

Civil Code § 1192 Gross Negligence Judicial Recognition of Gross Negligence

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Abstract

Through the study of the theory of gross negligence and the boundaries of tort liability, summary involving the Civil Code Article 1192 gross negligence judicial determination of the judgment instruments and research found that there are the following deficiencies: in the constitutive elements as well as the determination of the standard, the subjective requirements of whether there is awareness, objectively caused the degree of danger or damage to the determination of gross negligence, was found after the subjective and objective criteria for the specific why; in the After the study of judicial examples, it is necessary to make reasonable restrictions on the determination of gross negligence, and to clarify the elements that may affect the determination of gross negligence, for example, in the determination of the premise, it should be confirmed that the two parties constitute a personal labor relationship; in the recovery of responsibility, after the determination of gross negligence, how to recover the compensation from the ultimate responsibility of the person who is responsible for the recovery of the compensation; in the assumption of responsibility, the provision of labor services to the party's assumption of the way how to undertake, and how to assume more In terms of liability, what is the way of providing labor and how to undertake it is more scientific. In conclusion, this paper will study the judicial determination of gross negligence in Article 1192 of the Civil Code, and make empirical analysis and summary of the constitutive elements of gross negligence, determination criteria, determination premise, liability recovery and assumption of responsibility after the determination of the article, in order to provide references for the future judicial practice.

Keywords

Article 1192 of the Civil Code; Gross negligence; Judicial determination; Labor relations.

1. DEFINITION OF "GROSS NEGLIGENCE" UNDER ARTICLE 1192 OF THE CIVIL CODE

1.1. The Connotation of "Gross Negligence"

China's academic circles on the connotation of "gross negligence" there are the following three views. The first subjective theory that the degree of subjective foresight of the perpetrator should be determined whether the gross negligence. Different degrees of subjective foresight should be proportional to the duty of care required of them. If the perpetrator did not foresee, but should have foreseen, then he can be found to be grossly negligent. [Liu Jingwei and Zhou Yu, "Re-conceptualization of Illegality and Fault in the Composition of Tort Liability", Gansu Social Science, No. 2, 2021, p. 140]. The second objective theory asserts that gross negligence is the act itself. Just as the mainstream criminal law theories in Germany and the United States claim that the appearance of gross negligence is manifested by the fact that the actor creates a

great and realistic risk of damage. [Ye Mingtai, "The Construction of Gross Negligence Theory", Legal Studies, No. 6, 2009, p. 80]. The third subjective-objective combination theory believes that gross negligence firstly holds an attitude of indifference in the subjective state of mind, is legally condemnable, and has an external action governed by the subjective will of the actor. Obviously, the subjective and objective combination of views is more scientific.

The establishment of gross negligence must require that the perpetrator has the ability to recognize, judgment and the will to decide, control their own behavior. If the subjective psychological state of the perpetrator is not taken into account, and the perpetrator's external behavior alone is judged to bear civil liability, this practice will inappropriately expand the civil liability, resulting in an imbalance in the assumption of civil liability. Furthermore, if the perpetrator of gross negligence has only subjective indifference, but does not cause any damage, or even the risk of damage, it cannot be recognized as constituting gross negligence. Therefore, gross negligence should have the connotation that the subjective mental state of indifference on the part of the perpetrator leads to a failure to exercise reasonable care, causing objective damage or risk to others. This definition also applies to "gross negligence" in Article 1192 of the Civil Code.

1.2. Criteria for determining "gross negligence"

On the subjective side, the perpetrator must first be aware of the risk and the consequences of the damage. Under certain circumstances, the law directly presumes that the perpetrator is "aware". (2023) Liao 02 Civil Final No. 1808 The plaintiff (i.e., the party who provided the labor) was found to be subjectively grossly negligent in driving the tricycle, failing to exercise a high degree of care in driving the tricycle, which resulted in an accident. Section 8 of the Restatement of Torts provides that "willfulness" means that the actor expects his or her conduct to result in harm, or believes that his or her conduct is likely to result in that result; if the actor's certainty of the result decreases, his or her subjective state of mind will be "gross negligence". (b) "Gross negligence".

At the level of judicial practice, a judge will determine the existence of a particular fact on the basis of the facts of the case combined with a rule of thumb. In common law, "knowledge" does not have to be corroborated by precise evidence, but can be inferred by the judge. By coincidence, there is also a typical way of determining the knowledge of an expert. Expert liability is often applied in the determination of "gross negligence", and there is a reason for this approach. If a significant risk is recognized even by the general public, it is all the more incumbent on the expert to recognize the risk.

On the objective side, the perpetrator of gross negligence has caused serious damage or a high degree of danger to the person or property of others. The severity of the damage results and the protection given by the law to different levels of legal interests are positively correlated, and generally speaking, the personal damage is greater than the property damage. In addition, some scholars in China that, if the perpetrator did not cause serious bodily injury or death to others, should not be recognized as gross negligence, but this point of view, while emphasizing the high degree of danger and damage to the importance of gross negligence, but blocked the lighter personal or property damage is recognized as gross negligence, such a viewpoint is undoubtedly more biased, in the judicial practice of the link may be Such a viewpoint is undoubtedly biased and may be unjust in the judicial practice.

2. THE CIVIL CODE ARTICLE 1192 "GROSS NEGLIGENCE" OF THE EMPIRICAL EXAMINATION OF CASES

2.1. Organization of Cases

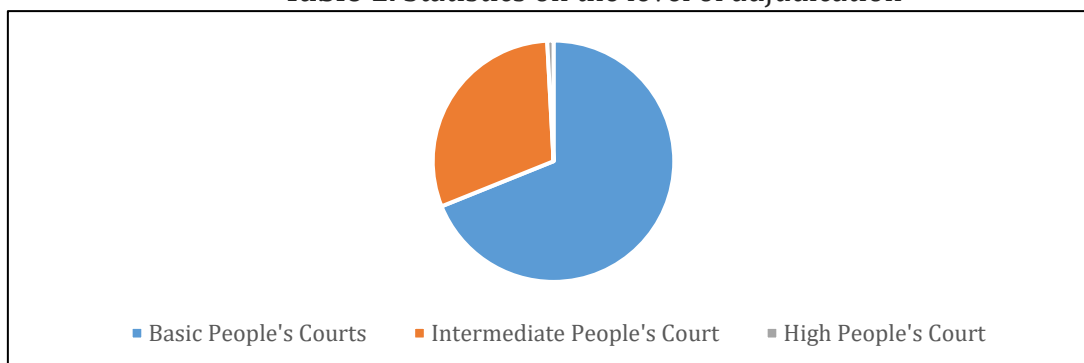
2.1.1 Description of Sample Sources

In order to understand the current status of judicial practice in the determination of "gross negligence" in Article 1192 of the Civil Code, and to find out the problems in the determination of "gross negligence", we collected the judgment documents as the object of study, and utilized the "Judgment Documents Website", "Beida Law Treasure", "Judgment Documents Website", "Beida Law Treasure" and "Judgment Documents Website". The research object is the collection of judicial documents, utilizing "Judgment Documents", "Beida Law Treasure" and "Handle Cases" as the case search platform, and inputting the key words in the "search bar" of the platform as Article 1192 of the Civil Code, "gross negligence", "civil case", "recovery". The search was conducted from January 1, 2023 to the present, and a total of 119 documents were retrieved.

2.1.2 Statistical data organization

In terms of the trial level of the adjudication instruments, the 119 adjudication instruments contain 82 cases heard by the Basic People's Court, 36 cases heard by the Intermediate People's Court, and 1 case heard by the Higher People's Court, accounting for the cases shown in the chart below:

Table 1. Statistics on the level of adjudication



These 119 judgments cover most of the country, including 21 provinces, autonomous regions and municipalities directly under the central government.

2.2. Status of treatment by the courts

2.2.1 Non-recognition of "gross negligence"

A collation of the data shows that of the 119 decisions, only 36 recognized "gross negligence", while 61 of the remaining 83 did not refer to article 1192 of the Civil Code because it did not refer to that article. As a result, there are still 22 cases in which the courts did not recognize gross negligence on the part of the party providing the services. It can be seen that in judicial practice, the denial of "gross negligence" is also a relatively common situation.

Through an analysis of the cases in which "gross negligence" was not recognized, there were three main reasons for the decisions: the first was that the two parties were not in a personal labour relationship, and there were 14 such decisions; the second was that the person who provided the labour was indeed at fault but not to the extent of gross negligence, and there were six such decisions; and the third was that the person who provided the labour caused harm outside the scope of the labour activities arranged by the employer, and there were two such decisions. In the third category, there were two decisions on cases in which the provider of

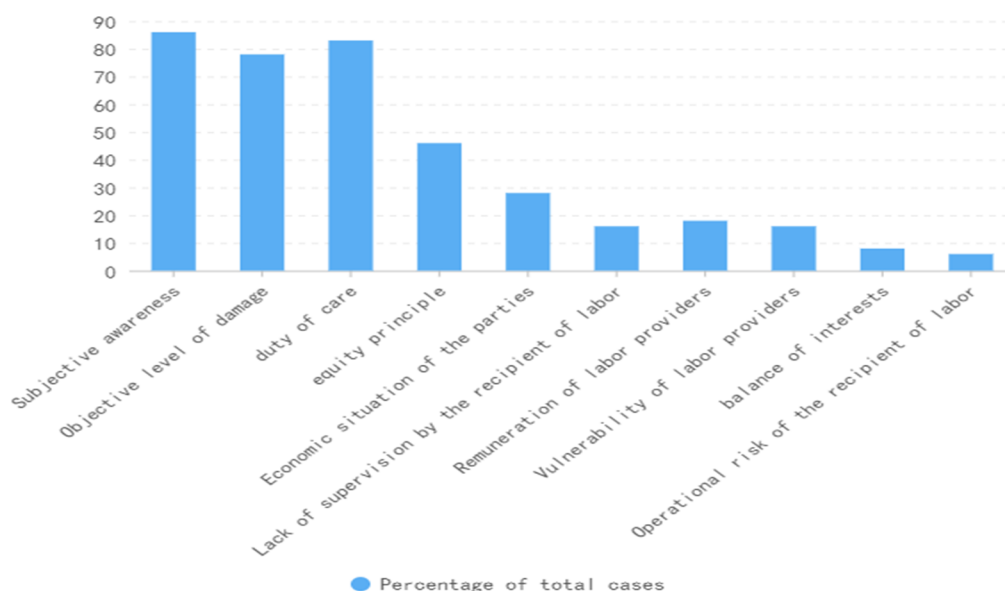
labour caused damage to a person outside the scope of the labour activity arranged by the employer.

The first category to (2022) ji 01 min final 5117 case, for example, the court held that the defendant to provide labor subcontract, can only prove that it and the plaintiff labor subcontracting, contracting relationship, but can not prove that it and the plaintiff has a relationship of labor, and therefore do not recognize "gross negligence". The second category is exemplified by the case of (2022) Liao 14 Civil Final No. 2774, in which the employee caused injury to the body of a third person in the course of construction work, and was the tortfeasor, but the damage caused was relatively minor; at the same time, the employer failed to fulfill its safety and security obligations, and should be held liable as well. Therefore, the court determined their respective responsibilities only on the basis of the circumstances of the damage, and did not find that the party providing the labour had been "grossly negligent". The third category is exemplified by the case of (2023) Shaan 07 Civil Terminal No. 305, where the content of the services provided by the party providing the services to the party receiving the services included only the transportation of coffins and kitchen items by forklift truck, and the act of transporting the person across the river went beyond the scope of the services arranged by the party receiving the services, and the court did not, therefore, recognize "gross negligence".

2.2.2 Recognition of "gross negligence"

In the 36 cases in which "gross negligence" was found, the courts tended to consider the following 10 factors when determining whether or not the provider of labor was guilty of "gross negligence" and dividing the responsibility between the two parties after the finding:

Table 2. Percentage of total cases



As shown in the above chart, after statistics, 86% of the cases are considered from the level of the perpetrator's awareness of the risk or damage caused by his own behavior, 78% of the cases will focus on the objective degree of damage when determining "gross negligence", and 83% of the cases are considered from the perspective of the duty of care, the three factors are both important considerations for the judicial determination of "gross negligence" and also important reasons for judicial practice for the determination of "gross negligence". These three factors are important considerations for the judicial determination of "gross negligence", and

are also important reasons for the judicial determination of "gross negligence" in judicial practice. Secondly, it is the principle of fairness, accounting for 46%, and the economic situation of both parties, accounting for 28%. The disadvantaged position of the party providing the labor, the lack of supervision of the party receiving the labor and the remuneration of the party providing the labor were almost equal, accounting for 16%, 16% and 18% respectively. In a few cases, the factors of "balance of interests" and "business risk of the recipient" were taken into account, accounting for 8% and 6% respectively.

2.2.2.1 Factors affecting the determination of "gross negligence"

It can be seen that subjective awareness is the factor most considered by the trial court when deciding cases. In the case of (2023) Shaan 04 Civil Final 344, the court held that the defendant, as a driver, should have been able to foresee the consequences of not driving in accordance with the norms, but at the time of the incident, the defendant was grossly negligent as he moved the vehicle without receiving a removal order, which resulted in the fall of the third person who was loading the vehicle.

The degree of objective damage is also one of the important factors to be considered in deciding a case. In the case of (2022) Liao 14 Civil Final No. 2774, the employee caused bodily injury to a third person during construction work, and should be held liable for tort, but the damage caused was relatively small, so the court did not find that it constituted gross negligence.

Duty of care is a factor that the trial court takes into account when deciding, in the case of (2022) Liao 0402 Minchu 3800, the court held that the defendant drove an electric car against the flow of traffic on a non-motorized road, resulting in the traffic accident, and was held fully responsible, and found that he was grossly at fault in the accident.

2.2.2.2 Factors affecting recovery for "gross negligence"

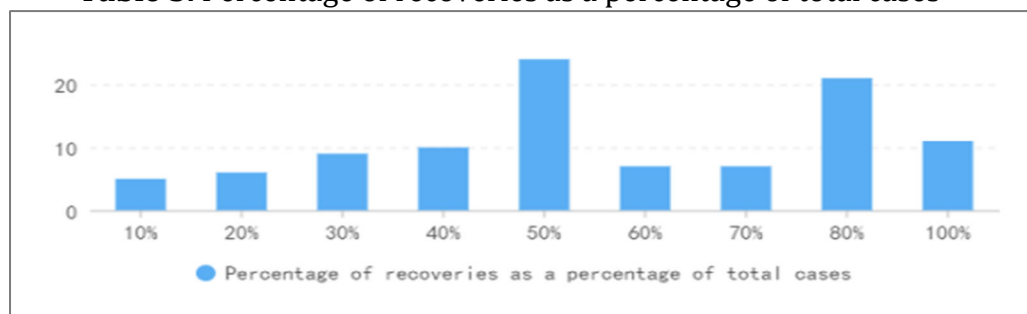
The principle of fairness is a factor that is taken into account when deciding, for example, in the case of (2023) shaanxi 05 min final 795, the plaintiff and the defendant agreed that if the defendant's work behavior causes damage to others, the defendant will only bear the liability of 10,000 yuan. So when the defendant caused damage, the court found that the agreement does not violate the principle of fairness, ruled valid.

Secondly, to be recognized as "gross negligence" to consider more factors is the economic situation of both sides, in (2023) lu 0283 minchu 1196 case, the court that the defendant in the accident has taken a certain amount of risk avoidance behavior and then combined with the actual situation of both sides of the economy, the defendant to pay for the loss of the case should be appropriately reduced to 30% as appropriate.

2.2.3 Analysis of the percentage of recovery following a finding of "gross negligence"

After the court determines "gross negligence", in the vast majority of cases, it decides on the percentage of recoverable damages after the recipient of the labor is held liable on behalf of the provider of the labor, and the percentage of recoverable damages is decided as shown in the chart below:

Table 3. Percentage of recoveries as a percentage of total cases



Through the above chart, it can be seen that the recovery ratio of 50% accounted for the most, usually in the determination of the labor provider constitutes "gross negligence", and did not cause more serious consequences, such as causing other people's serious injuries or deaths, the court in most cases will be determined by the proportion of its recovery to take an intermediate value that is 50%, in the (2022) liao In the case of (2022) liao 0402 civil 3800, the court held that the defendant on the safe driving did not pay attention to the corresponding duty of care, resulting in accidents, with gross negligence, is fully responsible, the plaintiff bears the responsibility for compensation, can be recovered from the defendant, combined with the employer due to the actual loss of the accident, the employer and the employee's fault and the economic situation, etc. Determine the proportion of the recovery of 50%; in the case of (2022) lu 0983 civil In the case of (2022) Lu 0983 Minchu, the employer should have the obligation to prompt safe driving and operation. But in the case of the plaintiff did not prompt, so the plaintiff for their own losses also bear the corresponding responsibility, the court ordered the plaintiff has 50% of the recovery qualification. 80% of the recovery ratio followed, in 80% of the recovery ratio of the case, most of the labor provider's "gross negligence" is more serious, resulting in more serious damages, but the amount of recovery is still within their reach. The amount of recovery is still within the scope of its affordable, for example, in (2023) shaanxi 0423 minchu 111 case, the labor provider in the work of traffic accidents, resulting in the death of a third person, the court ordered to accept the labor party in the assumption of responsibility for damages, can be provided to the labor party to the proportion of recovery of 80%. Finally, there is the percentage of other recoveries, which is relatively small in the total number of cases.

3. PROBLEMS IN CASES OF "GROSS NEGLIGENCE" UNDER ARTICLE 1192 OF THE CIVIL CODE

3.1. Judging the ambiguity of the premise of the finding of "gross negligence"

The duty of care is not only one of the factors for the determination of gross negligence, but also a prerequisite for the determination of gross negligence. Article 1192 of the Civil Code defines the duty of care of the provider of labor as the duty to reasonably foresee and take effective measures to avoid causing personal injury to another person as a result of one's own actions in the course of the labor activity. Therefore, clarifying the scope of the duty of care is a prerequisite for recognizing "gross negligence" in Article 1192 of the Civil Code. From the perspective of the relationship between negligence and duty of care, gross negligence refers to the failure of the perpetrator to fulfill the duty of care of ordinary people, while general negligence refers to the violation of the duty of care of the good steward. It is particularly crucial, then, to explore the difference between the duty of care of an ordinary person and that of a good administrator in article 1192 of the Civil Code.

In the current judicial practice, the court did not say why the boundary between the two, in the case of (2023) su 0981 minchu 1222, the average person should know that when working at height, should take safety measures, and the court thinks that the average person in the preparation of pressing others standing unfastened planks, should take into account the risk of imbalance of the planks, the court is more clearly put forward in this case, the average person will have the duty of care, so when the perpetrator did not fulfill the obligation, the court considers that it meets the "gross negligence" one of the elements. In this case, the court more clearly put forward the general duty of care, so when the perpetrator failed to fulfill the obligation, the court considered that it meets the "gross negligence" of one of the elements. Some courts recognized that the duty of care is a prerequisite for the determination of "gross negligence", and also noted that the duty of care here is something that people in general should have. However, there are still some courts in the reasoning did not mention the extent of the obligation of the perpetrator should be performed, or even did not mention the duty of care, in

the case of (2023) lu 0681 minchu 1531, the court that the perpetrator in the performance of their duties during the time should be dutifully, the statement is too general, so that the "gross negligence" is recognized as the premise of the ambiguity, it is difficult to form a unified determination standard. This statement is too general, making the premise of the determination of "gross negligence" vague and making it difficult to form a uniform determination standard.

In addition to the duty of care, the personal labor relationship between the two parties is also the "gross negligence" determination of the premise, in judicial practice, the recipient of labor will usually not constitute a personal labor relationship between the two parties on the grounds of refusing to compensate the third party, so the need for the court to combine the two sides of the evidence provided by the judgment, because only in the composition of the personal labor relationship, there will be the next "gross negligence" determination of the premise. Only under the premise of constituting a personal labor relationship will there be a determination of "gross negligence". There are disputes about the relationship between the two parties, so the court should be clear that the personal service relationship is the premise of the determination, and clarify the connotation of the personal service relationship.

3.2. Lack of harmonization of factors affecting recovery for "gross negligence"

In case No. (2023) Lu 0681 Minchu 1531, the court held that the defendant, as a professional driver, driving a large automobile, should have done his duty during the performance of his duties to ensure the safety of the traveling car and the vehicle. However, the defendant's failure to maintain a safe distance from the vehicle caused a rear-end accident, which was gross negligence. In a similar case (2023) lu 1425 minchu 663, the trial court that the defendant in driving the vehicle, not in accordance with the operating specifications of safe driving, triggering accidents caused by the loss of outsiders, found that he was grossly negligent. Although the two cases were similar, the former court found that the percentage of recovery for the recipient of the labor was 100%, while the latter was 80%. The main reason for this is that the court in the latter case took into account the business risks of the recipient and the remuneration of the provider, and considered that, in an employment relationship, the employer benefits far more than the employee, and accordingly bears a greater risk than the provider; this, coupled with the fact that the recipient could transfer the risk through the purchase of insurance, made the possibility of spreading out the damage greater than that of the provider. It was thus proved that the court should also be comprehensive and fair in determining the percentage of recovery in the trial.

In the seven factors that will affect the recovery of gross negligence, even if it is not possible to comprehensively consider all the factors that may be involved, it is also necessary to focus on the principle of fairness, the acceptance of the business risk of the laborer, the two sides of the economic situation of these factors is very important for the determination of the proportion of the recovery, in order to achieve a relative balance of the interests of the two parties, to maintain judicial justice.

3.3. Blurring of modes of recovery and assumption of responsibility

In cases where gross negligence is found, the factors affecting recovery for gross negligence are not uniform, so the way in which this type of liability is recovered is also very ambiguous, resulting in the absence of clear and uniform rules for the assumption of liability that are appropriate for both parties.

With the development of social economy, short-term labor work relying on personal labor relations will be a more widespread existence in the future society, most of the laborers engaged in manual labor do not have work units, and find short-term work in the society by virtue of their personal skills, so the lack of rules on the recovery of responsibility and the way of assuming responsibility makes a loophole in the protection of the interests of the two parties.

We have to consider whether to let the two parties sign a labor contract before work, agree that if the labor provider causes damage to the third party, the proportion of responsibility borne by each party, and the subsequent compensation method, through such an agreement, firstly, it can constrain the party who provides labor to be careful in the work, and fulfill the duty of attention to reduce the infringement of the incident; secondly, the proportion of the contract agreed in the contract to recover the money and the way of compensation for a large probability for the Both parties can accept the degree, later if the damage occurs, can also save a certain degree of judicial resources.

In cases such as (2022) Hei 04 Civil Final No. 437, (2023) Su 0981 Civil Initial No. 1222, (2023) Chuan 1124 Civil Initial No. 196, the amount of reimbursement by the party providing labor to the party accepting the labor to compensate on behalf of the party is around 100,000 yuan, which is a huge amount of money for the laborers who don't have a stable job, and if they are allowed to repay it at one time, it may seriously affect them and their family's. If they are required to make a one-time repayment, it may seriously affect their daily lives and those of their families. Therefore, it is very necessary to formulate a reasonable and clear way of assuming responsibility.

4. ARTICLE 1192 OF THE CIVIL CODE "GROSS NEGLIGENCE" SUGGESTIONS FOR IMPROVEMENT OF JUDICIAL DETERMINATIONS

4.1. Clarification of the factors affecting the determination of "gross negligence"

4.1.1 Objective degree of damage

In the cases of (2023) New 01 Civil Final No. 853 and (2022) Liao 14 Civil Final No. 2774, the court held that the degree of damage was minor and gross negligence was not established. A careful reading of the case found that the third person in the degree of injury for minor injuries or less, the court generally considered the degree of damage is light, but there are some cases do not specify the third person's specific injuries make it difficult to determine the degree of damage, so it should be clear what is the degree of damage is light, such as unity of the degree of minor injuries and the degree of injuries below do not believe that the perpetrator constitutes gross negligence.

In addition, in order to determine the case, there are some cases for the perpetrator to one or more deaths or serious injuries, in this case, it should be determined that constitutes gross negligence, but in some cases, the third person's injuries are in a critical value of a determination and not determined, both parties are also controversial, at this time, on the one hand, need to be appraised by professionals, to determine the extent of their injuries and the specific level, the court should also reach a consensus, for example, constitutes a minor injury of second degree that the establishment of gross negligence can determine the objective degree of damage, this way is more clear and scientific enough to convince both parties. At the same time, the court should also reach a consensus, such as constituting a minor injury of second degree that is established gross negligence can be determined by the objective degree of damage, this way more clear, scientific, enough to make both parties convinced, and help to a certain extent to circumvent the situation of the same case of different judgments.

4.1.2 Subjective awareness

In personal labour relations, the subjective awareness of the person who provides labour mainly refers to his or her attitude towards the potential dangers encountered in the course of labour activities and their degree; the person who provides labour is basically exposed to a certain degree of danger, only that the degree of danger varies, and in the field of tort liability, the risk of causing damage to a third party in the performance of the work duties of the person who provides labour is referred to as occupational danger. Different occupations entail different

degrees of occupational danger, and when the party providing the labour fails to pay attention to or disregards the damage caused by its occupational danger to third parties, it should be deemed to be subjectively aware of it.

4.2. Clarifying the prerequisites for the determination of "gross negligence"

Duty of care is both a factor and a prerequisite for the determination of gross negligence. To (2023) lu 06 civil final 568 case, for example, the appellee's negligence is in the labor activities, in the absence of any reasonable or necessary possibility of circumstances, hastily close to the construction of the doorway and out of curiosity to peep lead to the loss of footing fall, obviously there is gross negligence. Therefore, the judge in this case found that the appellee's failure to fulfill the duty of care constitutes gross negligence is very reasonable judgment. Therefore, and then combined with a number of cases can be seen that the violation of ordinary duty of care is to determine the perpetrator established gross negligence premise, only after the perpetrator violated the duty of care, can further trial of the case, if the perpetrator to perform the due diligence duty of care, there is a certain possibility that the accident.

In addition to the duty of care, the identification of a personal labor relationship is a prerequisite for the determination of gross negligence. At the theoretical level, it is clear from article 1192 of the Civil Code that the labor relationship it establishes is between two bodies, neither of which is a fixed entity, and most of the relationships established are short-term, non-fixed labor relationships. At the practical level, the court will stop the trial if it finds that there is no personal labor relationship between the two parties. Such as cab owners and cab companies operating contractual relationship. Therefore, the personal labor relationship between the two parties is the trial of cases involving the Civil Code Article 1192 "preconditions", only to meet this condition, there will be the need to continue to determine.

4.3. Harmonization of factors affecting "gross negligence" recovery

In the judicial determination of "gross negligence", the factors affecting the recovery of "gross negligence" should be clarified and harmonized. In the sample collation and analysis, a clearer decision tendency is also reflected. Among the seven factors related to the determination of the recovery ratio, the principle of fairness, the business risk of the recipient of the labor service, the disadvantageous position of the provider of the labor service, and the economic situation of the two parties should be taken into consideration, because the Civil Code does not have clear provisions on the extent and scope of the recipient of the labor service to recover from the provider of the labor service, so the judge needs to be more prudent and carefully consider the extent and scope of recovery when deciding cases. When adjudicating a case, the judge needs to be more cautious and carefully consider the factors that may affect the amount of recovery, so as to safeguard the legitimate rights and interests of both parties.

In the individual employment labor relations, the receiving party for their own production and management and hire the labor provider to make their labor activities, is required to bear certain responsibilities, obligations or risks, which is justified. In addition, the recipient of the labor activities of the provider of labor activities, although paid, but in essence, the provider of labor by the instructions of the recipient, for the benefit of its service, the recipient as a benefit of the enjoyment, based on the principle of fairness, should be provided to the provider of the tort to pay a certain degree of responsibility. Therefore, the assumption of such responsibility is also one of the bases for adjudication and should be taken into account in adjudication.

Since the recipient of labor has the right to manage and supervise the provider of labor, the recipient of labor should bear the corresponding responsibility for the results of the damage caused by the improper labor practices of the provider of labor. The vulnerable position of the provider of labor as a basis for decision-making, is in line with the law, humane. However, if only consider the vulnerable position of the provider of labor, so that the acceptance of the labor

party to bear more than its responsibility is also unfair, but if the consideration is lacking, then the acceptance of the labor party will mitigate the risk of the provider of the labor behavior, in this way, the responsibility will be shifted to the provider of the labor party, so that the weaker economic strength of the party to carry a greater risk, and also contrary to the principle of fairness of the civil law as well as the protection of the It is also contrary to the principle of fairness in civil law and the protection of the vulnerable position of those who provide labor. Therefore, the factors affecting the determination of the "percentage of recovery" should be clarified, so as to strike a balance between a reasonable judgment and the principle of fairness, and to avoid different judgments in the same case.

Consideration of the economic situation of both parties is also essentially based on the principle of fairness, it is not a factor that determines the percentage of recovery, but it does reflect the judicial activities with humanistic care, reflecting the people-oriented character, most of the labor providers are low-income groups in society, so in the hearing of the cases involving this part of the population, the economic disparity between the two parties should be taken into account, and this is the majority of the cases of the judgment results of the This is also reflected in the outcome of the judgments in most cases, where even if the party receiving the labour is not at fault, it still has to bear 10-30 per cent of the responsibility. On the face of it, this may be regarded as unfair, but it is precisely the judicial manifestation of the combination of the principle of fairness and the socialist system, and it demonstrates the humanitarian spirit of the courts in our country, which takes account of both the law and human feelings in the consideration of cases.

4.4. Determination of the modalities of recovery and assumption of responsibility

4.4.1 Modalities of liability recovery

There are two main ways to exercise the right of recovery from the labor recipient to the labor provider: one is to exercise the right by filing a lawsuit to the court, before the implementation of the Civil Code, there is no clear legal provisions to recognize the right of recovery from the labor recipient, therefore, in judicial practice, a few courts consider the recovery from the labor recipient as a workers' dispute and do not do substantive hearings, and the way of dealing with this kind of cases is gradually clarified after the Civil Code; secondly, the labor recipient can sign a labor contract with the labor provider to agree on the circumstances and proportion of recovery, subject to the relevant provisions of the law. After the introduction of the Civil Code, the handling of such cases has gradually become clearer; secondly, the recipient of labor may sign a labor contract with the provider of labor, agreeing on the circumstances and proportion of recoverable compensation, subject to the relevant provisions of the law. However, through judicial empirical research, most courts believe that the recipient of labor is often in a stronger dominant position than the provider of labor, and the agreement signed between the recipient of labor and the provider of labor, who is in a weaker position, may increase the responsibility of the provider of labor and reduce the responsibility of the recipient of labor. Therefore, the judge is required to confirm, based on the specific circumstances of the case, whether the agreement between the two parties can be applied to the "gross negligence". Therefore, it is necessary for the judge to confirm whether the agreement between the parties can be applied to the determination of "gross negligence" and the issue of recovery after the determination.

If simply from the perspective of the economic situation between the two are not equal to consider the issue, or with a biased perspective to determine the acceptance of the laborer's eligibility to recover and the ability to provide laborers to be recovered, is unreasonable and does not respect the principle of fairness between the two sides; so the two sides should be allowed to "gross negligence" can be recovered after the situation Agreement, including the scope of the amount of compensation, the reasons for doing so are: first, through the agreement between the two parties, so that the court can facilitate the determination of the provider of

labor constitutes "gross negligence", saving judicial resources; second, through the agreement between the two parties, so that the provider of labor subjectively understand that they will be improper labor behavior to assume a certain degree of responsibility, so as to urge them in the improper labor behavior, so that they will be able to recover the compensation. The second is that through the agreement between the two parties to make the provider of labor subjectively understand that they will bear a certain degree of responsibility for improper labor behavior, so as to urge them to be more careful in the work, to fulfill the duty of care, to a certain extent, to reduce the occurrence of "gross negligence" situation. Even in the case of "gross negligence", because of the agreement signed between the two parties, which is in accordance with laws and regulations and involves the recovery of damages, the civil liability of the party who provided the labor service will be pursued in a reasonable proportion on the premise of not aggravating the responsibility of the party who provided the labor service and safeguarding its legitimate interests.

4.4.2 Modalities of liability

Judicial empirical analysis reveals that, after finding "gross negligence", most courts do not have very clear provisions on how to reimburse the provider of the services. In disputes where the recipient of the service suffers a large loss, even if the court determines that the percentage of recoverable damages is low, it is still a significant amount for the party providing the service, therefore, the court should clarify the mode of assuming responsibility in judicial practice, and choose a reasonable method of compensation.

Compared to lump-sum compensation, installment compensation is mainly applicable to individual labour disputes in which the amount recoverable by the recipient of the labour is large or exceeds the ability of the provider of the labour to pay. Referring to Article 16 of the Provisional Regulations on the Payment of Wages, the employer may deduct a portion of the worker's wages to compensate for the employer's loss according to the agreement in the labor contract, and the deductible portion shall not be more than 20% of the worker's monthly wages, and the deducted amount shall not be lower than the local monthly minimum wage standard. Therefore, in judicial practice, the court can refer to this law to determine the compensation of the labor provider, taking into account the size of the amount recoverable by the recipient of the laborer and the level of the salary of the provider, to determine the amount that the recipient of the laborer can be made to pay in order to require the provider of the laborer to make compensation on a regular basis, in such a way, to prevent the laborer from falling into difficulties in life due to the recovery of the compensation, and at the same time also reflects the principle of fairness and reasonable protection of the interests of both sides in the civil law. This also reflects the principle of fairness in civil law and the reasonable safeguarding of the interests of both parties.

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