that both parties can agree on, and the view that this is somewhere where the terms are best left to be defined by circumstances if they ever become relevant – a ‘we’ll know when we see it’ approach. The cases which we have discussed above suggest that this approach, whilst quite possibly born of necessity, has left it to case law to fill in. The relatively large amount of case law, and the absence of definitive answers set out in it, suggests that tribunals struggle to give a definitive meaning to either term in the absence of guidance from the parties as to what they are intended to have meant. The cases do, however, at least seem clear that both terms impose a high bar to a successful attempt to disapply a relevant exclusion clause; it is striking that of all the cases set out above, on hardly any occasion has a claim to ‘wilful misconduct’ or ‘gross negligence’ ever been made out.

100. How, if at all, should the law develop to respond to this trend? We suggest as follows:

(i) As concerns gross negligence, other civil and common law jurisdictions recognise gross negligence as a legal concept distinct from negligence.91 Further, our own jurisdiction recognises and uses it in other areas (eg criminal law92 and insurance law93) with apparently little difficulty. It would thus not be impossible, and it would be desirable, for there to be a stated ‘default’ meaning as to what such a clause is likely to mean when found in a contract if not otherwise defined (and subject always to it being interpreted in accordance with the contract as a whole). Such ‘default’ rules of contractual construction are, in fact, commonplace.94

(ii) We have set out suggestions above as to what possible definitions might look like but attempting to arrive at a recognised meaning for ‘gross negligence’ in this context drawing on mid-19th century authorities from when the term was last used in a common law context is not a valid objection. The circumstances which will amount to gross negligence will be circumstance and date-specific, but the underlying policy considerations will not be, we suggest; whatever the age, the term ‘gross negligence’ is trying to capture

91 The scope of how the term is used in other jurisdictions is beyond the scope of this paper. Furthermore, there is no consistent pattern as to how the terms are to be applied, and in some jurisdictions the two terms are, or are close to being, synonymous. In the United States, for example, the meaning of the terms, and their interrelationship with each other, varies significantly from state to state.

92 Gross negligence manslaughter being an obvious example.

93 Raymond Thomas Porter v Zurich Insurance Co [2009] EWHC 376 (QB), [2010] Lloyd’s Rep IR 373 where the policy excluded liability for ‘any wilful or malicious act by a member of the family or by a person lawfully at or in the home’ (ironically, the judge in that case being the former head of the Technology and Construction Court).

94 Eg the rule that a clause which excludes liability does not exclude liability for negligence unless expressly stated or the construction of the contract as a whole requires it; and see also the authorities which indicate that, insofar as possible, for reasons of industry certainty judges will tend to read clauses in industry standard forms in the same way.
something which goes clearly beyond a lack of care but which stops short of wilful misconduct or default.

101. A comprehensive working definition of ‘wilful misconduct’ or ‘wilful default’ is obviously more difficult; it does not have the solid foundation of negligence simpliciter to ground it. Nonetheless we have set out what are likely to be the key considerations in most causes. As a working set of ‘rules’ to establish whether or not there has been relevant deliberate misconduct, we think they are a valid starting point.

102. Both terms are here to stay. We suggest the above as what are hopefully useful working guidelines, or at least points for discussion, as to how to apply them in context.

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