Gross negligence under English, French and Dutch law

1. Introduction

The use of the term 'gross negligence' in contracts has dramatically increased in the last years as many international oil companies and contracting companies have introduced the term in their standard contracting terms and conditions, especially, as a carve out in knock-for-knock systems[1] and limitation of liability clauses. In a knock-for-knock indemnity system, each party agrees to be liable for damage to its own property, death or injury of its own personnel and pollution emanating from its own property, regardless of cause of the damage, death, injury or pollution and even in the event of negligence or breach of statutory duty of the indemnified party.[2] Often in knock-for-knock agreements each party also agrees to indemnify the other party from its own consequential loss, whereby a broad definition of consequential loss is given. Knock-for-knock indemnity agreements are contractually agreed divisions of risk, without regard to the cause of the liability and usually explicitly state that they even apply in the event of negligence. In *Smit International (Deutschland GmbH) v Josef Mobius, Bau-Gesellschaft (GmbH & Co)* Mr Justice Morison said: 'The knock for knock agreement is a crude but workable allocation of risk and responsibility'.[3]

In recent years exceptions have been introduced to knock-for-knock systems in the event of gross negligence. Such an exception is known as a carve out. Typically, the carve out is formulated in such a way that an indemnity does apply in the event of negligence of the indemnified party, but not in the event of gross negligence of that party. Such carve outs have become more and more prevalent since the Deepwater Horizon / Macondo disaster, in which BP suffered a significant loss due to the gross negligence of a contractor.[4]

The idea of introducing a gross negligence carve out to a knock-for-knock system is to form an incentive for a party not to walk away from its responsibilities under the contract, as it had happened in the Deep Water Horizon case.[5] However, currently, there is no clear contractual definition of gross negligence in English law. In a judgment of June 2022 in *The Federal Republic of Nigeria v JP Morgan Chase Bank*, discussing the concept of gross negligence in a contract governed by English law, at para 325 Mrs Justice Cockerill said that the 'target' of gross negligence is 'a notoriously slippery concept: it requires something more than negligence but it does not require dishonesty or bad faith and indeed does not have any subjective mental element of appreciation of risk'. Thus, the difference between negligence and gross negligence tends to be unclear.

Conversely, in French law, gross negligence has a high bar and is strictly defined both in the French Civil Code and French case law. Similarly, in Dutch law, gross negligence is equivalent to wilful intent.

Below I will discuss the following points:

i. Tort of negligence in English law
ii. The definition of 'negligence' in English contract law compared to the tort of negligence, which is potentially different.
iii. Discussion of *Triple Point Technology v PTT*, where the majority of the Supreme Court held that the term negligence in contracts refers to the contractual duty to exercise care and the tort of negligence.
iv. Discussion of gross negligence under English law, introducing the Ardent[6] case where, for the first time in modern case law, an English judge accepted the concept of gross negligence in contracts.
v. Discussion of English case law regarding gross negligence since the Ardent case.
vi. Discussion of gross negligence concepts under French and Dutch law.
vii. Is the bar/threshold for gross negligence in continental Europe higher than in English law?

* DOI 10.7590/187714624X17515287554451 1877-1467 2024, European Journal of Commercial Contract Law
Alexandra Shishkareva is a Legal Assistant at Keystone Law in London with a Master of Laws from City, University of London. Nigel Margetson is a partner with MMRL Lawyers in Rotterdam. Nigel Margetson is the author of subsection 7 of this article: The meaning of gross negligence in Dutch law.

1 J Pickavance, J Bowling, 'Exclusions from Immunity: Gross Negligence and Wilful Misconduct' (2017) 1(2) Society of Construction Law 10.
2 D Cuthill, 'The Integrity of the BIMCO Supplytime 2017 'Knock for Knock' Regime in the Context of Rig Move Operations' (2020) 19(4) WMU Journal of Maritime Affairs 463.
3 [2001] EWHC 531 (Comm), para 19.
4 T Schoenbaum, 'Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the Light of Deepwater Horizon' (2012) 24(3) Journal of Environmental Law 395.
5 W Linda & Partners in Association with Clifford Chance 'Reviewing Knock for Knock Indemnities: Risk Allocation in Maritime and Offshore Oil and Gas Contracts' (2015) Briefing Note 3.
6 Q.B. (Com. Ct), 30 April 1997, LLR [1997] 2 547.

viii. Discussion of the purpose of knock for knock and the introduction of gross negligence carve outs in such systems in recent years.
ix. Potential issues of gross negligence carve outs in knock-for-knock contractual systems.
x. Which bar/threshold of gross negligence is better for knock-for-knock systems – low or high?

2. Negligence: Tort of negligence vs contractual negligence

Charlesworth & Percy[7] classify the concept of negligence in 3 different senses.

The first meaning of negligence, as categorised by Charlesworth & Percy, refers 'to the state of mind accompanying an action, when it can be contrasted, for instance, with intention'.[8]

This approach is described in *Gollins v Gollins*[9]. Lord Morris said:

> 'For a long time it was thought that, at least in theory, intention or mental state of some kind was a necessary ingredient in negligence. But life would be impossible in modern conditions unless on the highway and in the market place we were entitled to rely on the other man behaving like a reasonable man. So we now apply a purely objective standard. The other man may have been doing his best and he may not realise that his best is not good enough, but if he causes damage by falling short of the ordinary standard he must pay.'

Lord Morris continued:

> 'An act is intentional when it is purposeful and done with the desire or object of producing a particular result. In contrast, a negligent act, in the present sense, arises where someone either fails to consider a risk of particular action, or having considered it, fails to give the risk appropriate weight.'

In that sense, negligence means failure to appreciate a risk or a wrong risk appreciation, which arises form 'person's neglect state of mind'. Charlesworth & Percy emphasise:[10] 'A person's state of mind may be negligent even though there is an intention to exercise some care'.

Charlesworth & Percy differentiate a second meaning of negligence as follows:[11] 'negligence as careless conduct of a careless type'.

Charlesworth & Percy write the following about negligence as careless conduct:[12] 'Careless conduct does not necessarily give rise to a breach of a duty of care, the defining characteristic of the tort of negligence.'

Julian Bailey is also of the view that human error will not always constitute negligence. He writes:[13]

> 'Negligence refers to an obligation in tort, imposed by law, upon a person to conduct himself with reasonable care so as to ensure that another person or a class of persons will not suffer a particular type of injury, harm or loss. The obligation is founded on an impersonal standard of how a reasonable person should act in particular circumstances, where a particular type of injury, harm or loss is reasonably foreseeable.'

Julian Bailey states that negligence as obligation in tort will always be dependent on all the circumstances of the case.

Julian Bailey continues by referring to the 1A-G (BVI) Hartwell.[14] where Lord Nicholls said:

> 'Negligence as a basis of liability is founded on the impersonal ("objective") standard of how a reasonable person should have acted in the circumstances. Shortfall from this standard of conduct does not always give rise to legal liability. In order to elucidate the circumstances in which shortfall will give rise to liability the courts have fashioned several concepts, such as "duty of care".'

It his decision, Lord Nicholls provides clarity on the meaning of 'breach of duty of care' as used by Lord Porter in *Bolton v Stone*:[15]

> 'Unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty.'

Julian Bailey goes on clarifying the essence on duty of care, he refers to *t2 Matalan Discount Club (Cash & Carry) Ltd v Tokenspire Properties (North Western) Ltd*,[16] where HHJ Seymour QC said: 'The essential nature of a duty of care is an obligation to take reasonable care to avoid harm.'

In conclusion, the second meaning of negligence is careless conduct, which is not always equal to the tort of negligence. Whether or not human error will constitute negligence will be dependent on the particular circumstances of the case and the occurrence of a breach of a duty of care.

7 Charlesworth & Percy on Negligence (Fifteenth Edition, Thomson Reuters) (hereinafter 'C&P') chapter 1.
8 C&P, chapters 1-3.
9 *Gollins v Gollins* [1963] AC 644 (HL), the House of Lords.
10 C&P, chapters 1-4.
11 C&P, chapter 1-7.
12 C&P, chapter 1-7.
13 J Bailey, *Construction Law* (vol II, 3rd edn, Informa Law from Routledge) chapter 10.1.
14 *1A-G (BVI) Hartwell* [2004] 1 WLR 1273 at 1278 (PC).
15 *Bolton v Stone* [1951] AC 850.
16 *2 Matalan Discount Club (Cash & Carry) Ltd v Tokenspire Properties (North Western) Ltd* [2001] EWHC Tech 449 at [59], per HHJ Seymour QC.

The third meaning of negligence identified by Charlesworth & Percy is particularly relevant to the discussion in this paper. It is negligence as the breach of a duty to take care[17], which is a specific tort in itself.[18]

Charlesworth & Percy write the following about the relationship between breach of contract and the tort of negligence:[19]

> 'The central feature of the tort of negligence is accordingly breach of a duty to take care. It is distinct from a breach of contract. While a contract may contain an obligation to take care in the performance of its terms, the obligation arises from the agreement or presumed agreement of the parties, whereas a tortious duty of care arises from an objective view of given facts, of which an agreement may be one. Accordingly, where a contract term imports a duty to take reasonable care in the performance it can be concurrent with a duty to take care in tor, but it is by no means the case that every breach of contract involves a breach of tortious duty as well.'

Charlesworth & Percy supports this assertion by referring to *Brown v Boorman*,[20] where the court treated breach of contract as negligence but as time passed such an approach could no longer be sustained. Lord Campbell said:

> 'Wherever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract.'

Charlesworth & Percy goes on to remark that[21] 'where a duty of care arises between parties to a contract, wider obligations can be imposed in tort than those arising under the contract.'

Julian Bailey also discusses the particular difference between negligence in contract and tort:[22]

> 'Unlike contractual obligations, which are created by agreement, and usually articulated in a written document (often heavily negotiated), the existence and scope of an obligation in negligence is defined and imposed by law, not by agreement.'

HUDSON's Building and Engineering Contracts says the following about contractual negligence and the tort of negligence:[23]

> 'Tortious liabilities differ from contractual liabilities because:
>
> (I) tortious duties are imposed and defined by law, contractual duties and their ambit are based upon the consent of the parties; and
>
> (2) tortious duties are owed to persons generally, contractual duties are undertaken towards specific persons.
>
> However, tort and contract can interact where the parties are in a contractual relationship but the claimant wishes to sue in tort to avoid a limitation defence or to make a claim going beyond what was agreed within the contract. In these circumstances in the absence of anything in the contract excluding such a claim the courts will generally allow concurrent liabilities.
>
> …
>
> Tortious liability is a liability to pay damages which arises not out of contract, but from a civil wrong or a wrongful act.'

This concept of negligence in English law originates from 1932 case of *Donoghue v Stevenson*,[24] the most celebrated judgment in the history of the common law.[25]

In *Donoghue v Stevenson*, Donoghue suffered poisoning after drinking a bottle of ginger beer which contained a decomposed snail inside the bottle. Donoghue could not sue the factory responsible for producing the beer because she hadn't bought the bottle, and didn't have a contractual relationship with the manufacturer. However, the House of Lords held that the manufacturer owed a duty of care to her, which was breached because it was reasonably foreseeable that failure to ensure the product's safety would lead to harm to consumers. Thus, the House of Lords held in favour of Mrs. Donoghue, establishing the modern law of negligence. Lord Atkin formulates the famous 'neighbour principle':[26]

> 'At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am

17 C&P, chapters 1-19 and further.
18 C&P, chapters 1-19.
19 C&P, chapters 1-20.
20 *Brown v Boorman* (1844) 11 C.1. & F.1.
21 C&P, chapters 1-20.
22 J Bailey, *Construction Law* (vol II, 3rd edn, Informa Law from Routledge) chapters 10.3.
23 *HUDSON's Building and Engineering Contracts* (14th edn, Sweet & Maxwell) chapter 1-151.
24 *Donoghue v Stevenson* [1932] AC 562.
25 J Bailey, *Construction Law* (vol II, 3rd edn, Informa Law from Routledge) chapter 10.6.
26 *Donoghue v Stevenson* [1932] AC 562.

> directing my mind to the acts or omissions which are called in question.'

HUDSON's discusses the Principle of Liability in *Donoghue v Stevenson*:[27]

> 'Apart from certain cases of strict liability (that is, where negligence is not a necessary ingredient) the Donoghue v Stevenson liability represents the adaptation to modem society of the earlier generic tort of common law negligence. The liability is essentially concerned only with physical damage negligently caused to the person or property of others, without which there can be no liability, although economic loss following directly from the physical damage will also be recoverable.
>
> Donoghue v Stevenson in 1931 was an extension to manufactured products of earlier more primitive examples of common law negligence. The House of Lords specifically held that where a chattel was put into circulation by a manufacturer in circumstances where intermediate examination by a consumer was not practical or likely, and harm might foreseeably result, there was the necessary 'proximity' to support a duty of care, independently of any contract, to see that it was safe.'

Donoghue v Stevenson clearly establishes that in the event of absence of a contract, a manufacturer owes a duty of care to a consumer when putting a product on the market. Thus, a tort of negligence may arise between parties who do not have a contract.

In conclusion, the third meaning of negligence relates to the negligence in contract and tort. While negligence in contract arises from duties explicitly or implicitly agreed upon within contractual relationships, negligence in tort is grounded in duties imposed by law, irrespective of contractual agreements. Both contractual and tortious claims may coexist or interact based on the particular circumstances of the case.

3. Triple Point Technology v PTT

The most relevant and recent case about the meaning of the word 'negligence' in contracts is the 2021 Supreme Court case of *Triple Point Technology v PTT Public Company*.[28]

In this case, the claimant entered into a construction contract for services. The contract, which was governed by English law, required milestone payments for each part of the project. The defendant's services faced severe delays due to the defendant's negligence and breaches of contract. After one year parties agreed that services corresponding to the first milestone had been sufficiently completed and the claimant paid the first milestone payment. The defendant demanded further payments and wrongfully suspended works when the claimant refused to pay. The claimant subsequently terminated the contract for repudiation, negligent breach of contract and fundamental breach.

The relevant issue of the claim involves the interpretation of an exception to a cap on the contractor's liability for damages when the liability results from negligence. The question is whether 'negligence' in the exception means the tort of negligence or whether it includes breach of the contractual duty of skill and care.

In the High court decision, Mrs Justice Jefford held that 'negligence' in clause 12.3 did not constitute tort of negligence. She found the defendant to be in breach of its contractual duty under Article 12.1 to 'exercise all reasonable skill, care and diligence and efficiency in the performance of the services'.[29] Mrs Justice gives the following reasons:[30]

> 'Firstly, the limitation (and the exception) apply to liability under the Contract. The exception is, therefore, not apt to apply to non-contractual liability and must encompass contractual liability for "negligence". Secondly, other than by the choice of law and jurisdiction clause, this Contract has no connection whatsoever with England and Wales and the law of this jurisdiction. So why would a non-contractual duty of care ever arise? If no such duty of care arises, there is no negligence to consider other than that arising under Article 12.1.'

The Court of Appeal held that Mrs Justice's interpretation of negligence was incorrect and the exception for negligence only referred to the tort of negligence and not to situations amounting to breach of contract.[31] Sir Rupert Jackson held:[32]

> 'The word "negligence" must be read in context. The phrase "fraud, negligence, gross negligence, or wilful misconduct" is describing unusual or extreme conduct, such that Triple Point should forfeit the protection of the cap. **It is talking about breaches of contract which are also freestanding torts or deliberate wrongdoing.** In my view, "negligence" in this context means the freestanding tort of negligence.' (emphasis added)

However, the Supreme Court held that the term 'negligence' was not to be restricted to tortious negligence but also related to a breach of a contractual provision to exercise skill and care.[33] Lady Arden provides her reasons:[34]

> 'The first point to make is that the word "negligence" has an accepted meaning in English law, which was the governing law of the CTRM Contract. It **covers both the separate tort of failing to use due care and also breach of a contractual provision to exercise skill and care.** Unless, therefore, some strained meaning can be given to the word "negligence" in

27 HUDSON's Building and Engineering Contracts (14th edn, Sweet & Maxwell) Chapters 1-157.
28 *Triple Point Technology Inc v PTT Public Co Ltd Supreme Court* [2021] UKSC 29.
29 *Triple Point Technology v PTT* [2018] EWHC 45 (TCC).
30 See para 260.
31 *Triple Point Technology Inc v PTT Public Co Ltd Court of Appeal (Civil Division)* [2019] EWCA Civ 230.
32 See para 119.
33 *Triple Point Technology Inc v PTT Public Co Ltd Supreme* Court [2021] UKSC 29.
34 See para 52.

> the context of the final sentence of article 12.3 the effect of that clause is that liability for negligence does not exclude the breach of a contractual duty of care. As I shall explain in the next paragraph, the courts below took the view that the contractual duty of care was not included in the reference to negligence in the final sentence of article 12.3.' (emphasis added)

Lady Arden continues by pointing out that 'contract drew a distinction between those Services in respect of which Triple Point owed a contractual duty of care, and those matters which it would be a breach of contract not to provide (ie a distinction between contractual obligations of reasonable care and skill and strict contractual obligations)'.[35]

Lady Arden also discusses the inappropriate interpretation of the cap carve-out by referencing to unrealistic examples of independent torts given by the Court of Appeal. She held:[36]

> 'What the Court of Appeal and the judge held is that the word "negligence" must mean some independent tort and excludes breach of a contractual duty of skill and care. But no-one has yet thought of a realistic example of such a tort. **Unless there is an obvious example of an independent tort, it is unlikely in my judgment that the parties considered that the word "negligence" should apply, and on Triple Point's case apply only, to an independent tort.**
>
> …
>
> Moreover, and more importantly, these are examples of acts that were outside article 12.3 altogether. Article 12.3 only dealt with liability under the CTRM Contract: see the words italicised in article 12.3 as set out in para 51 above. That was the limitation on damages. The limitation placed on damages was on damages under the CTRM Contract. So, **any exclusion from that limitation also had to be damages under the Contract and that would exclude an independent tort.**' (emphasis added)

Lord Leggatt with whom Lord Burrows agreed, further discusses that liability in tort arises altogether outside the scope of the contract. He held:[37]

> 'In English law, someone who provides services to another person **generally owes that person a duty of care in tort whether or not the relationship between them is contractual** and even if such a duty of care is also owed under the contract.' (emphasis added)

However, Lord Sales with whom Lord Hodge agreed, comes to a different conclusion. He held:[38]

> 'Therefore, while the list of excepted conduct in the fourth sentence of article 12.3, **taken as a whole, refers to liability in contract and liability in tort, the word 'negligence' is intended to refer only to freestanding liability in tort.'** (emphasis added)

Lord Sales's reason is that:[39]

> '…in English law, which governs the CTRM Contract, "negligence" is a term which is capable of bearing a narrow, technical meaning as referring to the tort of negligence. The drafters' choice of that word in article 12.3, rather than referring more generally to a failure to exercise "reasonable skill and care" (ie using the language already employed in the same provision in article 12.1), tends to indicate that they **deliberately intended to draw a distinction** between the two concepts and that the word "negligence" should bear that narrower, technical meaning.' (emphasis added)

In conclusion, the *Triple Point Technology v PTT* case is hugely important point in the development of gross negligence concept, because the majority of the Supreme Court judges held that 'negligence in contracts' refers to the contractual duty to exercise care and the tort of negligence.

4. Gross negligence discussion

In older English law contracts the term gross negligence was not traditionally recognized.[40] However, whenever it has come before the courts of England and Wales for consideration, the court has tended to hold that it is merely a form of negligence.[41]

About the *Wilson v Brett*[42] case discussed in Baris Soyer and Andrew Tettenborn's publication B Rolfe referred to gross negligence as 'the same thing, with the addition of a vituperative epithet'.[43]

Likewise, in the more recent case *Tradigrain SA v Intertek Testing Servises (ITS) Canada Ltd*,[44] Mr Justice Langley held that 'The term "gross negligence", although often found in commercial documents, has never been accepted by English civil law as a concept distinct from simple negligence'.[45]

35 See para 55.
36 See paras 56-57.
37 See para 103.
38 See para 145.
39 See para 146.
40 B Soyer and A Tettenborn (eds), *Offshore Contracts and Liabilities* (Informa Law from Routledge 2015) 63.
41 ibid.
42 *Wilson v Brett* (1843) 11 M & W 113, 152 ER 737.
43 See para 116.
44 *Tradigrain SA v Intertek Testing Services* (ITS) Canada Ltd [2007] EWCA Civ 154.
45 See para 26.

Pickavance and Bowling discuss same approach used by Judge Willes in *Grill v The General Iron Screw Collier.*[46] Willes held:[47]

> 'Gross, therefore, is a word of description, and not a definition, and **it would have been only introducing a source of confusion to use the expression gross negligence**, instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his stimming up.' (emphasis added)

Baris Soyer and Andrew Tettenborn also discuss the lack of gross negligence term in traditional English law, and refer to *Armitage v Nurse*[48] where Judge Millett held:[49]

> **'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.'

In conclusion, the abovementioned cases demonstrate that the English courts did not recognise 'gross negligence' as a distinct legal concept. However, 'the starting point for the analysis of gross negligence as a contractual term, and also arguably the leading case, is Red Sea Tankers v Papachristidis (The Ardent)'[50, 51]

In cases where the term 'gross negligence' is not included in the contract, the court will attempt to interpret the intent of the parties using any contractually agreed definition or, in the absence of such a definition, the court will refer to previous cases for guidance.[52] Stuard Beadball and Simon Moore write:[53]

> 'In Red Sea Tankers Ltd and Others v Papachristidis and Others (The Hellespont Ardent), Mance J (as he then was) provided a detailed analyses of the concept of gross negligence. The following statement from that case **provides useful guidance on how the courts would interpret the term in the future cases.**[54]' (emphasis added)

In the conclusion applied under New York and English law in the Ardent case J Mance defines gross negligence as follows:[55]

> 'The concept of gross negligence appeared to embrace **serious negligence amounting to reckless disregard** without any necessary implication of consciousness of the high degree of risk or the likely consequences of the conduct on the part of the person acting or omitting to act.' (emphasis added)

J Mance further indicates that gross negligence represents 'something more' than standard negligence to provide proper skill and care:[56]

> **'"Gross" negligence was clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence**; but as a matter of ordinary language and general impression the concept of gross negligence seemed to be 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' (emphasis added)

However, as Pickavance and Bowling mention, it is interesting that Judge Mance found that what occurred was not 'negligence of so grave a nature as to fall outside the intended sphere of immunity'.[57]

The concept of gross negligence was developed in later judgments. Pickavance and Bowling discuss frequently cited cases after *Ardent*. For example, Pickavance and Bowling refer to *Great Scottish & Western Railway v British Railways Board*,[58] where LJ Beldam said:[59]

> '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 error and the seriousness of the risk which results from it.' (emphasis added)

46 *Grill v General Iron Screw Colliery Co Ltd* (1867-68) LR 3 CP 476.
47 See para 612.
48 *Armitage v Nurse* [1998] Ch 241.
49 *Armitage v Nurse* [1998] Ch 241, LJ Millett, p 254
50 *Red Sea Tankers Ltd v Papachristidis* [1997] 2 Lloyd's Rep 547.
51 J Pickavance and J Bowling, 'Exclusions from Immunity: Gross Negligence and Wilful Misconduct' (paper presented to the Society of Construction Law, London, 5 September 2017) para 18.
52 See para 11.46.
53 See para 11.47.
54 The approach used in Ardent case for interpreting gross negligence tends to be used in various cases later. For example, in *Torre Asset Funding v Royal bank of Scotland*, Judge Sales adopted the approach used in *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].'
55 *Red Sea Tankers Ltd v Papachristidis* [1997] 2 Lloyd's Rep 547, para 586, col 2.
56 See para 586.
57 *Red Sea Tankers Ltd v Papachristidis* [1997] 2 Lloyd's Rep 547, see p 617, col 2; p 618, col 1).
58 *Great Scottish & Western Railway Co Ltd v British Railways Board* [2000] 2 WLUK 367, para 37.
59 J Pickavance and J Bowling, 'Exclusions from Immunity: Gross Negligence and Wilful Misconduct' (paper presented to the Society of Construction Law, London, 5 September 2017), para 28.

Pickavance and Bowling go on to discuss the *Winnetka Trading Corporation v Julius Baer*[60] case, where Mr Justice Roth said:

> 'However, since the Investment Mandate uses both the expressions "negligence" and, separately, "gross negligence", I consider that **the two cannot be intended to have the same meaning**
> …
> However, it seems to me that "gross negligence" is not the same as subjective recklessness, although it may come close to it.' (emphasis added)

In *Marex Financial v Creative Finance*[61] Mr Justice Field particularly discusses the degree needed to achieve gross negligence:[62]

> '"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.' (emphasis added)

However, in my opinion, *Federal Republic of Nigeria v JP Morgan Chase Bank* provides the most recent take on gross negligence as a concept in English law contracts. Mrs Justice Cockerill said:[63]

> 'That target, of gross negligence, is one which is necessarily fact sensitive. It is a **notoriously slippery concept**: it requires **something more than negligence** but it does not require dishonesty or bad faith and indeed does not have any subjective mental element of appreciation of risk.' (emphasis added)

At paragraph 333 Mrs Justice Cockerill makes a very important point:[64]

> 'In these circumstances I conclude that even a serious lapse is not likely to be enough to engage the concept of gross negligence. **One is moving beyond bad mistakes to mistakes which have a very serious and often a shocking or startling (cf. "jaw-dropping") quality to them. The target is mistakes or defaults which are so serious that the word reckless may often come to mind, even if the test for recklessness is not met.** That is why the Hellespont Ardent points one to actual appreciation of the risks involved or conduct which is in serious disregard of an obvious risk.' (emphasis added)

In conclusion, the concept of gross negligence has significantly evolved in English law contracts, particularly from its recognition as 'something more' than standard negligence in the *Ardent* case to a 'jaw-dropping bar' as discussed in *Federal Republic of Nigeria v JP Morgan Chase Bank*. Initially, gross negligence was understood as a serious disregard of an obvious risk, surpassing ordinary negligence. However, recent judgments, such as those in *Marex Financial v Creative Finance* and *Federal Republic of Nigeria v JP Morgan Chase Bank*, have raised the threshold for gross negligence considerably higher.

5. Potential issues of gross negligence carve outs in knock-for-knock contractual systems

The purposes of knock-for-knock systems are:

i. Avoidance of litigation
ii. Prevention of application of double insurances

As mentioned above, in recent years, exceptions have been introduced to knock-for-knock systems in the event of gross negligence and wilful misconduct.

Jennings observes a growing trend where oil companies are increasingly amending standard contractual wordings, such as those in BIMCO forms, to shift more liability onto counterparties in cases of damage.[65] This shift is driven by a desire to protect their interests and put more responsibility onto the shoulders of the charterers, because they 'certainly do not see why they should pay for other companies' mistakes'.[66] Thus, 'there is a growing practice of inserting exclusions for gross negligence and wilful misconduct into the liability provisions of offshore contracts'.[67]

However, the potential problem with such carve outs since 'gross negligence' is not a recognised concept under English law and there is no established legal distinction between mere negligence and gross negligence, is that an indemnity clause that applies regardless of negligence would likely also cover gross negligence.[68] Beadball and Moore refer to the *Seadrill v Gazprom*[69] as follows:[70]

> 'An indemnity clause that relies on generic language and fails to make any express reference to negligence or gross negligence would likely be interpreted as not intended to apply to gross negligence for the same reasons described above.'

In order to address this problem, it is essential to differentiate the definitions of negligence and gross negligence in contractual clauses given that courts might interpret the absence of 'gross negligence' in certain clauses as an intent not to indemnify against it.

60 *Winnetka Trading Corp v Julius Baer International Ltd* [2011] EWHC 2030 (Ch), para 16.
61 *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm).
62 See para 67.
63 *Federal Republic of Nigeria v JP Morgan Chase Bank, N.A.* [2022] EWHC 1447 (Comm), para 325.
64 See para 333.
65 S Rainey, *The Law of Tug and Tow and Offshore Contracts* (4th edn, Informa 2017) para 4.131.
66 ibid.
67 ibid.
68 S Beadball and S Moore, *Offshore Construction Law and Practice* (Informa Law from Routledge 2017) para 11.43.
69 *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691.
70 S Beadball and S Moore, *Offshore Construction Law and Practice* (Informa Law from Routledge 2017) para 11.45.

Another issue arises when the word 'gross' is removed from the definition of gross negligence, because there is no established legal term. In his explanatory notes,[71] Rainey refers to this issue in *Great Scottish & Western Railway Co v British Railways Board*:[72]

> 'Sub-clause (c) provides the charterers with the right to cancel the charter party if the owners negligently or wilfully deliver the barge late. The words "gross" has been deleted from "gross negligence" as this is not an English legal term and it is inconsistent with recent BIMCO forms.'

However, Rainey argues that while older cases have discouraged using 'gross' with 'negligence', modern legal interpretations have given the term a more reasonable commercial meaning.[73] Therefore, if gross negligence is defined in a contract, it is crucial that the definition is precise and sets a high threshold, clearly distinguishing it from ordinary negligence. Defining 'gross negligence' will provide clarity and will reduce the scope for dispute, which is the very purpose of the knock-for-knock clause.

The particularly high threshold for the definition of gross negligence is highly important for the reason because a lower threshold can undermine the effectiveness of the knock-for-knock system, allowing parties to evade their responsibilities. In *Smit International v Joseph Mobius* Judge Moore-Bick holds that 'Introducing arguments about seaworthiness into this blunt and crude regime would lessen the effectiveness of the knock-for-knock agreement'.[74]

This means that unseaworthiness should not set a knock-for-knock agreement aside, and the lower the threshold of gross negligence, the less effective the knock-for-knock system.

6. The meaning of gross negligence in French law

Under French law, gross negligence is called 'faute lourde', which is mentioned under Article 1231-3 of the French Civil Code:[75]

> 'The debtor is only liable for damages that were foreseen or could have been foreseen at the time the contract was concluded, except where non-performance is due to gross negligence or wilful misconduct.'

Gross negligence is defined by case law as:[76]

> 'A behaviour of extreme gravity, bordering on fraud and indicating the inability of the debtor of the obligation to fulfil the contractual mission he had accepted.'

For the clarity reasons, fraudulent misconduct (escroquerie) under French law is established in Article 313-1 of the French criminal code:[77]

> 'Fraud is the act of deceiving a natural or legal person, by using a false name or quality, or abusing a quality, or using fraudulent means, in order to incite her to give funds, securities or property, or to provide a service, or to consent to an obligation or disclaimer.'

Thus, fraud specifically refers to a deliberate act where a person intentionally engages in criminal behaviour. Currently French courts often assimilate gross negligence to fraudulent misconduct:

> 'Gross negligence, which can be assimilated to fraud, prevents the contractor to whom it is attributable from limiting the damage reparation which he has previously caused to the damage foreseen or that could have been foreseen at the contractual time and from freeing himself from it by a non-liability clause.[78]

> The occupants of the building, which has so far only survived thanks to the partitions installed underneath when they were not intended for this purpose, unquestionably characterise a gross negligence on the part of a professional so serious that it must be qualified as fraudulent.[79]

> Having regard to Articles 1150 of the Civil Code, 23 and 29 of the Geneva Convention of 19 May 1956 relating to the Contract for the International Carriage of Goods by Road, known as the CMR; Whereas **negligence of extreme gravity bordering on fraud** and denoting the carrier's inability to carry out the contractual mission it has accepted **constitutes gross negligence**.'[80]

In conclusion, French law clearly sets up a very high bar of gross negligence. The 'reckless' element particularly relates to the extreme gravity bordering on fraud. The 'knowledge' element contains both damage foreseen or that could have been foreseen at the contractual time, thus, establishing the standard where the party responsible for gross negligence cannot escape liability.

7. The meaning of gross negligence in Dutch law

In older Dutch statutory laws the term *grove schuld* was used. A literal translation of that term is 'gross negligence'. In more modern statutory laws the term gross negligence is no longer used. Instead, the term '*bewuste roekeloosheid*' is used. That term can be translated as 'conscious recklessness'. Even though various Dutch statutory laws use the expressions gross negligence and conscious recklessness, those statutory laws do not de-

71 S Rainey, *The Law of Tug and Tow and Offshore Contracts* (4th edn, Informa 2017) para 6.30.
72 *Great Scottish & Western Rlwy Co v British Railways Board* [1993] EWCA Civ J0405-1.
73 ibid.
74 *Smit International (Deutschland) GmbH v Josef Mobius Baugesellschaft GmbH & Co* [2001] 2 All ER 265 [20].
75 Article 1231-3 of the French Civil Code.
76 Court of Cassation, Mixed Chamber, 22 April 2005, 03-14112.
77 Article 313-1 of the French criminal code.
78 Court of Cassation, Civil Chamber 1, 29 October 2014, Case No. 13-21980.
79 Court of Cassation, Civil, Civil Chamber 3, 12 July 2018, 17-19.701.
80 Court of Cassation, Civil, Commercial Chamber, February 27, 2007, 05-17.265.

fine those terms. Tjittes[81] says that 'it is not clear what is meant by conscious recklessness. However, according to the Supreme Court of the Netherlands, the older term "gross negligence" and the newer term "conscious recklessness" mean the same'.

Tjittes supports this assertion by referring to the Supreme Court of the Netherlands ('SCN') cases *Stein v Driessen*[82] and *Solon.*[83]

Sieburgh[84] is also of the view that in principle the terms gross negligence and conscious recklessness have the same meaning. Sieburgh supports her view by *inter alia* referring to the Advocate General's opinion for the SCN in *City Tax v De Boer*.[85]

Tjittes discusses the meaning of conscious recklessness by referring *inter alia* to the SCN case *Telfort/Scaramea*[86] and the discussion of that case by the Advocate General De Bock in her opinion[87] for the SCN in the case *Westplant Limburg B.V. v Stephan Haspel q.q*. In that opinion, De Bock said:

> *'In general, according to the standards of reasonableness and fairness, it is unacceptable to invoke an exclusion clause if the damage is due to wilful intent or conscious recklessness on the part of the debtor or persons charged with the management of the debtor's business. For this to apply, there must always be something more than "ordinary mistakes", namely mistakes that should not have been made.'*

Initially, it was assumed that the person causing the damage had to be aware in a subjective sense of the (high) probability that damage would result from his actions. As a result, it was not easily assumed that an act had been done with conscious recklessness. However, it follows from the judgment in Telfort/Scaramea that the threshold for assuming conscious recklessness is lower. In that case, the Court of Appeal's decision that Telfort could not invoke the exclusion clause under the aforementioned circumstances was upheld by the SCN:

> '3.5 (…) The Court of Appeal was thus able to rule that the conduct of Telfort, which was aware of Scaramea's great interest in the provision of the agreed internet connection capacity and the possibility of considerable damage resulting in the absence of such capacity, must be regarded as consciously reckless conduct in a number of respects, namely failing to verify whether KPN was actually able to deliver on time, despite indications giving rise to doubt, and the failure to take relatively simple measures to prevent significant damage to Scaramea. In saying this, the Court of Appeal expressed that Telfort had intentionally behaved in such a careless manner towards Scaramea that it would be unacceptable according to the standards of reasonableness and fairness if it were allowed to invoke the exclusion clause. The Court of Appeal was able to reach its conclusion even without it being established that Telfort actually knew that KPN would not be able to deliver the required capacity on time or that Telfort actually doubted this.'

Conscious recklessness therefore includes not only deliberate careless behaviour or 'consciousness of probability', but also 'consciousness of possibility', i.e. acts or omissions which the actor knew could cause damage, and consciously accepted that chance. This lowers the threshold for assuming conscious recklessness; The concept of 'conscious' has been given a more objective meaning.

Tjittes goes on to remark that lower courts have accepted that the bar for conscious recklessness has been lowered from subjective recklessness to objective recklessness. As an example, he cites the case *Oy Scanica/Standic.*[88]

In its decision of 26 January 2021[89] the Court of Appeal of The Hague shed some clarity on the meaning of gross negligence as used by SCN in Telfort/Scaramea:

> '9. The Court of Appeal does not agree with [the appellant]'s assertion that there was gross negligence on Stedin's part. It does not follow from the mere (alleged) circumstance that Stedin, when it decided to connect an emergency generator, was aware that damage could occur if a switching error were to be made, and that this risk of damage was consciously accepted, that there was conscious recklessness on the part of Stedin equal to gross negligence. To be able to assume conscious recklessness, at the very least it would also be necessary that the decision in the given circumstances – including in particular the degree of probability that damage would occur – be regarded as seriously reprehensible, for example because it involved taking risks that should have been avoided or reduced by the adoption of safety measures.
> That not every action done with knowledge that damage may result can be regarded as gross negligence or conscious recklessness, but that there must also be serious reprehensibility, follows from the classic description of gross negligence as "negligence bordering on intent in **reprehensibility**" (DCN 12 March 1954, ECLI:NL:HR:1954:9, Codam/Merwede,[90] emphasis added by court). Furthermore, in the judgment of 5 September 2008[91] referred to by [the appellant] (para. 6), the Supreme Court characterises conscious reckless conduct as

81 Rieme-Jan Tjittes, *Commercieel Contractenrecht* (Boom Juridische uitgevers 2018) 548.
82 SCN 12 December 1999, NJ 1998, 208.
83 SCN 4 February 2000, NJ 2000, 429, which decision was limited to the meaning of gross negligence in the Dutch statute relating to (marine) pilots.
84 CH Sieburgh, Asser 6.I De verbintenis in het algemeen, eerste gedeelte, 2020, No 365.
85 SCN 14 October 2005, NJ 2005/539.
86 SCN, 5 September 2008, NJ 2008, 480.
87 Opinion ECLI:NL:PHR:2018:253 (para 3.4.) for the SCN case ECLI:NL:HR:2018:679, 16 March 2018.
88 Court of Rotterdam, 21 March 2018, ECLI:NL:RBROT:2018:2415, para 4.9.
89 *[Appellant] v Stedin Netbeheer B.V.*, ECLI:NL:GHDHA:2021:44.
90 This is the same case as mentioned by Sieburgh (above): SCN 12 March 1954, NJ 1955/386.
91 This is the SCN case Telfort/Scaramea, discussed above by Tjittes.

> "intentionally[92] behaving in **such a careless manner**" towards the other party 'that it would be unacceptable according to the standards of reasonableness and fairness if it were allowed to invoke the exclusion clause.' (emphasis added by court)

It is my view that this Court of Appeal judgment makes clear that it is not really relevant whether the concept of 'conscious' in the term 'conscious recklessness' refers to objective consciousness or subjective consciousness. What is relevant is the degree of reprehensibility of the negligence or carelessness. Whether or not it will be acceptable to exclude liability for a certain degree of negligence or carelessness will always be dependent on all the circumstances of the case.[93]

Contrary to Tjittes, Sieburgh expresses no doubt concerning the meaning of gross negligence:[94]

> 'The question is what is meant by "gross negligence". With regard to Article 476 of the Dutch Commercial Code ('DCC') (old) and article 524 of the DCC (old), Cleveringa, The New Law of the Sea, p. 168 et seq., distinguishes between "gross negligence" and "gross carelessness". In his opinion, "gross negligence" should be understood to mean negligence which is wilful intent, or, if it is not wilful intent, it is not inferior in reprehensibility to it and therefore makes the same impression of immorality on the normal person; see also SCN 12 March 1954, NJ 1955/386: "gross negligence, that is to say: negligence bordering on intent in reprehensibility". As an example, he mentions the shipowner who, noticing that an easily extinguishable fire has broken out on board, just lets it burn until the ship completely goes up in flames.
> Gross negligence in this sense is indeed equal to wilful intent. Exclusion or limitation of liability for this is therefore in principle impermissible. With regard to the "gross carelessness", which falls outside this gross negligence, the question will have to be asked in any given case whether or not the exclusion of liability is contrary to accepted morality. It is not possible to give a general rule; see Houwing in his commentary on SCN 14 April 1950, NJ 1951/17. It also follows from that judgment that exclusion of liability for a person's own negligence that is not gross negligence can, in certain circumstances, be immoral and therefore unacceptable.'

Clearly, Sieburgh has no doubt concerning the meaning of gross negligence and equates it to wilful intent.

In the case SCN 14 April 1950, NJ 191/17 (discussed by Sieburgh above) a 20-year-old female factory worker had requested medical treatment against excessive facial hair. A radiologist treated her with X-ray treatment. The treatment resulted in the young woman losing her teeth and her lower jaw. The radiologist relied on an exclusion clause to protect him from liability. The SCN says:

> 'The Court of Appeal's judgment makes clear that X treated Y, a 20-year-old factory girl, for excessive facial hair with X-rays, even though he, as a radiologist, knew or should have known that such a treatment was disproportionally dangerous. The court of appeal correctly rejected a contractual exclusion of X's liability for the consequences of this treatment, which he knew, or should have known, was medically irresponsible and that he therefore should not have undertaken, as being immoral and therefore without effect.'

In his commentary on this judgment (referred to by Sieburgh hereinabove) Houwing says that general rules regarding the question whether a party may exclude his liability for gross negligence or wilful intent cannot be given. He says that the SCN, in its judgment of 14 April 1950 also apparently holds the same view. He says:

> '[The SCN's judgment] does not state to what degree of negligence an exclusion of liability clause can extend, but limits its decision to deciding that excluding liability for the consequences that resulted from the factual circumstances that are described in the decision would be immoral and therefore unacceptable'

From the all of the above I conclude that the law as stated by Sieburgh is correct and that the SCN case Telfort/Scaramea is not new law. Under Dutch law, gross negligence is:
(i) equivalent to wilful intent; or
(ii) negligence that is so reprehensible that it gives the impression of wilful intent.

Furthermore, under Dutch law, any degree of negligence can lead to liability, regardless of an exclusion clause. Whether or not an exclusion clause can be used will be dependent on the degree of reprehensibility of the negligence or carelessness in the given circumstances of a case.

8. Conclusions

In conclusion, English law has evolved significantly, with recent judgments like *Federal Republic of Nigeria v JP morgan Chase Bank* which set a 'jaw-dropping' threshold for gross negligence, surpassing ordinary negligence, but not requiring recklessness. However, the threshold for gross negligence in continental Europe is considerably higher than in English law. French law imposes a high bar, equating gross negligence with behaviour bordering on fraud. Dutch law treats gross negligence as equivalent to wilful intent or highly reprehensible negligence giving the impression of wilful intent, leading to liability disregard of exclusion clauses.

The particular effect of low and high thresholds of gross negligence is that the lower the bar for gross negligence is, the lower the effectiveness of the knock-for-knock system is. The high bar of gross negligence prevents parties from walking away from their responsibilities.

92 The Dutch word used by the SCN is '*welbewust*'. The Van Dale Groot Woordenboek van de Nederlandse taal, 15th edition, defines that term as meaning 'intentionally and consciously; willingly and knowingly'.

93 Both under the old Dutch law and the new law (effective as of 1992) there are various legal grounds based on which an exclusion clause can be declared invalid. Such grounds include immorality or that it would be contrary to standards of reasonableness and fairness to allow a guilty party to rely on an exclusion clause.

94 CH Sieburgh, Asser 6.I De verbintenis in het algemeen, eerste gedeelte, 2020, No 365.

The term 'gross negligence' may not always be defined in the contract, which causes disputes regarding its interpretation and the bar. As it was mentioned earlier, it is highly important that the gross negligence has a high bar. Thus, when the term of gross negligence is not defined, it is recommended to follow the navigating questions, proposed by the SCL, in order to determine the particular occurrence of gross negligence:[95]

i. The occurrence of high degree of risk in the case.
ii. Was the conduct undertaken with an appreciation of risks, but a blatant disregard of or indifference to an obvious risk?
iii. The disregard may not be always deliberate or conscious (in such cases it is recommended to use conscious factor as an aggravating factor of gross negligence). The bar of gross negligence may be reached by action or inaction of obvious disregard, which may be reasonably considered as indifference to the risk by a competent professional.
iv. The high seriousness of consequences that make the negligence 'gross'.
v. Did the same action or inaction take place before and was repeated?
vi. The objective probability of highly negative consequences. If it was high, it indicates gross negligence.
vii. What particular precautions took place in order to avoid the occurrence of negative consequences? If the precautions were modest and obvious and led to the risks, gross negligence shall apply.

95 J Pickavance and J Bowling, 'Exclusions from Immunity: Gross Negligence and Wilful Misconduct' (paper presented to the Society of Construction Law, London, 5 September 2017), para 52.