

The Concept of “Gross Negligence” in Section 19 (2)(i) of the Liability Act and Section 18(2) of the Insurance Agreement Act

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1 Introduction

Recently great interest had been shown to the contents of the concept of “gross negligence” in Denmark, both within tort law and insurance law. This is due to the fact that gross negligence is a decisive factor in the tortfeasor’s liability for damaged items covered by insurance, and because it may prevent a policy-holder being indemnified in case he himself causes the damage which gives rise to the claim. The relevant provisions are laid down in section 19 of the Liability Act and section 18(2) of the Insurance Agreement Act. Section 19 of the Liability Act stipulates: “To the extent damage is covered by a property insurance or business interruption insurance there is no liability for damages. (2) The provision laid down in (1) does not apply in case: 1) the liable party has caused the damage deliberately or by gross negligence [...]”. Thus the point of departure is that to the extent the claimant may have his loss covered by his own property or business interruption insurance he has no claim as against the tortfeasor. Neither is it possible for the claimant’s insurance company to direct a claim as against the tortfeasor. If the tortfeasor’s actions may be characterized as grossly negligent or even deliberate, the point of departure is different, so that the tortfeasor’s liability is upheld regardless of the claimant’s own insurance. Section 18(2) of the Insurance Agreement Act stipulates: If the insured caused the insured event by a negligence which in the actual circumstances may be characterized as gross, the degree of negligence as well as the other circumstances shall be considered in determining whether damages shall be paid and if so what extent. With regard to life insurance and liability insurance, however, the company is fully liable.

In this article it is sought to establish that, currently, an objective risk assessment is applied, with regard to the concept of gross negligence in both of these Acts, in as much as “a risk so obvious” is now the decisive criterion. The term of gross

negligence under Danish law has no set content; instead it is a mere concept applied by the courts in the assessment of whether damages should be paid or denied in an actual case. In fact, this concept encompasses a number of considerations of fairness for the courts to take into account when deciding whether a danger, in their opinion, has been *so* obvious that gross negligence is indisputable. Estimating the degree of negligence is complex and there are numerous aspects to be considered in such an estimation. This article demonstrates that gross negligence does not exclusively depend on the objective risk for the occurrence of damage, but that subjective elements must also, depending on the circumstances, be included, such as the extent of blame in any behaviour. It can be extracted from existing court practice that there are a number of similarities when deciding whether certain behaviour is grossly negligent in relation to section 19(2) of the Liability Act, and in relation to section 18(2) of the Insurance Agreement Act. It is not possible, based on current case law, to conclude whether the Danish Supreme Court finds the criteria with regard to gross negligence in the two codes to be identical, that is whether the estimation is completely identical. As the interests covered by these provisions are not identical, the legal position should be that each of these two Acts, which offer many points of resemblance without being completely comparable, should be assessed independently of each other.

The aim of this article is to describe gross negligence according to section 19(2)(i) of the Liability Act (second part) and according to section 18(2) of the Insurance Agreement Act (third part) by analysing recent judicial decisions and also to consider whether the process of estimation is and/or should be different in the two cases (part 5). In the fourth part gross negligence displayed by children or persons who lack the ability to act rationally, will be treated.

2 Gross Negligence According to Section 19(2)(i) of the Liability Act

2.1 The Legislative Background to the Provision in Section 19(2)(i) of the Liability Act (the “Travaux Préparatoires”)

In report no. 829/1978 (in the following report II)¹ the Liability Act-committee defines gross negligence in section 19(2)(i) of the Liability Act as “*a very high degree of negligence and that the act must be seen as an expression of reckless indifference toward other person's assets*”. The same report states that the committee did consider the expression “*gross disregard of elementary consideration for others*”, but the committee, nevertheless, found it would be more expedient to refer to the concept of gross negligence laid down in section 18(2) of the Insurance Agreement Act and the cases decided in accordance with this rule. The reason for this reference to the provision laid down in section 18(2) of the Insurance Agreement Act is that “it follows from the general considerations of fairness that a third party who has caused the insurance event should not be in a better position in relation to the company than the insured party himself”.² In

¹ Report no. 829/1978: *Report on modification of liability etc.*, p. 14.

² Report no. 826/1978, p. 15.

addition to this, it is explicitly stated in the explanatory notes to the law that "also other cases beside conscious negligence may, according to the circumstances, be regarded as gross negligence".³

Before the bill was introduced Lyngsø, among others, had stated that the concept of gross negligence in section 18(2) of the Insurance Agreement Act meant "conscious", gross negligence, in other words that the insured has foreseen the occurrence of the insured event as a possible consequence of his behaviour.⁴

Based on the above, the statement in the explanatory notes to section 19(2)(i) of the Liability Act may mean either that: 1) gross negligence is more extensive according to section 19(2)(i) of the Liability Act than the corresponding concept in Section 18(2) of the Insurance Agreement Act; or 2) there has not been agreement on Lyngsø's assumption that according to section 18 (2) of the Insurance Agreement Act only conscious negligence is gross. So far – i.e. until the decisions U 1995.737 Danish Supreme Court and U 1998.1683 Danish Supreme Court (which will be mentioned below) – theory seems to have taken it to be the first option.

The "travaux préparatoires" to the provision laid down in section 19(2)(i) of the Liability Act may thus be outlined as follows:⁵ 1) recourse presupposes seriously blameworthy actions, 2) there is no requirement that the tortfeasor has foreseen the occurrence of the event as a possible consequence of his behaviour 3) if the behaviour is grossly negligent according to section 18(2) of the Insurance Agreement Act it is also so according to section 19(2)(i) of the Liability Act.

The provision laid down in section 19(2)(i) of the Liability Act on upholding the tortfeasor's liability when the damage is covered by property or business interruption insurance is based on considerations concerned with the preventive effect of the insurance and the requirements of justice.⁶

2.2 *Decision U 1995.737 Danish Supreme Court "Midtkraft"*

Decision U 1995.737 Danish Supreme Court concerns a situation where an engineer, A, used his employer's, Midtkrafts, garage and tools for repairing his own car after working hours. A had placed his car over the pit and he was welding a crack in the silencer, when a fire broke out in the bottom of the car. The fire rapidly spread to the rest of the car and further on to the whole building. The building, which was insured by the insurance company F, was damaged and the cost of repairs were nearly DKK 1,4 mill. An excess amount of approximately DKK 154.000 was paid by A's private liability insurance company. F directed a claim of recourse against indemnity from A (his private liability insurance company for the residual amount on the grounds that A had behaved grossly negligent, cf. section 19(2)(i) of the Liability Act.⁷

³ FT 1983-84, 2nd. collection, appendix A p. 111.

⁴ Cf. thus Lyngsø *Fuldmægtigen* 1968.117.

⁵ Cf. Nørgaard U 1996 B. 194.

⁶ Cf. Report no. 829/1978 (Report II), p. 14.

⁷ The provision laid down in section 19(1) of the Liability Act only applies to the extent that the

The fire broke out because the anti-rust composition, which had been applied to the car approximately one year earlier, had caught fire. The engineer, A, was not a qualified welder, but privately he had carried out a good deal of welding. For the last thirty years A had thus repaired his own car and in that connection also carried out the welding. Because of his position as an engineer on call, A had access to the welding equipment in the garage. Before he started welding, A had loosened the exhaust system from the bottom of the car. During the trial there was a disagreement as to whether an employee was allowed to carry out welding in the garage facility at all.⁸ The Supreme Court did however not find it proven from the evidence that the employees were not allowed to borrow the welding equipment and/or use it in the garage.

There is no doubt that the behaviour of the tortfeasor, A, in decision U 1995.737 Danish Supreme Court was negligent.⁹ A had disregarded a number of rules laid down in the fire services' regulations, and furthermore he had neglected to screen off the undercarriage. In addition to that, A had failed to place the oil reservoirs at a safe distance from the place where the welding took place, and he had not ascertained himself of where the fire extinguishing equipment was, before he started welding. At the same time, there were a number of mitigating circumstances as A had taken the most elementary safety precaution, i.e. to loosen the exhaust system from the bottom of the car. Furthermore, the purpose of the enterprise was reasonable and it did take place in suitable surroundings. A did have experiences as a private mechanic, A did have a certain reason to believe that he controlled the situation. The court was not satisfied that it was forbidden to borrow and/or use the welding equipment, nor that A was aware of the risk that anti-rust composition might catch fire – this fact was known only by mechanics. (Although A was a qualified engineer he was not a motor-mechanic as such).

The Western Court of Appeal stated that A's negligence was not “*so gross*” that liability in accordance with section 19(2)(i) of the Liability Act should be upheld. The Supreme Court concurred with the Court of Appeal's decision but with a different choice of words: that A's actions “did not carry with it *so obvious a danger* of the actual damage that he could be regarded as having caused it by gross negligence in the sense this concept is defined in section 19(2)(i) of the Liability Act”.

The idea “so obvious a danger” shows that emphasis is put on those elements that are generally applied in negligence assessments. The Supreme Courts test of “a risk so obvious” does not require that the tortfeasor has realised the occurrence of the damage as a possible consequence – in other words, the concept is not limited by the tortfeasor's subjective attitude to a potential risk arising from his actions. The condition, that the behaviour must imply a risk *so obvious* in relation to the damage, indicates the existence of an extremely high risk of damage. It may also be

claimant's loss is covered by a property or business interruption insurance, consequently a tortfeasor is liable to pay damages for the excess amount according to the general rules.

⁸ On the garage wall there was a notice stating the rules for private use. From these it appeared that “The facilities may be used for washing, greasing, shift of oil and minor repairs on the employees' own cars. The facilities may not be used for engine repairs, tectyl treatment and extensive repairs. Use of the company's oil products, lubricants and detergents is not allowed”.

⁹ See in this connection Nørgaard in U 1996 B. 192 ff.

characterized as blameworthy that the tortfeasor has acted without taking that obvious risk into consideration. Thus, the word "so" seems to imply an increase in risk over and above the obvious risk of damage.

2.3 Decision U 1998.1558 Danish Supreme Court

In the decision U 1998.1558 Danish Supreme Court A, who was a trained plumber and who had also attended an AMU (labour market training) arc welding course, carried out a number of extensive sheet metal and steel plate work on his parent's car. A had permission to use a state school garage for these repairs. One of the things A did was to change corroded parts in the bottom of the car, and as A was welding on a new plate under the right front seat in the bottom of the cabin, a fire broke out which spread to the rest of the garage, causing damage with the cost of repairs amounting to approximately DKK 860.000. The building was insured by the insurance company F, who claimed recourse against A in pursuance of section 19(2)(i) of the Liability Act. It was established as a fact that, while welding in the bottom of the car, the fire had started because the petrol hose had melted due to the heat from the welding flame. The repairs in question were quite extensive and at the time of the accident they had been going on for about two weeks. A had cleaned off all of the anti-rust composition from the undercarriage.

Naturally, before claiming recourse against A, F had studied decision U 1995.737 Danish Supreme Court (The Midtkraft case) carefully and made a thorough comparison with the facts of the present case. To support its case that A had been grossly negligent according to section 19(2)(i) of the Liability Act, F stated that A had disregarded a number of rules laid down in the fire services legislation, that he had not taken relevant precautionary measures, including the fact that there was no fire extinguishing equipment in the building and also the suitability of the building for the purpose used. It was pointed out that the repairs had been going on for a relatively long period of time, which meant that A had had a particular reason for planning the process carefully, and based on that the tort could hardly be characterized as a "slip". In addition to that, there was a specific risk of fire connected to one particular object – namely the petrol hose, and the leaking petrol did constitute an obvious risk. In mitigation A said that he had taken out all flammable material from the car and cleaned off all of the anti-rust composition from the undercarriage.¹⁰ A stated that he had not given any thought to the petrol hose, but he did, however, know that there was only very little petrol left in the car¹¹ furthermore the repairs in question required only simple procedures. The Western Court of Appeal stated that it must be considered "obvious even for a lay person that in a car where the petrol tank is in the back and the motor in the front end there will be a petrol hose or pipe and most likely that hose or pipe will run somewhere under the car". The Court of Appeal therefore found it to be an elementary safety precaution to check where the hose was before welding in the

¹⁰ Contrary to the tortfeasor in decision U 1995.737 Danish Supreme Court he had, thus, been aware that the anti-rust composition did constitute a fire risk.

¹¹ Statements that, to at certain extent, seem contradictory at first sight.

bottom was initiated, subsequently, the risk of the damage was so obvious that gross negligence had been displayed regardless of whether or not A had realised the risk.

A Supreme Court majority supported the decision of the Court of Appeal with the addition that extensive welding had been carried out, that it had been going on for two weeks, and that A had cleaned the outer side of the undercarriage on which the petrol hose was attached. When A had carried out the welding close to the petrol hose without taking any safety precautions with regard to the fire hose, his behaviour had constituted a risk so obvious of causing a fire that A had displayed gross negligence. In the opinion of the majority the work to be done before the welding had given A plenty of opportunity to realise the nature of what he was dealing with under the car, and thus a particular incentive to arrange the processes in such a way that the risk involved was minimised. A's actions could not be characterised as a “slip”.

The minority stated that A had not thought of the petrol hose, and consequently he was not aware that he was welding close to it and by doing so performed an obviously dangerous act. The minority, thus, put conclusive emphasis on A's subjective circumstances, because the concept of gross negligence can only exist in realm of the particular tortfeasors subjective intention. As the minority did not find A's behaviour to be a sign of recklessness or gross carelessness, they did not find that it fell under section 19(2)(i) of the Liability Act.

2.4 Consequences of a Deliberate Act: A General Assessment

The assessment of whether an act of negligence is “gross” is made through a general assessment of the whole situation and the risk involved. Damage may occur as part of a chain of events triggered by a tortfeasor's deliberate act. A tortfeasor's intention to do wrong does not entail that any damage caused as a consequence hereof falls under the rule in section 19(2)(i) of the Liability Act. Intention may, however, form part of the general assessment – especially if the damage is closely connected to the intentional act itself.¹²

The above may be illustrated by U 1998.32 Danish Supreme Court. A had decided to commit suicide by turning on the gas cooker in his apartment. Between 10 - 11 PM he took 30 morphine pills and turned on the four gas taps. He turned off the pilot light in the gas water heater and stopped all gaps to prevent the gas from leaking out of the apartment. But he did not turn off the main electrical switch, therefore the TV and the VCR remained on standby and the refrigerator was running. Around 7 AM the next morning there was an explosion, which caused tremendous damage to the building. The building was insured and the insurance

¹² Compare with Gomard and Wad: *Erstatning og godtgørelse efter erstatningsansvarsloven og voldsofferloven* (Damages and compensation in pursuance of the Liability Act and the Victims Act) (1986), p. 126, where it is stated that in the assessment of whether for instance a car damaged by a car thief falls under section 19(2)(i) of the Liability Act it may have an effect if the damages has occurred in close connection with the theft, it may thus be more reasonable to let the intention to steal include damaging the car.

company claimed recourse against A, who survived, on the grounds that A had acted in a manner which was grossly negligent.¹³

Both the Court of Appeal and the Supreme Court established as a fact that A’s intention was to commit suicide, and that the exact cause of the explosion the following morning, which had damaged the building, had not been established. A weighing of the gas cylinder revealed that approximately 6,6 kg gas had leaked out. However, the insurance company had not proved that the amount of leaking gas constituted an obvious risk of the damages that had occurred. Consequently, A’s behaviour did not constitute a risk of the actual damage that was so obvious that the damage was caused by an act of gross negligence in pursuance of section 19(2)(i) of the Liability Act.

In the above decision it is difficult to talk about an obvious risk in as much as the cause of the explosion was never established. Gas does constitute a general risk, but the fact that A was aware of the general risk is not in itself enough to say that any damage – regardless of what exactly was the triggering cause – was obvious to such an extent that this was a case of gross negligence. The fact that the tortfeasor is aware that his intended actions involves certain risks and due to this he takes certain precautions, does not necessarily mean that gross negligence has been displayed in case the risk should actually result in damage.

Generally there will be mitigating circumstances that will go against characterizing an act a grossly negligent, e.g. that it is difficult for the tortfeasor to act differently at a critical point, or that he hardly has the sufficient time to act. Furthermore, it may have a mitigating effect if the tortfeasor has misjudged the situation.

The problem treated in this part also exists in connection with the provision laid down in section 18(2) of the Insurance Agreement Act. If one finds that most damage occur as part of a chain of events, triggered by a deliberate action or by a failure to act, it appears natural that insurance legislation, on the same lines as the above, applies an actual general assessment of the whole situation in which the damage occurred, including deliberate actions as one element in the assessment of whether the damage (i.e. the insurance event) is caused by a deliberate act or by gross negligence, cf. section 18(2) of the Insurance Agreement Act.¹⁴

3 Section 18(2) of the Insurance Agreement Act

¹³ A had, in an extra-judicial settlement and without legal assistance, accepted a DKK 10.000 fine – supposedly for violating section 252 of the criminal code, i.e. any person who recklessly exposes the life or health of others. On this provision see i.e. Greve, Toftgaard Nielsen and Asbjørn Jensen: *Kommenteret Straffelov Speciel Del* (The Criminal Code with Comments. Special Part) (6th edition), 289 f, where it is stated that “obvious risk” is a requirement that concerns the *probability* of the occurrence of a possible consequence, but it may also be taken to mean a requirement that a (certain) risk must be *obvious*. For some time, contrary to the “travaux préparatoires”, certain acts of negligence have been considered to fall under the provision. The fact that the perpetrator also puts his own life at risk is not necessarily enough to prove that he lacked knowledge about the risk involved, cf. Nelson U 1956 B. 158.

¹⁴ See discussion on the topic Ivan Sørensen: *Forsikringsret* (2. ed.), p. 141 f, Ivan Sørensen: in *Festskrift for FED, Forsikrings og Erstatningsretlige Skrifter I-2000*, s. 263 f and Kjærgaard: *Privatansvarsforsikring i et erstatningsretligt perspektiv* (1999), p. 76 ff.

3.1 *The "Travaux Préparatoires" on the Provision laid down in Section 18(2) of the Insurance Agreement Act*

Before the introduction of the Insurance Agreement Act there were statutory provisions and insurance conditions that exempted the company from liability if the insured himself was to blame for the occurrence of the insured event.¹⁵ Even simple negligence (that is negligence that falls short of being gross) was enough to free the company from paying damages. The introduction of 18(2) of the Insurance Agreement Act is, thus, clearly aimed at improving the insured party's possibility of obtaining insurance cover. One must bear in mind that general developments in society and especially increased consumer protection may entail that, in practice, the rule be interpreted differently from what was originally the intention.

In the section 18(2) of the Insurance Agreement Act bill¹⁶ gross negligence is only described as those cases where the negligence is of such a degree and nature that it is *very close to wilfulness*, which for instance is the case if the insured carries out a dangerous act knowing full well that it most probably will cause an insurance event.¹⁷ In the draft it is stated¹⁸ that it will in fact often be possible to establish that the insured has acted in a grossly negligent way, but there will not be sufficient evidence to establish that he has deliberately wanted to bring about the insurance event. In that case the provision covers both what is gross negligence and unproven willfulness.

The majority vote in supreme court decision U 1999.1706 may serve as an example to illustrate the above. The case concerned a casualty insurance coverage of A's death, which occurred after an approximately 6 metre fall from a parking lot situated on a roof. No one witnessed A's fall, which occurred less than an hour after his release from jail, where he had been remanded, charged with drunk driving. The Supreme Court established as a fact that A had moved up the ramp to the parking lot on the roof and across the lot to a rail placed approximately at a height of 1 metre and 1,5 metre from the edge, on which there was an additional curb, and that most probably A had voluntarily climbed over the rail and walked towards the edge, where he fell because he lost his balance. It was not sufficiently established that A had intended to fall in order to kill himself (thus, there was no prove of intention to cause the insurance event). On the other hand, in view of the obvious risk of falling by climbing over the rail and walking toward the edge, the accident was considered to have been caused by gross negligence. All the supreme court justices agreed that, especially based on a statement from the Medico-legal Council, it could be established as a fact that A's fall was not caused by beating from another person, participation in a fight or the like, in short, nobody else had anything to do with the fall. Subsequently, the majority stated that regardless of whether or not it

¹⁵ See also N. H. Bache: *Brandforsikringsretten* 1. del (1905), p. 95 ff and Stig Jørgensen in *Bör försäkringsavtalsrätten reformeras?* (1968), p. 63.

¹⁶ Draft bill on insurance agreements (1925), p. 50 f.

¹⁷ In Danish law the concept of intention includes direct intention, probability intention and wilful blindness.

¹⁸ Draft bill on insurance agreements (1925), p. 51.

was an accident as defined in the insurance policy,¹⁹ it had been established beyond reasonable doubt that A had "caused his own death by intention or gross negligence, cf. the conditions item no 3.4". In other words, there is no clear indication of whether the majority found that A had wanted to commit suicide or whether he only behaved in a grossly negligent manner. The choice of words may show that the court was suspicious of A's intention, but due to the scant information about what happened and to A's state of mind, the court had not been certain about it. It should be mentioned that the burden of proof in the case is complex, inasmuch as it is up to A's relatives to prove that an insurance event has taken place. In casualty insurance it is, thus, for the insured to prove that the event is not governed by will not caused by something external, i.e. e.g. not a disease²⁰, while it is for the insurance company to prove that the event in question is exempted from coverage (here due to the consequences of intention or gross negligence).²¹ (It may be discussed whether it makes any sense to talk about an intentional accident, as the definition of an accident requires that the injury has occurred independently of the insured person's own will.)²²

Such parts of section 18(2)(i) of the Insurance Agreement Act, that can be changed by the parties agreement (not all can) start by saying in case of gross negligence the insurance compensation is reduced in proportion to the degree of blame and the circumstances in general.²³ In other words, it is possible to award the insured reduced compensation even though he himself has brought about the insured event by gross negligence, it is, however, presupposed that compensation shall not be paid in more serious cases.²⁴ The fact that compensation may be paid according to a scale of criteria supports the assumption that gross negligence according to section 18(2) of the Insurance Agreement Act is not limited to cases of hidden intention. In this respect the legal effect of gross negligence between the provisions laid down in section 18(2) of the Insurance Agreement Act differs from the provisions in section 19(2)(i) of the Liability Act, the latter entails that the tortfeasor's liability is upheld in case of gross negligence. Furthermore, section 18(2) *in fine*, states that as declaratory point of departure a liability insurance will cover liability incurred by gross negligence entails that most often there will be no

¹⁹ The following condition was stipulated in the policy: "by accident, is here meant, a sudden, external event that causes the insured to be hurt involuntarily", which in any case constitutes a linguistic deviation from the traditional definition of an accident, cf. in details on this Ivan Sørensen: *Forsikringsret* (2.ed.), p. 364 and 385 ff.

²⁰ Compare however with decision U1997.683 H, where the insured got a brain injury when he was thrown off his bike and hit his head. The Supreme Court stated that such a injury is in its external objective form an accident and that there was no actual information to indicate otherwise.

²¹ See also on proof of intention in Ivan Sørensen, *Med lov ... Jurisprudential thoughts in celebration of professor Vagn Greve's 60 years birthday*, edited by Vestergaard and Balvig (1998), p. 258 ff and decision U1997.88 H.

²² Cf. Ivan Sørensen in *Med lov ... Jurisprudential thoughts in celebration of professor Vagn Greve's 60 years birthday*, edited by Vestergaard and Balvig (1998), p. 264.

²³ In certain types of insurance the normal procedure is to deviate from the non-mandatory point of departure, the company will, thus, completely exclude insurance events caused by gross negligence from being compensated, cf. Ivan Sørensen: *Forsikringsret* (2. ed.), p. 146 and Lyngsø: *Dansk Forsikringsret* (7. ed), p. 223f

²⁴ Cf. Draft bill on insurance agreements (1925), p. 51.

reason to look into whether a tortfeasor's action is grossly negligent both according to section 19(2)(i) of the Liability Act, as well as to section 18(2) of the Insurance Agreement Act.²⁵ In the draft version of section 18(2) of the Insurance Agreement Act it was suggested that in the absence of specific agreement to the contrary the rule should be that the liability insurance cover liability incurred by gross negligence: "[...] that which from a Social point of view is seen as the Main purpose of Liability Insurance, is to ensure that the injured party is Compensated for his Loss".²⁶

3.2 *The Decisions U 1998.1693 Danish Supreme Court and U 2000.1093 Danish Supreme Court*

From cases on section 18(2) of the Insurance Agreement Act it also appears that the criterion "a risk so obvious" may be applied. Decision U 1998.1693 Danish Supreme Court concerned an auction house where jewellery and other objects belonging to customers of the auction house, a collection of coins belonging to one of the owners of the auction house and an amount of money in cash had been stolen from a safe in the auction house. The loss was estimated at approximately DKK 1.7 million. There was no sign of forced entry and the key to the safe was found sitting in the lock, which at first made the insurer reject the idea that a burglary had taken place. Later it was observed that the alarm box had been broken open with some sort of object. The insurer then recognized there had been a burglary, but refused to cover the loss on the ground that the burglary was caused by gross negligence within the terms of section 18(2) of the Insurance Agreement Act.

For practical reasons, the key to the safe was kept on a shelf behind books in an office bookcase in the same building. Furthermore, it was the same key both for the front door and the alarm box.²⁷

The hiding place of the key was well known amongst employees, it was accessible and it had not been changed for several years, and because valuable items, easy to sell, were stored in the auction house making it an easy target for a burglary, a majority in the Court of Appeal found that the auction house had kept the key in "so careless a way", that the insured event had been caused by gross negligence. It was also emphasised that regardless of the fact that the insurance

²⁵ The situation will typically be that it is possible to find cases, concerning the provisions in question, which share many similarities, but are not entirely identical in facts, consequently it may be difficult to decide whether different results in the estimation of the degree of displayed negligence should be ascribed to these variations of facts or to a different way of applying the legal rules laid down in section 19(2)(i) of the Liability Act, and section 18(2) of the Insurance Agreement Act.

²⁶ Cf. Draft bill on insurance agreements (1925), p. 51.

²⁷ When the insurance was taken out in 1986, the insurance company had demanded that an alarm system was established and made instructions as to how the safety room should be established of the safe. The insurance conditions also stipulated e.g. "What items were covered? ... Cash, money substitutes, securities, manuscripts and documents, placed at the insured premises [...] The insurance does not cover theft from safe or safety box when codes and/or keys, to the extent this or these have been left at the insured place, have been used to commit the theft."

company had not pointed out that coverage presupposed that the key to the box be kept in another location, the auction house should have realised that the value of hiding the key would diminish when hid in the auction house. By way of introduction, the Supreme Court stated that the way the key was kept had been of decisive importance for the occurrence of the insured event. In other words, there was a causal relationship between the practise followed by the auction house and the burglary.²⁸ Next, the Supreme Court stated that as a substantial amount of valuables which could be resold were frequently stored in the safe, that the key was hidden in the same accessible place for years, a place that gradually more people came to know about the insured's behaviour "constituted a risk of a theft like the one committed that was so obvious" that the degree of negligence was gross. The insured party had displayed behaviour so blameworthy that the Supreme Court said the entire claim should be denied, cf. section 18(2)(i) of the Insurance Agreement Act in fine.

In case U 1998.1693 Danish Supreme Court, a number of elements regarding section 19(2)(i) of the Liability Act already emphasised in the decisions above can be found. It should, however, be noted that *section 18(2) of the Insurance Agreement Act is supplemented by the rule laid down in section 51* concerning the insured's violation of safety precautions. If the insurer has laid down special requirements/precautions to be taken that aim at preventing an insured event from occurring or minimizing the extent of an insured event, the insured will, in case he should violate these, only be entitled to compensation, if he is able to prove that there is no causal relationships between the occurrence of the insured event and the disregard of the requirement. Section 51 of the Insurance Agreement Act also applies to violation that is due to simple negligence of the requirement. Typically, the case will also fall under section 18(2) of the Insurance Agreement Act.

It should be noted that the Supreme Court applies the same criterion, namely "so obvious a risk" in relation to gross negligence according to section 19(2)(i) of the Liability Act, and section 18(2) of the Insurance Agreement Act; this implies that the concept of gross negligence in both provisions is objective. Consequently, decision U 1998.1693 Danish Supreme Court must be seen as a demonstration that the concept of gross negligence is almost the same in both tort and insurance law. The use of "so obvious a risk" indicates that the Supreme Court does not find that there is any difference in principle. Actions which are considered grossly negligent according to section 18(2) of the Insurance Agreement Act will also be so according to section 19(2)(i) of the Liability Act.

Applying the criterion "so obvious a risk" in connection with section 18(2) of the Insurance Agreement Act indicates that gross negligence is not limited to situations where the insured has caused the insured event by conscious gross negligence. Gross negligence does not depend on whether the occurrence of the damage (the insured event) have been foreseen as a possible consequence. By applying an objective assessment, decision U 1998.1693 Danish Supreme Court

²⁸ The Supreme Court, thus, clearly disagrees with dissenting opinion of the Court of Appeal which stated: "[...] the plaintiff [the auctions house] had displayed negligence by the way the kept the key to the sikringsboksen, the nature of the negligence, however, had not been such that it can be said to have triggered off the insurance event, cf. section 18(2) of the Insurance Agreement Act".

clearly differs from Lyngsø's view, that gross negligence includes only "conscious negligence". The decisive factor is the nature of the risk of the occurrence of an insured event caused by the insured's actions, regardless of whether the insured has actually appreciated that the risk exists. Naturally, there must be a causal relationship between the gross negligence and the damage, but in those cases where it is relevant to discuss gross negligence, the causal relationship of the damage in relation to the behaviour will normally be obvious.

The more recent decision U 2000.1093 Danish Supreme Court, however, does not apply the criterion "so obvious a risk" when deciding whether or not a death was provoked by gross negligence in connection with an insurance policy, cf. the insurance conditions' exemption of "[...] accidents caused by the injured persons himself deliberately or by gross negligence, suicide or suicide attempts included" and section 18(2) of the Insurance Agreement Act. In this case the insured had taken out casualty insurance, which included "accidents caused by disease (e.g. stroke and seizures and unsoundness of mind)". After a long day at work, and after that a dinner and a single glass of wine, the insured cycled home on his bike in the snow. The insured rode out into a junction, where the light, in his direction, was red. In the middle of the crossing, the insured turned around into the direction he had come from, but he was hit by a car driving through a green light. The insured had had his bicycle lamps on. Based on the information about the insured, the Court of Appeal established as a fact that he had driven through the red light, and in panic a he had turned around the bike and headed back, when he realized the danger he was in. In the opinion of the Court of Appeal the behaviour had implied so obvious a risk of the damage that it was caused by gross negligence in the sense this concept is defined in section 18(2) of the Insurance Agreement Act. The Supreme Court found it established as a fact that the insured, when he entered the crossing, he was not aware that the light in his direction was red, and when he did realize it, in the middle of the crossing, he tried to avoid the danger by turning his bike around. Based on the above, and despite the road traffic violation, the insured's behaviour was not so blameworthy that it is was gross negligence, which would have meant that the accident would not have been covered by the insurance in pursuance of 18(2) of the Insurance Agreement Act. A violation of the road traffic legislation, which aims at controlling behaviour in this situation, does suggest that is culpable conduct, but that does not entail that the behaviour is grossly negligent.

There is little doubt that ignoring a red light involves a significant degree of danger, and it may be extremely dangerous – and surprising to other road users – when someone suddenly changes direction in the middle of the crossing. It may be noted that by avoiding discussion of the objective risk in the decision and underlining that it was not behaviour that was so blameworthy so as to justify exemption from the insurance coverage, the Supreme Court put major emphasis on the insured's subjective situation. By emphasizing that the insured was not aware that he entered the crossing while the light was red, it also underlined that the damage did not occur as an element in a chain of events triggered off by a deliberate action, in which case the negligence assessment might be influenced (cf. on the above in part 2.3). Regardless of the risk, overlooking a traffic light in a moment's distraction can hardly be characterized as grossly negligent. To turn the bike around in the middle of the crossing does entail further danger, but (regardless

of whether or not the insured has realised the danger at this point) it is to be judged by assessing the insured event in its entirety whether gross negligence as defined in section 18(2) of the Insurance Agreement Act (and section 19(2)(i) of the Liability Act) has been demonstrated. In the assessment of whether personal injury is caused by culpable conduct, the situation in its entirety will affect the assessment; e.g. if we assume that an emergency may entail that an act which otherwise would be negligent, but exactly because it is an emergency is not actionable (the behavior is not negligent)²⁹, even though it does of course make a difference if it is an "emergency" caused by the person in question himself. In the assessment of gross negligence - the degree of negligence included - emphasis will be put on whether the person in question may be blamed for putting himself in the situation. The Supreme Court emphasises, in decision U 2000.1093, that the insured had not acted in so blameworthy manner that gross negligence in accordance with section 18(2) of the Insurance Agreement Act's had been displayed, appears to be based on these kind of considerations. It should also be remembered, in this connection, that according to the legislative background to section 19(2)(i) of the Liability Act gross negligence requires that the person acting has behaved in a manner which is extremely blameworthy (cf. above part 2.1.1), consequently, a similar requirement must exist in relation to section 18(2) of the Insurance Agreement Act. This must be the case regardless of whether or not it is assumed that the concept of gross negligence is more limited in section 18(2) of the Insurance Agreement Act, than it is in section 19(2)(i) of the Liability Act, or whether the two provisions are identical.³⁰ Decision U 2000.1093 illustrates that damage which arises from so-called "slips" cannot be characterized as gross negligence in the sense this concept is applied in section 18(2) of the Insurance Agreement Act.³¹ Gross negligence implies more than a short inattentive moment, thoughtlessness, or a purely reflexed act. Probably, the objective risk of possible damage will influence the assessment of whether a act is likely to be a "slip" – or put differently: the margin for "slips" decreases concurrently with the danger of the situation and the possibilities of taking precautions to minimize the risk in advance.³²

Thus, the concept of gross negligence may hardly be considered a mere risk criterion. The action or lack of action which causes the damage must objectively constitute a distinct deviation from generally accepted behavioural pattern in the area concerned. It is not possible though to let gross negligence depend on a

²⁹ See on this subject e.g. von Eyben and Vagner: *Lærebog i erstatningsret* (4. udg.), p. 45 f.

³⁰ That gross negligence according to section 19(2)(i) of the Liability Act and to section 18(2) of the Insurance Agreement Act is identical, means that the same elements are suited to form part of the assessment.

³¹ It can be noted that the cyclist's behaviour – to stop the bike and turn it around in order to go back where he came from – does exactly show that he had no intention of driving through red, but rather that this was indeed a "slip".

³² In *Forsikringsaftaleloven med kommentarer* (2000), p. 89, I van Sørensen states that it may be "difficult find any other explanations for the unusual ratio decidenti and decision in case of 7. February 2000 [i.e. decision U 2000.1093]" than the one that it takes a higher degree of negligence before compensation is denied in case of personal injury, than in relation to damages objects,. Generally, it must be assumed that the character of the occurred damage is a suitable element in the assessment of whether the displayed negligence is gross.

condition that the actual tortfeasor/insured was aware of the risk, or that he knew how to act correctly in the situation. Even though it is not possible to require that the risk was obvious to the individual, it cannot be ignored that there must be something for which the person in question is to be blamed. Gross is implied by the nature of the thoughtlessness displayed. Gross is connected to the displayed degree of negligence, where the risk incurred and the possible extent of damage caused by the action must also be taken into consideration. In other words the extent and nature of possible damage, and the chance of avoiding or minimizing the risk of the damage. Also in the assessment of possibilities of avoiding a risk, a subjective element may be included, namely the actual person's ability to behave differently in connection with the occurrence of the damage and his capacity to understand and evaluate the risk. Von Eyben states³³ that "it is natural that more emphasis is put on individual ability, especially subjective inferiority, in the 'one step higher' assessment of whether negligence has been gross than on the actual culpa assessment, but the current practise does not form a basis for evaluating how big a difference in degree there actually is in this respect". It does not eliminate liability that the tortfeasor's act is the result of a moment's distraction, fatigue or the like. Physical handicap will probably not necessarily lead to a milder assessment of negligence; still it cannot be excluded that such circumstances may be taken into account. This may especially be the case with regard to causing the insured event.³⁴ Likewise, it may be taken into the consideration of the assessment of the degree of negligence, that the tortfeasor – or within insurance, the insured – at the moment of action has misunderstood the actual situation and as a consequence thereof cannot be expected to have been aware of the risk connected to his behaviour. It is in no way certain that such a mistake will be considered a mitigating circumstance – lack of knowledge about the actual state of affairs may in it self express a significant degree of negligence. The question may be illustrated by the dissenting opinion in the previously mentioned decision U 1999.1706 H, where it was established as a fact that a parking lot, when approached by the ramp, appeared to be situated at first floor level, and that the accident took place at a time when it was dark in the courtyard. Based on this, the minority did not find it to be established that the deceased had been aware that there was a 6 metre fall from the parking lot to the courtyard, and subsequently had not been aware that there was a significant risk involved in climbing over the fence and walking to the edge; thus in their opinion, the death could not have been caused by gross negligence.³⁵

³³ The negotiations at the 33. Nordic Jurist Meeting, Copenhagen 1993, p. 633 f.

³⁴ Compare von Eyben and Vagner: *Lærebog i erstatningsret* (4. udg.), p. 81, where it is stated that in case of physical defect, such as blindness, deafness and paralysis it is likely that the negligence assessment will be milder in those cases where the person in question is injured, or in other words, the physical defect may result in a relatively mild assessment of guilt.

³⁵ Compare also decision FED 1997.1527 V, where the question was whether the deceased, A, who was a passenger in a car that crashed, had displayed gross negligence from a casualty insurance point of view. The main reason that the accident occurred was that the driver was intoxicated. Concerning the degree of negligence displayed by the driver, the Court of Appeal found that the case bordered on gross negligence, but even though it was established as a fact that the driver had acted grossly negligent, in addition to that, it was also a precondition, in order to regard A's death exempted from his casualty insurance that A should have realised that the driver had

There are variations as to how culpa is measured within insurance law.³⁶ This can for instance be seen in the fact that in cases involving professionals, standards for what can be expected from a professional in the area in question, will be included in the assessment of negligence. It is measured with an objective yardstick. Consequently a professional cannot use the excuse that he, for personal reasons, was not able to live up to the professional standards in his line of work.³⁷ In the assessment of whether a business man has been grossly negligent an objective assessment will be used to decide whether, to a skilled and experienced professional, there was a so obvious a risk of the damage that the behaviour falls under the provision laid down in section 18(2) of the Insurance Agreement Act, section 19(2)(i) of the Liability Act, respectively.³⁸

Had the engineer in case U 1995.737 been a motor mechanic, it is likely that the case would have turned out differently, as the risk that anti-rust composition may catch fire is within the knowledge expected of motor mechanics, and consequently it would not be a mitigating circumstance that the actual tortfeasor, in spite of his job, was not familiar with the risk involved. There seems to be a tendency that general knowledge about the risk of the occurred damage constitutes the starting point in a discussion of negligence. See also with regard to this tendency Supreme Court decision of 20 December 2000 in case I 76/1999, where a person, A, caused a fire on a third party's insured property, when he tried to defrost a van using a hot-air engine in close proximity to straw. It was established as a fact that sparks from the hot-air engine had started the fire, and thus not the hot air itself. It was not to be expected that an ordinary user would be familiar with the risk of sparks from hot-air engines, like the one in question. Consequently, the Supreme Court did not find that gross negligence in accordance with section 19(2)(i) of the Liability Act had been displayed, even though public guidelines had been disregarded. Based on this case, it should be emphasised that not only must there be a causal link between the damage and the gross negligence, but also that the consequence of the gross negligence should be typical (adequate)

consumed such an amount of alcohol that driving was grossly negligent. As the driver and A had not been together the whole night, and the amount of alcohol in the drivers bloodstream was minimum 1,29 per thousand, it had not been established that the driver had consumed alcohol to such an extent that A had acted grossly negligent by letting the driver give him a lift. In other words, A did not know the actual circumstances regarding the drivers state of intoxication. The assessment of negligence displayed by A in relation to the casualty insurance is similar to the assessment of contributory negligence which is applied in pursuance of section 101(2)(ii) of the Road Traffic Act on whether the claim of the injured party against the car's compulsory liability insurance is to be reduced, cf. section 108(1) of the Road Traffic Act, cf. section 105.

³⁶ Cf. on this e.g. von Eyben and Vagner: *Lærebog i erstatningsret* (4. ed.), p. 75 ff.

³⁷ Cf. von Eyben and Vagner: *Lærebog i erstatningsret* (4. ed.), p. 77.

³⁸ Naturally, also a professional may cause a damage by negligence which will be covered by the claimant's property or business interruption insurance. The decision of whether a professional has displayed gross negligence in accordance with section 19(2)(i) of the Liability Act is, however, less interesting insofar as the liability in these cases (furthermore) is upheld in pursuance of section 19(2)(ii) of the Liability Act on damages caused during the execution of one's work in public, in business or the like.

4 Damages Caused by Children and Persons Incapable of Acting Rationally

As already mentioned, the use of the criterion "so obvious a risk" is to be seen as a way of estimating the concept of gross negligence objectively; thus, it is not a condition that the tortfeasor or policy holder has been conscious about the risk that the damage might occur. It is however not clear whether estimating the concept of gross negligence objectively is strictly objective, or whether the risk, in general, should be obvious to the kind of people the tortfeasor and the policy holder are. In other words, the question is to what extent it is relevant to the assessment of gross negligence if the tortfeasor is a child or a person incapable of acting rationally, cf. section 24 b of the Liability Act and section 19 of the Insurance Agreement Act.

Children under the age of 15 are liable for their damaging actions according to the same rules as adults, cf. section 24 a(1)(i) of the Liability Act. It does however appear from decided cases that children under a certain minimum age cannot be held liable, i.e. a "liability minimum age"³⁹ does exist. Gross negligence is of no interest unless the child has reach the age where it may be held liable. A child has acted culpably if it has acted differently from how children at the same age normally act (or would have acted) in the same situation, i.e. children's behaviour is not measure by the same yardstick as adults'.⁴⁰ It is thus reasonable to assume that if damage is caused by a child the gross negligence assessment will not be completely objective compared to a similar case involving an adult. On the other hand, it should be expected that, in principle, an assessment should be made of how obvious the risk of the damage is to children at the same age as the tortfeasor. Although the damage must be an adequate consequence of the child's action, an objective assessment is applied, so that the nature of the damage is in focus and not whether a child at the tortfeasor's age might normally act in this way.⁴¹ As a consequence what is an obvious risk to a child and not what is an obvious risk to an adult, should be taken into consideration in the case of gross negligence.

The limitation of the concept of gross negligence within insurance law is of less practical importance where children are involved as insurances as a non-mandatory point of departure covers insured events caused both by deliberate acts as well as by gross negligence when the child is under the age of 14, cf. section 19(1) of the Insurance Agreement Act. It is reasonable to assume that, as within tort law, the assessment of whether a child has caused the insurance event by negligence will be seen in the light of whether the child has acted any different from how children of his age would normally act (or would have acted) in the same situation.⁴²

³⁹ Cf. e.g. von Eyben og Vagner: *Lærebog i erstatningsret* (4. ed.), p. 89, Gomard: *Børns erstatningsansvar* (1980), p. 33 ff and Kjærgaard: *Privatansvarsforsikring i et erstatningsretligt perspektiv* (1999), p. 189 ff.

⁴⁰ Cf. e.g. von Eyben and Vagner: *Lærebog i erstatningsret* (4. ed.), p. 84 and Jens Møller and Wiisbye: *Erstatningsansvarsloven med kommentarer* (5. ed.), p. 440.

⁴¹ Cf. decisions U 1989.278 V and FED 1995.961 V and e.g.. von Eyben og Vagner: *Lærebog i erstatningsret* (4. ed.), p. 88 and p. 279.

⁴² In other words, in the negligence assessment the same principles as within tort law shall be applied, bearing in mind, however, the slight difference there may be between causing an injury on someone else and being the insured who causes an insurance event.

Section 24 b(1)(i) of the Liability Act states that persons who due to mental illness or deficiency, unsoundness of mind, or persons who for a similar reason lacks the ability to act rationally are liable in tort in accordance with the same rules as mentally healthy persons. This means that it is possible to impose liability to pay damages to the injured party on a person who under section 16 of the Criminal Code is not punishable.⁴³ Special (less severe) culpa yardstick will not be applied in connection with damage caused by persons lacking the ability to act rationally. Consequently, it is reasonable to assume that in the assessment of whether a mentally incapacitated person is liable in pursuance of section 19(2)(i) of the Liability Act, due to gross negligence, an objective assessment of risk ignoring the person's lack of ability to act rationally will be applied, even if the mental state of the person in question means that he cannot, subjectively, be held accountable for the damage. In other words, in relation to section 19(2)(i) of the Liability Act it is of no consequence that the tortfeasor due to e.g. mental incapacity is incapable of understanding the risk of damage.⁴⁴ Section 24 b(1)(ii) of the Liability Act contains a possibility to ease liability incurred by this sort of person. In deciding whether liability under section 24 b(1)(ii) of the Liability Act should be pleaded, emphasis may be put on the person's inability to realise recklessness or to act in accordance with such a realisation, and also the degree of soundness of his mind.⁴⁵ It may thus be reasonable when applying this rule to take into consideration (compensate for) the fact that the tortfeasor is measured by the same culpa yardstick as average sound minded persons, and thus indirectly try to assess, what options tortfeasors in the area concerned would normally have for realising the risk of a damage. From decided cases, however, it seems the courts have been somewhat reluctant to ease liability in pursuance of section 24 b(1) of the Liability Act⁴⁶ If, in agreement with the above, it is assumed, that an objective assessment shall be applied, it follows that the insurance event was considered to have been caused by gross negligence in spite of the tortfeasor's lacking ability to act rationally.

The position under insurance law is significant different. Section 19(1) of the Insurance Agreement Act, stipulates as a non-mandatory rule, that the provisions laid down in section 18 shall not be applied when the insured is under the age of 14 or in case of temporary or permanent insanity, mental deficiency, or if that person for some other, similar reason lacks the ability to act rationally. In other words, the insurance will, as point of departure, cover even when the displayed behaviour can be characterised as grossly negligent. It does, however, mean that when a person

⁴³ Cf. Danielsen and Black: *Myndighedsloven med kommentarer* (3. ed.), p. 165 and Jens Møller and Wiisbye: *Erstatningsansvarsloven med kommentarer* (5. ed.), p. 453.

⁴⁴ A brain damaged person, for instance, may be at a development stage that corresponds to that of a child under the "tort law minimum age", i.e. approx. 4-5 years of age depending on the damage situation (see on this e.g. von Eyben and Vagner: *Lærebog i erstatningsret* (4. ed.), p. 89, Gomard: *Børns erstatningsansvar* (1980), p. 33 ff and Kjærgaard: *Privatansvarsforsikring i et erstatningsretligt perspektiv* (1999), p. 189 ff), men det udelukker altså ikke erstatningsansvar.

⁴⁵ Cf. Danielsen and Black: *Myndighedsloven med kommentarer* (3. ed.), p. 165 and Jens Møller and Wiisbye: *Erstatningsansvarsloven med kommentarer* (5. ed.), p. 454.

⁴⁶ Cf. Danielsen and Black: *Myndighedsloven med kommentarer* (3. ed.), p. 165, von Eyben and Vagner: *Lærebog i erstatningsret* (4. ed.), p. 80 f, Jens Møller and Wiisbye: *Erstatningsansvarsloven med kommentarer* (5. ed.), p. 455.

who lacks the capacity to act rationally, by gross negligence, causes a damage covered by the injured party's property or business interruption insurance the tortfeasor's liability is upheld, cf. section 19(2)(i) of the Liability Act, but to the extent the tortfeasor has taken out a liability insurance compensation will, in accordance with section 19(1) of the Insurance Agreement Act. The consequence hereof is that the actual liability insurance coverage will exclude the relaxation rule laid down in section 24 b(1)(ii) of the Liability Act from being applied. Thus, the loss will be borne by the liability insurance company. It might be questioned if this fully corresponds with the intention on which the provisions laid down in section 19 of the Liability Act is based, namely that liability shall be upheld only when deemed necessary in spite of the injured party's own insurance coverage.⁴⁷ For preventive reasons for upholding the liability are not always legitimate when the tortfeasor's state of mind is such that he cannot be punished for his behaviour. It should be noted, though, that the considerations on which the criminal law and insurance law rules are based will not necessarily correspond. Furthermore, section 19(2)(i) of the Liability Act is based on considerations regarding the general sense of justice, which may support the above mentioned legal position.

5 Should the Concept of Gross Negligence Within Liability Law and Insurance Agreement Law Correspond /should the Concept of Gross Negligence Within Liability Law be More Extensive than Within the Insurance Agreement Law?

The concept of gross negligence is applied in various, independent, rules. This indicates that gross negligence is indeed a broad concept, and thus, the content cannot be completely identical in all the connections where it is applied.⁴⁸ It is a concept for which no single and lasting definition is possible. A complex assessment is thus to be made in each case, and where possible, supported by decided cases, a pattern will be extracted as a guideline for what elements are suitable to be included in the assessment. In a correct application of the pattern on an actual dispute it will be necessary to see the case in a broad perspective, combined with an understanding of the peculiarities of the case in question. Gross negligence is thus only a collective name for a number of cases, in which there is a need to deviate from the point of departure – the point of departure is not completely identical in all these cases, therefore, the deviation is not necessarily identical either, and consequently the concept may vary in content.⁴⁹ When comparing the concept of gross negligence laid down in section 18(2) of the Insurance Agreement Act with the one in section 19(2)(i) of the Liability Act it is thus necessary to take into account those interests which are to be served, i.e. both the main rules on insurance coverage, exemption of insurance coverage, and

⁴⁷ Cf. Report no. 829/1978 on Special terms of liability etc., p. 12 og 14 ff.

⁴⁸ Cf. Bo von Eyben: *Forhandlingerne på Det 33. Nordiske Juristmøde* (1993), p. 588.

⁴⁹ What is stated also means that understanding of gross negligence as applied e.g. in the provision in section 7 of the Insurance Agreement Act, is of no real interest with regard to determining the concept in section 18(2) of the Insurance Agreement Act.

exceptions from the main rules. Gross negligence is an auxiliary concept, it is characterized by being open, blurred with fluid limits, and the interest in focus is as much the individual as the general.⁵⁰ Subsequently, the task of the courts, both in connection with section 18(2) of the Insurance Agreement Act and section 19(2)(i) of the Liability Act, consists partly in defining the typical cases based on an interpretation of the objective legislative aim, partly in assessing actual cases and placing these within the already available "typological scenarios".⁵¹

Section 19(2)(i) of the Liability Act aims at supporting the preventive effect and the general sense of justice. It seems obvious that insurance events which are caused deliberately should not normally entitle the insured to have his loss covered by the insurance, inasmuch as it would be contrary to the nature of the insurance agreement, and furthermore, it would also be without a reasonable and economical goal.⁵² As strict requirements must be made to prove that an insurance event has been caused deliberately – possibly also containing a hint that it could be insurance fraud – and in addition hereto, to prevent that the insurance itself does not lead to an increased careless behaviour on the part of the insured, there will be a need for exemptions with regard to those situations in which negligence comes close to intention. Although section 18(2) of the Insurance Agreement Act does especially aim at cases of "hidden intention", there is no basis, in the "travaux préparatoires", for limiting the area of gross negligence to this. On the other hand, it is not certain that the preventive effect of excluding insurance events caused by gross negligence and the general sense of justice in these situation correspond completely with the considerations on which section 19(2)(i) of the Liability Act is based.

An insurance is taken out for the benefit of the insured party himself and for his own economy - the purpose of an insurance is e.g. to cover losses for which no one can be made liable. Thus, an insurance is not taken out with a view that there might be a liable tortfeasor. At the same time, it is a fact that most people act negligently at some point, and that it seems a natural part of the insurance idea that the risk of causing an insurance event by negligence should be transferred to the company. The policy holder pays the company to take over a risk, so that economical consequences of a possible insurance event is transferred to the company. Insurance is, thus, a manifestation of an idea of solidarity and spreading the risk. The insured party is entitled to the coverage stipulated in the agreement and for which he has agreed to pay, as long as it is not contrary to mandatory rules, such as the rules laid down in DL 5-1-2⁵³ and section 35 of the Insurance Agreement Act.⁵⁴

It could be argued that because the insured has paid for coverage, the concept of gross negligence should be given a more limited content within insurance law than within liability law. To this Bo von Eyben⁵⁵ has stated that, before the occurrence

⁵⁰ Cf. Stig Jørgensen in *Nordisk Gjenklang Festskrift til Carl Jacob Arnholm* (1969), p. 148 ff on the characteristics concerning the concept of type.

⁵¹ Cf. Stig Jørgensen in *Nordisk Gjenklang Festskrift til Carl Jacob Arnholm* (1969), p. 153.

⁵² Cf. Draft bill on insurance agreements (1925), p. 50 and e.g. Stig Jørgensen in *Bör försäkringsavtalsrätten reformeras?* (1968), p. 63.

⁵³ The provision establishes that agreement contrary to public policy are invalid.

⁵⁴ It is only possible to take out an insurance on a legal interest.

⁵⁵ *Forhandlingerne på Det 33. Nordiske Juristmøde*, København 1993, p. 616 f.

of an insurance event, it is not generally in the interest of the insured that gross negligence is interpreted in the most limited way possible, as in that case the insured will be made to pay, through the premiums, for a compensation which will only be to the benefit of those few who cause an insurance event by gross negligence.

Where section 19 of the Liability Act is a "either or", the mandatory point of departure for section 18(2) of the Insurance Agreement Act is a graduation. This is an argument for extending the scope of section 18(2) of the Insurance Agreement Act, even though it should be remembered that according to section 24 of the Liability Act the possibility of relieving a tortfeasor's liability does already exist, provided that the liability is not covered by a liability insurance.

The risk of insurance fraud is undoubtedly larger when it is the insured himself who causes the insurance event, insofar as the insured is aware that the insurance exists, while to a tortfeasor an insurance will typically be an incidental circumstance, not to be counted on.

On the other hand, it is also apparent that the tortfeasor's liability is not generally upheld to the same extent as coverage may be excluded on an insurance taken out by the tortfeasor himself. Section 19(2)(i) of the Liability Act is, thus, limited to intention and gross negligence, while insurance coverage is not governed by section 18 of the Insurance Agreement Act alone but also by the insurance conditions, section 20 of the Insurance Agreement Act (which authorises an access to exclusion in case of self inflicted intoxication) etc. The difference is a consequence of the fact that an insurance is a contract, where the company is paid to take over the economical consequences of a well defined risk, while liability law does not aim at a previously defined risk, and moreover, it builds on an action that gives rise to liability. The "inequality" constituted by the fact that an insured who causes an insurance event himself may in certain cases be in a worse position than the tortfeasor who has had the luck to hit an insured "victim", should not mean that the tortfeasor cannot be freed from his liability due to an absurd equality idea.⁵⁶

6 Concluding Remarks

Whereas in the classical culpa assessment, the point of departure is a bonus pater, and thus, what has been recognizable and predictable to the actual acting tortfeasor⁵⁷, a more objective culpa assessment is applied today, inasmuch as the point of departure is whether the action deviates from generally accepted patterns of behaviour, as these have been expressed in laws, rules, customs etc, the danger of the action, possible extent of damage, options for avoiding the damage etc.⁵⁸

⁵⁶ Compare von Eyben og Vagner: *Lærebog i erstatningsret* (4. ed.), p. 330. In the *Juristen* 1993 p. 31 ff on the current state of law, Lyngsø stats that it does not correspond with what immediately seems right and fair. It seems thus to have been ignored that the two situations are not fully comparable.

⁵⁷ Cf. von Eyben og Vagner: *Lærebog i erstatningsret* (4. ed), p. 56 f and Vinding Kruse: *Erstatningsretten* (5. ed.), p. 67 ff.

⁵⁸ Cf. thus von Eyben og Vagner: *Lærebog i erstatningsret* (4. ed.), p. 57 ff.

Likewise, the foreseeability assessment has been made more objective, as emphasis is put on whether the damage is a typical consequence - and not whether it has been foreseeable to the actual tortfeasor. In summing up of the legal practise accounted for above it can be stated that also the assessment of whether a certain behaviour is grossly negligent has become more objective, and it may be assessed by employing the same elements as those suitable for deciding whether a certain behaviour is culpable. Gross negligence is thus a term, which can be applied on a qualified culpable behaviour. It is hardly possible to see "gross" as concerning the tortfeasor's subjective circumstances exclusively.

The fact that the assessment has been made objective, does of course not entail that the assessment is made more rigorous – or the liability has been made "strict", only that the criteria have been turned into objectively recognisable norms of reasonable behaviour in a damage situation⁵⁹

Despite the fact that, in general, today we would say that an "objective culpa assessment" is applied and thus also an objective assessment of whether the negligence is gross, also a tortfeasor's / insured's actual special knowledge may and shall still be considered. Special knowledge about or the possibility of foreseeing both the risk of damage and also how immediate that risk is, is a serious circumstance.

The way the Supreme Court applies the criterion "a so obvious risk" in relation to both section 19(2)(i) of the Liability Act, and section 18(2) of the Insurance Agreement Act, in the above, indicates, supposedly, only that in both cases an objective risk assessment shall be applied, in such a way, though, that the so called "slips" does not fall under the concept of gross negligence. It is not certain that the outcome of an actual risk assessment will necessarily be the same for these two provisions.⁶⁰ Just as there is not absolute identity between the assessment of whether a behaviour displayed by a tortfeasor is negligent (actionable) and whether that same behaviour should be characterized as contributory/own fault, which may show cause for a reduction of the injured party's claim against the liable tortfeasor, there will also be variations in the assessment when a damage is caused, and when an insurance event is caused.

It will always depend on an actual balancing of the pros and cons whether the displayed behaviour should be characterized as negligent in relation to the provisions in section 19(2)(i) of the Liability Act and section 18(2) of the Insurance Agreement Act. The criterion "so obvious a risk", developed by decided cases, does

⁵⁹ See, however, Ivan Sørensen in *Festskrift for FED*, Forsikrings og Erstatningsretlige Skrifter I · 2000, p. 269 f and Ivan Sørensen in *Forsikringsaftaleloven med kommentarer* (2000), p. 88 f, where it is stated that there is reason to believe that the decisions where the mentioned objectively assessment of the concept of gross negligence in certain areas may be made stricter to the tortfeasor and the insured in the future, cf. e.g. decision U 1998.1693 H.

⁶⁰ Compare Ivan Sørensen in *Festskrift for FED*, Forsikrings og Erstatningsretlige Skrifter I · 2000, p. 262 f, where it is stated that the courts will probably strive to reach the same decisions in both to codes, as this will also correspond with Report no. II, and also it will seem strange if gross negligence was assessed differently in those cases where the tortfeasor had taken out a liability insurance. It is underlined elsewhere, though, that there will be cases where a decision in accordance with the Liability Act may be contrary to the insurance law principles or the mandatory, statutory rules in the Insurance Agreement Act, if "applied" in an insurance law decision, wherefore, a deviation from the point of departure of the two codes is necessary.

of course contain a certain guide to the necessary balancing of elements, but it is also obvious that the concept only gets a content through decided cases in this area, which is exemplified by the fact that not only shall the risk have been obvious, but "so obvious" that gross negligence has been displayed, and the displayed behaviour must have been blameworthy.