

WHAT IS DEFINED AS “GROSS NEGLIGENCE”



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The best place to get an idea of what would be considered gross negligence is from the Financial Ombudsman Service decisions. We have reviewed some of the recent decisions and created the below table which gives an indication as to what is (and more likely isn't) gross negligence. It is, at its core, a high bar to reach.

	DECISION	DATE	CIRCUMSTANCES AND COMMENT	LINK
1	Grossly negligent (although not the main thrust of complaint)	29.11.23	<ul style="list-style-type: none">• Miss R's phone was stolen and the thief used her Chase Bank passcode to transfer £3,060 away• Evidence showed that the payment in dispute was from Miss R's genuine app on her registered phone with the correct passcode and there was no evidence of hacking or security being bypassed so the transaction was properly authenticated and as such Miss R failed to keep her account safe either intentionally or through gross negligence.• Chase had reasonable grounds to decline a refund	<u>Decision Reference</u>
2	Not grossly negligent	27.11.23	<ul style="list-style-type: none">• Mr S got his emails hacked and the fraudster persuaded him to share personal details allowing them access to his bank.• Unauthorised transactions• He shared the OTP and personal information and was corresponding with the 'bank' by whatsapp.• Do not think he showed a serious disregard to an obvious risk.	<u>Decision Reference</u>



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3	Not grossly negligent	26.11.23	<ul style="list-style-type: none">• Had his phone stolen from a nightclub on 28 August 2022• Passwords saved on his phone• Bank refused to refund as there was no evidence the payments were made by a TP• The PSRs say that a payment transaction is authorised by the payer where they have given their consent to the execution to the payment transaction. Such consent must be given in the form and in accordance with the procedure agreed between the payer and the payment service provider. Unless the payment service provider can show consent has been given, it has no authority to make a payment or debit the customer's account. Where a payment service user denies having authorised a payment transaction, it is for the payment service provider to prove that the transactions in question were authorised by the customer.• Not enough evidence to show that it was the complainant who made the transactions.• Kept his passwords in the notes section of his phone• Gross negligence is not an abstract concept. It's important to take into account all the circumstances when considering whether an individual's actions amount to gross negligence. In this instance, I appreciate that Mr L had stored his security credentials on his device, which customers are advised not to do by their banks. However, while this may have been careless, I don't consider it to have been grossly negligent.	<u>Decision Reference</u>
4	Not grossly negligent	25.10.23	<ul style="list-style-type: none">• Background is unclear but fraudsters have contacted the complainant and informed her that she was the victim of a fraud and persuaded her to share her virtual card details and OTP code.• I'm not persuaded that means she failed with gross negligence – or, in other words, that she acted with very significant carelessness; seriously disregarded an obvious risk; or acted so far below what a reasonable person would've done.• <i>"I'm not persuaded that means she failed with gross negligence – or, in other words, that she acted with very significant carelessness; seriously disregarded an obvious risk; or acted so far below what a reasonable person would've done"</i>.• Burden is on Revolut to show that she was grossly negligent and they have not	<u>Decision Reference</u>



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5	Grossly negligent	24.10.23	<ul style="list-style-type: none">• Miss P lost her debit card which was then used for cash withdrawals.• Use of PIN number and the only plausible explanation is that she either consented or failed to keep her account safe through gross negligence.	<u>Decision Reference</u>
6	Not grossly negligent	5.10.23	<ul style="list-style-type: none">• Phone and purse was stolen when Miss W was working abroad.• Revolut stated that the appropriate authentication was done for these transactions.• Miss W states she did keep them secure.• Held that she was not grossly negligent as she may have been shoulder surfed or her phone was unlocked when it was stolen	<u>Decision Reference</u>
7	Not grossly neg and comment on effective warnings	29.09.23	<ul style="list-style-type: none">• Property purchase fraud• Payment received negative CoP• When she proceeded it asked what it was for and she chose the option large purchase (house or car) and the payment was stopped by the fraud team• Tried again next day for a lesser sum of £200 and for same CoP message and stated it was for goods and services and rec'd a different warning message• Tried to send £50,000 later than day and got stopped by the bank for fraud checks. During the call with the bank she said she had confirmed the details on the phone but it was only over email.• Asked first direct to pay 50% of her losses• First instance found that Miss R had not ignored an effective warning under the CRM and she had a reasonable basis for her belief that she was dealing with her conveyancers.• The bank had not explained why there were asking how she got the account details.• Her actions did not amount to gross negligence	<u>Decision Reference</u>



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8	Not grossly negligent	14.07.23	<ul style="list-style-type: none">• APP fraud• Customer had shared OTP with fraudster who was pretending to be his bank (cashplus)• FOS held that the use of 2 factor authentication did not mean that the customer was GN.• Regulation 75 of the PSRs states that the recorded use of a payment instrument (which would include 2FA in this case) isn't enough to show gross negligence.• And the FCA, in its guidance on its approach under the PSRs explains that gross negligence <i>"must be assessed on its merits to ascertain whether the customer has acted with "gross negligence". In line with the recitals to PSD2, we interpret "gross negligence" to be a higher standard than the standard of negligence under common law. The customer needs to have shown a very significant degree of carelessness."</i>	<u>Decision Reference</u>
9	Not grossly negligent	31.03.23	<ul style="list-style-type: none">• Complainant was contacted by fraudsters pretending to be her bank and convinced her to share details and the fraudsters were then able to make two payments from the account.• Unauthorised transactions• Not grossly negligent• Use of spoofing phone numbers and that most people do not realise that fraudsters can do this.	<u>Decision Reference</u>
10	Not grossly negligent	17.12.21	<ul style="list-style-type: none">• Spoof number and fraudsters pretending to be from her bank.Unauthorised payments.• Starting point is that under the PSR 2017the complainant is not liable unless she failed with GN or intent to comply with the terms of the account of keep her personalised security details safe.• Does not feel that she failed as she genuinely believed she was doing what was necessary to protect the account.• AIB stated that there was a warning not to share her OTP and she failed with GN as she share it anyway.	<u>Decision Reference</u>



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11	Not grossly negligent	16.09.20	<ul style="list-style-type: none">• Unauthorised transactions – complainant has allows fraudsters posing as his telecoms company into his phone who then gained access to his banking.• Refers to the FCA commentary cited above• Also Red Sea Tankers v Papachristidis (the “Ardent”) [1997] <i>“If the matter is viewed according to purely English principles of construction, ... “Gross” negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence... as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard [sic] of or indifference to an obvious risk.”</i>• FOS states <i>“Negligence is often referred to as a failure to exercise reasonable care. And, as I have described above, the use of ‘gross negligence’, rather than mere ‘negligence’, suggests a lack of care that goes significantly beyond ordinary negligence or carelessness. So I have to consider whether Mr R’s actions fell so far below the standard of a reasonable person that he failed with gross negligence to keep his personalised security details safe or to comply with his account terms and conditions.</i>• I’m satisfied gross negligence should mean a very significant degree of carelessness, involving a serious disregard or indifference to an obvious risk. This is a high bar, it isn’t enough to say Mr R was grossly negligent simply because in the middle of a sophisticated scam he downloaded some apps and left his mobile apps open. I’m not persuaded his actions fell so far below what a reasonable person would do in the circumstances to amount to gross negligence. I think a lot of people would have reacted in a similar way to how Mr R did here.	<u>Decision Reference</u>



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12	Grossly negligent	06.08.19	<ul style="list-style-type: none">• Mr C had his bag stolen with his cards in and it was found that the thief also had access to his PIN and that it was likely he kept a record of his PIN with his card.• Whether a customer has acted with “gross negligence” is something that can only be assessed on a case-by-case basis, taking into account all the circumstances.• Reliance on Payment Services Directive²• The FCA, Payment Services Regulations 2017, says: “...we interpret “gross negligence” to be a higher standard than the standard of negligence under common law. The customer needs to have shown a very significant degree of carelessness.”• FOS relies on these even when not directly relevant. As they are of value as a relevant consideration in the absence of contemporaneous interpretative guidance, and because they inform the meaning of a concept that has been in place for some time (in the Banking Code).• When considering gross negligence in a commercial contract context, Mance J in <i>Red Sea Tankers Ltd v Papachristidis</i> (“The “Arden”) [1997] 2 Lloyd’s Rep 547, 586³• Negligence is often referred to as a failure to exercise reasonable care. But as I have described above, gross negligence suggests a lack of care that goes significantly beyond ordinary negligence.• Under PSR 2009 unauthorised transactions should be reimbursed unless the complainant failed with intent or gross negligence to comply with the terms and conditions of the card or the obligations set out in the PSR 2009⁴	<u>Decision Reference</u>



	DECISION	DATE	CIRCUMSTANCES AND COMMENT	LINK
13	Not gross neg	14.04.22	<ul style="list-style-type: none">• HMRC scam saying she has not paid tax• Made 30 payments totalling £27,965 over the next few days from her Metro account• Scam uncovered by another bank she was making payments from• Metro refused to refund under CRM code ² but refunded 50%• FOS found that the warnings were not effective and the frequency of payments should have raised alarm bells• Call made and Metro did not make it clear what a scam could look like and did not explain any steps. Phone call was not clear or impactful enough.• Reimbursed first four payments• 50% of the remaining payments	<u>Decision Reference</u>
14	Gross neg	04.03.24	<ul style="list-style-type: none">• Mrs B was the victim of a bank impersonation scam and she transferred her money from wise to another account controlled by the fraudster.• Was held that these were authorised payments and that Wise had acted fairly in processing the payments.• FOS stated that it was 3D secure approved and that it was not practical or realistic for Wise to check every payment leaving its customers accounts.	<u>Decision Reference</u>

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15	Not gross neg	04.04.24	<ul style="list-style-type: none"> • Mr S and Mrs R had an account with Revolut. • In April 2023 a new device accessed the account using Mrs R's email address and started to make transfers out of the account. • Revolut refused to reimburse/clear the overdraft • Revolut agreed upon review that it was likely that Mrs R's email address had been compromised. 	<u>Decision Reference</u>
16	Not gross neg	01.03.24	<ul style="list-style-type: none"> • Mr L was the victim of a bank impersonation scam • He was informed that his Revolut account had been compromised and he transferred his funds from his Euro account to his GBP account and to delete and download the app again. He provided the caller with the one time passcode that was sent to his phone. • Three payments were then made on his account by the fraudster of £190,£2,198 and £1,948. • Revolut refused to reimburse as they said they could find no trace of fraudulent activity and that he had acted negligently in providing the OTP to the scammer and he broke the terms and conditions of the account. • The FOS found that it was not grossly negligent of him to provide the OTP to the scammer as he thought he was dealing with Revolut. 	<u>Decision Reference</u>



- Case by case basis
- The term is not defined in the PSR's 2009 or in the Payment Services Directive
- Recital 72 of the second Payment Services Directive provides as follows: "In order to assess possible negligence or gross negligence on the part of the payment service user, account should be taken of all of the circumstances. The evidence and degree of alleged negligence should generally be evaluated according to national law. However, while the concept of negligence implies a breach of a duty of care, gross negligence should mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness; for example, keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties..."
- Reflecting this, the FCA, in its document setting out its role under the Payment Services Regulations 2017, says: "...we interpret "gross negligence" to be a higher standard than the standard of negligence under common law. The customer needs to have shown a very significant degree of carelessness."
- Although neither of these is directly relevant to this case, they are of value as a relevant consideration in the absence of contemporaneous interpretative guidance, and because they inform the meaning of a concept that has been in place for some time (in the Banking Code).
- When considering gross negligence in a commercial contract context, Mance J in *Red Sea Tankers Ltd v Papachristidis* ("The "Ardent") [1997] 2 Lloyd's Rep 547, 586 said: "If the matter is viewed according to purely English principles of construction, ... "Gross" negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence...as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk."
- Negligence is often referred to as a failure to exercise reasonable care. But as I have described above, gross negligence suggests a lack of care that goes significantly beyond ordinary negligence.
- Did the standard fall so far below the standard expected of a reasonable person that it would be fair to say he failed with gross negligence.

1. ALBEIT I KNOW OF A CASE THAT THE EXACT OPPOSITE HAS BEEN FOUND.THIS WAS AN ENQUIRY IN THE NAME OF WHITEHEAD AND HE HAS SENT US THE FOS DECISION
2. SEE NOTES AT END OF DOC
3. SEE NOTES AT END OF DOC
4. [HTTPS://WWW.LEGISLATION.GOV.UK/UKSI/2009/209/REGULATION/57/MADE](https://www.legislation.gov.uk/UKSI/2009/209/REGULATION/57/MADE)