

Deepwater Horizon – US legal developments



LeRoy Lambert
President/Regional Claims Director
+1 646 753 9020
leroy.lambert@ctplc.com

The meaning of gross negligence is an issue that arises often when contracting in the US offshore industry. This article explores a recent decision from the Eastern District of Louisiana in New Orleans arising out of the Deepwater Horizon casualty which, subject to appeal, has the potential to provide certainty to the answer to this question.



Leanne O'Loughlin
Claims Director
+1 646 753 9021
leanne.oloughlin@ctplc.com

On 20 April 2010, the mobile offshore drilling unit *Deepwater Horizon* exploded in a fireball and sank. Tragically, 11 people died. Others suffered physical and psychological injury. Oil from under the earth's crust flowed into the Gulf of Mexico for 87 days, causing untold environmental and economic damage.

Commercial parties, and their insurers, need clarity in the law in order to contract and allocate the risk of such enormous potential damages with as much certainty as is possible. The *Deepwater Horizon* catastrophe presents an opportunity for the courts to establish definitive interpretations on points of law that have not been addressed or, if addressed, have been considered by different courts in different ways with different results.

Allocation of responsibility

Most of the issues arising out of the *Deepwater Horizon* casualty are being addressed initially by Judge Barbier of the United States District Court for the Eastern District of Louisiana in New Orleans. On 4 September 2014, Judge Barbier issued a 153 page decision in which he allocated responsibility among BP, Transocean and Halliburton under the US Clean Water Act (CWA) and the general maritime law of the US. Under the general maritime law, Judge Barbier found that all three companies "engaged in conduct that was negligent or worse and a legal cause of the

blowout, explosion, and oil spill" and held BP 67% at fault, Transocean 30%, and Halliburton 3%. Under the CWA, he found BP's conduct constituted gross negligence, while the conduct of Transocean and Halliburton constituted negligence. In reaching his conclusions, Judge Barbier summarised the jurisprudence in the US dealing with the differences between negligence, gross negligence and wilful misconduct.

Strictly, Judge Barbier interpreted those terms with reference to the CWA. However, it is expected that his interpretation, at least until any revisions on appeal, will be persuasive in other contexts as well, especially since the CWA did not define gross negligence and wilful misconduct in the statute, but left those terms to be applied and given meaning by judges in particular cases.

Gross negligence

Judge Barbier held that gross negligence and wilful misconduct were two separate concepts, rejecting BP's contention that the two overlapped in some instances. BP contended that gross negligence had "objective and subjective elements". According to BP, gross negligence required an extreme departure from the standard of care plus a "culpable mental state". The US, by contrast, contended gross negligence required only the objective element. After a thorough review of the existing authorities, Judge Barbier adopted the US position:

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.

Wilful misconduct

In reaching this definition, Judge Barbier dealt with the contentions of the parties about “recklessness”, a term that was not at issue in this case, but that the parties agreed was somewhere between gross negligence and wilful misconduct. In the end, Judge Barbier held that recklessness was a species of wilful misconduct, not negligence, whether gross or ordinary.¹

As to wilful misconduct, Judge Barbier adopted the following definition:

An act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences. If the harm results from an omission, the omission must be intentional, and the actor must either know the omission will result in damage or the circumstances surrounding the failure to act must allow an implication of a reckless disregard of the probable consequences.

Knock-for-knock

US courts will enforce knock-for-knock clauses provided they state the intent clearly and absent any statutory prohibition to the contrary. This is especially so if the clause is “mutual”, as a properly drafted knock-for-knock clause is. The same holds true under English law.

English law, however, does not have the concept of “gross negligence” as US law does. As a result, when one party wishes to carve out “gross negligence” while the other does not, uncertainty results. The purpose of knock-for-knock clauses is to eliminate uncertainty and litigation risks and costs no matter how high the stakes.

Conclusion

Accordingly, if “gross negligence” is, in the end, a species of negligent act with an “objective” component only and does not require a “culpable mental state”, as held by Judge Barbier, his decision endorses the potential for commercial parties and insurers contracting under US law to contract and allocate risk with more certainty than before.

Judge Barbier, his law clerks and the parties are continuing to work their way through the many legal issues that have arisen. Any appeals will be taken to the United States Court of Appeals for the Fifth Circuit, also in New Orleans. It remains to be seen whether the United States Supreme Court will review any issues arising from the *Deepwater Horizon* casualty. In the event that they do, we will report further.

¹ Due to uncertainty created by a decision by the Fifth Circuit after the *Deepwater Horizon* casualty, Judge Barbier also analysed BP’s actions under a recklessness standard and found BP did not meet that standard either.