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# Enforcing safety with law - implications for incident controllers and fire agencies

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Fire fighter safety is a primary concern for all involved in fire fighting. The obligation to protect fire fighters is enshrined in common law, criminal law and work health and safety legislation.

Notwithstanding this, fire fighters are still asked to put their own lives at risk to save others. Balancing the need to protect fire fighter safety with the inherent risks involved in the work they do is a challenge for the law, but a greater challenge for incident controllers and chief officers.

This paper, and the associated presentation at the *International Association of Wildland Fire 'Safety Summit'*, hosted in Sydney in October 2005, considers recent developments in case law and legislation from both Australia and the United Kingdom and how these developments may impact upon, and reinforce, the overriding obligation to put fire fighter safety first. These legal obligations need to be understood by fire officers if they are to meet their duties both to fire fighters and to those in need of fire and rescue services. The learning identified is relevant not only to fire agencies in Australia and the UK but also to agencies from countries with similar legal traditions such as the United States, New Zealand and Canada.

## **What's the measure of success for fire-fighters?**

Communities expect many things from their fire agencies, in particular they want a rapid response and an effective resolution of their emergency. Fire fighters are portrayed as selfless, self-sacrificing heroes who are expected to, or at least rewarded for, putting themselves in danger to save others.

Sometimes however, fire-fighters are not able to bring an ideal resolution to an issue, houses will burn, people will die in house and bushfires, some people cannot be rescued in time to save their lives. The fact that a person who a fire services was called to rescue dies, or a fire could not be extinguished before property was lost, cannot reasonably be the measure of success for a fire service, yet fire services are judged, after an event, by what was lost rather than what was saved.

To understand what the emergency services see as a success, or failure, researchers conducted interviews with a number of chief officers of the Australian fire and emergency services. The research

participants were drawn from those chief officers that attended an Australasian Fire and Emergency Services Authorities Council (AFAC) Commander's Forum and who agreed to take part.

Semi-structured interviews were conducted, recorded and transcribed. The interviews were given with a commitment to anonymity, accordingly the identity of the relevant speakers, when quoted below, is undisclosed. The research protocol was approved by the ANU Human Research Ethics Committee.<sup>1</sup>

Chief officers' nominated a number of possible measures of success, such as they should be judged by what is saved rather than what is lost; by whether they were able to execute their pre-event plan or by whether everyone did the best that they could in the circumstances. All of those measures, as measures of success, have difficulties and it is beyond the scope of this paper to discuss those limitations. What was clear however is that there was one, unanimous view, of success – a mission was a success if, and only if, no fire-fighter died. Some comments from the chief officer interviews are below:

'The aspirational goal is no loss of life, but not at the cost of more lives'<sup>2</sup>

'... we've stopped killing fire fighters at least for now... Our success rates in fire fighter safety are very high. So that has to be an indicator.'<sup>3</sup>

'The first life that you're concerned about is the life of your own staff.'<sup>4</sup>

The 'flip side' of that view is that the death of a fire fighter is always a failure:

'[A fire fighter death] will always scar that operation. It's no longer successful because there's been a fire fighter death.'<sup>5</sup>

'... in terms of measure of success of an operation the fire fighter death brings it right down... when they die something has clearly gone wrong'.<sup>6</sup>

Fire fighter safety is the primary concern of fire brigade chief officers. That obligation, that priority, is also enshrined in the common law of negligence, criminal law and work or occupational health and safety law.

## Common law of negligence

At common law, an employer owes a duty of care to an employee; but there is generally no duty to a stranger and no duty to rescue. The mere fact that someone, such a fire brigade, is aware that

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<sup>1</sup> Human Ethics Protocol 2011/480, 26 September 2011.

<sup>2</sup> Pers. Comm Chief Fire officers survey, details on file with the author

<sup>3</sup> Pers. Comm Chief Fire officers survey, details on file with the author

<sup>4</sup> Pers. Comm Chief Fire officers survey, details on file with the author

<sup>5</sup> Pers. Comm Chief Fire officers survey, details on file with the author

<sup>6</sup> Pers. Comm Chief Fire officers survey, details on file with the author

someone is in danger, needs their assistance and could in fact be assisted does not, of itself, give rise to a legal obligation to assist. As Justices Gummow, Hayne and Heydon, of the Australian High Court said:

‘The co-existence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law.’<sup>7</sup>

The duty of an employer to devise and implement a safe system of work and to take reasonable care of their employee’s safety is beyond question.<sup>8</sup> If there is a duty to those in need of rescue, whether imposed by statute or common law, it will only call for an agency to take reasonable steps to meet that obligation. In deciding what is reasonable, an agency must have regard to

... the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action **and any other conflicting responsibilities which the defendant may have.**<sup>9</sup>

A fire agency would have to consider not only the risk to the person in need but the risk to fire-fighters and the fact that putting fire-fighters in harm’s way to save a victim may conflict with their obligation to take reasonable care for the safety of their employees.

## Criminal law

The common law offence of negligent manslaughter requires proof of ‘gross negligence’ or recklessness that causes or substantially contributes to a death.<sup>10</sup> One can be found guilty for an act that causes death if that action is a substantial contributor, but one can only be liable for failing to act and thereby causing death where there was a positive, legal duty to act.<sup>11</sup> In the context of fire fighter safety directing a fire officer into danger may be seen as an act, so the incident controller that makes that order, if he or she makes a decision that is so far below the standard expected of the reasonable incident controller, if he or she realises that death is likely but proceeds anyway, then he or she could be guilty of manslaughter. If, on the other hand, the incident controller stops, takes time to think of the safety issues and takes steps to minimise the risk to fire fighters, then they cannot be guilty of manslaughter, even if the person awaiting rescue dies on the basis they did not act to cause the death; they omitted to act and they can only be liable for that omission if there was a legal duty not to make that omission.

As noted above, the mere fact that you know someone needs help is not sufficient to give rise to a duty and even if it did, it would not be an obligation to put your own staff to needless risk.

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<sup>7</sup> *Stuart v Kirland-Veenstra* [2009] HCA 15, [88].

<sup>8</sup> *Czatyрко v Edith Cowan University* [2005] HCA 14, [12] (Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ).

<sup>9</sup> *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 (Mason J) (emphasis added).

<sup>10</sup> *Andrews v DPP* [1937] 2 All ER 552.

<sup>11</sup> *Airedale NHS Trust v Bland* [1992] UKHL 5.

Further developments in the criminal law, particularly in the United Kingdom and the Australian Capital Territory reinforce that the paramount obligation of a fire agency must be to fire-fighter safety. The legislatures in these jurisdictions have created an offence of corporate manslaughter.

In the United Kingdom the offence of 'Corporate manslaughter' is committed if the corporation's activities represents a breach of a legal duty and causes death. The police and emergency services are largely exempt from these provisions except where the legal duty is owed to their own staff.<sup>12</sup>

In the Australian Capital Territory, the offence is committed if a corporation or a senior officer recklessly or negligently causes the death of a 'worker'.<sup>13</sup>

Again from a fire brigade perspective it follows that the managers of the brigade could be guilty of corporate manslaughter for negligence that causes the death of an employee or worker, but not for the death of a third person, even if that person is the person they have been called to rescue. This will be discussed in more detail in relation to the case of Alison Hume, below.

## Work health and safety

In the UK, it is an employer's duty to ensure the health, safety and welfare of employees. The business must be conducted to ensure that other people, affected by the business, are not exposed to risks to health or safety.<sup>14</sup> Similar rules apply in Australia<sup>15</sup> where the 'primary duty of care' is owed to workers (including volunteers) and people put at risk from the work, but not people put at risk from other sources, such as a fire.<sup>16</sup>

## Actual prosecutions

Criminal prosecutions over dangerous work practices are not common, but they are not unheard of. In *Workcover v NSW Fire Brigades*<sup>17</sup> the Fire Brigades were prosecuted over the deaths of four factory workers in injury to some fire-fighters during a blaze in a grain silo near Newcastle. The issue in that case was not so much on the ground decisions by incident controllers as the failure of the Brigades to adequately train and equip the fire-fighters to deal with the situation. As a result the defendant was the NSW Fire Brigades rather than an individual fire-fighter but the threat remains.

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<sup>12</sup> *Corporate Homicide and Corporate Manslaughter Act 2007* (UK) ss 1, 5 & 6.

<sup>13</sup> *Crimes Act 1900* (ACT) ss 49C and 49D.

<sup>14</sup> *Health and Safety at Work Act 1974* (UK) ss 2 and 3.

<sup>15</sup> In 2012 the Australian States and Territories were meant to introduce uniform work health and safety laws (see <http://www.safeworkaustralia.gov.au/sites/swa/legislation/modelwhsact/pages/modelwhsact.aspx>). Whilst not all states have passed that legislation, for the sake of simplicity this paper will refer to the Work Health and Safety Act 2011 (NSW) which is based on the model Act and so is consistent across most, if not all jurisdictions.

<sup>16</sup> *Work Health and Safety Act 2011* (NSW) s 19.

<sup>17</sup> [2006] NSWIRComm 356.

In the United States, Curt Varone, US fire lawyer, reports that he is tracking 12 cases 'since 2001 where fire and EMS personnel have been charged criminally with murder or manslaughter for on-duty actions.'<sup>18</sup>

In the United Kingdom a factory fire in 2007 says three incident controllers charged with manslaughter of the deaths of four fire-fighters<sup>19</sup> although all were ultimately acquitted.<sup>20</sup>

It may be thought that authorities are looking to use the law to enforce fire fighter safety but that raises an obvious dilemma. Fire-fighting is intrinsically dangerous and fire-fighters (as indeed are all emergency responders) are asked, if not expected, to put their lives at risk to help others, but the agency for which they work is required to ensure the fire fighters safety and to put that safety ahead of the safety of others. Expecting fire services, and their incident controllers, to guarantee fire-fighter safety would, at its logical extreme, mean not responding fire-fighters to an emergency!

That extreme position is not reasonable nor what is required by law. What is required is a balancing act when the risk to fire-fighters is minimised through training and equipment and the residual risk is balanced against the value of the outcome whether that's extinguishing the fire or rescue the person in need. Striking that balance is a challenge for fire services and for incident controllers, a challenge that is compounded by the threat of legal action.

## The problem in practice

The dilemma of how to balance these competing interests was demonstrated in the case of a mine rescue in Scotland in 2008. The victim in that case fell down a disused mine shaft. The fire and rescue service were called and fire-fighters were willing to make their way down the shaft in order to rescue the victim, but they were stopped by the incident controller who was aware that the fire service had issued an order that their equipment, provided to ensure safe working at heights, was not used in a rescue. Their standard operating procedures required that the Police Mountain Rescue Squad be called for this type of rescue, and this was done. The decision not to allow the fire-fighters to make the

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<sup>18</sup> Curt Varone 'Louisville EMT in Prison for Manslaughter Catches a Break' 3 August 2010, <<http://firelawblog.com/2010/08/louisville-emt-in-prison-for-manslaughter-catches-a-break/>>, Accessed 27 November 2012.

<sup>19</sup> Claire Ellicott, 'Three brigade bosses to be charged with manslaughter over deaths of four firefighters in warehouse blaze' *Mail Online*, 1 March 2011 <<http://www.dailymail.co.uk/news/article-1361454/Fire-brigade-bosses-charged-manslaughter-warehouse-blaze.html>>, Accessed 27 November 2012; Steve Hayes, 'Atherstone fire charges could be dropped' *Lemington Observer* (Online), 28 November 2011 <<http://www.leamingtonobserver.co.uk/2011/12/05/story-Atherstone-fire-charges-could-be-dropped-24000.html>>, Accessed 27 November 2012.

<sup>20</sup> 'Fire officers cleared over Atherstone warehouse deaths' BBC News online 30 May 2012, <<http://www.bbc.co.uk/news/uk-england-coventry-warwickshire-18251348>>, Accessed 27 November 2012; see also Michael Eburn 'UK Incident controllers cleared of manslaughter', *Australian Emergency Law*, 31 May 2012 <<http://emergencylaw.wordpress.com/2012/05/31/uk-incident-controllers-cleared-of-manslaughter/>>, Accessed 27 November 2012.

rescue was confirmed by subsequent senior officers who took on the role of incident controller. Unfortunately the delay in responding the Police Rescue Squad meant that the victim died of injuries that were otherwise survivable.

Before a Fatal Accidents Inquiry, the Sherriff (the equivalent of a coroner) said that one of the incident controllers

... in particular, considered that the rescue operation was "a success". In his view he had adhered to the policies and procedures set out by [the] ... Fire and Rescue Service... There had been no casualties other than the one to whom the Service was called upon to rescue.

The Sherriff did not agree; he said

Unfortunately this was not a successful operation: a woman died who had not only sustained survivable though life threatening injuries, but who had also ultimately suffered and died from acute hypothermia ...<sup>21</sup>

Given what has been identified, above, as the current law, what was the incident controller to do? The fire service was not the cause of Ms Hume's injuries, they did not cause her to fall down the well. The mere fact that she was in danger, that they knew of that danger and could, possibly do something about it, is not enough to give rise to a common law duty to act.<sup>22</sup> The primary obligation was to the fire-fighters<sup>23</sup> and the incident controller could have been charged with manslaughter if a fire-fighter had died, but not for her death.<sup>24</sup> The law was clear despite the Sherriff's criticism of the fire service's conduct and despite criticism that informed, trained and experienced fire fighters should have been allowed to perform the rescue that they believed they were competent to perform.

The problem was, in the mind of the Sherriff, that the incident controller, despite all of the above, did not conduct a proper risk assessment:

'The core consideration of a risk assessment is a question of whether or not the risks to be taken are proportionate to the benefits gained...

It is difficult not to form the view that [the] ... approach to risk assessment was to effectively eliminate risk. I did not think that a process of risk assessment was adopted whereby risks were identified and those risks accommodated to achieve the central purpose of the attendance of Strathclyde Fire and Rescue Service.<sup>25</sup>

The failure to actually think about the risk to fire-fighters and balance that against the benefit to Ms Hume was compounded by the fact that the Fire Service directive on the use of 'safe work at heights' equipment, tied the hands of the Incident Controller.

A subsequent review into the Fire Service and its practices recognised that fire service policies

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<sup>21</sup> Sheriff Desmond J Leslie, *Fatal Accident Inquiry ... into the Death of Allison Hume* [2011] FAI 51.

<sup>22</sup> *Stuart v Kirland-Veenstra* [2009] HCA 15, [88].

<sup>23</sup> *Health and Safety at Work Act 1974* (UK) ss 2 and 3; *Work Health and Safety Act 2011* (NSW) s 19.

<sup>24</sup> *Corporate Homicide and Corporate Manslaughter Act 2007* (UK) ss 1, 5 & 6.

<sup>25</sup> Sheriff Desmond J Leslie, *Fatal Accident Inquiry ... into the Death of Allison Hume* [2011] FAI 51.

'... exist for a reason... incident commanders had a duty to take into account the Service's operational guidance and, in other circumstances, would have been held to account had they not done so.'<sup>26</sup>

## What's to be done?

The picture painted, so far, is gloomy. It suggests that in all cases the lives of people who depend upon the fire or rescue service as their last, best hope for survival, have to be sacrificed for fire fighter safety. That appears to be inconsistent with the job of fire fighting that is, by its very nature, dangerous so safety can never be guaranteed. It is also probably inconsistent with the motivation of people who join a fire and rescue service which probably includes a desire to save people who need saving.

That may be the perception and it may even be the reality if incident controllers, fire services and others think that the law requires strict procedures, and strict adherence to them. If that is the belief then agencies will, to try and comply, impose that sort of strict rule and that did happen in this rescue. There was no option to use the safe work at heights equipment if it was assessed as an acceptable risk; its use was prohibited.

The Sherriff put it this way:

'For a rescue to be achieved, some *imagination, flexibility, and adaptability* [is] necessary. There [is] clearly a balance to be struck between the interests and safety of the rescuers, and those of the casualty they [are] there to rescue ...'<sup>27</sup>

'Imagination, flexibility, and adaptability' is not only necessary it has to be expressly allowed, but many people may believe that the law will not allow this, but that is not the case.

Work Health and Safety legislation does not require that safety is guaranteed, rather it requires agency do what is reasonably practicable. Deciding what is reasonably practicable takes into account

- The probability of harm;
- The degree of harm;
- What's available to mitigate the risk;
- Is the cost of mitigation disproportionate to the risk.<sup>28</sup>

If the cost of waiting for other equipment and specialists, whether that cost is in dollars, time or the risk to the victims life, is disproportionate what is considered a low risk of injury to staff, then it may not be 'reasonably practicable' to wait but may be appropriate to find other ways to resolve the problem, in this example to make the rescue.

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<sup>26</sup> Steven Torrie, *A Report to Scottish Ministers - The 2008 Galston Mine Incident* (Her Majesty's Fire Service Inspectorate, London, 2012).

<sup>27</sup> Sheriff Desmond J Leslie, *Fatal Accident Inquiry ... into the Death of Allison Hume* [2011] FAI 51 (emphasis added and changed to the present tense).

<sup>28</sup> *Work Health and Safety Act 2011* (NSW) s 18.

The common law of negligence, when deciding whether a person's actions were reasonable, considers similar factors. As noted above Justice Mason said that in order to determine what the reasonable response to a recognised risk is, a court must consider:

... the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.<sup>29</sup>

If fire agencies want to allow 'imagination, flexibility, and adaptability' they should avoid rules that are too restrictive. As a chief officer in our interviews said:

'... lawyers are writing the plans, or helping us write the plans. They are so prescriptive as to be almost irrelevant. Every operation has its own unique dynamic. Plans should be, you know, principle based and fairly broad and give a large landscape in which to operate with some principles in which to comply with.

But we're getting so much prescription ... Well, that's great, but then you've got the documents and then you've got the environment which you've got to operate it within. I'm yet to be convinced that the two will ever align...' <sup>30</sup>

The plans, whether for the rescue of an individual or the response to a catastrophic fire have to allow incident controllers flexibility to adjust strategies to suit the environment, rather than expecting the environment to comply with the plan.

As the rescue (or failure) to rescue Ms Hume shows, having strict policies, and sticking to them, does not guarantee success nor does it guarantee that there won't be criticism for trying to comply with the plan:

... it has to be borne steadily in mind that one can always find fault in a setting of such complexity. The temptation to criticise the minutiae of every decision that was taken by a group of individuals or by the individuals themselves is sometimes difficult to resist. <sup>31</sup>

The UK Fire Services Inspectorate said:

... given the broad and ultimately un-definable range of incidents which the Service might be called on to respond to, the best operational policies are ones which set out what can and cannot reasonably be done but which allow for intelligent and informed decision making on the incident ground.<sup>32</sup>

If we want rescuers to exercise 'imagination, flexibility, and adaptability' then the training and doctrine of the organisation has to empower and authorise them to assess outcomes and if necessary depart from policy. Policy, training and law have to be flexible and identify factors to be considered and how to balance different risks, and then empower controllers to make the final judgement. The modern

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<sup>29</sup> *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48.

<sup>30</sup> Pers. Comm Chief Fire officers survey, details on file with the author

<sup>31</sup> Anthony E Schapel *Inquest Into The [Wangarry Fires]* (Coroners Court of South Australia undated) p xiv, [70].

<sup>32</sup> Steven Torrie, *A Report to Scottish Ministers - The 2008 Galston Mine Incident* (Her Majesty's Fire Service Inspectorate, London, 2012).

law, with its focus on what is reasonably practicable and its express direction on the factors to be considered could incorporate such flexibility. A fire service could move away from edicts and stringent standard operating procedures but that would require a significant amount of trust in their staff and a willingness, still, to accept that there will be consequences that the community does not like –people will still be allowed to die when the assessed risk to rescuers exceeds the likely benefit, and fire fighters will die when a rescue is considered ‘worth the risk’ but an unlikely, worst case residual risk occurs. In either case, when reviewing these events, incident controllers deserve to be judged on the basis of the information available at the time the decision was made (including standing orders and service doctrine) and not with the distorting effects of ‘hindsight bias’. Regardless of the decision making process, if someone dies, incident controllers are going to be required to answer questions and justify their decision.

Courts are quite capable of recognising when a person is given discretion and understand that it’s not negligence even if, with the benefit of hindsight, it appears another decision may have led to a more favourable outcome.<sup>33</sup> They are conscious of the need to avoid ‘hindsight bias’ and not seen actual outcomes as if they were inevitable at the time critical decisions were made.<sup>34</sup>

It follows that if an incident controller is directed ‘you must not do x’ then doing x is, on the face of it, negligent and culpable. If, on the other hand, the incident controller is directed to the effect that he or she should consider various actions and in deciding what to do consider that the primary but not sole obligation is to employees and others not already exposed to danger, look to the risks to fire-fighters, the cost in terms of lives lost of the alternatives, what steps can be taken to mitigate the risk, and whether, ultimately the risk is ‘worth’ it. If that is done, and importantly, if the decision process and the issues that have been considered is recorded, then even if there is an poor outcome, the chances are that a court when considering whether or not the actions were ‘reasonable’ or whether the incident controller did all that was ‘reasonably practicable’ to avoid a risk to worker safety would be unwilling to ‘second guess’ the judgment of an experienced, trained incident controller.

## Conclusion

These real situations demonstrate the very real dilemmas facing incident controllers and the problems of applying work health and safety laws in the context of the emergency services. The law requires everyone, including fire fighters, to do what is ‘reasonable’ but that gives little guidance. Many people are in positions where they have to balance competing objectives and considerations but, unlike emergency service incident controllers, they don’t have to do it in a dynamic environment where, whatever they decide, lives are in the balance.

On the current law, and faced with the direction not to use safe working at heights equipment in a rescue but to call the Police Rescue Squad, the Scottish incident controller was correct in ordering the

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<sup>33</sup> *Leishman v Thomas* (1958) 75 WN(NSW) 173, 175.

<sup>34</sup> *Vairy v Wyong Shire* [2005] HCA 62 [124]-[130](Hayne J).

fire-fighters to withdraw from the edge of the mine shaft and to deny them permission to attempt the rescue. The outcome was of course tragic, but the incident controller had little option.

The result does not necessarily, however, require a change in the law but a change in practice. Despite belief to the contrary the law can accommodate flexibility, but it does make employee, and in this case fire fighter safety the paramount consideration.

Incident controllers, even if given flexibility, have to be told that includes the right to make the decision that was made at the place of Ms Hume's rescue, that is at times that the risk to fire fighter safety is too great and that rescue or internal fire fighting will not be done. This will, inevitably, lead to criticism if people die in circumstances that, later, the community, or the press or the Sherriff decided was not so risky after all. Allowing incident controllers to make decisions necessarily requires being prepared to stand by them and their decision even if the outcome is poor.