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GROSS NEGLIGENCE—PRONOUNCED DEAD 100 YEARS AGO, BUT ALIVE AND WELL

The concept of gross negligence has been much criticized. One of Canada's leading texts on the law of torts cites a former United States judge to the effect that the difference between negligence, gross negligence, and recklessness is akin to the difference between a fool, a damned fool, and a God-damned fool. As early as the 1920s, the concept of gross negligence was said to serve no purpose at law.

Yet, almost 100 years later, Canadian courts continue to draw a distinction between the two levels of negligence. Today, the concept of gross negligence is most commonly raised in an attempt to circumvent limitation of liability clauses. A typical such clause will provide that the parties will not be liable for consequential damages except to the extent that the damages result from gross negligence.

Courts have had difficulty defining the concept. In *Adeco Exploration Company Ltd. v. Hunt Oil Company of Canada Inc*., Hunt Oil was the co-owner and operator of an oil and gas lease. Hunt was responsible for renewing the lease but failed to do so because of a wholly inadequate renewal application. The Alberta Court of Appeal looked for definitions in the case law and found references to "very great negligence", "conscious wrongdoing", and "a very marked departure" from the standard of care required. In *Holland v. City of Toronto*, the Supreme Court of Canada described "the character and the duration of the neglect to fulfill [the] duty, including the comparative ease or difficulty of discharging it" as "important, if not vital, factors in determining whether the fault (if any) ... is so much more than merely ordinary neglect that it should be held to be a very great, or gross, negligence". "Conscious indifference" has also been held to equate to gross negligence.

In *Adeco*, the court found Hunt grossly negligent because while Hunt had a system for renewal in place, that system involved a great deal of *ad hoc* response to crises by personnel lacking requisite knowledge and skills, and quality control was conducted, if at all, by equally uninformed staff. In effect, it was a system where the blind were leading the blind. The court concluded that Hunt Oil was grossly negligent by failing to continue the lease.

In Ontario, gross negligence is almost exclusively discussed in the context of municipal liability, since municipalities are statutorily liable for

certain damages only in case of gross negligence. The Ontario Court of Appeal, in *Crinson v. Toronto (City)*, reviewed the jurisprudence and could find nothing more definitive than this: "it is clear that there must be more than a breach of a duty of care; the breach must rise to a level that can properly be described as gross negligence". Although a precise definition may be elusive, courts are nonetheless equipped to decide the issue of gross negligence. The court held that "to a great extent, the determination of gross negligence depends on the facts of each case. It depends on the application of a less than precise definition of gross negligence, interpreted through the prism of common sense".

United States courts have also struggled with the issue. In September 2014, the District Court for the Eastern District of Louisiana in *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico on April 20, 2010* reviewed the U.S. law on gross negligence in finding that BP was "grossly negligent" leading up to the 2010 Deepwater Horizon oil spill in the Gulf of Mexico. The court accepted the following definition of gross negligence:

> Gross negligence is a nebulous term that is defined in a multitude of ways, depending on the legal context and the jurisdiction. However, when the "cluster of ideas" surrounding "gross negligence" is considered, the prevailing notion is that gross negligence differs from ordinary negligence in terms of degree, and both are different in kind from reckless, wanton, and willful misconduct.
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> Gross negligence, like ordinary negligence, requires only objective, not subjective, proof. While ordinary negligence is a failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances, gross negligence is an extreme departure from the care required under the circumstances or a failure to exercise even slight care. Thus, the United States contends that gross negligence differs from ordinary negligence only in degree, not in kind.

Based on that definition, BP's decision not to re-run a crucial failed pressure test was held to constitute gross negligence in and of itself. However, the court did not stop there. It held that a number of cumulative breaches viewed together also amounted to gross negligence:

> 517. However, a series of negligent acts may also constitute gross negligence or willful misconduct under the CWA.
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> 518. Accordingly, the Court further finds and concludes that BPXP committed a series of negligent acts or omissions that resulted in the discharge of oil, which together amount to gross negligence and willful misconduct under the CWA. This is an additional and alternative grounds for finding BPXP's conduct amounted to gross negligence and wilful misconduct.
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> 519. BPXP's negligent acts that caused the blowout, explosion, and oil spill include: drilling the final 100 feet of the well with little or no margin, running the production casing with the float collar in unconverted mode and without a shoe filter, failing to verify whether the float collar converted by reverse circulating the well, not conducting a CBL, using LCM as a spacer for the displacement and negative pressure test, misinterpreting the negative pressure test, allowing simultaneous operations to occur during displacement, and failing to provide a displacement schedule to the Transocean drill crew. Notably, the decisions regarding drilling the final 100 feet, the CBL, and LCM-spacer were profit-driven decisions.
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> 520. These instances of negligence, taken together, evince an extreme deviation from the standard of care and a conscious disregard of known risks.

In summary, while the concept is far from crystal clear, the decisions in *Adeco* and *Deepwater Horizon* offer some guidance on what courts will be looking for. Courts will investigate whether systems were in place to avoid the damage, whether those systems were followed, and if not, why not. They will consider whether the negligent act was a momentary lapse or whether it was indicative of a pattern of negligent behaviour. They will judge all this against minimum industry standards. They will also not hesitate to find gross negligence based not on one outrageous act but on the cumulative effect of a number of seemingly minor infractions.

Finally, the decisions in *Adeco* and *Deepwater Horizon* indicate that the relative ease and low cost of the proper conduct is a relevant factor in determining whether negligence is elevated to the level of gross negligence. In *Adeco*, the court held that what Hunt ought to have done was both easy and cheap:

> 53 It is clear that continuation in this case was a simple matter. What was missing was available to Hunt Oil or could have been produced by it with minimal effort. When Hunt Oil's land agent responded to the request for more information, either she was clearly wrong or the technical person who informed her was clearly wrong. Moreover,

> the process of renewal had been in place for many years. What was required for renewal was readily available to Hunt Oil on a guide provided by Alberta Energy and on its website, referred to in that guide. Most importantly, although Hunt Oil says that it had a system in place for continuing leases, that system was dreadfully deficient. No alarm bells rang when the rejection letters were received by it. The employee who filed the initial application clearly did not know what was required to ensure continuation of the leases, nor did the employee who received and dealt with the rejection notices. It would have been an easy matter to have in place an employee who knew and understood the continuation process, or to arrange oversight by such a person. It would also have been an easy matter to require that all rejections be referred to someone up the management chain.
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> 61 The trial judge found that it was not unreasonable for Adeco and Shaman to assume that Hunt Oil, as a good operator, would do what the operation agreement required it to do. In the words of the trial judge "[Hunt Oil] was obligated to do it and [was] paid to do it. There was no cost to [Hunt Oil] to do it and it was a slam dunk".
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> [Emphasis added]

Similarly, in *Deepwater Horizon*, the court held that the proper interpretation of a test result, which would have avoided the disaster, was not a complex matter:

> 504. Furthermore, interpreting the negative pressure test is relatively straightforward. It is a "pass-or-fail" test; inconclusive or contradictory results mean the test has failed. This reduces the likelihood that a misinterpretation is an "honest mistake" or "mere inadvertence".

All BP had to do was to re-run a test it had already done. It did not, and in not doing so, was grossly negligent and caused a massive environmental disaster.

CITATIONS

Adeco Exploration Company Ltd. v. Hunt Oil Company of Canada Inc., [2008] A.J. No. 836, 2008 ABCA 214.

Bank of Montreal v. Bail ltée, [1992] S.C.J. No. 66, [1992] 2 SCR 554.

Bhasin v. Hrynew, [2014] S.C.J. No. 71, 2014 SCC 71.

Birdair inc. c. Danny's Construction Company Inc., [2013] J.Q. no 2968, 2013 QCCA 580.

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Crinson v. Toronto (City), [2010] O.J. No. 216, 2010 ONCA 44.

Dawco Electric inc. c. Hydro-Québec, [2014] J.Q. no 4458, 2014 QCCA 948.

Holland v. City of Toronto, [1927] S.C.R. 242.

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In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico on April 20, 2010, 2014 WL 4375933 (E.D.La.).

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