Australian National University

Warragamba Winery v NSW

[2012] NSWSC 701 (26 June 2012) and

Meyer v State Fire Commission (Tas)

[2012] TASSC 54 (24 August 2012).

bushfire CRC

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Woodford
Heights
Blaxland
Penrith
Parker St
Werrington
Glendenning
Leonay
Mount Druitt
Claremont Meadows
Glenmore Park
Orchard Hills
Minchinbury
St Clair
Eastern Creek
Satellite
Traffic
Kings Tableland
Blue Labyrinth
Defence Restricted Area
Prospect Reservoir
Mulgoa
Horsley Park
Wetherill Park
Wallacia
Elizabeth Drive
Kemps Creek
Cecil Park
Luddenham
Badgerys Creek
Bonnyrigg
Warragamba
Silverdale
Hinchinbrook
Greendale
Austral
Lurnea
Bringelly
Rossmore
Prestons
University of Sydney-University Farms
Leppington
Silverdale Rd
Macquarie Fields
Catherine Field
Theresa Park
Lake Burragorang
Burragorang State Recreation Area
Hume Hwy
Cobbitty
Orangeville
5 km
2 mi

The case

- Was brought by 15 plaintiff's who lost homes or business.
- They sued the State of New South Wales over the actions of:
  - The Rural Fire Service;
  - The Sydney Catchment Authority; and
  - The National Parks and Wildlife Service.

THAT the RFS owed a duty to the property owners to fight the fire on the morning of the 24th.

→ If they had fought the fire they could have extinguished it so that the damage to the plaintiffs would not have occurred.

Alternatively…

The agencies had a duty to warn based → If warnings had been issued the fire brigades and the plaintiffs would have been better prepared → With appropriate warning and preparation they would have successfully defended their assets.

Common law duty of care

- *Goldman v Hargrave* (1963) 110 CLR 40 (HC); [1967] 1 AC 645 (PC).
- *Capital and Counties* [1997] QB 1004.
- The duty of the Fire Brigades is not to make it worse. Nothing the RFS did made the situation worse.

Authority

- There was no Australian authority to support the plaintiffs; English and Canadian Authority and academic commentary (including by Eburn) were against them.
- “For the above reasons I find that the defendants owed no duty of care to the plaintiffs”.

McHugh J in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 asked:

1. Was injury foreseeable? **YES**
2. Could the defendant protect the plaintiff? **YES**.
3. Was the plaintiff vulnerable? **YES**.
4. Did the defendant know of the risk of harm? **YES**
5. Would a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions? **NO.**
6. Are there any other reason to deny the existence of a duty of care (for example, the imposition of a duty is inconsistent with the statutory scheme)? **NO.**

In this case the trial judge answered them:

1. Was injury foreseeable? **YES**
2. Could the defendant protect the plaintiff? **NO**.
3. Was the plaintiff vulnerable? **NO**
4. Did the defendant know of the risk of harm? **YES**
5. Would a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions? **YES**
6. Are there any other reason to deny the existence of a duty of care (for example, the imposition of a duty is inconsistent with the statutory scheme)? **YES**

Breach of Statutory Duty

- A statute vests power in an agency. Whether the agency exercises that power is usually a matter of discretion.
- Depending on the nature of the power it is not usually given to benefit individuals.
- Individuals cannot sue for a breach of duty unless the Parliament intended that as the remedy.

“I do not consider the statutes relied on create private rights of the type contended for:

(a) I do not discern any intention in those or other sections of the RFA to create such a private right;

(b) The statute is on its face one for the general good of the community;

(c) It does impose obligations on occupiers, as the plaintiffs point out, in s 64. But there are criminal sanctions for breaches of that section…

(d) The three authorities are statutory ones, each carrying out important public functions; each of them had different primary functions; the functions of each were apparently for the public good;”

Rural Fires Act 1997 (NSW) s 128

"I conclude that here, for the defence to have succeeded, I would have needed to be persuaded that the NPWS and the RFS had each made a genuine attempt to discharge the relevant functions it had, having regard to the circumstances in which they were exercised, such as having limited resources, and established procedures."

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And later:

"Had negligence been found, this would have been a clear case for the application of s 128 to the alleged acts and omissions of the NPWS and the RFS. Thus had it been necessary, I would have found the first defendant entitled to rely on s 128, and that the defence had been made out."

Civil Liability Act 2002 (NSW) s 43A

Liability over the way in which a statutory authority exercises a special statutory power can only arise if the conduct was so unreasonable no authority would think they were trying to exercise that power for its proper purposes.

In summary

- Was there a duty of care? No
- BUT if there was, there was no negligence;
- AND if there had been the Crown was protected by RFA s 128 and Civil Liability Act s 43A.
- The plaintiffs therefore lose.

Just in case

- There was no negligence; and if there was
- The plaintiffs could not prove their losses;
- Many exaggerated their claims;
- They could not satisfy the court that
  - They would have heard any warnings;
  - They would have done anything differently; or
  - It would have made a difference.

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The learning

- The question of duty remains complex but this is further support for no duty of care by fire services.
- The court implicitly imposed ‘shared responsibility’.
- The lessons from ‘failure to warn’ could not be carried forward to today.

Meyer v State Fire Commission (Tas) [2012] TASSC 54 (24 August 2012).

- A case that could also have raised the issue of duty of care but
- By consent, the parties asked the judge to consider the application of the *Fire Service Act 1979* (Tas) s 121.

That section says:

- The Commission is liable for any negligence of its officers and members…
- But there is no liability for actions '*directed to extinguishing, or preventing the spread of, a fire or reducing the risk of a fire occurring, or to the training of persons in the carrying out of any of those operations.'*

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Plaintiff argued

- This fire was due to the negligence of the Commission, not it's staff and
- The Chief Officer was not an 'officer, employee or agent' and so was not protected.

The Court

- Rejected those arguments:
  - *'… the relevant damage, even if attributable partly to [negligence] … in relation to planning and training, was at least partly attributable to acts and omissions of officers and fire-fighters during the operation directed to extinguishing, or preventing the spread of, the Myer fire, ie during an operation within the scope of s121(3). It follows that the Commission must be entitled to the immunity provided by s121(2).'*

And

- *There is no reason why the Chief Officer, alone amongst the personnel of the TFS, should be personally liable for acts or omissions in good faith. And it would be absurd if the Chief Officer, the chief executive officer of the TFS, was, as a matter of law, not really an officer at all.'*

Other cases

- Canberra 2003;
- *Matthews v SPI Electricity (No 2)* [2011] VSC 168 ('Black Saturday' action against Victoria Police).

A word on shared responsibility?

– *At least in relation to property damage, legislation in this State since 1920 had reflected a policy that the financial burden of unfortunate operational decisions should be borne by insurers, or by the uninsured. That seems possibly to have been a quid pro quo for the State providing fire-fighting services which, in times long past, were provided by insurance companies, and not at the expense of the public.*