DUTY TO WARN INVOLVING SAFETY: PERSPECTIVES FROM DIFFERENT JURISDICTIONS

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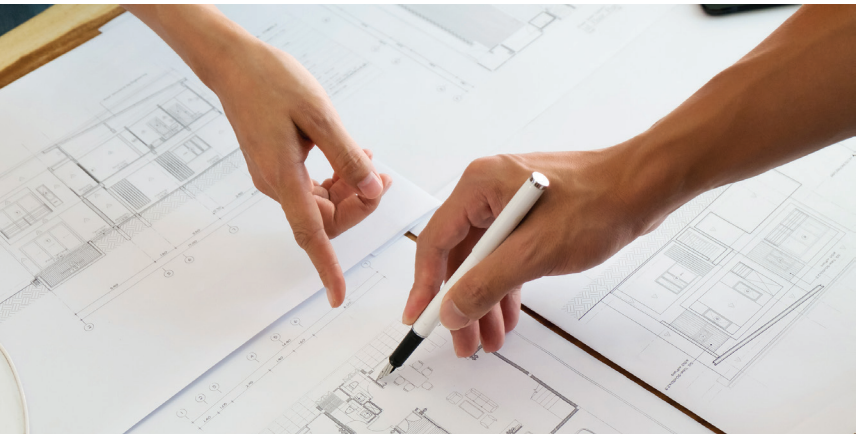

Consider this scenario: A family decides to convert their cellar into a living accommodation by increasing its height. The family engages engineering firm ABC to design the structural works, specifically underpinning the outer walls and lowering the floor to create more height. Engineering firm ABC is *not* engaged to supervise and inspect the works, a fact that will prove to be critical in the court case that will follow.

Later, the family hires contractor XYZ to install the underpinning and perform the excavation based on ABC's design. During the project, contractor XYZ engages engineering firm ABC to inspect solely the construction of one of the pins. During the site visit, the engineer for ABC notes the design drawings are not being followed: specifically, there was no reinforcement. Furthermore, the engineer informs contractor XYZ that the pin needs to be replaced and explains the importance of following the design drawings.

Engineering firm ABC does not inform the family that contractor XYZ was not following the design drawings, as at the time, there was no imminent danger or reason to believe contractor XYZ would not follow the drawings after receiving the engineer's advice. Contractor XYZ continues its work without following the drawings, ignoring the advice of the engineer.

Later, the family observes serious cracking on the structure and evacuates the building; subsequently, part of the building collapses. Thereupon, the family brings proceedings against engineering firm ABC and contractor XYZ. However, contractor XYZ is insolvent and plays no part in the proceedings. Nonetheless, the judge determines that it was the breaches of contract on the part of contractor XYZ that caused the collapse and there was no liability on the part of engineering firm ABC.

Key to the ruling is the following statement made by the judge: "The basic standard of care in a case like this involves the exercise of the care to be expected of a reasonably competent engineer." Continuing, the judge notes the scope of services of engineering firm ABC clearly did not cover supervision of the contractor or inspection of the contractor's work.

Therefore, the judge determines professional negligence was not established with regards to whether engineering firm ABC should have warned the family as well. In fact, the judge notes a sizeable number of engineers would have done no more and no less than advise their client—contractor XYZ at this stage—to follow the drawings, since there was no evidence of danger at that moment. Consequently, the family's case against engineering firm ABC is dismissed.

This scenario is based on a court case where the expression "the devil is in the details" clearly applies. For more information, read the full case *Goldswain & Another v Beltec Ltd (t/a BCS Consulting) & Another [2015] EWHC 556, England's Technology and Construction Court* (www.bailii.org/ew/cases/EWHC/TCC/2015/556.html).

DUTY TO WARN INVOLVING PROFESSIONALS IN THE UNITED KINGDOM

In the above-cited case from the United Kingdom, the judge, based on authorities' testimonies, reached the following conclusions in relation to a duty to warn involving professionals:

1. Where the professionals—engineers in this case—are contractually retained, the court must initially determine the scope of the contractual duties and services. It is in this context that the duty to warn and its arising circumstances should be determined.
2. It will, almost invariably, be incumbent upon the professional to exercise reasonable care and skill. This must be looked at in the context of what the professional is engaged to do. The duty to warn is just one aspect a competent professional is to perform with skill and duty.
3. Whether, when and to what extent the duty will arise will depend on all circumstances.
4. The duty to warn will often arise when there is an obvious and significant danger either to life and limb or to property. However, it can arise when a careful professional, having regard to all the facts and circumstances, ought to have known of such danger.
5. The court will be unlikely to find liability because the professional sees merely a possi-

bility of some future danger; likewise, any duty to warn may well not be engaged if there is merely a possibility that the contractor in question may not properly follow procedures in the future.

From the above, it follows that where practitioners are engaged to supervise or inspect construction, there is a clear duty to warn of risks that would be apparent to a reasonable practitioner during the supervision or inspection of construction.

ENGINEER'S DUTY TO WARN OCCUPANTS OF A BUILDING IN CALIFORNIA

The attorney general of California provides opinions on specific questions, particularly when existing laws do not provide clear answers. Several years ago, the following question of interest to engineers, paraphrased here, was presented:

A registered engineer is retained to investigate a building. He or she determines the structural deficiencies are in violation of building standards and there is imminent risk of serious injury to the building's occupants. The building's owner does not intend to disclose the risk to authorities or perform remedial action. The owner then asks the registered engineer to remain silent. Does the registered engineer have a duty to warn the occupants or notify authorities?

Key to the analysis of the attorney general was the following text from *Thompson v. County of Alameda (1980) 27 Cal.3d 741* (https://law.justia.com/cases/california/supreme-court/3d/27/741.html), a case revolving around a public entity's duty to warn of a release of an inmate:

"In those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger, a releasing agent may well be liable for failure to warn such persons."

Using this scenario as a jumping board, the attorney general noted that if a building poses an imminent risk of serious injury, its occupants similarly constitute a "readily identifiable group of victims" who can be effectively warned of the danger by the engineer who made such determination. The attorney general concluded: "[The] registered engineer has a duty to warn the identifiable occupants or, if not feasible, to notify the local building officials or other appropriate authority of such determinations."

Because this article is only an overview of the duty to warn involving safety, practitioners should read the opinion in its entirety: https://oag.ca.gov/system/files/opinions/pdfs/85-208.pdf.

ENGINEER'S DUTY TO WARN IN ONTARIO AND CANADA

Ontario regulations

The following sections from O. Reg. 941/90 are relevant to an engineer's duty to warn:

72. (1) In this section:

….

"negligence" means an act or an omission in the carrying out of the work of a practitioner that constitutes a failure to maintain the standards that a reasonable and prudent practitioner would maintain in the circumstances.

(2) For the purposes of the act and this regulation, "professional misconduct" means,

…

(c) failure to act to correct or report a situation the practitioner believes may endanger the safety or the welfare of the public,

…

(f) failure of a practitioner to present clearly to the practitioner's employer the consequences to be expected from a deviation proposed in work, if the professional engineering judgment of the practitioner is overruled by non-technical authority in cases where the practitioner is responsible for the technical adequacy of professional engineering work,

Standard of care

Based on the above regulation, an Ontario engineer's duty falls within "the standards that a reasonable and prudent practitioner would maintain in the circumstances." Note its similarity to the UK's standard of care: "The basic standard of care in a case like this involves the exercise of the care to be expected of a reasonably competent engineer."

Scope of services

Because the statutory obligation is to "present clearly to the practitioner's employer…in cases where the practitioner is responsible for the technical adequacy of the professional engineering work," it follows that the work must be part of the practitioner's scope of services for a duty to warn to be established. Again, just like in the UK, the scope of services of the practitioner is quite relevant.

Imminent risk and client inaction

What if the practitioner reports an unsafe situation and, despite clearly articulating its consequences, is asked by his or her client or employer to keep quiet? Although the regulations are silent with respect to situations where there is an imminent danger combined with an unco-operative client or employer, PEO's *Professional Engineering Practice* guideline states:

"Sometimes professional engineers find their advice is not accepted and that the client or employer has no intention of correcting the situation. If the engineer firmly believes that, after exhausting all internal resources, the health and safety of any person is being, or is imminently, endangered, it may be necessary to report these concerns to some external authority, such as a designated regulatory body, a government ministry or ombudsperson…." (For context, it is beneficial to read the entire guideline at www.peo.on.ca/index.php/ci_id/22127/la_id/1.htm.)

Note that this approach happens to mirror the attorney general of California's opinion where an

engineer has a duty to "notify the local building officials or other appropriate authority" in a case of imminent danger combined with an unco-operative building owner.

Duty to warn in Canada

The Supreme Court judgment *Smith v. Jones* (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1689/index.do) notes that:

Three factors should be taken into consideration in determining whether public safety outweighs solicitor-client privilege:

1. Is there a clear risk to an identifiable person or group of persons?
2. Is there a risk of serious bodily harm or death?
3. Is the danger imminent?

Although it is not clear how this judgment specifically applies to professional engineers in Ontario, these three factors provide a framework for practitioners to consider when faced with similar situations.

ADDITIONAL INFORMATION

As noted in the previous Professional Practice article "How practitioners can prevent conflicting obligations" (*Engineering Dimensions*, March/April 2018, p. 21), agreements and scopes of services should be consistent with the statutory obligations of practitioners to avoid unnecessary conflicts between their contractual obligations, such as confidentiality, and the practitioner's duty to report unsafe situations.

Finally, PEO's practice advisory team is available by email at practice-standards@peo.on.ca and is happy to help practitioners who are looking for more information on the duty to warn a client, employer or appropriate authority of an unsafe situation related to their scope of services. However, practitioners looking for assistance on resolving legal problems occurring in specific situations should contact their lawyer. **e**

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