

Cerno

Distinguish; determine; resolve.

Date 11 January 2013

Welcome

Welcome to this first newsletter of 2013 from Cerno, a consultancy providing dispute resolution advice and services to the construction, engineering, industrial and maritime industries and related professions such as lawyers, architects and engineers. We wish all our friends a happy and prosperous year.

The purpose of Cerno's newsletters is to provide information on matters of general interest and updates on latest the developments in the field of dispute resolution and related case law. In this issue we look at the duty of third parties to construction projects, including designers and draughtsmen, to warn of potential dangers to human beings.

Duty of Care and Duty to Warn

The case of *Cleightonhills v Bembridge Marine Ltd. & Others* [2012] EWHC 3449 (TCC) concerned the liability of designers, contracts, sub-contractors and sub-sub-contractors for the personal injury incurred by an employee in a boatyard.

The facts, in brief, are that a young employee was assisting in moving a boat from an external gantry platform to an adjacent warehouse. Both the gantry and warehouse had only recently been designed and constructed. The grated flooring of the gantry moved and the employee fell to the floor below and was subsequently struck by the falling grating panel. The employee suffered severe traumatic brain injury and was awarded more than £7 million in damages against the boatyard owner who then brought proceedings against those involved in the design and construction and the supply chain.

A duty to warn of danger may extend widely, even to those performing tasks such as the detailing of drawings.

Claims against the designer and structural engineer were settled separately at an aggregate level of around £4 million. The case concerned, in particular, the subcontractor for the platform supply and construction, the sub-subcontractor for fabrication of certain elements, and detailing draughtsmen. What duty of care did those persons owe to the employee?

The complaint against each of those third parties was that they failed to appreciate the actual intended uses the platform was to be put to; that the platform could fail, and that injury to anyone on the platform was foreseeable. The third parties accepted they owed a duty of care to the employee. The judge, Mr. Justice Akenhead noted:

- The court needed to consider the contractual context in which the third parties were involved in the first place.
- The scope of the duty of care is determinable by reference to what the party owing the duty is broadly employed to do or actually does.
- It does not follow that a party in breach of contract will also be in breach of a duty of care owed to someone who is not a party to the contract.

Against that background the judge found that the third parties had exercised all the care and skill reasonably expected of them. The real problem was a failure by the primary designers.

No criticism was made of the third parties for not warning the designers and others further up the chain that there was a potential problem. In the circumstances they could not be criticized for not appreciating that there was a need to warn.

Conclusion

A failure to warn of potential danger to human beings may give rise to a breach of any duty of care owed to a third party by any party who knows of the danger; however it is necessary to always review the entirety of the circumstances.

Where the parties are in contract the duty to warn may extend to dangers of which the third party in question should have been aware by virtue of its involvement.

In purely tortious circumstances a duty to warn may not extend in fact to warning the persons who might be affected by the danger; it may be limited to warning the party with whom the person required to warn is in contract.

In the context of a construction project detailing draughtsmen, for example, have a level of involvement that might oblige them to notify their employer (the designer) of a perceived risk. Design checkers are likely to have a greater duty to warn as their involvement and understanding of the design would be greater. This appreciation of the obligations is found at the heart of the Construction Design & Management Regulations in force in England & Wales, which require consideration from a very early stage of the risks of construction, usage of the project throughout its lifetime and, ultimately, demolition.

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