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CRUDE DECISIONS: RE-EXAMINING DEGREES OF NEGLIGENCE IN THE CONTEXT OF THE BP OIL SPILL

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Introduction

The Deepwater Horizon oil rig explosion was the worst man-made environmental disaster in history. This singular event caused the death of eleven rig workers, damaged, perhaps irreversibly, the coastlines and ecosystems of five Gulf States and imposed financial ruin on tens of thousands who relied upon a functional Gulf of Mexico for their livelihood. Left in its wake is a massive and complex web of high-stakes multi-district litigation which will seek to determine how and why so catastrophic an event could have occurred, attribute fault among the various responsible parties, compensate those damaged by the harm and sanction those responsible. When the litigation dust settles, the cumulative damages awarded and penalties assessed will likely be the largest ever in a mass tort case.

The primary defendant in the gulf oil spill litigation (“the BP litigation”) is BP Exploration & Production, Inc., (BP), operator of the Macondo well where the spill originated. The predominant tort claims in the BP litigation are grounded in negligence. However, the determination of who will ultimately bear the largest share of costs for this disaster will not necessarily be resolved within the traditional negligence framework. Rather, the most potentially significant of these claims will hinge upon the court’s interpretation and application of the terms “gross negligence” and “willful misconduct,” labels which have confounded courts and produced a litany of conflicting and conflated definitions in the jurisprudence.

The typical negligence action focuses on whether the defendant acted unreasonably without regard to the degree of negligence involved. Thus, courts are seldom required to determine whether defendant’s behavior constitutes ordinary negligence, gross negligence or willful misconduct. The egregiousness of defendant’s lapse in care is usually irrelevant to the determination of whether negligence liability attaches. Nor does the typical negligence case compel the trier of fact to specifically label defendant’s degree of fault or to otherwise particularize its gradation. However, several of the most significant liability and damages issues in the BP litigation, as well as any potential criminal liability, will indeed require the court to determine whether the defendants’ conduct transcends ordinary negligence and rises to the level of gross negligence or willful misconduct. Regulatory schemes, such as the environmental statutes at issue in this case, use these heightened degrees of fault as liability triggers to impose more severe punishment than would otherwise apply in a case of ordinary negligence. Consequently, the gradation of negligence assigned to defendants’ conduct in the BP litigation will have a profound impact upon the amount of compensatory damages awarded and civil penalties imposed under the relevant environmental statutes, the amount of punitive damages awarded under federal maritime and state tort law, BP’s contractual indemnification obligations to its business partners, and, at least indirectly, the comparative allocation of fault amongst all the defendants. Simply stated, a finding of gross negligence or willful misconduct will exponentially increase damages and sanctions. Given its pivotal effect upon the ultimate costs defendants will pay, how the court categorizes defendants’ conduct is undoubtedly the single most important issue in the case.2

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2 The magnitude and complexity of this litigation could mean that a final resolution will not occur for many years, or even decades. However, the important process of designating the degree of fault may actually begin as early as February 27, 2012, the date the court has set to begin the first of three phases of a bench trial to determine limitations of liability, exoneration and fault allocation issues, including “negligence, gross negligence or other bases of liability.” In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, at 1 (E.D. La. 2011) (Pretrial Order No. 41 scheduling trial to commence on February 27, 2012).
However, it will be extraordinarily difficult for the court to categorize the degree of defendants’ fault applying existing jurisprudence interpreting the terms gross negligence and willful misconduct, particularly against the technically and factually complex setting of this case. Over the last 100 years courts have been unable to draw coherent distinctions between degrees of negligence. The development of workable lines of demarcation between this tripartite division of care has proven to be so elusive, some states have abandoned their usage altogether. Several scholars have acknowledged the futility of categorizing degrees of negligence and questioned the need to do so.\(^3\) Others have cast serious doubt on the conceptual soundness of attempts to define the terms gross negligence and willful misconduct in the first place.\(^4\)

Despite the murky distinctions and lack of guidance surrounding these terms, they remain a vital component of the regulatory fabric of many state and federal statutory schemes that use them as triggers for augmented liability; and, in some states, they are the predicate for awarding punitive damages. In light of their prevalent usage as a regulatory tool, clarified standards for degrees of negligence could serve as a potent deterrent to careless conduct and improve safety in future high-risk activities by providing greater predictability of greater liability exposure for those enterprisers engaged in such activities. Given the magnitude of the BP litigation and the central role played by degrees of negligence, as well as, the inevitable regulatory effect the *Deepwater Horizon* incident will have on future high-risk activity, a workable analytical framework for applying degrees of negligence is sorely needed. The goal of this article is to provide such a framework.

Part I explains why degrees of negligence are so vital to the outcome of the BP litigation, delineating precisely how the terms gross negligence and willful misconduct will drive every major damages and allocation of fault decision in the case. This section also discusses the potential regulatory implications degrees of negligence could have on future high-risk activities. The interpretative criteria the courts utilize for gross negligence in this high-profile case will likely become the benchmark for future applications of these widely used terms.

In order to lend some factual context to the abstract negligence theory discussed in subsequent sections, Part II describes some of the key alleged acts of negligence which led to the explosion aboard the *Deepwater Horizon* oil rig, including decisions made regarding the design and construction of the Macondo well, efforts to plug it and actions which could have averted a blowout.

Part III then provides a primer on degrees of negligence discussing the troubled origins of the concept, tracing its problematic development and critiquing existing theories courts have used to explain a doctrine that remains largely in a state of disarray.

As an alternative to the hopelessly contorted existing definitions for advanced degrees of fault, Part IV offers a novel, criteria-guided analytical framework for determining whether misconduct rises to the level of gross negligence or willful misconduct. The selected criteria are derived from the doctrinal regimes of punitive damages, strict liability and comparative fault which serve the same punitive, deterrent and reparative functions as do the terms gross negligence and willful misconduct. These interpretative criteria are then cast in a two-tiered, multi-factor balancing test which provides analytical clarity and precision in applying the terms gross negligence and willful misconduct.

In an effort to put theory to practice, Part V then illustrates how the proposed test for gross negligence and willful misconduct could be applied against some of the alleged acts of negligence in the BP case.

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3 *See* Keeton et al., *supra* note 1, at 210-211 (footnotes omitted); and Dobbs, *supra* note 1, at 350 (footnotes omitted).

4 *See* Patrick Martin, *The BP Spill and the Meaning of “Gross Negligence or Willful Misconduct”*, 71 LA. L. REV. 957 (2011) (Professor Martin offers an intriguing and compelling interpretative framework for the terms gross negligence and willful misconduct).
I. The Significance of Degrees of Negligence to the BP Litigation and Beyond

The BP litigation is an amalgamation of hundreds of class actions brought by diverse categories of plaintiffs claiming economic losses due to the Gulf oil spill. The claimants include, among others, commercial fisherman, charter boat operators, seafood harvesters, oyster bed owners, restaurant owners, real estate owners, rental property owners and other Gulf coast business owners. In separate lawsuits, the United States, the Gulf States and local governments impacted by the spill have also asserted claims for oil spill clean-up costs, civil penalties and damages under various federal and state environmental statutes. In addition to BP, the other principal defendants in the BP litigation are Anadarko Exploration & Production LP (Anadarko) and MOEX Offshore 2007 LLC (MOEX), BP’s business partners and co-owners of the Macondo well, and Transocean Holdings LLC (Transocean), the owner, either directly or through subsidiaries, of the Deepwater Horizon oil rig (collectively “the BP defendants”). The U.S. Judicial Panel on Multi-district Litigation has consolidated the litigation in the Eastern District of Louisiana.

A. Federal Environmental Statutory Claims

There are two federal environmental statutes that will figure prominently in BP’s liability for the oil spill. Each of these statutes provides for substantially augmented damages and penalties if the harm was caused by gross negligence or willful misconduct. This section provides a brief overview of the applicable environmental statutory claims and the critical impact the terms gross negligence and willful misconduct may have on their outcome.

1. The Oil Pollution Act of 1990

The chief compensatory vehicle through which the BP litigation plaintiffs, both private and public, will recover for economic loss and clean-up costs is the Oil Pollution Act of 1990 (“OPA”). The OPA provides for recovery of a wide array of damages and costs by both private citizens and governmental entities. As explained below, the ultimate amount of these damages and costs the responsible parties may be compelled to pay will depend on the degree of negligence assigned to their conduct. The cumulative tally under the OPA’s broadly worded damages provision will be enormous by any measure.

Under the OPA, the United States, individual states and Indian tribes may recover all costs associated with the containment, mitigation and removal of spilled oil. BP, as permittee of the Macondo well drill area where the spill occurred, and Transocean, as owner of the vessel (the

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6 Id. at 376-378 (discussing the various statutory bases for these governmental claims).
8 Several other subcontractors have been named as defendants in the class actions. The most noteworthy of these are Halliburton, the company that did the cementing work involved in capping the Macondo well and Cameron International (Cameron), the company that supplied the malfunctioning blow-out preventer valves which failed to stop the spill. See Gidiere, supra note 5, at 379.
9 See In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. 2010).
10 33 U.S.C. § 2701 et seq.
Deepwater Horizon oil rig) from which the oil was discharged, have been deemed the “responsible parties” under the OPA.\textsuperscript{12}

These same public entities may also recover damages for harm caused to, or loss of use of, natural resources, including the costs of assessing any such damage.\textsuperscript{13} Still further, governmental entities, including local governments, can recover revenues loss from such sources as taxes, royalties, rents and fees resulting from damage to real or personal property, or natural resources\textsuperscript{14} as well as costs for providing increased or additional public services during or after removal activities.\textsuperscript{15}

The OPA also grants a private cause of action to owners or lessees of real or personal property to recover damages or economic losses resulting from the destruction or injury to such property.\textsuperscript{16}

The OPA imposes strict liability under its damages provisions.\textsuperscript{17} Consequently, liability attaches without regard to the reasonableness or blameworthiness of the responsible party’s conduct. Liability is subject to a monetary cap of $75,000,000 for each incident by each responsible party.\textsuperscript{18} This liability cap, however, is subject to a critical exception at issue in the BP litigation. There is no limit to liability if the damage was proximately caused by the “gross negligence or willful misconduct” of the responsible party.\textsuperscript{19}

The investigative findings to date leave little doubt that negligence was the root cause of the explosion aboard the Deepwater Horizon oil rig and the subsequent oil spill.\textsuperscript{20} The degree of that negligent conduct, however, is yet to be determined, and that very determination is at the epicenter of BP’s liability under the OPA and beyond.

\textsuperscript{12} 33 U.S.C. § 2701(32)(Supp. 2011). Responsible parties include the owner or operator of a vessel. The Deepwater Horizon was a semisubmersible mobile offshore drilling rig, qualifying it as a “vessel” and thus its owner, Transocean, as a responsible party under this section. This section also defines the responsible party of an offshore facility as the lessee or permittee of the area in which the facility is located. As permittee of the Macondo well area, and operator and lessee of the Deepwater Horizon oil rig, BP was designated, by the United States Coast Guard, as a responsible party under OPA and has accepted that designation. See John C.P. Goldberg, Liability for Economic Loss in Connection with the Deepwater Horizon Spill (November 22, 2010) note 33, citing http://www.uscg.mil/foia/docs/DWH/2094.pdf.


\textsuperscript{14} 33 U.S.C. § 2702(b)(2)(D)(2001). See also Gidiere, supra note 5, at 375. Taken together, these broadly phrased provisions allowing damages for loss of use and loss revenue due to property or natural resource damage are sufficiently expansive to support an argument that loss revenue of the moratorium precipitated by the oil spill are recoverable under OPA. Indeed, in denying defendants’ motion to dismiss moratorium claims, the court in the BP litigation has ruled that the moratorium claimants have plausibly alleged claims under the OPA. See In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. August 29, 2011) (order and reasons granting in part and denying in part certain defendants’ motions to dismiss the B1 Master Complaint).

\textsuperscript{15} 33 U.S.C. § 2702(b)(2)(F)(2001). See also Gidiere, supra note 5, at 376.


\textsuperscript{17} Goldberg, supra note 12, at 8; Gidiere, supra note 5, at 375.


\textsuperscript{19} 33 U.S.C. § 2704(c)(1)(A)(2001). This exception negating the cap also extends to any “person acting pursuant to a contractual relationship with the responsible party.” Thus BP’s minority partners, Anadarko and MOEX, may be liable for their proportionate share of unlimited liability in accordance with their joint venture agreement. For these defendants, which are much smaller companies than BP, having to bear their share of unlimited damages under the OPA could bankrupt them.

\textsuperscript{20} Some observers have even suggested that at minimum gross negligence was involved in both the precipitating events that caused the explosion and subsequent efforts to avert the spill. Gidiere, supra note 5, at 376. The specter of gross negligence or willful misconduct is also magnified by the U.S. Justice Department’s on-going criminal investigation of the BP oil spill given that such behavior is a predicate for criminal liability under certain environmental provisions and other criminal statutes. See discussion infra, Part I(A)(2).
2. The Clean Water Act

Another environmental statute under which the BP defendants’ liability is seriously impacted by a finding of gross negligence or willful misconduct is the Clean Water Act (“CWA”). The CWA imposes civil penalties on the owner or operator of any vessel or facility which discharges oil into national waters. The penalty for such discharges is up to $1100 per barrel of oil. However, the penalty is up to $4,300 per barrel if the discharge was the result of “gross negligence or willful misconduct” of the person who caused it. So here too, a designation by the court that the BP defendants engaged in some heightened degree of fault could result in trebled sanctions for these defendants.

The difference in liability under the CWA is significant considering the volume of oil that spilled into the Gulf of Mexico. According to government estimates, approximately 4.9 million barrels of oil were discharged into the Gulf of Mexico. Thus a finding of gross negligence or willful misconduct could mean the difference between $5.4 billion versus $21.1 billion in CWA fines alone. Moreover, such a designation under the OPA or the CWA could trigger increased liability under federal maritime and state common law and statutory tort claims as discussed in the next section.

B. State Common Law and Statutory Claims

While plaintiffs will rely principally upon the OPA to recover the bulk of the economic losses incurred as a result of the oil spill, they have also asserted a variety of state common law and statutory claims seeking additional compensatory and punitive damage awards. These tort claims, including actions for trespass, nuisance, strict liability and fraudulent concealment, were made based upon a savings clause in the OPA which provides, in relevant part, that: “Nothing in this [Act] . . . shall affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under. . . . State law, including common law.” This savings provision arguably opens the door to a host of state common law claims the resolution of which could also be heavily shaped, either directly or indirectly, by the degree of negligence assigned to the BP defendants’ conduct. However, as this article was nearing completion, the District Court in the BP litigation dismissed all state common law and statutory claims finding that these state law claims were preempted by federal maritime law, notwithstanding the OPA’s savings provisions. Nonetheless, for purposes of this article, these state law claims remain relevant for several reasons. First, the court’s interlocutory order dismissing them on federal preemption grounds involves an unsettled area of law subject to

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22 33 U.S.C. § 1321(b)(7)(2001). The United States has named BP, Anadarko, MOEX and Transocean, and its affiliates, as defendants in its Complaint seeking civil penalties under the CWA. See Complaint, ¶¶ 70-76, In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. 2010).
27 In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. August 29, 2011) (order and reasons granting in part and denying in part certain defendants’ motions to dismiss the B1 Master Complaint).
varying interpretations.\textsuperscript{28} Thus there is the possibility of reversal on appeal. Secondly, plaintiffs have filed similar state court claims in various state courts where they are still pending.\textsuperscript{29} Thirdly, beyond the BP litigation, there will be future catastrophic damage cases where federal law may not preempt the state law claims asserted. Consequently, the potential role degrees of negligence may play in the disposition of such claims is still instructive for our purposes, regardless of whether they play out in the BP multi-district case. Accordingly, the state law claims are discussed below for illustrative purposes notwithstanding their interim, interlocutory dismissal in the BP litigation.

As explained below, several of these torts claims allow for the award of punitive damages which are recoverable when the defendant has engaged in grossly negligent or willful misconduct. In addition, such a finding could materially affect the percentage of causal fault assigned to each of the BP defendants under comparative law principles.

1. **Punitive Awards**

There are several potential bases for the award of punitive damages in the BP litigation. First, federal maritime law may permit recovery of punitive damages, which would be in addition to any compensatory damages, including damages for economic loss, recovered from other sources such as the OPA.\textsuperscript{30} Secondly, the state laws of several Gulf States impacted by the spill allow for recovery of punitive damages on state common law causes of action.\textsuperscript{31} Thirdly, there are state environmental counterparts to the OPA and the CWA that also use aggravated forms of negligence as liability triggers for the award of punitive damages.\textsuperscript{32}

Punitive damages are awarded to deter and punish wrongful conduct beyond that of ordinary negligence. In order to recover punitive damages, plaintiff must prove not only fault on the part of defendant, but some heightened degree of fault such as gross negligence, wanton, willful or intentional misconduct. Some of the state statutes implicated in the BP litigation explicitly permit punitive damages upon a showing of gross negligence or willful or wanton misconduct by defendant.\textsuperscript{33} Thus once again a finding of some advanced degree of carelessness by the BP defendants could lead to liability well beyond the already massive compensatory damages likely to be awarded.\textsuperscript{34}

A finding of gross negligence or willful misconduct could also influence the outcomes under those punitive damage statutory schemes that do not expressly require such a finding. Among the factors courts look to in determining the propriety of a punitive award is the degree of

\textsuperscript{28} There is conflicting case law on whether the state law claims brought in the BP litigation are preempted by maritime law under the facts of this case. For a full discussion of the court’s preemption rationale in the BP litigation see id. at 8-18.

\textsuperscript{29} Id. at 16.

\textsuperscript{30} Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); see Galligan, Death at Sea: A Sad Tale of Disaster, Injustice, and Unnecessary Risk, 71 LA. L. REV. 784, 814 (2011); see Gidiere, supra note 5, at 376.


\textsuperscript{32} See Gidiere, supra note 5, at 378, citing Ala. Code §§ 22-22-1 to -14, and 22-9(n)(2005) (the Alabama Water Pollution Control Act).


\textsuperscript{34} There is some uncertainty over whether punitive damages under federal maritime law, if awarded, will be subject to the caps imposed by the United States Supreme Court in Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (1:1 ratio of punitive to compensatory damages) or the 9:1 ratio imposed on state law punitive awards in State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003). See Gidiere, supra note 6, at 376-77.
reprehensibility of defendant’s conduct.\textsuperscript{35} While this term is itself broad, encompassing a wide range of morally repugnant behavior, courts have found the more culpable state of mind associated with gross negligence sufficient to reach the reprehensibility threshold.\textsuperscript{36} Other punitive damages factors which coincide with the characteristics of gross negligence and willful misconduct include the magnitude of the harm\textsuperscript{37} and defendant’s consciousness of and indifference to the risk involved.\textsuperscript{38}

2. Comparative Fault Assessments

The court will eventually make a determination of the relative degree to which the conduct of each defendant contributed to plaintiffs’ harm. In apportioning fault amongst the defendants, the court will likely rely upon the guiding principles of comparative fault. Degrees of negligence may also be implicated in the court’s comparative fault analysis even though their purpose and assessment are quite different.\textsuperscript{39} In determining comparative fault, the court apportions fault, usually expressed in terms of percentages, to all tortfeasors whose negligence causally contributed to plaintiff’s harm, including the plaintiff’s own contributory negligence.\textsuperscript{40} The type or degree of negligent conduct, however, is largely irrelevant to the causal relationship it bears to plaintiff’s injury.\textsuperscript{41} The percentages reflect the degree to which the tortfeasor’s behavior caused the harm rather than a comparison of the relative gradation of defendant’s negligence. Put another way, comparative fault assesses the causal relationship between defendant’s conduct and plaintiff’s harm. Whereas, gross negligence and willful misconduct determinations evaluate the state of mind and relative blameworthiness of defendant’s conduct.\textsuperscript{42}

Notwithstanding these conceptual and functional distinctions, the degree of negligence assigned to BP’s conduct could, at least indirectly, influence the apportionment of fault. Gross negligence and willful misconduct, share certain salient features that are also primary to the comparative fault analysis. Most courts agree that these heightened forms of carelessness require more than the momentary inattention, lack of circumspection or inadvertence characteristic of ordinary negligence.\textsuperscript{43} Some awareness of the potential harm is a necessary predicate for applying these elevated degrees of fault. Likewise, cognizance of the danger is also a major factor in determining how to apportion the blame amongst multiple tortfeasors in the comparative fault analysis.\textsuperscript{44} An actor found to have been subjectively aware of the harm which eventually manifested, is more likely to be deemed grossly negligent or willful and attributed a higher proportionate share of the fault because of that awareness. Another common denominator is the dispositive role that the magnitude of the potential harm plays in findings of gross negligence and willful misconduct and in the allocation of comparative fault. Activities, like deep-water drilling, that pose greater danger require a higher degree of care

\textsuperscript{36} See id. at 419 (stating that one of the factors courts should use to determine the degree of reprehensibility was the defendant’s indifference towards the safety of others, which is also a key determinant of gross negligence and willful misconduct).
\textsuperscript{37} See discussion infra Part IV(A)(2).
\textsuperscript{38} See, e.g., Mobile Oil Corp. v. Ellender, 968 S.W.2d 917, 921 (Tex. 1998); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994).
\textsuperscript{39} Dobbs, supra note 1, at 352.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} See id. at 508-509.
\textsuperscript{43} See discussion infra Part IV.
\textsuperscript{44} See Commissioners’ Comment to Uniform Comparative Fault Act § 2, 12 U.L.A. 137 (1996).
commensurate with the risk.\footnote{Keeton et al., supra note 1 at 208.} Degrees of negligence (\textit{i.e.}, degrees of fault) correspond to the higher degrees of care demanded of such high-risk activities.\footnote{Id. at 209.} Likewise, the magnitude of the potential risk created by defendant’s conduct, including the number of persons placed at risk of potential serious injury, is also a major consideration in the comparative apportionment of fault.\footnote{See Commissioners’ Comment to Uniform Comparative Fault Act § 2, 12 U.L.A. 137 (1996).}

The degree of fault assigned to a defendant’s conduct is not, at least conceptually, the same thing as the degree to which that behavior actually caused plaintiff’s harm. Nonetheless, in apportioning causal fault, the trier of fact on a visceral level is more apt to assign a higher proportion of fault, causally speaking, to the more culpable behavior of a grossly negligent defendant than an ordinarily negligent one.

\section*{C. Contractual Allocation of Fault}

The level of fault assigned to BP’s conduct will also be a key determinant of BP’s private contractual obligations to its business partners with whom it shared ownership of the Macondo oil well where the spill occurred. Contractual provisions that distribute losses between the parties are a common feature of commercial agreements between co-adventurers and joint business enterprises. Typically, losses between co-adventurers are shared in proportion to their percentage of ownership interest. Also typical of these agreements are exceptions that absolve a party from incurring their proportionate share of a loss if that loss was caused by the reckless actions of a co-party, in which event the entirety of the loss is absorbed by the offending party.\footnote{In standard operating agreements, the allocation of loss provisions affected by degrees of negligence are usually found in indemnification, distribution of loss or liability clauses within the agreement.} Contractual allocations of loss premised upon escalated forms of fault such as those at issue in the BP litigation are commonplace across a broad range of industries. The operating agreement between BP and its partners reflected such loss distribution provisions. Indeed, the agreement uses the very terms “gross negligence” and “willful misconduct” to apportion losses between the parties.

The Macondo well is jointly owned by BP, Anadarko and MOEX, with respective ownership shares of 65-25-10 percent. Under the terms of their standard industry form operating agreement, each party bears its proportionate share of losses or liabilities except those resulting from a party’s “gross negligence or willful misconduct,”$^{50}$ the very same terms which trigger liability under the OPA and the CWA.

\footnote{The Operating Agreement is based upon the AAPL Model Form Deepwater Operating Agreement that is standard in the offshore drilling industry. See Cohen, Goddard & LeCesne, supra note 7, at 2.}

\begin{itemize}
\item BP, the majority owner, was designated as the “Operator” of the well while the minority owners, Anadarko and MOEX, were deemed “non-operating” parties. Section 5.2 of the Operating Agreement, entitled “Workmanlike Conduct” pertains to BP’s obligations and potential liability as Operator of the Macondo well project. It provides, in relevant part: “The Operator shall not be liable to the non-operating parties for losses sustained or liabilities incurred, except as may result from operator’s gross negligence or willful misconduct. . . .” In addition, Article 22, entitled “Liabilities, Claims and Lawsuits,” governs the parties’ respective liabilities for various damages, including those caused by an oil spill. Section 22.5, entitled Liability for Damages, provides that each party is liable for its proportionate share of damages “except that when liability results from the gross negligence or willful misconduct of a Party, that Party shall be solely responsible for liability resulting from its gross negligence or willful misconduct.” Still further, Section 22.7, entitled “Damage to Reservoir and Loss of Reserves,” provides that no Party is liable to another for “damage to a reservoir or loss of hydrocarbons, except if that damage or loss arises from a Party’s gross negligence or willful misconduct.” Under this Article BP would also have to absorb the entirety of the loss value of the oil spilled, which is estimated to have been worth $372 million based on the
The liability implications for BP are far-reaching. A finding of gross negligence or willful misconduct on its part would result not only in the enhanced compensatory and punitive damages outlined above under federal and state law, but also in BP having to absorb 100% versus 65% of those liabilities, as well as consequential losses attributable to the value of the spilled oil and loss profits, on its own.

The ability to spread the risk of loss and capital investment involved in these costly, speculative projects amongst several partners is a major inducement to using the joint venture business model in these types of enterprises. The operating agreements governing the parties’ relationship take on greater urgency when the enterprise is engaged in a high-risk activity that carries the potential for great harm, and with it, extraordinary liability. The financial incentive to avert losses triggered by heightened degrees of fault in private commercial agreements could provide yet another powerful deterrent tool if there were particularized criteria to guide their application, co-extensive with federal and state laws which deploy these same terms to deter careless conduct. Should a predictable standard for aggravated negligence emerge from cases like the BP litigation, it will inevitably manifest in contractual provisions allocating losses among co-adventurers in high-risk enterprises. Such an outcome could provide joint enterprisers with a sobering financial incentive to minimize risk because the potential losses would include not only the already daunting litigation damages and regulatory penalties but also the entirety of the company’s capital investment and loss profits from the venture.

D. Criminal Liability

While this article’s focus is on the impact gross negligence and willful misconduct will have on augmented civil liability, it is worth mentioning that these terms could determine BP’s criminal liability as well. The United States Justice Department is considering possible manslaughter charges arising out of the deaths of the eleven rig workers killed in the Deepwater Horizon explosion. Under the applicable federal crimes statute, manslaughter is defined as an “unlawful killing of a human being without malice….[w]ithin the special maritime and territorial jurisdiction of the United States.” A conviction for involuntary manslaughter may be based upon a finding of gross negligence, which is defined as a “wanton or reckless disregard for human life.” The criminal negligence punishable under this statute shares many of the same characteristics of gross negligence, its tort law analog, and is viewed as the functional equivalent. Consequently, a parallel finding of gross negligence in the civil litigation could result in both civil and criminal sanctions, further underscoring the significance of a gross negligence designation in the BP litigation and invigorating its future deterrent value.

average weekly price of oil per barrel during the course of the spill. See Cohen, Goddard & LeCesne, supra note 7, at 2-3.

51 Contractual liability, however, will be determined in the private, extrajudicial setting of mandated binding arbitration in accordance with Section 22.9 – Dispute Resolution Procedure of the Operating Agreement.


54 “Criminal negligence, in fact, corresponds to the concept of ’gross negligence’ in tort law.” Reporter’s Comment, La. Rev. Stat. Ann. § 14:8 (2007). See Martin, supra note 4, at 1015-16. (“Gross negligence can be found when an action is bound together with a certain state of mind; this is true whether it is in a criminal or a tort context.”). See discussion infra Part III.
E. Regulatory Implications for Future High-Risk Activities

Communities are increasingly exposed to large scale potentially catastrophic threats posed by profit-driven, high-risk activities, particularly in the energy sector. Exceptionally dangerous activities such as deep-water drilling, natural gas exploration, nuclear energy development and strip coal mining will only become more prevalent and escalate in the potential magnitude and frequency of harm as the unending quest for new and additional sources of energy becomes more acute. The need for effective regulatory mechanisms to ensure that those operations, and the new technologies they employ, are conducted with minimal risk has never been greater. A clarified regime of heightened degrees of fault, and their accompanying enhanced sanctions, could be a potent deterrent mechanism in the regulatory arsenal.

The BP litigation will likely generate renewed interest in the meaning and application of the terms gross negligence and willful misconduct given their potentially monumental impact on damages and penalties in this high-profile case. It could also shed light on the existing muddled iterations of these terms and, hopefully, present an opportunity to both clarify and particularize the heightened duty owed under these advanced forms of fault.

The Deepwater Horizon oil spill presents the perfect storm of circumstances against which to assess the efficacy of the regulatory function degrees of negligence can, and, in many legal regimes, was intended to serve. At work here is the convergence of a series of acts of a complex technical nature by multiple actors involving multiple, sequential lapses during several distinct operational phases of a highly dangerous process. It is also how future disasters of this type are more likely to unfold.

In stark contrast, the second largest oil spill in history, the Exxon Valdez incident, involved an entirely different factual setting that was unfavorable to exposing the existing flawed utility of aggravated negligence as a reparative, punitive and deterrent tool. The Exxon Valdez oil spill was caused by an isolated, graphic act of reckless misconduct by an individual. Even the existing tortured definitions of gross negligence were sufficient to determine whether a drunken tanker captain who left the helm of a supertanker carrying 53 million gallons of oil moments before negotiating a dangerous turn, exceeded the boundaries of ordinary negligence.

Also significant is the fact that the Exxon Valdez spill occurred prior to enactment of the OPA and, as destructive as it was, caused significantly less economic and environmental damage than did the Deepwater Horizon event. Consequently, there was no prospect of unlimited liability for gross negligence or willful misconduct. While gross negligence did figure in the imposition of fines under the CWA and the award of punitive damages under maritime common law, the court had no trouble finding gross negligence under these relatively anomalous circumstances.

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56 Of course, it is also possible that none of the issues regarding degrees of negligence will ever be decided in the BP litigation. BP could reach a global settlement of all damages including liability for fines, damages and other penalties, thus avoiding any designation of the degree of its alleged negligence. See Jane Wardell, BP Reaches $1B Settlement with Gulf Well Partner Over Oil Disaster, Huffington Post (May 20, 2011), available at www.huffingtonpost.com/2011/05/20/bp-1b-settlement-with-gulf-well_n_864644.html.


58 See id.
Tort law liability has traditionally functioned as an important regulatory adjunct to legislative schemes that seek to regulate similar behavior. The prospect of having to compensate the victims of one’s negligent conduct presumably deters the actor from engaging in unreasonably risky conduct. Predictable standards of care in relation to the risks an activity poses enables the actor to coordinate and modify his behavior to comport with the required duty of care, including the heightened duty of care demanded of high-impact risks.

However, more effective deterrents are necessary to combat the elevated risks accompanying the type of profit-driven, high-risk activities implicated in the BP litigation. These endeavors are capital-intensive projects, requiring huge capital outlays that exert considerable economic pressures from management and shareholders to assure profitability. Yet, these are also abnormally dangerous activities that demand an uncompromising commitment to safety in order to minimize risk. Strategic financial decision-making often overrides safety protocol in the field, especially when the operator lacks a strong safety culture or regularly disregards safety protocol to save costs or time. More reliable criteria for determining gross negligence and willful misconduct enhance the predictability of augmented damages, thus increasing their deterrent value.

In addition, the threat of punitive damages alone may not sufficiently incentivize conductors of these high-risk activities given the United States Supreme Court’s recent inclinations to cap punitive awards. Moreover, some punitive damages schemes are, in part, based on gross negligence or willful misconduct, and are impeded by the same linguistic vagaries and conceptual fogginess surrounding current use of these terms.

Still further, the current lack of clarity diminishes the deterrent value of these terms for a number of reasons. The sources of injury-producing conduct in high-risk activities such as deepwater drilling can be difficult to pin-point and are likely embedded in a combination of acts. These projects are technically complex; they routinely involve multiple actors with overlapping input into key aspects of the operations; and the harm is more likely to result from a series of acts or systemic behavioral patterns than from a singular, episodic event such as what occurred in the Exxon Valdez spill. All of this makes the fact-finder’s task of grading the level of negligence exceedingly difficult, especially when measured against a nebulous and ill-conceived standard. The uncertainty surrounding these terms facilitates defense strategies in further obfuscating the already blurry lines of distinction between ordinary negligence, gross negligence and willful misconduct. It also makes the prospects for augmented liability in the actor’s psyche a remote abstraction rather than a predictable and proximate risk-management consideration. Individual sense of responsibility amongst these multiple actors is diminished by the layers of profit-driven participants and multiplicity of tasks, furthering the subliminal disconnect between unreasonable risk and increased liability.

II. A Synopsis of Some Key Alleged Negligent Conduct

The Deepwater Horizon rig explosion was not precipitated by a single episode of negligence. Rather, it was the culmination of a series of decisions, acts and omissions that occurred over the

59 See Andrew F. Popper, Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill, and Arbitrary Limits on Civil Liability, 60 DePaul L. Rev. 975 (2011) (“Caps on something as dangerous as an oil spill seem an obvious mistake. In fact caps in most instances have been demonstrated to be a bad idea. They do nothing for consumers and create disincentives for safer and more efficient goods. It is simply an illusion that they improve the marketplace for goods and services or enhance public safety. The consequences of limiting liability can be devastating and deadly. While the data is not yet conclusive, a strong case can be made that a lack of due care, made more likely by capped liability and a one-to-one compensatory to punitive damage ratio, affected the choices made by BP leading to the Deepwater Horizon disaster.”). Id. at 1005.

60 See Keeton et al., supra note 1, at 210.
course of many months.\textsuperscript{61} Flawed decision-making, much of it allegedly driven by cost or time-
saving considerations permeated key aspects of the Macondo well’s operation including its ill-fated
design, faulty construction and careless monitoring of its stability. The investigative findings to date
point to a number of acts as potential contributing factors in the rig explosion including: the decision
to use one long continuous string of casing rather than the industry standard series of interlocking
liners which would have provided redundant barriers to hydrocarbons escaping around the outside of
casing,\textsuperscript{62} the use of 6 centralizers in constructing the well instead of the 21 urged by Halliburton, the
subcontractor responsible for cementing the well to seal it;\textsuperscript{63} the premature replacement of “drilling
mud,” a dense, heavy substance, with the much lighter seawater, against the recommendation of
subcontractors;\textsuperscript{64} disregarding lab test results indicating that the cement slurry used to seal the well
was unstable,\textsuperscript{65} choosing to forego a critical test used to determine the quality of the cementing work,
even though the subcontractor that would have conducted the test was already on site;\textsuperscript{66} disregarding
the danger signaled by frequent “kicks” of hydrocarbons surging from the well;\textsuperscript{67} and ignoring poor
results from a “negative-pressure test” indicating the well was not properly cemented.\textsuperscript{68}

It was the cumulative effect of these and numerous other decisions, acts and omissions that
allegedly contributed to the blowout, either directly or indirectly. And it is within this complex,
highly technical factual context that the trier of fact will have to determine the degree of negligence
involved and apportion fault amongst several possibly concurrent tortfeasors.

III. Degrees of Negligence: A Primer

The notion of separating negligence into ascending and descending degrees of care is a
departure from negligence orthodoxy. According to traditional negligence doctrine, negligence
occurs when an actor fails to exercise reasonable care causing damage to another’s person or
property. The most often used standard of care is that which a rea-
t was the cumulative effect of th-
menreasonable person

\textsuperscript{61} See Cohen, Goddard & LeCesne, \textit{supra} note 7, at 5.
\textsuperscript{62} See \textit{id.} See also Bob Cavnar, Disaster on the Horizon, High Stakes, High Risks, and the Story Behind the
Deepwater Well Blowout (2010). The author opines that BP’s decision to run one long string of casing
from the bottom of the well all the way to the well head was “one of its worst errors—an error that likely
played a key role in the blowout.” \textit{Id.} at 26; and National Commission on the Deepwater Horizon Oil Spill
& Offshore Drilling, Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling, Final Report to
the President, at 115 (2001) (hereinafter “Oil Spill Commission Report”) (finding that the decision to use
the long-string design should have led BP and Halliburton to be on heightened alert for any signs of
primary cement failure). \textit{But cf.} Bureau of Ocean Energy Management, Regulation and Enforcement,
(hereinafter “BOEMRE Report”) (concluding that the decision to not use liners was made to save costs, but
ultimately finding no evidence that the long-string casing design was a cause of the blow-out).
\textsuperscript{63} See Cohen, Goddard & LeCesne, \textit{supra} note 7, at 5 (footnote omitted); and Cavnar, \textit{supra} note 62, at 27;
(finding no evidence that the use of 6 versus 21 centralizers was a cause of the blowout).
\textsuperscript{64} See Cohen, Goddard & LeCesne, \textit{supra} note 7, at 5 (footnote omitted); Oil Spill Commission Report,
\textit{supra} note 62, at 119-20.
\textsuperscript{65} Oil Spill Commission Report, \textit{supra} note 62, at 117.
\textsuperscript{66} \textit{Id.} at 118-19.
\textsuperscript{67} \textit{Id.} at 120-21.
\textsuperscript{68} \textit{Id.} at 105-08.
\textsuperscript{69} Vaughan v. Menlove, 132 ENG. REP. 490, 493 (C.P. 1837) (The canonical citation for the proposition that
“negligence is a lack of ordinary care.”).
standard, the greater the potential harm posed by the risk, the greater the caution the actor is required to use to avert it.\textsuperscript{70}

As explained below, a substantial number of courts and legislatures over the last century developed the idea that negligent conduct could be cabined into distinct “degrees” of legal fault, with corresponding required “degrees” of care.\textsuperscript{71} Negligence was separated into categories of ordinary, gross, and willful misconduct. However, courts encountered significant difficulties in defining the mandated degrees of care, the boundaries separating them and how, and under what circumstances, they should be applied. The result is a labyrinth of jurisprudence rife with inconsistencies, contradictions and obscurity. Degrees of negligence lack a coherent doctrine and specific criteria to guide courts in their application. Today, courts are no closer to resolving this conundrum than they were at the turn of the last century.\textsuperscript{72}

\section*{A. Origins and Development of the Concept}

The division of negligence into three degrees can be traced to Roman law, which distinguished standards of care into gross, ordinary and slight neglect.\textsuperscript{73} This tripartite division of care was later adopted at common law in bailment cases during the early 18th century.\textsuperscript{74} Slight negligence was considered the failure to exercise extraordinary care; ordinary negligence, the failure to use ordinary care; and gross negligence, the failure to use even slight care.\textsuperscript{75} In bailment cases, a gratuitous bailee was only expected to exercise slight care and thus would only be liable for gross negligence. Conversely, if the property was held for the bailee’s benefit, extraordinary care was required and liability would result for slight negligence. If the bailment was for the mutual benefit of both bailor and bailee, liability would arise for ordinary negligence.\textsuperscript{76}

Beginning in 1907, a small number of courts developed a principle holding a driver to a limited standard of care to guest passengers, based upon the lower level of care required of a gratuitous bailee.\textsuperscript{77} Taking their cue from this emerging doctrine, a number of state legislatures enacted “automobile guest statutes” which limited the liability of a car driver to gratuitous guest passengers to instances of aggravated misconduct.\textsuperscript{78} The definition of misconduct under these guest statutes varied from state to state, according to the “fancy of the legislature.”\textsuperscript{79} The proscribed misconduct in some states included “gross negligence” while in others it included “willful,” “wanton,” or “reckless” misconduct or some combination of these terms.\textsuperscript{80} The following case captures the disarray that followed.

In \textit{Williamson v. McKenna}, the Oregon Supreme Court examined the state of gross negligence across multiple jurisdictions in the context of automobile guest statutes, and came to the conclusion that the standard was synonymous with recklessness.\textsuperscript{81} The court undertook the task of

\begin{itemize}
\item \textsuperscript{70} See Keeton et al., \textit{supra} note 1, at 208.
\item \textsuperscript{71} \textit{Id.} at 209.
\item \textsuperscript{72} \textit{Cf.} Linda Sandstrom Simard, \textit{Meeting Expectations: Two Profiles for Specific Jurisdiction}, 38 IND. L. REV. 343, 347 (2005) (discussing the similarly incoherent doctrine surrounding courts’ attempts to distinguish the characteristics of general and specific jurisdiction).
\item \textsuperscript{73} Nelson P. Miller, \textit{An Ancient Law of Care}, 26 WHITTIER L. REV. 3 (2004); Green, \textit{The Three Degrees of Negligence}, 8 AM. L. REV. 649 (1874).
\item \textsuperscript{74} Dobbs, \textit{supra} note 1, at 349, \textit{citing} Coggs v. Bernard, 92 ENG. REP. 107 (1703).
\item \textsuperscript{75} Keeton et al., \textit{supra} note 1, at 210 (footnotes omitted).
\item \textsuperscript{76} Dobbs, \textit{supra} note 1, at 349.
\item \textsuperscript{77} Keeton et al., \textit{supra} note 1, at 215 (footnotes omitted).
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Williamson v. McKenna}, 354 P.2d. 56, 66 (Or. 1960).
\end{itemize}
formulating a usable test, which would enable trial judges and juries to determine “with reasonable accuracy and consistency” what conduct was sufficiently culpable enough to satisfy gross negligence. Upon surveying other states’ application of the gross negligence standard in its attempt to create such a test, the Oregon Supreme Court noted that most jurisdictions struggled with distinguishing gross negligence from recklessness. The key factor troubling courts appeared to be a determination of the actor’s state of mind. Alabama, California, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Ohio, South Dakota, Texas, Utah, and Washington were listed as the states who by this time had already done away with the term “gross negligence” (originally included) in their guest statutes. Other courts, such as Kansas, Michigan and Florida, made the term synonymous with willful and wanton misconduct.

Still, other jurisdictions persisted in distinguishing gross negligence and willful or wanton misconduct under their guest statutes. Wyoming defined gross negligence as “manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency to injure.” Massachusetts, on the other hand, attempted to separate gross negligence from ordinary negligence in the context of automobile accidents on the basis of the number of seconds that the driver is guilty of inattention by comparing them with instances showing longer periods of inattention.

In light of such wildly varying, and sometimes incoherent, interpretations of gross negligence and willful or wanton misconduct and the pragmatic difficulties in applying these terms, most courts and commentators rejected the idea of degrees of negligence as “vague and impracticable” and lacking a basis in legal principle. Among the critics were Prosser and Keeton, who observed that: “There is perhaps no other group of statutes which have filled the courts with appeals on so many knotty little problems involving petty and otherwise entirely inconsequential points of law [such as]… the meaning, and application, of ‘gross,’ ‘willful,’ ‘wanton,’ ‘reckless,’ or whatever other terms the statute may adopt.” Another noted tort scholar applauded their demise, commenting that “[n]othing was lost in leaving the scheme behind because the reasonable prudent person test, with its attention to circumstances, was quite adequate to deal with the cases.”

The miserable failure of the automobile guest statute experiment did not, however, dissuade other courts and legislatures from using various forms of aggravated negligence to impose greater liability than would be applicable for ordinary negligence. The terms gross negligence, willful, wanton and reckless were used prolifically, often in arbitrary combinations, to distinguish ordinary negligence from more culpable misconduct deserving of more severe punishment. The amalgamation of these terms only furthered the confusion amongst courts interpreting them.

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82 Id. at 59. “Since we are dealing here with a question of the quantum of fault it is obvious that we cannot expect to find a rule or standard that can be applied with any precision; the most we can hope for is a clear statement of the factors or elements which must characterize the host’s conduct in order to permit recovery.”
83 Id. at 62.
84 Id. at 59.
85 Id. at 60.
86 Id. at 62.
87 Mitchell v. Walters, 100 P.2d 102, 107 (1940).
89 Keeton et al., supra note 1, at 210 (footnote omitted); Dobbs, supra note 1, at 350.
90 Keeton et al., supra note 1, at 216.
91 Dobbs, supra note 1, at 350.
To fully appreciate the ensuing confusion, which remains to this day, it would be helpful to explore briefly what the individual terms gross negligence and willful, wanton or reckless misconduct are intended, at least theoretically, to convey. “Negligence,” in its broadest sense, imparts the idea of inattention, inadvertence or lack of circumspection. The difference between ordinary and gross negligence is considered one of degree. “Willfulness,” on the other hand, conveys the notion of purpose or design, actual or constructive. “Wantonness” and “recklessness” suggest that the actor knew or had reason to know of a substantial risk of harm and chose to proceed in conscious indifference to the safety of others. Willful, wanton and reckless misconduct each entail a mental component that is neither necessary nor appropriate to establish gross negligence since negligence is conduct, not a state of mind. Hence, the difference between any form of negligence and willful, wanton or reckless misconduct is said to be a matter of kind.

Notwithstanding these conceptual distinctions, some courts, dissatisfied with degrees of negligence as a matter of law, began to construe gross negligence to require willful, wanton or reckless misconduct. These jurisdictions viewed willful, wanton, or reckless actions as indistinguishable, conflating all three terms to have the same meaning. In equating gross negligence with these forms of quasi-intentional misconduct, gross negligence became suffused with the mental element characteristic of willful, wanton and reckless behavior. Consequently, some courts began requiring a conscious indifference to the risk of harm as a prerequisite to a finding of gross negligence.

Some consider negligence and willfulness or wantonness as self-contradictory, incongruous terms that are mutually exclusive and which infer radically different mental states. Negligence is a mere inadvertence while “willful” and “wanton” describe acts that transcend “negligence,” no matter how “gross.” Recklessness “involves a clear and present danger… awareness … that act or omission is likely to result in injury,” while willful misconduct is likened more to a level of culpability approaching intent, almost a “design, purpose or intent to cause the injury.” Contrasted with the obscure contours of gross negligence, willful misconduct is a more clearly defined standard. Willful misconduct denotes a state of mind that “approaches intent to do harm.” Therefore, willful misconduct can be established by demonstrating that an “actor has intentionally committed an act of unreasonable character in disregard of a known or obvious risk that is so great as to make it highly

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93 Id.
94 Id.
95 See DeJesus v. U.S. Dept. of Veteran Affairs, 479 F.3d 271, 286 (3d. Cir. 2007).
96 See Dobbs supra note 1, at 351.
97 Id. at 275.
98 Id.
99 Keeton et al., supra note 1, at 212.
100 Id.
101 Speiser et al., supra note 92, at § 10:7, citing Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 830 (Ca. 1993) (negligence and willful misconduct are “mutually exclusive”); Kelly v. Mallot, 135 F. 74 (7th Cir. 1905) (“Negligence and willfulness are as unmixable as oil and water, ‘Wilful negligence’ is as self-contradictory as ‘guilty innocence.’ ”); Anderson v. Commissioner of Internal Revenue, 81 F.2d 457, 460 (10th Cir. 1936).
102 Speiser et al., supra note 92, at § 10:6 (footnotes omitted).
probable that harm will follow.” 105 It is this focus on the design or purpose in the actor’s state of mind which places willful misconduct closer to the intentional conduct end of the spectrum, while gross negligence is nearer to the ordinary negligence end of that spectrum. As articulated by the Fifth Circuit, willful misconduct is a standard of deliberate indifference, a “lesser form of intent,” while gross negligence is a “heightened degree of negligence.” 106

Another incongruity resulting from courts’ construing gross negligence under a willful misconduct standard involves the required level of actual or constructive prior knowledge of the risk. 107 The level of awareness required for willful misconduct is much more specific than what is necessary for gross negligence, where it is an awareness of a general, but grave, risk of harm. In willful misconduct, the awareness must rise to a level of specificity as to the actual harm which resulted, such that it is in just short of intentionally willing the resulting harm.

Despite such ideational anomalies, courts have clung to the assimilation of gross negligence to willful or reckless misconduct when deploying those terms to justify harsher punishment. The terms, rightfully or wrongly, are viewed by many courts as synonymous, each requiring a mental state evincing an indifference to the injurious consequences of one’s actions thus providing the culpable mindset that distinguishes this behavior from ordinary negligence. Williamson offers one possible explanation for their conflation in the jurisprudence:

Faced with the problem of drawing a line between ordinary negligence and inadvertent conduct of a more serious nature, but short of conduct evidencing a consciousness of risk and danger, the courts found that the task was impossible because there was no test or language or factors to guide the courts’ hand in marking out the division between ordinary and gross negligence on the scale of ‘ascending and descending degrees of care,’ to borrow a phrase from Jones on Bailments. As a matter of the practical administration of justice, it was necessary to move up the scale of fault where there could be found a distinguishing feature which could serve as a point of division in describing serious culpability and which could be used in testing the defendant’s conduct in a particular case. That feature was the defendant’s mental state—the fault that is associated with a consciousness of danger and an election to encounter it. Gross negligence thus becomes identical with recklessness. 108

Texas has even codified this view in its statutory definition of “gross negligence” which states:

Gross negligence means more than momentary thoughtlessness, inadvertence or error of judgment. It means an entire want of care as to establish that the act or omission was the result of actual, conscious indifference to the rights, safety and welfare of the person affected (emphasis in original). 109

The Fifth Circuit has adopted a similar view. As a result, the district court for the Eastern District of Louisiana handling the BP litigation will likely require that defendants’ negligence be

105 Bryant, 728 P.2d at 1136, citing Keeton et al., supra note 1.
106 Doe v. Taylor Ind. School Dist., 15 F.3d 443, 453 (5th Cir. 1994).
108 Williamson v. McKenna, 354 P.2d at 66.
coupled with a conscious awareness of the risk of harm based on *Houston Exploration Co. v. Halliburton Energy Services, Inc.* In *Houston Exploration Co.*, an oil and gas producer sued for damages after the company’s gas well blew out due to the defendant’s negligent testing on the well. The court sought to determine whether gross negligence nullified a contractual right to indemnification between the parties. The district court erroneously found the defendant grossly negligent without evidence that defendant was cognizant of the potential consequences of their actions. The Fifth Circuit reversed the lower court’s application of gross negligence for failing to adequately consider that defendant’s employees lacked knowledge of the risk. Citing *Cates v. Beauregard*, the court held that gross negligence requires that the negligence of the actor be coupled with a conscious awareness of the risk of harm.111

**B. Existing Standards**

[I may not be able to define it.] But I know it when I see it.112

The current contorted definitions of gross negligence and willful misconduct are reminiscent of the above observation by Justice Stewart regarding the futility of defining hard-core pornography. Gross negligence and willful misconduct have morphed into similarly indefinable terms.113 Due in large part to various courts’ ill-fated attempts to define them, these terms have become so muddied and conflated in the jurisprudence their foundational qualities have all but disappeared.114 Their conflation has been compounded by modern statutes (such as the OPA and CWA) which borrowed their common law usages without distinction or clarified standards for their application. Remarkably, the fragmented manner in which states initially categorized gross negligence under guest statutes remains and has arguably worsened.

Presently, and notwithstanding its ubiquitous statutory usage, there is no generally accepted meaning of “gross negligence.”115 Gross negligence has been recognized by the United States Supreme Court as “meaning a greater want of care than is implied by the term ‘ordinary negligence.’”116 As one court astutely noted, “If the absence of negligence is white and gross negligence is black, then innumerable shadings of grey lie between.”117 One court even dubbed the task of assigning this higher level of culpability as akin to entering a legal “twilight zone which exists somewhere between ordinary negligence and intentional injury.”118 Prosser and Keeton’s often quoted characterization of gross negligence as a term of “ill-defined content” succinctly portrays the collective discord.119 Unfortunately, this discombobulated term will be the fulcrum for determining damages in the largest mass tort case in history.

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110 Houston Exploration Co. v. Halliburton Energy Sources, Inc., 269 F.3d 528 (5th Cir. 2001).
113 See discussion infra Part IV.
114 Ambrose v. New Orleans Police Dept. Ambulance Service, 639 So. 2d 216, 219-20 (La. 1994), citing 65 C.J.S. NEGLIGENCE, § 8(4)(a), 539-40 (1966 & Supp. 1993) (“There is often no clear distinction between such [willful, wanton or reckless] conduct and ‘gross negligence,’ and the two have tended to merge and take on the same meaning.”).
115 See Keeton et al., supra note 1, at 212.
119 Keeton et al., supra note 1, § 2, at 10.
Despite the confusion, there are some formulations of gross negligence and willful misconduct which may prove useful to the court in the BP litigation. One of the most widely accepted modern expressions of gross negligence suggests that it consists of two components: (1) viewed from the objective standpoint of the actor; and (2) the actual, subjective awareness of the risk involved and indifference to the welfare of others.\footnote{120} The objective component evaluates the magnitude and probability of injury; whereas, the subjective component considers whether the actor has conscious awareness and indifference. Under the objective element, “extreme risk” means that there is a likelihood of serious injury to the plaintiff.\footnote{121} The court’s focus on the defendant’s state of mind examines whether the actor actually knew about the peril and demonstrates he did not care about its consequences to others.\footnote{122} Failure to observe slight care means that the actor is careless to a degree that infers indifference to the consequences that may result.\footnote{123} Inquiry into a corporate actor’s state of mind, however, can be problematic given the hierarchical structure of the decision making process. The following case is instructive on how such an inquiry may be made.

In Mobil Oil Corporation v. Ellender, the Texas Supreme Court upheld a jury verdict for the defendant corporation failing to take proper precaution while aware of the likelihood of injury to the plaintiff.\footnote{124} The court conducted a two-pronged analysis and concluded that there was sufficient evidence to show that the defendant was grossly negligent.\footnote{125} First, the court evaluated whether the defendant’s actions objectively involved an extreme degree of risk. The defendant argued that it complied with industry standards for benzene exposure that existed at the time the plaintiff was employed; however, the fact that a defendant exercised some care “does not insulate the defendant from gross negligence liability.”\footnote{126} The act of exposing an employee to an extreme risk setting without monitoring exposure, providing protective gear, or warning of the risks was evidence from which a jury could reasonably infer that the defendant’s acts and omissions involved an extreme degree of risk.\footnote{127}

Next, the court determined whether a vice principal of the defendant corporation subjectively knew of the extraordinary risk involved from benzene exposure.\footnote{128} In assessing liability the court distinguished between acts that are solely attributable to agents and acts that are directly attributable to the corporation.\footnote{129} A corporation is grossly liable if acts of negligence are attributable of a vice principal.\footnote{130} Critical to the court’s holding was a finding that there was sufficient evidence to show subjective awareness on the part of the defendant company. A corporation may be liable in punitive damages for gross negligence if the corporation: (1) authorizes or ratifies an agent’s gross negligent, (2) is grossly negligent in hiring an unfit agent, or commits gross negligence through the actions or inactions of:

(a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or

\footnote{120} See id. at § 10:16, citing Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305 (5th Cir. 2002) (summarizing Texas law).
\footnote{121} Mobil Oil Corp. v. Ellender, 968 S.W. 917 (Tex. 1998).
\footnote{122} Aguirre v. Vasquez, 225 S.W.3d 744 (Tex. App. 14th Dist. 2007).
\footnote{123} Speiser et al., supra note 92, at § 10:16. See also Mobil Oil Corp., 968 S.W.2d 917, 921; Wal-Mart Stores, Inc. v. Alexander, 868 S.W.2d 322, 326 (Tex. 1993).
\footnote{124} Mobil Oil Corp., 968 S.W.2d at 921.
\footnote{125} Id.
\footnote{126} Id. at 924.
\footnote{127} Id. at 923-24.
\footnote{128} Id. at 924.
\footnote{129} Id.
\footnote{130} Id. at 921-22.
absolute duties of the master; and (d) those to whom the master has confided the
management of the whole or a department or a division of the business.131

The court concluded that there was sufficient evidence that the defendant vice principals had actual
awareness of the risk benzene exposure involved, but “proceeded in conscious indifference to the
rights, safety or welfare” of the plaintiff and other workers.132 Particulariy, the testimony of the
defendant’s medical director that the company had knowledge of the extreme benzene hazards posed
at its workplace rendered the mere compliance with industry standards as insufficient to meet an
objective standard of a level of care which would “insulate the defendant from gross negligence
liability.”133 Further, to satisfy the subjective component of gross negligence, the court found that the
defendant’s policy of monitoring and protecting its own employees but not doing the same for
contract workers provided additional facts and circumstances for the jury to infer that the defendant
knew the risks of benzene exposure yet proceeded with conscious indifference toward the rights,
safety or welfare of contract workers vis-à-vis that risk.134

Another useful perspective comes from a few courts that have found gross negligence based
on multiple acts of ordinary negligence. The Fifth Circuit recognized that “single acts of ordinary
negligence may become ‘elements’ that ‘collectively constitute gross negligence,’ ” and that a
“record of evidence of the defendant’s acts of ordinary negligence demonstrated” conscious
indifference to the plaintiff’s rights.135 In Aetna Cas. & Sur. Co. v. Marshall, the plaintiff was
claiming mental anguish damages resulting from the mishandling of the plaintiffs medical claims
resulting from a workplace injury. Texas law required a showing of gross negligence to recover
mental anguish damages. The Texas appellate court defined gross negligence as an “entire want of
care which would raise the belief that the act or omission complained of was the result of a conscious
indifference to the right or welfare of the person or persons to be affected by it.”136 The court then
went further and stated, “[a] defendant’s single action may be no more than ordinary negligence;
however, when considered along with other negligent acts, it may become an element of what
collectively constitutes gross negligence.”137 In Aetna, the court held that Aetna’s “successive and
repetitive acts of negligence, when considered collectively, suffice to constitute gross negligence.”138
This idea can be traced back to even the Williamson era, where the Oregon Supreme Court noted “it
is generally agreed… that a combination of negligent acts” might “show … that gross negligence has
been established.”139

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131 Id., citing Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 406 (Tex. 1934); Hammerly Oaks, Inc.
v. Edwards, 958 S.W.2d 387 (Tex. 1997); King v. McFuff, 234 S.W.2d 403, 405 (Tex. 1950); Purvis v.
Prattco, Inc., 595 S.W.2d 103, 104 (Tex. 1980).
132 Id. at 925.
133 Mobil Oil Corp., 968 S.W.2d at 923-24.
134 Id. at 925. (The court focused on the fact that Mobil provided protective gear and instructions on proper
benzene handling to employees, but not to contract workers such as the plaintiff.).
135 Clements v. Steele, 792 F.2d 515, 516-17 (5th Cir. 1986), quoting Aetna Cas. & Sur. Co. v. Marshall,
137 Id. (“Numerous singular acts by Aetna could constitute ordinary negligence when considered alone; they
may constitute gross negligence when considered together.”).
138 Id. (Aetna’s acts of negligence included several acts with regard to the handling of the plaintiff’s file;
which when taken together showed a “conscious disregard” to the plaintiff’s rights; acts such as a failure to
maintain correct forms in the file, the ignoring of an incorrect unsigned judgment in the file despite the fact
that plaintiff’s attorneys had pointed it out several times, and a lack of diligence in documenting the
plaintiff’s file – which all prevented the plaintiff from being able to see the physician of his choice to seek
medical treatment.).
139 Williamson v. McKenna, 354 P.2d. at 72.
Gross negligence arising from a series of acts can also be found in *Apache Corp. v. Moore*, when an oil well blowout resulted from a combination of negligent acts on behalf of the defendant corporation;¹⁴⁰ and *Water Quality Insurance Syndicate v. United States*.¹⁴¹ This line of cases is of particular relevance to the BP litigation because, as previously described, the *Deepwater Horizon* explosion was allegedly precipitated by a series of acts and omissions.

### IV. Gross Negligence/Willful Misconduct: A Proposed Standard For High-Risk Activities

A review of the commentaries, scholarly treatises and case law on gross negligence shows the term to have universally escaped definition, and despite the most assiduous efforts to give it precision it retains its amorphous quality...the idea remains extremely difficult for the trial courts to apply in specific situations.¹⁴²

The “unhappy history”¹⁴³ of aggravated negligence described above reveals that courts have been spectacularly unsuccessful in their attempts to draw meaningful lines of demarcation between degrees of negligence. Those failed efforts also show that separating negligence arbitrarily¹⁴⁴ into three categories was unwarranted to begin with and that the definitional results lend little meaningful assistance to the fact-finder in identifying the measure of fault involved. Indeed, current definitions are more apt to confuse rather than enlighten the fact-finder.¹⁴⁵

Some scholars and courts have offered several explanations for this dilemma. One view is that negligence is incapable of being sequestered into a few standardized modules of varying levels of carelessness because what constitutes heightened fault varies with the myriad circumstances faced by the actor whose conduct is being evaluated.¹⁴⁶ As one commentator has noted:

Certainly the division of all negligence into three degrees has not proved helpful and has been generally criticized. The trouble is that it is extremely difficult to use effectively. If you say that in one circumstance the defendant is liable for slight negligence and in another only for gross negligence, you invite a great deal of bootless wrangling over questions that cannot be objectively determined in any event. Was the defendant’s negligence more than ‘ordinary’? Was the case one that required gross negligence or was it one that required only slight negligence?”¹⁴⁷

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¹⁴³ Keeton et al., *supra* note 1, at 211.

¹⁴⁴ Dobbs, *supra* note 1, at 349. (“It is not easy to believe that there are three and only three degrees of fault, since risks imposed by the defendant’s conduct range in virtually infinite gradations.”).

¹⁴⁵ Keeton et al., *supra* note 1, at 210.

¹⁴⁶ See Massey v. Scripter, 258 N.W.2d 44, 47 (Mich. 1977) (“One standard of care, that care which a reasonably prudent person would use under similar circumstances, is mandated in view of the medley of circumstances that may be presented to the trier of fact.”), cited and quoted in Keeton et al., *supra* note 1 at, 209, n.12.

¹⁴⁷ Dobbs, *supra* note 1, at 350. See *also*, Martin, *supra* note 4, at 959, quoting an early admiralty case lamenting use of the terms slight, ordinary and gross negligence. The court noted: “It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the
Others have observed that degrees of negligence serve to fulfill a function rather than describe a course of behavior,⁵⁴⁸ that they are necessarily functional rather than descriptive. One scholar explains this theory as follows:

A determination of ‘gross negligence’ is to serve a specific purpose or function, not merely to describe negligence by an adjective for which another adjective could function…. [T]o judge that a party has been ‘very negligent’ is not a very good substitute for judging the party as ‘grossly negligent’. . . . When we describe ‘gross negligence’ or ‘willful misconduct’ as an operative of a formula, we are stating its function…[which] is to control or to justify the imposition of liability of a certain sort…. The concept of ‘gross negligence’ developed as a means of imposing more severe consequences for a party causing injury than would ensue from tort rules applicable to ‘negligence.’ The concept of ‘gross negligence’ carries with it, then, a judgment that the conduct of the injury-causing party is more blameworthy than ‘negligence’ itself would suggest.⁵⁴⁹

Still others have opined that gross negligence and willful misconduct are more terms of art than distinct legal principles.⁵⁵⁰ Rather than attempting to redefine that which is indefinable, this article proposes a factor-balancing or criteria-guided approach that will provide more precise, fact-driven guidance to the trier of fact compelled to assess the degree of defendant’s negligence. The reasons for such an approach are both principled and pragmatic. The criteria are tethered to the compensatory and deterrent functions that the terms gross negligence and willful misconduct were intended to serve⁵⁵¹ as well as the foundational policies they were designed to promote.

Negligence determinations of any variety are highly fact-intensive exercises.⁵⁵² Assessing degrees of negligence is a question of fact for the fact-finder to resolve.⁵⁵³ The utilitarian advantage of a criteria-guided approach to advanced degrees of fault is its flexibility in adjusting to the varying circumstances confronted by the fact-finder who is being asked to make a relative judgment. The criteria provide signposts that are probative, though not necessarily determinative, of the behavior. A criteria-guided framework also facilitates this function by prompting fact-specific inquiry and demanding fact-driven conclusions. It also reflects the fact-centric nature of any negligence analysis, consistent with the prevailing rule that “in most situations... there are no ‘degrees’ of care or negligence, as a matter of law; there are only different amounts of care, as a matter of fact.”⁵⁵⁴

There are also a number of practical reasons to resist a definition-oriented solution to the problem. For one, the existing formulations are too knotty and com mingled to unravel with simply another definition. Courts are unlikely to redefine their way out of this thicket of conflicting and conflated definitions for labels that have come to mean the same thing. Definitions of gross negligence and willful misconduct have melded together to the point where many courts and legislatures view them as interchangeable labels to describe the same threshold of culpability which
would warrant more severe penalties than ordinary negligence. Still further, the definitional paradigm is so entrenched in the jurisprudence that yet another definition, however illuminating, is unlikely to shift attention from the familiar descriptive formulas to which courts so stubbornly cling, despite their incoherence and lack of utility. In short, they are far beyond definitional salvation.

The criteria-guided approach proposed in this article is akin to the “cluster of ideas” interpretative methodology frequently used by the Supreme Court when deciphering the meaning of common law terms of art used in federal statutes. In *Morissette v. United States* the Court explained this technique as follows:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such cases, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

In determining gross negligence and willful misconduct under the OPA and the CWA, the court handling the BP litigation could very well resort to the *Morissette* “cluster of ideas” approach, as some have predicted. However, the mere randomized reference to the common law’s “widely accepted definitions” of these terms would afford the court scant interpretative assistance since the definitions themselves, as illustrated above, are hopelessly conjoined and mired in uncertainty. Without more, the court may find that the “cluster of ideas” for these terms is just a morass of “clustered ideas”.

Therefore, both carefully reasoned and informed selection of the salient features of gross negligence and willful misconduct and a structured analytical framework for their application are needed and what the test proposed below endeavors to provide. A significant distinction between the “cluster of ideas” technique and what is proposed here is that the “cluster of ideas” are borrowed not only from the common features of gross negligence and willful misconduct found in the cases and statutes using those terms, but also from other doctrinal regimes which those terms helped shape and with which they share common functions. In addition, the distilled criteria are presented in a factor-balancing framework that reflects their relative probative weight in light of their historical usages by courts and legislatures.

The question then becomes which criteria to use and why those particular ones. If gross negligence or willful misconduct labels do indeed serve a function, it makes sense to develop interpretative criteria from policy-related doctrines that serve the same or similar functions. Accordingly, the criteria proposed below derive from several doctrines whose functions parallel those of aggravated negligence. For example, punitive damages also serve the same dual purpose – punishment and deterrence – that the terms gross negligence and willful misconduct are intended to promote under the OPA and the CWA. In addition, the statutory and jurisprudential guidelines for the

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155 Martin, supra note 4, at 987, citing Morissette v. U.S., 342 U.S. 246 (1952) (The Court sought to determine whether a criminal statute that did not include the term “intent” meant to exclude that requirement as an element of the crimes listed in the statute); Molzof v. United States, 502 U.S. 301 (1992) (interpreting the application of a punitive damages provision in a federal statute) cited in, Martin, supra note 4, at 987.

156 Morissette, 342 U.S. at 246, 263, cited and quoted in, Martin, supra note 4, at 987.

157 Id. at 986-87. Professor Martin predicts that the court will likely turn to the “cluster of ideas” interpretative technique in applying gross negligence and willful misconduct to the facts in the BP litigation.

158 See id. at 987.
award of punitive damages regularly use the reprehensibility of defendant’s conduct as a factor, the same touchstone of gross negligence and willful misconduct so prevalent in cases interpreting those terms.

Strict liability doctrine is also instructive because statutory schemes such as the OPA and the CWA, which use gross negligence or willful misconduct to trigger enhanced liability, are strict liability regimes. That is, because the activity involves such a grave risk of harm, liability is imposed without regard to fault, thus assuring a compensatory mechanism for those harmed by such inherently dangerous activity even in the absence of negligence.

Comparative fault principles also provide a fertile doctrinal source for the criteria. A key feature that distinguishes ordinary negligence from gross negligence or willful misconduct is the moral blameworthiness typically associated with these advanced degrees of negligence. The primary reason some courts and statutory schemes separate negligence into different categories is to impose a higher penalty on those engaged in the more culpable conduct of gross negligence or willful misconduct. While comparative fault serves a different function, focusing on the cause of the harm rather than the character of fault, the fact-finder instinctively considers the defendant’s relative culpability in determining which party should bear the largest proportion of the reparative cost.

Punitive damages, strict liability and comparative fault have also been reciprocally influenced by certain characteristic features of gross negligence and willful misconduct. As will be seen below, the underlying policies and functions of these related doctrinal regimes and degrees of negligence mutually reinforce one another. Moreover, each of these regimes also uses a factor-balancing test to fulfill their respective functions.

A. Doctrinal Bases

1. Risk-Utility Analysis

As mentioned above, several scholars have opined that determining whether one’s behavior exceeded the boundaries of ordinary negligence and was thus deserving of more severe punishment, could be satisfactorily resolved within the familiar construct of what a reasonably prudent person would have done under the same or similar circumstances. They suggest that the objective of imposing a special or higher standard of care in certain situations could have been more effectively addressed by adhering to the familiar reasonable person under the circumstances used to assess ordinary negligence. Under this approach, the hypothetical objectively reasonable person, when confronted by an abnormally dangerous risk would be expected to exercise increased caution commensurate with the risk. As Prosser and Keeton put it:

The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it. . . .

Although the [degrees of negligence] language used by the courts sometimes seems to indicate that a special standard is being applied, it would appear that none of these cases should logically call for the departure from the usual formula. What is required is merely the conduct of the reasonable person of ordinary prudence under the

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159 Keeton et al., supra note 1, at 208-09; Dobbs, supra note 1, at 349-50.
160 Id. at 209. See also Dobbs, supra, note 1, at 350.
161 Dobbs, supra note 1, at 349.
circumstances, and the greater danger, or greater responsibility, is merely one of the circumstances, demanding only an increased amount of care.\footnote{Keeton et al., supra note 1, at 208-09 (footnotes omitted).}

In deciding whether one has conformed to the reasonable prudent person standard, most courts resort to some variant of the risk-utility analysis first proposed by Judge Learned Hand in \textit{United States v. Carroll Towing Co.}\footnote{U.S. v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).} The risk-utility analysis (which, incidentally, is a factor-balancing approach of sorts) requires the court to weigh (1) the probability that the harm will occur and (2) the gravity of the harm, should it manifest against (3) the costs of avoiding the harm and the utility of the actor’s conduct.\footnote{See Dobbs, supra note 1, at 337.} Judge Hand proposed this model literally as an algebraic formula that would find an actor negligent if the costs (i.e., burden) of avoiding the harm (B) was less than the probability of the harm occurring (P) times the magnitude of the harm should it occur (L). The burden of avoiding the harm includes not only the direct costs of implementing the safer alternative, but also the loss incurred by others or society at large resulting from averting the risk.\footnote{Id. at 341. This component of the cost of avoidance is sometimes referred to as the social utility value of defendant’s conduct.}

Mathematically speaking, negligence liability would ensue if $B < P \times L$.

Some courts rigidly adhere to this formulaic approach.\footnote{See id. at 340-43.} Many courts, however, use a far less structured version which involves a loose weighing of the factors.\footnote{See id. at 337-40.} For those proponents of the structured formulaic Hand model, a tempting solution to the degrees of negligence conundrum would be to simply calibrate the Hand formula to require a higher numerical differential for acts of gross negligence or willful misconduct than that which would be needed for ordinary negligence.

While intuitively appealing, a formulaic application of the risk-utility test has significant shortcomings as a diagnostic tool for degrees of negligence in scenarios like the \textit{Deepwater Horizon} event. The main problem in these kinds of cases is quantification of the risk utility factors. Hand’s formula does not require mathematical proof and in most cases, “the formula is applied to rough estimates derived from practical everyday evidence.”\footnote{See Dobbs, supra note 1, at 345.} However, establishing defendant’s negligence under it still requires plaintiff to offer some supporting proof probative of the factors.\footnote{Id.} In a case like the BP litigation adducing such evidence even as a rough, generalized estimate would be exceedingly difficult and, even more troubling, produce a skewed result. For example, with respect to the probability of harm factor, probabilities are usually expressed in terms of odds or percentages that reflect the average number of occurrences over a given span of time.\footnote{Id. at 343.} Prior to the \textit{Deepwater Horizon} incident, there had not been a deep water oil spill (blow out) in the Gulf of Mexico since 1969.\footnote{See Hornbeck Offshore Services, L.L.C. v. Salazar, 696 F. Supp. 2d 627, 638 (E.D. La. 2010) (order and reasons granting plaintiffs’ motion for a preliminary injunction).} Expressed in terms of percentages, or the odds that such an event could occur in 2010, the probability of harm factor would be so low that even when multiplied by the exceptional gravity of potential harm it would compromise the reasonableness calculus.

To compound the problem there are also considerable difficulties with roughly quantifying the magnitude of the harm factor in this kind of case. The full scope of the potential threat from an off-shore oil spill is so speculative as to be unknowable. It could be anywhere from a relatively small number of gallons which quickly dissipate at sea, causing no measurable harm, to hundreds of
millions of gallons or more that cause unfathomable environmental damage to the ecosystems of several states, the lasting effects of which might never be known.\textsuperscript{172} What numerical value, or even rough estimate, does the fact-finder assign to the “L” in Hand’s formula when assessing the unknown dimensions or possibly irreversible effects of an oil spill’s impact?

Estimating the costs of avoiding the harm is also an unacceptably speculative exercise for the fact-finder applying the Hand formula in these kinds of cases. The cost of risk-avoidance (or the “burden” of taking adequate precautions, as Judge Hand put it) includes both the direct costs of taking alternative measures to avert the harm and the social utility of defendant’s conduct. Direct costs such as the cost of using a more expensive type of casing to line a well or the monetary value of delays required to perform additional pressure tests may be easily measured.\textsuperscript{173} Quantifying the utility of a domestic oil and gas drilling operation is also reasonably measurable.\textsuperscript{174} However, a risk assessment process that considers only the value society at large places on the utility of the conduct without asking the community stakeholders directly affected by a potential catastrophic outcome what price they would be willing to pay to avert such a risk is intrinsically flawed.\textsuperscript{175} As one scholar rhetorically asks:

\begin{quote}
What are the reasons for assuming that direct human responses to such a question would be less reliable than a method of decision making, such as cost-benefit analysis, that uses a stylized definition of catastrophe and studiously avoids addressing matters of right and responsibility? What are the reasons for treating catastrophic losses indistinguishably from an agglomeration of trivial ones, albeit with a slight upward adjustment for some decontextualized notion of risk aversion? What justifies the assumption that catastrophic events can be smoothed into continuous functions within policy models, rather than remain in the form that they will actually take, as plunges, spikes, flips, and ruptures?\textsuperscript{176}
\end{quote}

The risk-assessment/cost-benefit analysis paradigm leaves such questions unanswered, making it ill-suited for evaluating the risk-worthiness of uncertain or calamitous threats which are possibly irreversible.\textsuperscript{177} The destruction caused by the BP spill, the full dimensions of which are still unknown, is illustrative.\textsuperscript{178} The possibly irreparable environmental damage inflicted by the discharge of millions of barrels of toxic crude oil, and equally toxic dispersants, at unprecedented ocean depths, the resulting decades of uncertainty for commercial fisherman,\textsuperscript{179} and permanent closure of Gulf

\textsuperscript{172} This example does not even take into account the potential threat to human life posed by the oil spill’s precipitating event — the well blowout or the massive economic loss caused by the spill.

\textsuperscript{173} However, even with these relatively identifiable direct costs problems ensue when, as in the BP case, there are multiple acts by multiple parties which cumulatively contributed to the harm. Determining the causal contribution of each act and its associated costs would be a messy proposition.

\textsuperscript{174} For example, an estimated 150,000 jobs are directly related to offshore operations in the Gulf of Mexico alone. Gulf oil production accounts for 31% of total domestic oil production and 11% of total domestic gas production. See Hornbeck Offshore Services, L.L.C. v. Salazar, 696 F. Supp. 2d 627, 632, supra note 171, at 5-6.

\textsuperscript{175} See Douglas A. Kysar, Regulating from Nowhere, at 95-96 (Yale University Press 2010) (The author persuasively argues why a cost-benefit, risk-utility analysis is a “poor decision guide” for low-probability, high-consequence environmental threats).

\textsuperscript{176} Id.

\textsuperscript{177} Id.

\textsuperscript{178} See Robert R.M. Verchick, Op-Ed., In Making Disaster Plans, We Have to Imagine the Worst Case, New Orleans Times-Picayune, April 28, 2011.

\textsuperscript{179} See Bob Marshall, Not Another Fish Story, New Orleans Times-Picayune, October 3, 2011, at A1 (reporting a university study which found that some species of Gulf fish are showing signs of hydrocarbon
Coast businesses, some of which were multi-generational, are just a few examples of the “costs” rendered irrelevant by an exclusively egalitarian valuation of the risk.

Another problem with a cost-benefit calculus of an exceptionally high magnitude risk is that it casts the value of defendant’s decision making in stark economic terms, devaluing the moral aspect of the actor’s choices.\(^\text{180}\)

As mentioned above, many courts use the risk-utility factors in a far more unstructured way, informally weighing the factors to determine the reasonableness of the defendant’s conduct.\(^\text{181}\) However, even this approach has its deficiencies when applied to a BP type case. The factors are simply too generalized to adequately inform the fact-finder of whether the threshold of ordinary negligence has been crossed. In addition, an unstructured weighing of these factors also suffers from the same prognosticating difficulties and skewed results described above with respect to low probability, high-impact events.

Notwithstanding these limitations, the risk-utility analysis remains the most frequently used framework for determining negligence and would likely suffice in less complex or non-catastrophic cases that call for a finding of gross negligence or willful misconduct. It could also satisfactorily resolve episodic “know it when you see it” gross negligence scenarios like the Exxon-Valdez incident. As such, it is the logical starting point in developing an alternative analytical framework for degrees of negligence in more factually and technically complex cases like the BP litigation.

In addition, the other doctrinal regimes from which the criteria for the proposed test are drawn also rely upon derivatives of one or more of the risk-utility factors. Several of the criteria proposed below owe their selection in some way to the risk-utility factor balancing test. For example, the criterion awareness of the danger, which is a more particularized expression of the risk utility’s probability of the harm component, is a factor in the award of punitive damages and the allocation of comparative fault. Another proposed criterion, a high degree of potential harm, which is a variation of the risk-utility’s magnitude of the harm component, figures prominently in the application of strict liability, punitive damages and comparative fault. Another proposed criterion — financially motivated conduct — derives from the risk-utility’s cost of prevention element and also weighs heavily in punitive damages and comparative fault assessments. Still further, other examples of the risk-utility analysis’ contributions to the test proposed here and the doctrinal regimes upon which the proposed test’s criteria are based are mentioned below.

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poisoning that was a precursor to the collapse of some fish and wildlife populations in Alaska after the Exxon Valdez oil spill). Id. at A8.

\(^{180}\) The activity’s value to the community, though quite relevant to a determination of unreasonableness on a negligence theory, was not included in the proposed test for a couple of reasons. First, in strict liability applications like the OPA and the CWA, the dangers of the activity have already been determined to outweigh the social utility of the activity by virtue of its strict liability designation. Secondly, the kinds of activities for which the proposed test has been tailored present such a high degree of risk, that its social utility could not, or at least, should not, outweigh the costs of the potentially catastrophic harm, even under the most rigorous economic cost-benefit analysis. Thirdly, a rigid economic interpretation of Hand’s risk-utility analysis would undermine the emphasis on safety that the proposed test aspires to promote, reducing what should be, at least in part, a morally based calculation into a purely economic one. As some critics of Hand’s risk-utility test have complained, it places greater value on social utility than it does on consideration of individual justice or moral choice, thus making the rights of those injured by the activity subservient to and contingent upon what is best for society at large. See Dobbs, supra note 1, at § 146, p. 346 (footnotes omitted). These critics, with whom this writer agrees, fear that weighing risks and utilities turns ‘moral analysis into a bloodless form of calculation’ that simply involves plugging in numbers.” Id. citing Kenneth W. Simons, Negligence, 16 SOCIAL PHILOSOPHY & POLICY 2, 52, 80 (1999).

\(^{181}\) Dobbs, supra note 1, at 337.
2. Punitive Damages

There is a strong doctrinal kinship between the law of punitive damages and degrees of negligence. Statutory schemes that deploy terms like gross negligence and willful misconduct as a predicate for imposing exemplary damages do so to serve the same dual function of punitive damages regimes which is to punish wrongful conduct and deter the wrongdoer and others from engaging in similar misconduct. Punitive damage schemes, in turn, frequently use heightened forms of fault as determining factors in the award of punitive damages.

The availability of punitive damages on the state level is generally a matter of state statutory law. Several states involved in the BP litigation authorize the award of punitive damages under certain circumstances, including advanced levels of carelessness. For example, Florida permits punitive damages in negligence cases “involving willful, wanton, or gross misconduct”. Similarly, a Mississippi plaintiff is entitled to punitive damages upon a showing by “clear and convincing evidence that defendant…acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed with actual fraud.” Likewise, Texas authorizes punitive damages upon proof by “clear and convincing evidence that the harm…result[ed] from…willful act or omission or gross neglect.” In Alabama, punitive damages may be awarded in tort actions supported by clear and convincing proof that “defendant consciously engaged in…wantonness, or malice with regard to the plaintiff.”

The reciprocal influence and prevalent interplay between punitive damages and degrees of negligence provided instructive doctrinal guidance for the criteria proposed below. Several guiding principles consistently emerge from state punitive damages statutory schemes. These include: (1) the likelihood that serious harm would arise from defendant’s misconduct; (2) defendant’s awareness of the likelihood of serious harm; (3) defendant’s indifference to the safety of others; and (4) the profitability to defendant from his misconduct. Each of these factors help shape several of the criteria used in the proposed framework for degrees of negligence as applied to high-risk activities of the type involved in the Deepwater Horizon event.

Some of these same themes are echoed in the jurisprudence evaluating punitive damages awards. In BMW of North America, Inc. v. Gore the United States Supreme Court set forth three “guideposts” for determining whether punitive damages awards were excessive. One of these guideposts is the “reprehensibility” of defendant’s misconduct. This guidepost is of particular

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182 Some statutes such as the OPA and the CWA serve compensatory and remedial functions as well. In a few states, including Texas (a plaintiff in the BP litigation), punitive damages are also viewed as compensatory in nature. See John J. Kircher and Christine M. Wiseman, Punitive Damages: Law and Practice, Vol. 1, § 4:02 (2d Ed. West 2000).
186 Ala. Code § 6-11-20(a) (2005). This section also defines wantonness as “conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.” Id.
188 See, e.g., id.
relevance because degrees of negligence are often used to describe a culpable state of mind uncharacteristic of ordinary negligence and that is also consistent with the notion of reprehensibility. Since the term reprehensibility embraces a broad range of morally repugnant behavior, the Court provided various indicia of reprehensible conduct to help inform courts’ decisions on this element. One indicium of reprehensibility that is especially useful for our purposes is indifference to or a reckless disregard of the health or safety of others,\textsuperscript{192} the same guiding factor common to many state punitive damages statutes. Indifference to the safety of others is an integral trait of gross negligence and willful misconduct as well as one of the most important factors in awarding punitive damages. For these reasons, it plays an equally prominent role in the test suggested below.

Another indicium of reprehensibility which lends support to one of the proposed criteria is whether the conduct involved repeated actions or was an isolated incident.\textsuperscript{193} Repeated past behavior consistent with the conduct at issue could provide probative insight into either the motivation for defendant’s conduct or why it may have occurred. The factor used in the proposed test that is derived from this concept is whether defendant’s conduct is consistent with a pattern or practice of disregarding safety. As is the case with several of the criteria in the proposed test, it is a particularized derivative of an existing principle and the manner of its intended usage will be further explained below.

Yet another proposed criterion takes its cue from a United States Supreme Court decision which reviewed, and ultimately reduced, the punitive damages awarded by the lower courts in the Exxon Valdez oil spill. In Exxon Shipping Co. v. Baker, the Court granted certiorari to consider whether the $2.5 billion awarded under federal maritime tort law was excessive.\textsuperscript{194} In remitting the punitive award to $500 million the Court, in an admittedly narrow ruling, held that punitive damages awarded in this particular maritime tort case should not exceed the amount of compensatory damages awarded. Noting that defendant’s “tortious action was worse than negligent but less than malicious,”\textsuperscript{195} the Court concluded that punitive damages’ dual objective of deterrence and punishment was served by a 1:1 ratio between the punitive and compensatory damages awarded under these facts.\textsuperscript{196} The Court emphasized, however, that a higher ratio than 1:1 may be warranted when defendant’s conduct evinces a higher degree of moral blameworthiness than that involved in this case.\textsuperscript{197} Significantly, the Court pointed out that “strategic financial wrongdoing” was indicative of the more culpable behavior that may justify a higher ratio\textsuperscript{198} and that “[a]ction taken or omitted in order to augment profit represents an enhanced degree of punishable culpability.”\textsuperscript{199}

Exxon Shipping Co. and state punitive damages schemes that consider the financial gain associated with defendant’s actions firmly support the conclusion that profit-driven conduct amidst high-risk activity is emblematic of a higher degree of culpable conduct worthy of more severe


\textsuperscript{193} Id. North Carolina also uses a comparable factor for determining punitive damages. “The existence and frequency of any similar past conduct” is a punitive damages consideration for the trier of fact. See N.C. Gen. Stat. § 1D-35 (Michie 2009).

\textsuperscript{194} Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008). The jury’s original punitive award of $5 billion against Exxon was eventually reduced to $2.5 billion by the Ninth Circuit. Id. at 481.

\textsuperscript{195} Id. at 510.

\textsuperscript{196} Id. at 513-14.

\textsuperscript{197} Id. at 510.

\textsuperscript{198} Id. at 510 n.24. The Court cited Alaska’s and Florida’s punitive damages statutes as illustrative. Both states allow a 3:1 ratio of punitive to compensatory damages and consider financially motivated misconduct as a factor in awarding punitive damages. See Thomas C. Galligan, Jr., Death at Sea: A Sad Tale of Disaster, Injustice, and Unnecessary Risk, 71 LA. L. REV. 787, 815 (2011).

\textsuperscript{199} Exxon Shipping Co., 554 U.S. at 494.
punishment when things go wrong. The proposed criterion of whether defendant’s conduct was motivated by strategic financial concerns reflects this perspective.

3. Strict Liability

The core problem that inspired this article is society’s increasing exposure to continuously escalating levels of potentially catastrophic threats associated with high-stakes, high-risk enterprises and the concomitant ineffectiveness of current legal regimes to satisfactorily deter unreasonable risk-taking by these enterprisers. The criteria-guided analytical framework for degrees of negligence offered in this article is specifically intended for use in cases involving exceptionally risky activities where the magnitude of the potential harm is great. Strict liability doctrine imposes a special form of liability for high-risk activities that are so dangerous that significant harm may result even if the conductor of that activity exercises the utmost care. Liability is imposed even if the harm was not caused by any fault of the actor. Presumably, the threat of such strict liability deters risky conduct and encourages safer practices amongst those engaged in abnormally dangerous activities.200 As we have seen, statutes like the OPA and the CWA serve a similar deterrent purpose by using advanced degrees of negligence to impose augmented damages. Given the relationship between these strict liability statutory regimes and the terms gross negligence and willful misconduct, particularly when applied in a high-risk context, strict liability principles provide yet another insightful doctrinal source of interpretative criteria for these terms.

Towards this end, the First Restatement of Torts is most useful. A foundational principle of the First Restatement is that strict liability should be imposed on any enterpriser who elects to engage in an activity, regardless of its social utility, that exposes the community to an abnormal risk of serious harm.201 The enterpriser should bear the costs of any harm resulting from activities that are both abnormally dangerous and uncommon.202 This enterprise theory of liability embodied in the First Restatement parallels the over-arching objectives of degrees of negligence as deterrent and reparative devices.

The drafters of the First Restatement chose the designation “ultra-hazardous activity” to describe those activities deserving of strict liability treatment. The two indispensable features of ultra-hazardous activities according to the First Restatement’s definition were that it (1) presented a risk of serious harm to persons or property which could not be eliminated even with the exercise of utmost care, and (2) was not a matter of common usage.203 Both of these features are considered in the proposed test for gross negligence and willful misconduct as applied to high-risk activities. However, as will be explained below, both characteristics need not be met for a finding of gross negligence or willful misconduct in the suggested framework.

The Second Restatement of Torts is also instructive, though perhaps more for its flaws than for its virtues. The Second Restatement displaced the term “ultra-hazardous activity” with “abnormally dangerous activities” and listed six factors to be considered. Those factors are as follows: (a) activity that presents a high degree of risk of harm; (b) the likelihood that the harm will be great; (c) the inability to avoid the risk with reasonable care; (d) whether the activity is uncommon; (e) whether the activity is inappropriate to the place where it is conducted; and (f) the extent to which its value to the community is outweighed by its dangerous attributes.204 Factors (a)
through (d) would militate in favor of a strict liability finding while factors (e) and (f) would militate against it. One of the major criticisms of this factor balancing approach to strict liability is that it looks more like a “poorly disguised negligence regime” balancing the likely prospects for significant harm against the value (i.e., social utility) of the defendant’s activity to the community. Prosser and Keeton have also criticized the community value factor as relevant to a negligence theory of liability but irrelevant to whether the risk of loss from of a highly dangerous activity should be allocated to the defendant who chooses to engage in that activity. Such criticism regarding the similarities of the Second Restatement’s factor-based approach to a negligence analysis is actually instructive for our purposes because it reinforces the proposition that negligence assessments benefit from the similar factor-guided approach offered below.

Another criticism of the Second Restatement formulation is that the risk of serious harm and uncommon nature of the activity, rather than being considered absolute requirements as they were in the First Restatement, are each considered merely one of several factors to be weighed such that strict liability could be imposed even in their absence. The non-exclusiveness of these factors is, of course, what makes them look like a negligence framework, which is actually suitable for our purposes. The kinds of activities for which the proposed test is intended to be used are exceptionally dangerous and typically would not be viewed as a matter of common usage. Consequently, some, but not all, of them would likely warrant strict liability treatment under the Second Restatement. For example, deep water drilling and the production or handling of nuclear materials would likely be deemed strict liability activities. On the other hand, some activities, like strip coal mining or shallow water drilling, may be considered abnormally dangerous, but a court might determine that the dangers are outweighed by other factors such as the activity’s value to the community, the ability to avoid harm with reasonable care or finding such activity to be a matter of common usage.

Yet all of these activities present a significant enough risk of harm to the community that those enterprisers who seek to profit from them should be incentivized to minimize the risk regardless of whether a court imposes strict liability. While heightened degrees of fault are occasionally used in strict liability statutes like the OPA and the CWA, these are still fault based terms and their potential efficacy is not, nor were they intended to be, limited to strict liability activities. Likewise, the objective of the proposed test for gross negligence and willful misconduct is to fortify their intended deterrent function and thus encourage safer practices regardless of whether a court or legislature has anointed the activity to which they are being applied with strict liability status. For the same reason, this article also rejects the Second Restatement’s notion that the communitarian value of the activity should be a relevant consideration, adopting instead the First

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205 Dobbs, supra, note 1, § 347, at 953.
206 Keeton et al., supra note 1, § 78, 555. The authors further observed: “When a court applies all of the factors suggested in the Second Restatement it is doing virtually the same thing as is done with the negligence concept, except for the fact it is the function of the court to apply the abnormally dangerous concept to the facts as found by the jury.” Id.
207 Id.
208 See supra note 175.
209 For example, shallow water drilling occurs in waters under 500 feet, enabling the use of jack-up rigs rather than the floating rigs used in deeper waters. Jack-up rigs are considered safer because they allow blowout preventers to be placed on the surface and use of traditional and proven well control methods. See Hornbeck Offshore Services, L.L.C. v. Salazar, 696 F. Supp. 2d 627, 632 (E.D. La. 2010).
210 For example, coal mining in West Virginia and Pennsylvania would be considered a common activity which is appropriate to the location.
211 For one thing, their usage in strict liability statutes like the OPA and the CWA is to determine the level of damages not whether strict liability should be imposed. Violations of these statutes result in strict liability even if caused by no fault of the operator, or, if there was fault, regardless of its degree.
Restatement’s perspective that enterprisers engaged in these abnormally dangerous activities, however socially desirable, should bear the costs of the harm those activities cause. 212

The principal criterion in the proposed test that is derived, in part, from the strict liability principles discussed above is the existence of a high degree of potential harm. In the framework proposed below, both the gravity of harm and uncommon character of the activity are not considered absolute requirements as they are for strict liability under the First Restatement. Nor are they each treated as just one of several non-exclusive factors for strict liability as in the Second Restatement. Rather, only the risk of grave harm criterion is considered indispensable to a finding of gross negligence or willful misconduct. Whereas, the activity’s uncommon character is an unstated contingency that only indirectly affects the relative weight of the other factors. For example, a finding of uncommon usage increases the prospects for strict liability which, in turn, heightens the perceived dangerousness of the risk. Accordingly, the degree of potential harm may be magnified.

Moreover, the common usage of the activity would only be relevant where the activity at issue was not already predetermined to be strict as it is under the OPA, the CWA and other strict liability statutes.

4. Comparative Fault

In the BP litigation the court will at some point apportion fault amongst all the BP defendants. In doing so, it will likely have made, or be required to make, an ancillary finding of gross negligence or willful misconduct on the part of one or more of the defendants. 213 It remains to be seen whether the court’s allocation of fault will be influenced by any such ancillary findings regarding the degrees of negligence involved.

In the classic comparative fault analysis, the fact-finder compares the extent to which each party’s misconduct, including that of the plaintiff, contributed to plaintiff’s harm and then assigns a percentage of fault to that conduct. Here, the fact-finder is, at least in theory, only concerned with the causal relationship between defendant’s conduct and plaintiff’s harm, not the quality of defendant’s negligence. 214 For example, if defendant A’s conduct is 90% of the cause of plaintiff’s harm and defendant B’s conduct is 10% of the cause of harm, liability will be apportioned between them accordingly, even if defendant B’s negligence was viewed as “gross” and defendant A’s negligence was considered “ordinary”. 215 This seemingly paradoxical result is consistent with the traditional view of negligence 216 which considers an actor’s state of mind as immaterial to determining whether he was negligent. In describing this axiomatic principle of traditional negligence, one noted treatise author writes:

A bad state of mind is neither necessary nor sufficient to show negligence, and conduct is everything. One who drives at a dangerous speed is negligent even if he is not aware of his speed and is using his best efforts to drive carefully. Conversely, a person who drives without the slightest care for the safety of others is not negligent unless he drives in some way that is unreasonably risky. State of mind, including knowledge and belief, may motivate or shape conduct, but it is not in itself an

212 Keeton et al., supra note 1, § 78, at 555.
213 An ancillary finding of gross negligence or willful misconduct could occur in determining the applicability of enhanced damages and penalties under the OPA or the CWA or the award of punitive damages under federal maritime law or state statutory law.
214 Dobbs, supra note 1, at 352.
215 See id.
216 Id. § 202, at 508.
actionable tort. The legal concept of negligence as unduly risky conduct distinct from state of mind reflects the law’s strong commitment to an objective standard of behavior.217

It follows from this conventional negligence perspective that a culpable mental state should be equally irrelevant to the causal apportionment of fault in the comparative fault determination. Conversely, modern comparative fault applications consider the actor’s subjective state of mind or reasons behind his conduct as relevant considerations in attributing fault.218 The Uniform Comparative Fault Act endorses this approach by requiring the fact-finder to consider “both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed” in determining percentages of fault.219 In comparing fault, the drafters of the Act urge the fact-finder to consider a non-exclusive list of factors that implicate the actor’s state of mind or reasons for his conduct. These include:

(1) Whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved;
(2) The magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury;
(3) The significance of what the actor was seeking to attain by his or her conduct;
(4) The actor’s superior or inferior capacities; and
(5) The particular circumstances, such as the existence of an emergency requiring a hasty decision.220

Louisiana (the locus of the BP litigation) has adopted these same factors in its comparative fault scheme,221 although neither the drafters of the Act nor the courts using them provide any guidance on how they should be weighed in calculating percentages of fault.222 Nonetheless, the above factors fit neatly within the traditional risk-utility framework. Moreover, some of them (awareness of the danger, magnitude of the risk and significance of the conduct) replicate factors used in strict liability and punitive damages regimes, all of which further illustrates the cross-pollination between the risk-utility factors and the doctrinal regimes, including comparative fault, from which the proposed test originate.

Another, more practical reason why modern comparative fault principles are instructive is because they reflect the way the human psyche processes terms like gross negligence and willful misconduct. These advanced forms of careless conduct connote a higher degree of moral turpitude than that associated with ordinary negligence. The human mind invariably associates the moral blameworthiness of defendant’s conduct with the cause of plaintiff’s harm.223 This culpability-causation nexus is made on a visceral level by the fact-finder in the comparative allocation of fault. One scholar convincingly explains the phenomenon as follows:

217 Id. § 116, at 275. (footnotes omitted).
218 See, e.g., RESTATEMENT (THIRD) OF APPORTIONMENT OF LIABILITY § 8(c). This section urges consideration of a person’s “awareness” or indifference with respect to the risks created by the conduct; Uniform Comparative Fault Act § 2.
219 Uniform Comparative Fault Act § 2 (b). See Victor E. Schwartz, Comparative Negligence, § 17.01 [a], at 383 (5th ed. 2010).
220 See Commissioners’ Comment to Uniform Comparative Fault Act § 2, 12 U.L.A. 137 (1996). See also Best et al., Comparative Negligence Law and Practice, Vol. 3, § 19.10 [3][b] (Matthew Bender, Rev. Ed.).
222 Best et al., supra note 220.
223 See Martin, supra note 4, at 1027.
The usage of ‘gross negligence’ and ‘willful misconduct,’ or words of similar import, merges together with concepts of causation: the human mind in making such a judgment generally requires that to cross that threshold of blameworthiness the act constituting the gross negligence and willful misconduct must have been the principal reason for the injury. Despite efforts of some writers and courts to separate law and liability from concepts of morality, the human mind is evidently designed to make such judgments.224

A number of the criteria in the proposed test were derived, in part, from the above-referenced comparative fault factors. They include an unusually high degree of potential harm and awareness of the danger, both of which were also selected because of their significant roles in punitive damages doctrine; conduct motivated by strategic financial concerns, which is also frequently used in punitive damages assessments and is a derivative of the above-referenced “significance” of the actor’s conduct; and the presence of any exigent circumstances tending to vitiate the culpability which would otherwise be imputed from the actor’s behavior.

B. A Multi-Factor Balancing Test: The Elements

A few preliminary observations about the proposed test and how it is designed to function are in order before addressing its specific elements. As illustrated above, most of the proposed criteria for gross negligence and willful misconduct are not novel concepts. Rather, they are particularized derivatives of existing legal principles culled from doctrinal regimes that serve the same over-arching functions as do these terms. What is unique is their collective use as an analytical framework for gross negligence or willful misconduct when these terms are applied to certain complex, high-risk scenarios.

Several common features of gross negligence and willful misconduct have consistently emerged from their usage. These include a high magnitude of harm (an objective component); awareness of the danger (a subjective component); and indifference to the harm that the danger poses to others (a morally blameworthy component). However Byzantine the varying existing formulations of gross negligence and willful misconduct are, these three traits regularly course through most iterations. As a result, these three characteristics are incorporated into three keystone elements of the proposed test.

The elements of the test are proposed as a two-tiered analysis to assist the fact-finder in determining whether defendant’s actions constitute gross negligence or willful misconduct. The first three elements are considered essential prerequisites to such a finding. Accordingly, the first level of analysis would require a prima facie showing by plaintiff on each of these elements. The absence of prima facie evidentiary support on any one of these elements would pretermit a finding of gross negligence or willful misconduct. Conversely, a robust evidentiary showing on all three elements would normally support such a finding without the need for further inquiry.

The next three elements, in descending order of evidentiary weight, are considered variables that may or may not be present in a given case. The presence of any one or more of these variables could affect the weight given to the first-tier elements. For example, a weak prima facie showing on one or more of the first-tier elements may be considerably strengthened by strong evidence of one or more of the second-tier elements. In this respect, the two tiers may be viewed as an informal sliding scale with the first-tier elements bearing an inverse probative relationship to those in the second tier. As the quantum of evidence on the first-tier factors increases, a weaker evidentiary showing on the

224 Id. at 1027-28.
second-tier factors would be permissible. When evidence on the first-tier factors is slight, a stronger showing on the second-tier factors would be required.225

The last element, exigent circumstances, is a catch-all mitigating variable that would tend to justify, explain or excuse the improvident actions taken by the defendant.

[First-Tier Factors]

1. **Existence of an Unusually High Degree of Potential Harm**

As the jurisprudence makes clear, extraordinary risk demands extraordinary care. The failure to exercise care that is commensurate with the risk is negligence and when the magnitude of likely harm is exceptionally high, that failure equates to gross negligence. Quite simply, there can be no gross negligence in the absence of an unusually high degree of prospective harm. Conduct that presents an extraordinarily grave risk of harm is a foundational, sine qua non element of gross negligence and willful misconduct. Here, it is similarly treated as an absolute prerequisite.

This element would require an objective assessment of the magnitude of prospective harm to persons or property. In making this assessment the fact-finder may consider the potential gravity of the harm in light of the overall activity setting (e.g., deep water drilling) or as a function of specific conduct (e.g., cementing a well) within that high-risk setting.

2. **Awareness of the Danger**

This element is also an indispensable predicate for gross negligence and willful misconduct. The actor’s consciousness of the threat of significant injury to others or their property is a distinguishing hallmark that separates gross negligence or worse from the momentary inattention or inadvertence of ordinary negligence. It requires actual subjective awareness of the danger on the actor’s part. The specificity level of the actor’s awareness can significantly affect this element’s probative value. For example, a non-specific, general sense of foreboding may not be sufficient. Whereas, awareness that a particular type of harm could come about in a particular manner would likely suffice. Of course, there are many degrees of cognizance in between the two opposite poles of this awareness continuum. Where the actor’s subjective awareness falls on that continuum will determine the probative impact of this element.

Were it not for the unfortunate conflation of the terms gross negligence and willful misconduct, as discussed above, awareness of an extremely high degree of harm and the failure to take reasonable steps to avert it would be sufficient to find gross negligence in most cases. There would be no need to assess the actor’s moral perspective of the risk because “negligence” is conduct, not a state of mind.226 However, because courts and legislatures have so consistently and thoroughly imbued gross negligence with the morally blameworthy attribute of willful or wanton misconduct, a criterion for determining the actor’s culpable state of mind is necessary. The next criterion serves that purpose.


3. **Indifference towards the Risk of Harm**

An actor’s failure to exercise the care necessary to avoid a known abnormally dangerous condition does not necessarily mean that he was apathetic to the risk of harm. Thus, a third element critical to a finding of gross negligence or willful misconduct is the actor’s indifference to the risk of serious harm that his actions pose to others. This is another subjectively assessed element that invokes a moral inquiry into the path chosen by defendant. It is also one that merges the actor’s act with his state of mind. Indifference to the known injurious consequences of one’s behavior is a defining feature courts consistently use to separate ordinary negligence from more culpable forms of careless misconduct.

As with awareness of the danger, the actor’s complacency towards it has many permutations, levels and underlying causes, all of which could affect its probative worth for assessing the moral blameworthiness of defendant’s actions. What is indispensable here is that defendant’s words or deeds evince some lack of concern for the safety of persons or property. The ultimate probative weight given this factor will be influenced by the quality of defendant’s indifference depending on whether it more closely resembles a casual insouciance than a reckless or wanton disregard of the consequences.

The probative assessment also necessitates an evaluation of any possible causes that tend to neutralize the defendant’s seemingly complacent disposition towards the danger. An actor may ignore a potentially grave risk for a variety of reasons. Intentionally disregarding a risk is an indicator of indifference, but until we know its underlying cause, we have an incomplete picture of defendant’s culpability. For example, one defendant may have deliberately ignored a danger because he was overruled by a concurrent tortfeasor with operational control over the injury producing activity; or because countervailing operational exigencies may have forced the defendant to proceed despite the danger or caused him to miscalculate the prospects for harm. While such explanations may not necessarily absolve the actor of ordinary negligence, they could negate the culpability feature that is so essential to a gross negligence/willful misconduct determination. On the other hand, when the explanations for defendant’s disregard of the danger are grounded in cost- or time-saving considerations, the requisite culpability may be readily found. The next factor, which is the first and most weighty variable amongst the second-tier criteria, prompts just such an inquiry into the presence of any fiscal motives behind the actor’s conduct.

[Second-Tier Factors]

4. **Conduct Motivated by Strategic Financial Concerns**

Financially motivated misconduct is a key indicium of morally blameworthy behavior that crosses the divide between ordinary and gross negligence, thus warranting punitive sanctions and augmented liability. Given the interpretative prominence of fiscal motives as a major factor in the gross negligence/willful misconduct jurisprudence and in punitive damages statutory schemes, it should be accorded the greatest weight of all the variable factors in the second-tier analysis. Another

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227 See Martin, supra note 4, at 975.
228 The analysis here resembles the criminal law’s dual requirements of mens rea and actus reus for determining whether an actor has committed a crime.
229 Several of the BP’s subcontractors, who are co-defendants in the BP litigation, have complained that they were regularly overruled by the BP “company man” with respect to key decisions on the design, monitoring and cementing of the well. See discussion supra Part II and infra Part V.
230 These same considerations could also have exculpatory value under the exigent circumstances element. See discussion infra Part IV(B)(7).
reason for its suggested weightiness is that fiscal pressures often drive operational decisions in the type of high-risk enterprises for which this proposed test is most useful. The potential expanded liability costs that accompany a finding of gross negligence/willful misconduct ruling would more effectively deter unreasonable risk taking if the risky conduct’s associated cost savings were greatly outweighed by the potential liability. The deterrence efficacy of enhanced damages is considerably strengthened if the actor knows beforehand that his conduct leading up to a mishap will be specifically evaluated for its profit-driven qualities. Just as profit maximization often drives operational decisions and overrides safety protocol, liability avoidance could influence the decision makers to place a greater value on safety, but only if the predictors for compounded liability are certain and specific. This factor and its relative weightiness provide the necessary specificity and certainty as a predictive criterion for gross negligence and willful misconduct.

5. Conduct Consistent with a Pattern or Practice of Disregarding Safety

A pattern or practice of disregarding safety could affect the probative weight of the preceding factor, in particular, when it appears that defendant’s misconduct may have been financially motivated. A fiscally driven decision which is uncharacteristic of an enterpriser’s operational behavior or inconsistent with its otherwise vigorously enforced safety protocol may be considered an isolated aberration undeserving of a gross negligence/willful misconduct designation, depending on the quality and quantity of evidentiary support on the other factors. However, if the actor’s financially motivated conduct is consistent with a regular pattern or practice of disregarding safety concerns, such a showing would militate strongly in favor of the more culpable gross negligence label. The defendant’s safety record, safety protocol, as measured by industry and regulatory standards, and safety culture would be relevant considerations.

Even when there is insufficient evidence to support a finding of strategic financial decision making, evidence of an enterprise’s systemic culture of tolerance for safety lapses, whatever the reason, could affect the weight given to the other factors. For example, if the activity setting is so abnormally dangerous that it qualifies for strict liability treatment, a poor safety record or culture further heightens an already high magnitude of potential harm. With respect to the indifference factor, if defendant’s complacency towards the risk of harm is corroborated by an enterprise’s cultural apathy towards safety, the evidence of indifference would be fortified.


Aggregate gross negligence, as formulated in this article, is a relatively novel theory of gross negligence. It is the only criterion in the proposed framework that is not traceable to the related doctrines of punitive damages, strict liability or comparative fault. Moreover, neither the term itself, nor any corollary, has been found in the jurisprudence. Nonetheless, a few courts have embraced the concept that multiple acts of ordinary negligence, when considered collectively, may constitute gross negligence. The holdings in Aetna Cas. & Sur. Co. v. Marshall and Apache Corp. v. Moore reflect this proposition. Each of those courts emphasized that the cumulative effect of a series of acts was

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indicative of defendant’s conscious indifference towards the rights or safety of others, thus providing the culpable state of mind element necessary to find gross negligence.  

The courts in *Williamson v. McKenna* and *Water Quality Insurance Syndicate v. United States* also held that gross negligence could arise from a series of acts but neither court offered any guidance or criteria for making such a determination. Rather, the *Williamson* court merely recognized that a succession of negligent acts may provide the requisite reckless state of mind for gross negligence. The court’s rationale in *Water Quality* was even more cryptic. In reviewing an agency’s finding of gross negligence under the applicable rational basis standard, the court summarily held, without further explanation, that there was a “rational connection” between the facts and the agency’s finding that the defendant acted with gross negligence. Therefore, while all of the aforementioned courts support the concept that multiple acts of ordinary negligence may equate to gross negligence, each of them stopped well shy of explaining how the cumulative impact of several acts would interact with other facts and circumstances to justify a finding of gross negligence.

Incidents like the Macondo well blow-out are more likely to result from a series of successive lapses than from a single isolated act. The precipitating negligence is more apt to be systematic rather than episodic. The facts in *Apache Corp.* are illustrative and eerily similar to the series of failures which led to the Macondo well blowout. In the *Apache Corp.* incident, no tests were conducted to determine the cause or origin of metal shavings found in the drilling mud. Metal shavings frequently indicate that worn casings or tubing were allowing the metal of the drill pipe to rub and shave off, thereby compromising the equipment in the hole. The well later experienced a “kick” as the well began to flow, causing cement that was placed to secure the liner at the bottom of the hole, to back up into the intermediate casing, where it hardened. The cement was drilled out of the casing, but no tests were conducted to determine if the casing had been damaged. Upon completion of the well, a pressure leak at the surface denoted pressure on the backside of the well, placing the intermediate casing under stress. Ignoring the drilling superintendent’s recommendation to pull the tubing and repair the leak, Apache conducted a single test which failed to determine the source of the leak. Without any further effort to find the source of, or to repair, the leak, which Apache knew would create pressure that would stress the intermediate casings, the company plugged the well to await connection to a pipeline. To relieve the pressure caused by the leak the company had a casing relief valve installed on the well. The relief valve ultimately failed because of the lack of nitrogen upon which it depended to operate properly, causing pressure to build and precipitating the blow-out. The court found that the company’s failure to properly monitor the relief valve and

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232 In *Aetna* the court noted that defendant’s multiple acts of ordinary negligence demonstrated a “conscious disregard” of plaintiff’s rights. *Aetna Cas. & Sur. Co., supra* at 903. Similarly, the court in *Apache* held that “[o]rdinary negligence is raised to the level of gross negligence by mental attitude, *i.e.*, the conscious indifference, of the defendant to the rights, welfare and safety of others.” *Apache Corp., supra* at 681 (citations omitted).


236 *Apache Corp. v. Moore*, 891 S.W. 2d at 674.

237 *Id.*

238 *Id.*

239 *Id.*

240 *Id.*

241 *Id.* at 674-75.

242 *Id.* at 675.

243 *Id.*
flow of nitrogen evinced a conscious indifference to the safety of others from which defendant’s mental culpability could be inferred.244

Support for the proposition that acts of ordinary negligence in high-risk environments warrant elevated punishment may also be gleaned from the criminal penalties provisions of the CWA, which criminalizes negligence.245 Unlike the treble civil penalties for gross negligence under the CWA, its criminal penalties provisions are not triggered by “gross,” as opposed to ordinary negligence.246 In fact, the Ninth Circuit held that ordinary negligence could satisfy a finding of criminal liability under the CWA because the defendant was engaged in conduct where … mere negligence posed a danger to the public at large.247 In U.S. v. Hanousek, the defendant acted in a supervisory role over the maintenance and construction of a railroad track. The defendant’s failure to properly protect a high-pressure petroleum products pipeline which ran parallel to the railroad tract during the course of the project was deemed such a “danger to the public at large,” that mere negligence was sufficient to impose criminal liability. In its reasoning, the court emphasized that the “type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety,” warranted criminal negligence liability for acts of even ordinary negligence. What is particularly instructive from this application of the CWA is the court’s focus on the risk to the public welfare. The concern for excessive risk is the driving factor behind imposition of criminal liability for ordinary negligence, and it is a well-established doctrine.248 It easily follows that multiple acts of ordinary negligence, during a highly-regulated activity which already poses a potentially large public hazard and exponentially magnifies the risk, could compel a finding of gross negligence and the enhanced civil sanctions it brings.

As proposed here, the aggregate effect of several acts of ordinary negligence is not interpreted as restrictively as it was in Aetna Cas. & Sur. Co. and Apache Corp. Rather, its use as a criterion for gross negligence is multifaceted. It is a variable that may lend probative weight to a variety of factors beyond just the defendant’s indifference to the risk of harm. It may affect the weight of objective or subjective factors alike. For instance, the degree of potential harm from a series of negligence acts may be substantially elevated when committed in an exceptionally high-risk environment. The multiplicity of negligent acts, even those considered as “ordinary,” increases the likelihood of “extraordinary” harm.

Also, each successive act of ordinary negligence may forewarn the actor of a specific impending danger, which, if ignored, could lead to serious harm. The well blowout that occurred in Apache Corp. involved a combination of negligent acts and omissions remarkably similar to those which allegedly caused the Macondo well explosion both in terms of the types of misconduct and the increasingly ominous portents of each successive misstep. Such a finding would affect the depth and specificity of defendant’s subjective awareness of the danger.

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244 Apache Corp. v. Moore, 891 S.W. 2d at 683.
246 The CWA provides that any person who “negligently” discharges oil into navigable waters of the United States, inter alia, may be punished by fine, imprisonment or both. 33 U.S.C. § 1319(c)(1)(A)(2001).
247 U.S. v. Hanousek, 176 F.3d 1116, 1122 (9th Cir. 1999).
248 U.S. v. Balinit, 258 U.S. 250, 252-53 (1922) (’W’here one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.”); United States v. Dotterweich, 320 U.S. 277, 281 (1943) (“In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”); Staples v. U.S., 511 U.S. 600, 607 n.3 (reiterating that public welfare statutes may dispense with a “mental element”).
Repeated acts of ordinary negligence may also be indicative of and consistent with a pattern or practice of unsafe conduct by the defendant, thus adding to that factor’s probative weight. In sum, the aggregate effect of multiple acts of ordinary negligence should be treated as a multidimensional variable, one of several factors that a court may use to determine gross negligence or willful misconduct. This variable should be accorded roughly equal weight as the preceding pattern of disregarding safety factor.

7. Exigent Circumstances

This variable is suggested as a justification mechanism whenever exigent circumstances either compel the actor to act hastily without sufficient opportunity to consider the potential injurious consequences of his decisions or leave him without a safer alternative course of action. It is consistent with traditional negligence doctrine that considers exigent conditions in evaluating the reasonableness of an actor’s conduct. Under the so-called “emergency doctrine,” when an actor is confronted with a sudden unforeseeable emergency not of his own making, the fact-finder is allowed to consider the emergency as one of the relevant circumstances in deciding whether the actor behaved reasonably. 249 In considering whether given conduct constitutes gross negligence, the fact-finder is determining whether the behavior was exceptionally unreasonable in light of the heightened risk. The effect of exigent circumstances in the test proposed here has more limited exculpatory value than it would in an ordinary negligence case. Here, it does not operate, as it may in a case of ordinary negligence, to completely absolve the defendant of liability. 250 Rather, it would mitigate a finding of gross negligence to that of ordinary negligence if the emergency circumstances tend to negate the culpability that would ordinarily be inferred from the actor’s behavior in the absence of the exigency. For example, emergency circumstances which impede deliberative decision making could lessen the extent of the actor’s awareness of the danger or nullify his otherwise apparent indifference to it.

V. Applying the Test to the BP Litigation

Any novel, untested legal theory or analytical framework presumably benefits more from an empirical rather than a purely fictional application. Its utility and functionality are more accurately evaluated when applied against actual, as opposed to hypothetical and, inevitably, artificial, factual settings. The purpose of this section is to illustrate how the proposed test for gross negligence and willful misconduct might theoretically apply to some of the actual facts thus far discovered in the investigation of the Deepwater Horizon rig explosion.

This section is not, however, intended to prognosticate or attribute fault to any of the parties involved in the BP litigation. The facts referenced here are based largely upon testimony given before various federal agencies investigating the cause of the oil spill and efforts to contain it. It bears emphasis that these are not judicial findings of fact that have been subject to full evidentiary and adversarial scrutiny in a trial setting. Consequently, the facts mentioned here are treated as mere allegations used solely for illustrative purposes. Nor does this analysis address legal causation issues. It would be inappropriate to draw any liability conclusions based upon this purely conjectural illustration. 251 Bearing this caveat in mind, the proposed test for gross negligence and willful misconduct as applied to the Deepwater Horizon incident might apply as illustrated below.

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249 See Dobbs supra note 1, § 129, at 304, citing Restatement § 296 (1).
250 This is not to say that under the emergency doctrine an actor suspected of grossly negligent conduct could not also be completely absolved of negligence, gross or ordinary.
251 The factual analysis is limited to the actions of BP for a couple of reasons. BP had chief operational control of the Macondo well operations and ultimate decision-making authority. Also, evaluating the
Unusually High Degree of Potential Harm. Even before the Deepwater Horizon catastrophe, exploring and drilling for oil in water depths over 1000 feet and several miles below the ocean floor was commonly perceived to be a risk-intensive endeavor. Moreover, even though deep-water well blowouts are relatively infrequent occurrences, such an event poses a potentially catastrophic threat of harm to persons, property and the environment. This is due to, among other things, the highly toxic and volatile hydrocarbons (i.e., oil and gas) being extracted miles below the seabed, the difficulty of averting, controlling and cleaning up a spill at such depths and the potentially irreparable damage a spill can cause to waterways and adjacent lands. Given the known highly dangerous profile of deep-water drilling, a trier of fact would likely conclude, as an objective assessment, that this activity presented an exceptionally high magnitude of prospective harm.252

In order to better understand the analysis of the remaining factors, a brief overview of how a deep-water well is drilled would be helpful. The drilling rig lowers drill pipe (also known as a drill string) with a drill bit attached to its end.253 The drill bit bores into the sea floor and subsea rock formation to make a hole, referred to as a wellbore.254 The rig installs large-diameter pipe known as “casing” into the wellbore to prevent the hole from caving in and to flow hydrocarbons to the surface.255 The rig then uses a “riser”, which is a large pipe that connects the well at the seafloor with the surface equipment.256 The riser guides the drill string down into the well and provides a conduit for drilling fluid coming up from the wellbore for processing.257 As drilling progresses, the rig sets additional casings (sections of pipe) that are slightly smaller in diameter than the wellbore.258

After each casing string is set, it is bonded into place by pumping cement down the drill string, out the bottom of the casing and back up into the annular space (the space between the pipe and the hole or between the pipe and the casing).259 Cementing is a crucial element of well design and essential to safe drilling operations.260 It maintains the integrity of the wellbore by preventing collapse of the hole already drilled; preventing hydrocarbons from flowing through the annular space; and protecting the sides of the wellbore from pressure exerted by drilling fluids called “drilling mud,” which is pumped down the drill pipe through the drill bit nozzles during drilling.261 Drilling mud lubricates and cools the drill bit during drilling and plays a critical role in controlling the hydrocarbon pressure in the well.262 The weight of the column of mud exerts pressure that counterbalances the pressures exerted from the surrounding hydrocarbon formation.263 If the mud weight is too low, hydrocarbon fluids can enter the well, causing what is known as a “kick.”264

actions and roles of the numerous subcontractors involved would prohibitively lengthen and overly complicate this academic discussion. That being said, the conclusions reached are not to suggest that BP was solely responsible for the Deepwater Horizon rig explosion or that other parties may not share responsibility for the event.252 The abnormally dangerous quality of drilling for oil, as well as handling and transporting it, at sea is also reinforced by the strict liability imposed on this activity under federal statutes such as the OPA, the CWA and their state statutory counterparts.253 BOEMRE Report, supra note 62, at 14. 254 Id. 255 Canvar, supra note 62, at 184. 256 Id. at 192. 257 Id. 258 BOEMRE Report, supra note 62, at 15. The outermost casing near the top of the well can be up to four feet in diameter, and the innermost casing string near the well bottom can be less than six inches wide. Id. 259 Id. at 16. 260 Id. 261 Id. at 15-16. 262 Oil Spill Commission Report, supra note 62, at 91. 263 Id. 264 Id.
However, if the mud weight is too high, it can fracture the surrounding rock formation, potentially causing “lost returns”—mud leaking into the formation.265

Upon completion of drilling and evaluation of an exploratory well for its production potential, the operator typically seals the well by pumping cement (a “cement plug”) and installing mechanical plugs, a procedure known as “plugging and abandoning” the well.266 If the operator believes the well will produce sufficient hydrocarbons, it may elect to perform “temporary abandonment” procedures which enable the drilling rig to leave the well site and return later to complete the well for production.267 The Macondo well blowout occurred while BP was engaged in the temporary abandonment process.

Awareness of the Danger. BP experienced a number of operational problems during drilling and temporary abandonment procedures at the Macondo well, including kicks, stuck pipe, lost returns, equipment leaks, cost overruns, well-scheduling and logistical issues, personnel changes and conflicts and last-minute changes in procedure. These regularly occurring difficulties led rig personnel to refer to Macondo as the “well from hell.”268 The problem plagued notoriety of the Macondo well arguably imputed heightened concern for the prospects of a blowout.

There were certain events and management decisions which also provided notice of particular dangers and which strongly suggest BP was aware of the risks those dangers posed. One threshold decision that should have alerted BP to increased risk was the choice of a long-string casing design rather than the use of a liner, which would have provided an additional barrier to oil and gas channeling up the wellbore to the surface.269 While it is unclear whether the decision to use the long string design contributed directly to the blowout, it did increase the difficulty of obtaining a reliable primary cement job in several respects, and primary cement failure was a direct and proximate cause of the blowout.270 This decision should have led BP to be on heightened alert for any signs of primary cement failure.271

Another risk factor that should have prompted elevated vigilance by BP was the decision to use 6 rather than the 21 centralizers recommended by Halliburton, the cementing subcontractor.272 A centralizer is a device that fits around the casing to ensure the casing stays centered in the open

265 Id.
266 BOEMRE Report, supra note 62, at 14.
267 Id. at 14.
268 BOEMRE Report, supra note 62, at 75.
269 See Cavnar, supra note 62, at 26. The production casing runs from the bottom of the well up to the wellhead. BOEMRE Report, supra note 62, at 37. There are two general design options for production casing—a long string design or a liner design. Id. A long string design consists of casing that extends from the bottom of the well to the top of the wellbore. Id. A liner casing design consists of a shorter string of casing that extends from the bottom of the well to just inside the next largest string of casing where it is anchored to the casing above by a liner hanger that forms a barrier to any influx of wellbore fluids. Cavnar, supra note 62, at 189. In contrast, the only barriers in the long string design are the cement at the bottom of the casing and the casing hanger at the surface. Id.
270 Oil Spill Commission Report, supra note 62, at 115. The failure of the cement barrier allowed hydrocarbons to flow up the wellbore, through the riser and onto the rig, causing the blowout. BOEMRE Report, supra note 62, at 1. The increased risks associated with the long string design were explained as follows: “First, the long string required the cement to travel through a longer stretch of steel casing—roughly 12,000 feet longer—before reaching its final destination, potentially increasing the risk of cement contamination. Second, because it can require higher cement pumping pressure, a long string design can lead to the section of lower cement volumes, lower densities, and lower pump rates. Third, the cement job at the bottom of a long string is more difficult to remediate than one at the bottom of a liner.” Oil Spill Commission Report, supra note 62, at 325, n.128.
271 Id. at 115.
272 Id. at 118.
Centralizers are crucial components to ensuring a good cement job. The 15 additional centralizers were ordered after computer modeling suggested that the casing would need more than 6 centralizers to avoid channeling. Based on computer simulations, Halliburton recommended that BP use 21 centralizers to minimize the risk of channeling due to gas flow. BP was aware of the increased risk of using fewer than the recommended number of centralizers, but declined to follow the recommendation.

There were several other portents of danger during operations at the Macondo well that alerted BP to the increased prospect of a blowout. Company records and testimony from rig personnel establish that multiple “kicks” occurred during drilling and temporary abandonment operations. A kick occurs when fluids from the pores of a rock formation (which can include water, gas, or oil) flows into the wellbore as a result of pressure in the wellbore being lower than that of the surrounding formation. These fluids can then travel up through the wellbore, with the upward pressure risking a blowout if not quickly addressed.

Multiple lost returns experienced by BP throughout the drilling at the Macondo well also signaled trouble. Lost returns occur when drilling mud escapes from the wellbore rather than circulating back to the surface because of weakness or fractures in the surrounding rock formations. While not uncommon, a lost return is a key indicator to monitor the well closely to ensure that well and formation integrity are being maintained.

BP’s engineers aboard the Deepwater Horizon consistently ran roughshod over subcontractors who openly lamented the potentially catastrophic consequences of BP’s decisions. “This is how it’s going to be,” one BP engineer reportedly said in overruling a subcontractor on the critical question of when to replace drilling mud, which prevents hydrocarbons from flowing up the well, with seawater. BP’s decision to displace the dense, heavy drilling mud with the much lighter seawater before the well was sealed unnecessarily and substantially increased the risk of a blowout. Such regularly occurring risk-related operational skirmishes between BP and its subcontractors made BP aware of the potential dangers involved.

273 BOEMRE Report, supra note 62, at 47.
274 Oil Spill Commission Report, supra note 62, at 96. Centered casing facilitates efficient placement of cement around the casing string. BOEMRE Report, supra note 62, at 47. Even in a straight hole (such as the Macondo well), the production casing does not always align exactly with the center of the wellbore. Id. Therefore, without centralizers the casing could rest along the sides of the wellbore and cause void spaces in the cement job (i.e., “channeling”). Id. 
275 Oil Spill Commission Report, supra note 62, at 97.
276 Id.
277 BP’s reasons for disregarding Halliburton’s recommendation were two-fold. First, BP did not want to lose another 10 hours it would take to install the additional centralizers. Id. Secondly, more centralizers increased the possibility that one of the parts could come off during installation and clog the wellbore, which would be a bigger operational hassle to remedy than remediating a poor cementing job caused by too few centralizers. See id. See also BOEMRE Report, supra note 62, at 48. In doing so, BP unnecessarily increased risk, compromising safety for operational efficiencies.
278 Id. at 75.
279 Cavnar, supra note 62, at 188.
280 Id. at 188-89.
281 Id. at 189. When a lost return happens, the rig has to stop drilling until the crew can seal the fracture. Oil Spill Commission Report, supra note 62, at 94.
282 BOEMRE Report, supra note 62, at 33.
284 Id.
Indifference towards the Risk of Harm. There is evidence that BP not only knew of the risks associated with some of the above-mentioned events, but affirmatively chose to ignore them, usually to save costs or time. The most direct evidence of BP’s apathy towards the risk of harm involved the decision to proceed with only 6, rather than the recommended 21 centralizers, a decision BP engineers openly acknowledged carried some increased risk. One BP engineer opined that more centralizers were unnecessary because the hole was straight. In an e-mail expressing disagreement with that opinion, another BP engineer wrote:

But, who cares, it’s done, end of story, [we] will probably be fine and we’ll get a good cement job. I would rather have to squeeze [remediate the cement job] than get stuck above the WH [wellhead]. So Guide is right on the risk/reward equation.286

The decision to use the significantly less expensive long string casing design rather than the more costly liner design option also evinced a financially induced indifference to the known risks of drilling in ultra-deep water and in an exceptionally challenging geological formation.287

BP’s response to the multiple lost returns also reveals a conscious disregard of the danger signaled by those events. Abnormal pressure zones identified by mud loss events often prompt drilling engineers to change the well design and casing setting points.288 Despite these known mud losses experienced in the well, BP also failed to take added precautions such as establishing additional barriers during cementing, a failure deemed to be a contributing cause to the blowout.289

Indifference to known risks may also be reasonably inferred from BP’s insistence upon using a cement slurry design that was foamed with nitrogen, a design with which it had little experience.290 Several lab tests, which are essential to determining the cement’s stability, confirmed that the slurry was unstable.291 Given the inherent uncertainty of cementing, even under optimal conditions, the specific risk factors surrounding the problematic Macondo well operations and the critical importance of the cement plug as the only barrier to hydrocarbon intrusion under the Macondo’s questionable well design, proceeding with cement slurry it knew was volatile, further demonstrates BP’s indifference to the risk of harm.

In addition, the Oil Spill Commission Report concluded that the overall complacency of the Deepwater Horizon crew was a possible contributing cause of the kick-detection failure.292

Conduct Motivated by Strategic Financial Concerns. There is substantial evidence that many of the decisions that contributed to the explosion were made primarily to save costs and time. The Deepwater Horizon’s day rate at the time of the blowout was $533,495 and total daily operating costs were approximately $1 million.293 Because of the many problems encountered with the Macondo

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287 Id. at 91.
288 BOEMRE Report, supra note 62, at 33.
289 Id. at 69.
290 See Oil Spill Commission Report, supra note 62, at 100. This lightweight, nitrified cement, is generally used on shallower strings of pipe where lost circulation and water flow are significant problems; it’s not typically used as completion cement deep in the well. Cavnar, supra note 62, at 27.
291 Oil Spill Commission Report, supra note 62, at 101, 117. It should be noted that the Oil Spill Commission Report suggested that Halliburton may not have timely shared the final test results with BP before the cement was poured. Id. at 101-02. However, the BOEMRE Report concluded that BP was apprised of several pilot test results that indicated cement instability. See BOEMRE Report supra note 62, at 43. Halliburton was still waiting for the results of the final comprehensive strength analysis on April 19 and told BP such. Id. Nevertheless, BP continued the cement job without waiting for the final test results. Id.
292 BOEMRE Report, supra note 62, at 196.
293 Id. at 18.
well, the project was already 38 days behind schedule and $58 million over budget on the day of the blowout.\textsuperscript{294} The BOEMRE Report found that in the weeks before the blowout, BP “made a series of operational decisions that reduced costs and increased risks.”\textsuperscript{295} Some of the decisions which saved costs and decreased rig time while escalating the risk included: (1) the decision to use the long string casing design versus the liner which reduced well-completion costs by $7-10 million;\textsuperscript{296} (2) the use of 6 versus 21 centralizers which saved the additional ten hours it would have taken to install another 15 centralizers;\textsuperscript{297} (3) the timing of the lock-down sleeve installation which saved the company $2.2 million;\textsuperscript{298} (4) the use of lost circulation material as spacer which saved the cost of having to dispose of the materials onshore;\textsuperscript{299} (5) the decision to forego a cement evaluation log which saved the subcontractor costs to perform the test and the additional time necessary to complete it;\textsuperscript{300} and the decision to limit the circulation of drilling mud through the wellbore before cementing.\textsuperscript{301} The Oil Commission Report similarly provided nine examples of decisions, including some of the aforementioned ones, which increased risks while potentially saving time.\textsuperscript{302}

\begin{itemize}
  \item \textsuperscript{294} BOEMRE Report, supra note 62, at 19.
  \item \textsuperscript{295} Id. at 178.
  \item \textsuperscript{296} Id. at 38. The BOEMRE Report was inconclusive as to whether this decision increased risk. Id. at 179.
  \item \textsuperscript{297} Oil Spill Commission Report, supra note 62, at 97.
  \item \textsuperscript{298} BOEMRE Report, supra note 62, at 85. A lock-down sleeve is a device that connects and holds the production casing to the wellhead during production, thereby protecting the connection from the pressures generated by a flowing well. BOEMRE Report, supra note 62, at 78. They are typically installed on lower cost rigs that are used mainly for completion work rather than on a drilling rig like the Deepwater Horizon. Id. BP initially did not intend on using a lock-down sleeve, but decided otherwise when it learned that doing so would likely save 5.5 days of rig time and approximately $2.2 million. Id. at 78-79. This cost-saving decision may have precipitated further complications during the temporary abandonment process. Id. at 79.
  \item \textsuperscript{299} Id. at 87. Displacing the drilling mud from the riser required the use of spacer fluid, which is used to separate the drilling mud from the seawater during displacement. Id. BP chose to use a blend of leftover lost circulation material that had been mixed on the rig and used to prevent additional lost returns at the well. Id. BP had never used this type of spacer before and did not know if it would be compatible with the synthetic mud it was displacing or the long-term stability of its interface with seawater. Id. BP chose this novel use of lost circulation material solely to avoid the additional time and costs associated with onshore disposal. Id. BP’s own post-blowout investigation concluded that this spacer material caused viscous material to be present across the choke and kill lines during the negative pressure test, possibly plugging the kill line. Id. at 88. The choke line is a pipe that serves as a conduit for fluids to flow from the well to the surface through the choke manifold. Cavnar, supra note 62, at 184. The kill line serves as a conduit through which heavier drill mud can be forced into the well to stop the flow of kick fluids. Id. at 189.
  \item \textsuperscript{300} BOEMRE Report, supra note 62, at 59. A cement evaluation log is used to evaluate the quality of a cement job and whether the cement in the annular space set properly. Id. The log detects problems which can then be remediated by pumping additional cement. Id. BP canceled the bond log even though Schlumberger, the subcontractor that would have performed it, had been pre-positioned on the rig to run the log. Id. at 59-60.
  \item \textsuperscript{301} See id. at 179. See also Oil Spill Commission Report, supra note 62, at 100. The most effective option for this step in the cementing process would have been to do a “bottoms-up” circulation of the mud through the wellbore, meaning mud would have been pumped down the wellbore to bring mud originally at the bottom of the well all the way back up to the rig. Id. Such extensive circulation would have cleaned the wellbore and reduced the likelihood of channeling and allowed technicians to examine mud from the bottom of the well for hydrocarbon content before cementing. Id. BP engineers, however, vetoed this preferred mud circulation technique because the longer circulation process increased the prospects for more lost-returns events, which would have delayed the completion of cementing and increased its costs. Id. As a result, BP only circulated an estimated 350 barrels of mud before cementing instead of the 2,760 barrels necessary for a full bottoms-up circulation. Id.
  \item \textsuperscript{302} Oil Spill Commission Report, supra note 62, at 125.
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Each of the federal investigations referenced here have concluded that much of BP’s decision making was financially motivated. Based on the evidence adduced, much of it coming from BP’s own internal documents and the testimony of its personnel, the conclusion that BP was acutely and exclusively focused on the fiscal repercussions of every major operational decision is inescapable. Accordingly, the evidentiary weight of this factor is considerable and would militate strongly in support of a finding of gross negligence. The strength of its probative value would also comfortably overcome a more tepid showing on any of the first-tier factors. As noted above, the supporting evidence on the first-tier factors is equally compelling, though one might reasonably argue that the evidence of indifference is only of moderate weight or even equivocal. However, when viewed in light of BP’s manifest and pervasive financially-driven conduct, any doubt as to whether or why BP proceeded in the face of known and unnecessary risks is easily resolved.

**Conduct Consistent with a Pattern or Practice of Disregarding Safety.** BP’s fixation on saving costs and time in many instances came at the expense of compromising safety. Each of the above-mentioned cost-cutting or time-saving decisions increased risk without any correlating attention to the resultant safety implications. Nor were those decisions subjected to BP’s formal risk assessment processes that it had in place.

The BOEMRE Report also highlighted seven incidents where BP was found to be in non-compliance with federal regulations governing well operations, including the failure to protect, and unreasonably jeopardizing, public health, safety, life, property and the environment. Another federal investigative report concluded that BP failed to rigorously analyze risks created by key decisions or to develop plans for mitigating those risks. As a result, decisions in the last month of operations were biased in favor of cost and time savings while increasing the risk of a blowout.

The Macondo well blowout was not BP’s only catastrophic experience involving a disregard of unsafe conditions. In 2005, the Texas City refinery explosion that killed 15 people was caused by unsafe and antiquated equipment designs of which BP was well before the explosion, according to a report by the U.S. Chemical Safety Board. Incidents such as this, and now the Macondo well blowout, prompted one industry observer to write: “BP has been plagued with safety and environmental violations and tragic accidents reflective of their cost-cutting culture and laser-sharp focus on profits…” The historical evidence of BP’s deeply entrenched cultural indifference to its own safety protocol, safety regulations and unsafe working conditions strongly suggests that its decision making in the Macondo well blowout was consistent with a systemic unconcern for safety. Accordingly, this second-tier factor would firmly support a finding of gross negligence under the test.

**Aggregate Gross Negligence: Multiple Acts of Ordinary Negligence.** The BOEMRE Report identified literally dozens of negligent acts, omissions and decisions by BP and others that were

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303 In its risk register, BP identified 23 risks while planning the well. BOEMRE Report, supra note 62, at 177. Every one of these risks was categorized by BP as a cost, production or scheduling risk, rather than a “health and safety” risk, one of category choices on the risk register form. Id. For example, a well control problem was identified as a “cost” but not a “health and safety” risk. Id.

304 BOEMRE Report, supra note 62, at 178.

305 See id. at 173.


307 Id.

308 Cavnar, supra note 62, at 68. BP was fined $87 million for safety violations and paid over $2 billion in legal claims in the Texas City Refinery incident. Id.

309 Id. at 63. Even before the Macondo well blowout, BP’s abysmal safety and environmental records had earned it the reputation of a “rogue” operator. Id.

310 See Popper, supra note 59, at 986-87.
contributing, or possibly contributing, causes of the Deepwater Horizon rig explosion.\textsuperscript{311} The above-mentioned failures are only a representative sampling of arguable misconduct. Some additional noteworthy negligent acts include BP’s misinterpretation of the critically important negative-pressure test results, which are used to evaluate the integrity of the primary cementing of the well.\textsuperscript{312} The tests results clearly showed hydrocarbons were leaking into the well.\textsuperscript{313} Yet BP failed to investigate or resolve the anomalies revealed in the test results.\textsuperscript{314} The negative-pressure test had even greater significance since BP sent the cement evaluation subcontractor back to shore after cancelling the cement evaluation log discussed above.\textsuperscript{315} The displacement of drilling mud with seawater before sealing the well also placed a significant premium on the negative-pressure test used to evaluate the integrity of the bottom hole cement, which was the only physical barrier in the well during the displacement process.\textsuperscript{316}

The blowout was the collective product of numerous missteps and oversights by BP and others.\textsuperscript{317} Each of these mistakes increased the risk of a blowout.\textsuperscript{318} In addition, the cumulative risk that resulted from many of BP’s decisions was both unreasonably large and avoidable.\textsuperscript{319} Even if some of the misconduct could arguably be construed as ordinary rather than gross negligence, the sheer volume of errors exponentially increased the risk of a catastrophic event given the intrinsically high-risk nature of ultra-deep water drilling. Multiple acts of ordinary negligence may constitute gross negligence when their aggregate effect creates an unreasonable risk of exceptionally grave harm. The aggregate gross negligence in this case is compelling and would provide yet another weighty second-tier factor that could counterbalance a lesser evidentiary showing on any of the first-tier factors, if needed.

\textit{Exigent Circumstances.} Deep water drilling regularly presents unexpected conditions, anomalies and other emergent circumstances which require swift remedial action and hyper vigilance to avert the risk of harm they create. However, as described above, in this case the vast bulk of the most serious risks encountered by BP were both foreseeable and the direct result of its own flawed decisions and practices. Consequently, such self-imposed exigencies would not operate to mitigate otherwise grossly negligent misconduct to that of ordinary negligence.

\textit{Resolution and Reconciliation of the First and Second-Tier Factors.} A prima facie showing would likely be readily established on each of the first-tier factors in the proposed test. The magnitude of prospective harm and awareness of the danger factors are exceptionally strong based on the investigative findings to date. The indifference factor, while also solid, would likely be viewed as moderate in weight when tempered by considerations such as confused areas of responsibility and in-fighting amongst BP personnel, operational disputes with the subcontractors, poor communication, inadequate risk assessment procedures and ambiguity as to whether BP was timely provided certain test results on the instability of the cement slurry design. Such variables, if proven, could arguably lessen the weight of the indifference factor evidence. However, since the record is replete with demonstrable instances of fiscally induced complacency towards known dangers, a moderately strong prima facie showing of indifference could, nonetheless, be made. Under such a trial scenario, the prima facie case on the first-tier factors would be sufficient for a finding of gross negligence even without consideration of a second-tier factors analysis.

\textsuperscript{311} BOEMRE Report, \textit{supra} note 62, at 194-99.
\textsuperscript{312} See Oil Spill Commission Report, \textit{supra} note 62, at 118.
\textsuperscript{313} Chief Counsel’s Report, \textit{supra} note 306, at x.
\textsuperscript{314} BOEMRE Report, \textit{supra} note 62, at 111.
\textsuperscript{315} See Oil Spill Commission Report, \textit{supra} note 62, at 118.
\textsuperscript{316} Id. at 120.
\textsuperscript{317} See id. at 115.
\textsuperscript{318} See id.
\textsuperscript{319} See id.
Each of the second-tier factors, in turn, are supported by substantial evidence that would result in a sound prima facie finding on each factor. When applied as variables against the first-tier factors, and in the absence of any legally cognizable exigent circumstances, an overall finding of gross negligence could undoubtedly be sustained.

Conclusion

The trial and appellate courts hearing claims related to the BP oil spill will face daunting challenges sorting through the complex maze of technically laced conduct by multiple decision makers with overlapping input into the highly technical drilling and abandonment operations of the Macondo well. Much is at stake in the court’s determination of whether gross negligence or willful misconduct was involved in this catastrophe. What the courts ultimately decide will have far-reaching implications for how safely future high-risk enterprises are conducted and the well-being of those communities placed in harm’s way by these abnormally dangerous activities. The existing jurisprudence on what constitutes gross negligence or willful misconduct lacks sufficient clarity and consistency to adequately assist the courts in interpreting those terms in a complex case like the BP litigation. The proposed criteria-guided framework for applying gross negligence and willful misconduct to the BP case, and future cases like it, should enable courts to more precisely determine whether the behavior that caused the harm merits the more severe punishment those heightened degrees of fault serve to impose.