

5.12 GROSS NEGLIGENCE (Approved 2/04)

INTRODUCTORY NOTES

Gross negligence is the want or absence of, failure to exercise slight care or diligence. *Draney v. Bachman*, 138 N.J. Super. 503, 509-510 (Law Div. 1976) quoting *Oliver v. Kantor*, 122 N.J.L. 528, 532 (Sup. Ct. 1939), *aff'd* 124, N.J.L. (E. & A. 1941).

The facts of a particular case may require examination of relevant case law or certain statutes that utilize the term gross negligence to decide if the court should charge gross negligence to the jury or the different concepts of willful and wanton misconduct or recklessness. In *Draney, supra*, gross negligence was applied to a defendant driver who failed to prevent her car from running off the roadway thereby injuring the plaintiff passenger. In *Shick v. Ferolito*, 167 N.J. 7, 20 (2001), a plaintiff who was struck in the eye by a golf ball was required to prove “recklessness” to recover from the defendant who failed to announce his tee shot at a golf course.

The Legislature has extended liability immunity to certain classes of individuals and organizations engaged in government, public or beneficial services and activities. Liability immunity is often qualified and immunity often does not extend to acts or omissions that are grossly negligent. For example, N.J.S.A. 2A:53A-7.1b (volunteer officers of nonprofit organizations have no immunity from willful, wanton or grossly negligent acts of commission or omission), N.J.S.A. 2A:62A-6 (school and volunteer sports coaches and officials), N.J.S.A. 2A:62A-9 (persons who attempt to mitigate hazardous spills), N.J.S.A. 2A:62A-12 to 14 (condominium associations), N.J.S.A. 2A:62A-15 (local emergency planning committees).

Gross negligence occurs on the continuum between ordinary negligence and intentional misconduct. The continuum runs from (1) ordinary negligence, through (2) gross negligence, (3) willful

and wanton misconduct, (4) reckless misconduct to (5) intentional misconduct. The difference between negligence and gross negligence is a matter of degree. *Monaghan v. Holy Trinity Church*, 275 N.J. Super. 594, 599 (App. Div. 1994); *Stuyvesant Assoc. v. Doe*, 221 N.J. Super. 340, 344 (Law Div. 1987). Gross negligence does not imply willful or wanton misconduct or recklessness. *Stuyvesant Associates, supra*. “Essentially, the concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others. Where an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds him responsible for the injuries he causes.” *G.S. v. Dept. Human Serv. DYFS*, 157 N.J.161, 179 (1999).

The Committee observes that gross negligence and willful and wanton misconduct are sometimes combined in qualified immunity statutes. For example, *N.J.S.A. 62A-27c*, states, “[t]his subsection (defibrillator use for emergency care) shall not immunize a person for any act of gross negligence or willful or wanton misconduct.” The terms are not equivalent and their meaning, within the context of a particular statute, must be analyzed to determine the minimal conduct that eliminates an immunity defense.

The punitive damages statute, *N.J.S.A. 2A:15-5.10*, defines “wanton and willful disregard” as a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.

The comparative negligence statute recognizes gross negligence as only different in degree from ordinary negligence. *Draney v. Bachman, supra*. Ordinary and gross negligence will generally only support a claim for compensatory damages, while willful and wanton misconduct will support punitive damages. *Edwards v. Our Lady of Lourdes Hospital*, 217 N.J. Super. 448, 462 (App. Div. 1987); *N.J.S.A. 2A:15-5.12*. Mere negligence, no matter how gross, will not suffice as a basis for punitive damages. *Smith v. Whitaker*, 160 N.J. 221 (1999) citing *DiGiovanni v. Pessel*, 55 N.J. 188, 190

(1970); *Schick v. Ferolito*, 167 N.J. 7 (2001) (Verniero, J. concurring/dissenting opinion).

In defense to the plaintiff's claims, the defendant, *[insert the defendant's name]*, claims to have been acting within the course and scope of his/her duties as *[insert the defendant's claimed position and membership in an organization or governmental activity with qualified immunity from suit, e.g., compensated sports official, fire fighter, a member of a state professional board, an organization or entity deemed operating in the public interest]*.

If you find that the defendant, *[insert the defendant's name]*, was exercising or discharging a function associated with *[insert the appropriate organization or government activity]* and that the defendant was acting within the course and scope of his/her official duties, then in order to find for the plaintiff and impose liability upon the defendant, *[insert the defendant's name]*, you must determine that:

(1) The defendant *[insert the defendant's name]* was grossly negligent, as I will hereafter define the term; and

(2) The defendant's *[insert the defendant's name]* gross negligence was a cause of the plaintiff's loss.

To determine gross negligence you should consider what a reasonable person would or would not do under the same or similar circumstances as shown by the evidence.

Negligence is the failure to exercise ordinary or reasonable care; that is: what would be the conduct of an ordinarily prudent, careful person in the same or similar circumstances as the defendant found himself. The defendant's conduct is then measured against what an ordinarily prudent, careful person would have done or would have avoided doing.

In this case, the plaintiff must prove more than negligence. The plaintiff must prove gross negligence.

I will now define gross negligence for you. Gross negligence is an act or omission, which is more than ordinary negligence, but less than willful or intentional misconduct. Gross negligence refers to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise slight care or diligence. ¹

¹ To aid the jury's grasp of this concept, the court may give examples of gross negligence that convey the notion that it (1) is the failure to exercise a slight degree of care, (2) is lack of even scant care, (3) implies the absence of care or indifference to others, (4) thoughtless disregard to the consequence that may follow from an act, (5) an act done with utter unconcern for the safety of others, or (6) an "omission of slight care that even an inattentive and thoughtless person never fails to take of their own concerns" *Capezzaro v. Winfrey*, 153 *N.J. Super.* 267 (App. Div. 1977) quoting *Dudley v. Camden and Phila. Ferry Co.*, 42 *N.J.L.* 25, 27 (Sup. Ct. 1880).

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To find gross negligence the facts as you find them at the time the defendant acted or failed to act must be such that the consequences of the defendant's conduct could reasonably have been foreseen. It must appear that the injury was not the result of inattention, mistaken judgment or the failure to exercise ordinary or reasonable care. Rather it must appear that the injury was the natural and probable result of the failure to exercise slight care or diligence.