



LEGAL BRIEFING

Without a care

(1) E H Humphries (Norton) Ltd (2) Thistle Hotels Plc v Fire Alarm Fabrication Services Ltd

Court of Appeal May LJ, Gage LJ and Hallett LJ, [2006] EWCA Civ 1496

The Facts

On 9 January 2001, Ian Gray, a fire alarm installation engineer and employee of Fire Alarm Fabrication Services Limited (“FAFS”) fell through a skylight window in the roof of a building at Victoria Station. He died as a result of the injuries he sustained.

This was an appeal by E H Humphries (Norton) Limited (“EHH”) and Thistle Hotels Plc (“Thistle”) against the decision that they were both liable to contribute to the damages which FAFS had paid to Mr Gray’s estate, on the basis that they were negligent and such negligence caused or contributed to Mr Gray’s accident.

Thistle had engaged EHH as the electrical contractor to carry out works at Thistle’s hotel. EHH had then engaged FAFS as the subcontractor to carry out the requisite fire alarm system modifications. The route for the electrical cables for the system had not been decided when FAFS started work. FAFS unilaterally decided to route the cables externally and Mr Gray went on to an adjacent roof owned by Railtrack and fell through it.

The trial judge found that no one had made it clear to FAFS that the option of external cabling was not to be pursued and, further, that it was up to FAFS to decide on the most appropriate route. EHH had been negligent in failing to obtain a proper method statement or risk assessment from FAFS and Thistle had been negligent in not disclosing that Railtrack did not allow anyone to go onto its roof except in accordance with its own permit system.

On appeal, EHH and Thistle contended that FAFS had been positively instructed not to route the cable externally and that it had not been open to the judge to find that FAFS’ representatives believed that it was for FAFS to decide which route to take and that accordingly EHH and Thistle were not in breach of any duty of care owed to Mr Gray.

The Issues

1. Whether the trial judge was entitled to find that EHH’s right to supervise the work so as to ensure that it was carried out safely imposed on it a duty of care which extended to FAFS’ employees;
2. whether circumstances existed such that a duty of care could be imposed on EHH or Thistle to take care to avoid the accident which had occurred; and
3. whether EHH was entitled to a contractual indemnity from FAFS in respect of damages under the provisions of their subcontract.

The Decision

The appeals by both EHH and Thistle were allowed. The trial judge was entitled to find, in the circumstances, that EHH's right to supervise the work so as to ensure it was carried out safely imposed on it a duty of care which extended to FAFS' employees. However, on the evidence, the trial judge's finding that the FAFS' representatives reasonably believed that FAFS was entitled to unilaterally decide how to route the cable could not stand. The circumstances were therefore not such as to impose a duty of care on either EHH or Thistle to take care to avoid the accident which had occurred; Lord Justice May cited *S v Gloucestershire County Council* [2001] Fam. 313, *Caparo* [1990] 2 AC 605 and *Murphy v Brentwood District Council* [1991] 1 AC 398 in approval. In addition, the court found that EHH was not entitled to a contractual indemnity from FAFS in respect of damages under provisions of their subcontract.

Comment

This tragic case serves to illustrate just how important properly prepared method statements and risk assessments are to any construction project. Such documents should be prepared well in advance of work being undertaken and studied by all parties involved, to ensure any risks are identified and mitigated at the outset. It is also important to ensure that all parties understand how the decision-making process works. If specialist contractors are not entitled to unilaterally make decisions in their area of expertise, then that should be clearly spelt out before work is undertaken.

This case also serves as a reminder as to how and when a duty of care may be imposed. When faced with this problem, the court must establish whether a duty of care in fact existed, whether that duty was breached and what damage was caused by the breach of that duty. In keeping with *Gloucestershire*, it is critical to establish whether the scope of the duty of care in the circumstances of the case was such as to encompass the damages sustained. The question of scope is determined by assessing the kind of damage from which one party must save another party.

Rebecca Saunders
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