“Duty to Warn!”

Webinar

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Introductions

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Agenda – Duty to Warn

+ Typical professional standard of care.
+ Duty to warn – why is it relevant?
+ Case law summary, including *Goldswain & Anr v Beltec Ltd & Anr* [2015].
+ Other related obligations –
  – i.e. “supervision”, “inspection” or “monitoring” etc.; and
  – statutory duties.
+ Practical considerations and conclusions.
General Duties of Care – Recap!

+ Professional’s contractual obligation = typically “reasonable skill and care”, although usually duty slightly higher than this.

+ Regardless of whether specifically referred to in the appointment:
  – Tort of negligence;

+ In absence of “special circumstances”, Court cannot extend normal obligations of a professional beyond reasonable skill and care – *Hawkins v Chrysler (UK) Limited* [1988].

+ May be more onerous where the professional is highly skilled or specialised – *Gloucestershire Health Authority v Torpy* (1997).
Duty to Warn – Why Relevant?

+ Given the number of parties and interface required on construction projects – common to ‘see’ things and thus assumption of obligation to warn.
+ Consultants – “supervising”, “inspecting”, “monitoring” etc.
+ Statutory duties?
+ Consequence of not warning could be significant – health and safety, delivery (time and money), claims.
+ Over the years, the courts’ opinion of the extent of a “duty to warn” has differed tremendously + decisions made on case-by-case basis.
The Duty to Warn – General Position (common law)

- General proposition - a genuine bystander has no duty to warn.

- There is a general duty on a professional to warn of any danger or problem which arises of which he ought to be aware and about which he could reasonably be expected to warn the client.

- For example:
  - “If any danger or problem arises in connection with the work allotted to ... an architect of ordinary competence of which he ought reasonably to be aware and reasonably could be expected to warn the client, the duty of the architect [is] to warn the client” (Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council (1986)).

- So what does this mean!?
The Duty to Warn – Examples

+ Out of the ordinary:

  – Risks involved in a **novel design or untried design** - duty for architect and other designers to warn the client specifically of what they are doing and obtain approval (*Independent Broadcasting Authority v EMI Electronics and BICC* (1980)).

+ Design defects:

  – Implied term in contracts to warn of any known or suspected defects in design. “**Belief**”, will be sufficient for finding a duty to warn (*Victoria University of Manchester v Wilson* (1984)).

  – Duty to warn arose **even if not sub-contractor’s (or consultant’s) responsibility** where not only design defective but obviously dangerous (*Plant Construction v Clive Adams* [2000]).
The Duty to Warn – Examples (cont.)

- *Plant Construction v Clive Adams* [2000]:
  - There will usually be an implied contractual term that a contractor shall perform a contract using the skill and care of an ordinarily competent contractor;
  - The particular circumstances of a contract will determine the scope of that obligation; and
  - Where an experienced contractor is involved, and the design of the works is not only defective but obviously dangerous, there is an “overwhelming case” that the contractor is bound, as part of its obligation to use appropriate skill and care, to warn a client of dangers it perceives.
The Duty to Warn – Examples (cont.)

+ Deficiencies in the performance of contractors:
  
  – “If an engineer employed by an owner in respect of permanent works observes a state of temporary works which is **dangerous and causing immediate peril** to the permanent works in respect of which he is employed he is obliged to take such steps as are open to him to obviate that danger. It seems to me that that follows, partly as a matter of commonsense...”
  
  – The court decided that there was “**clear and obvious danger**” to the works (Hart Investments Ltd v Fidler (2006)).
The Duty to Warn – Examples (cont.)

- Supervision + concurrent liability:
  - Builder using inappropriate materials and the architect not detecting the fault when should have done in course of his construction supervision duties – duty to warn.
  - 60/40 liability against contractor, based on building contractor’s mistake being a positive act and architect’s mistake being an omission (McKenzie v Potts (1997)).
Chesham Properties v Bucknall (1996)

Considered whether project managers, architects, engineers and quantity surveyors have a general duty to employer to warn about actual or potential deficiencies in performance.

Allegations were made by employer that each had a duty to advise on deficiencies of others in simple construction development.

Looked at terms of engagement:

- Project manager – YES – express obligation to monitor performance;
- Architect – NO – in relation to project manager, as not inferred from scope of services;
- Architect – YES – in relation to performance of structural engineer and QS as, RIBA scope of services referred to monitoring obligations, amongst others;
- Structural Engineer + QS – NO - for structural engineer (based on ACE services and not in scope) and QS (no appointment terms).

Demonstrates importance of express terms.
Goldswain and another v Beltec Ltd (t/a BCS Consulting) [2015] – The Facts

+ Court considered circumstances in which a professional engineer has duty to warn a contractor + home owner of problems with contractor performance.

+ Beltec designed the structural works to a residential property – included permanent works and underpinning.

+ No contractual responsibilities to inspect or supervise.

+ Works were defective following an inspection and Beltec recommended complete replacement.

+ Building collapsed and subsequent proceedings.

+ Claimants alleged that Beltec was negligent for failing to warn about shortcoming in construction work.
Goldswain v Beltec Ltd – Guidance

Court considered the authorities and provided following general guidance:

1. Where professionals are contractually retained, the court must initially determine the scope of the contractual duties.

2. Despite this, possible to view the duty to warn as simply an extension of reasonable skill and care.

3. Extent of duty to warn will be dependent on all the circumstances.

4. The duty often arises where there is an ‘obvious and significant danger either to life and limb or to property’. But can also arise when a careful professional ought to have anticipated a risk.

5. Should consultant have known of danger – the mere possibility that a contractor may not carry out the works properly is unlikely to create a duty to warn.
Goldswain v Beltec Ltd – Decision

+ Court satisfied that by advising contractor to do work again, including advising on the method of construction, the consultant exercised reasonable skill and care – sizable number of engineers would have done the same.

+ No express duty to warn in appointment and thus not in breach of contract.

+ No duty to warn that there was a risk that the contractor would continue with defective design following inspection.

+ **Welcome news?**
Statutory Duties

- Duty to warn type obligations may also arise under statute. For example:
  - The Construction (Design and Management) Regulations 2015:
    - came into force on 6 April 2015 and impose duties on the Principal Designer to ensure, so far as is reasonably practicable, that the project is carried out without risks to health and safety (other designers also have obligations in this regard).
  - The Health and Safety at Work etc. Act 1974:
    - creates obligations to warn people about the dangers at a place of work.

- Change in law obligation?
“Supervision”, “Inspection” and “Monitoring” Obligations

+ Duties to warn may arise from the work being carried out – for example, scope may include supervision, inspection and monitoring obligations which may lead to duties to warn.

+ In the case of an architect with an obligation to supervise and inspect on a periodic basis as necessary to ensure that the works were executed in general accordance with the contract – it was not good enough to inspect only at monthly site meetings (McGlinn v Waltham Contractors Ltd [2007] EWHC 149 (TCC)).

+ The frequency and duration of inspections should be proportionate to the nature of the works on site – where there are concerns regarding the work, inspections should be increased (this may necessitate employing site staff).

+ The inspecting professional is not required to look into every matter in detail. However, once a matter has been picked up, there will be duty to take steps to see that the defect is remedied – this might go beyond simply “warning”…
Other Contractual Obligations

+ The terms of an appointment may impose other obligations, leading to a duty to warn.

+ **Early warnings** – the NEC3 Professional Services Contract includes mutual obligations to give notice of various matters specified.

+ **Deleterious materials provisions** – sometimes say a duty to warn if prohibited materials are being used or incorporated into the works.

+ **Other contracts** – may introduce duties from other contracts (for example, in back to back contracts).
Practical Considerations and Conclusions

+ Who has a duty to warn?
  – Any party involved in construction, but consultants are often in the firing line.

+ What is the extent of the duty?
  – Start with the scope set out in the contract.
  – Extension of reasonable skill and care.
  – Duty likely to depend on party’s role and its knowledge.
  – “Mere possibility” not sufficient to impose a duty.
  – Increases with the seriousness of the danger – often arises where there is an ‘obvious and significant danger either to life and limb or to property’.
Practical Considerations and Conclusions (cont.)

- What is sufficient warning?
  - The nature of the warning will depend on the specific circumstances.
  - However, the warning must be ‘overwhelmingly and plainly effective’ (Six Continents Retail Ltd v Carford Catering Ltd [2003] EWCA Civ 1790).
  - E.g. advising contractor to do the work again and advising on the method of construction.

- What to do when faced with client instructions?
  - Communicate with the client and advise of any dangers – record advice in writing.
  - Where matter could lead to danger to life and limb – “get tough” with the client!
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Approaching M&E Webinars

- We are running a series of free M&A webinars over the next few months in association with the ACE and Wilkins Kennedy Corporate Finance. The first webinar is on 18 November and focuses on the topic of growth strategy. It will cover:

  + **Introduction**: How does a business manage growth, what are the structuring and financing issues, the changing consultant market and the pitfalls of M&A - Nelson Ogunshakin, Chief Executive of the ACE;

  + **Finding and valuing the target**: How to identify the perfect target, how to value a business and potential sources of financing a deal – Dan Nixon, Director at WK Corporate Finance; and

  + **Structuring an acquisition**: The legal structure of a corporate deal, the due diligence process, the key legal documentation and protecting the buyer’s position - James Hutchinson, Partner at Beale & Company.

- Please contact [marketing@beale-law.com](mailto:marketing@beale-law.com) if it is of interest, or pass on to any colleagues.