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FIRE UPDATE

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CANBERRA BUSHFIRES LITIGATION

NSW V WEST [2008] ACT COURT OF APPEAL 14 (5 SEPTEMBER 2008)

The decision of the Australian Capital Territory Court of Appeal in *NSW v West* represents the first of what is likely to be many judgments in the litigation arising from the 2003 Canberra bushfires.

The plaintiff has commenced action in the Australian Capital Territory against, amongst others, the New South Wales Rural Fire Service. The essence of his allegation is that the Rural Fire Service was negligent in failing to take active fire fighting measures to try and extinguish the McIntyre's Hut fire and that as a result the fire spread across the Goodradigbee River and burnt out his property.

The Rural Fire Service sought to have the plaintiff's claim dismissed on the basis that it failed to disclose any cause of action; that is as a matter of law, even if he established the facts alleged in his pleadings, the plaintiff could not win as the law would not hold that the Service owed him a legal duty of care. Connolly J declined to strike out the plaintiff's claim so the Fire Service appealed to the Court of Appeal. By a 2 to1 majority (Chief Justice Higgins and Justice Penfold; Justice Graham dissenting) the Court dismissed the appeal and allowed the legal action to continue.

ABOUT THE AUTHOR

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▲ ABOVE: THE ALPINE FIRES OF JANUARY 2003 MOVED FROM BUSHLAND INTO CANBERRA'S URBAN FRINGE.

WHAT THIS CASE DID AND DID NOT DECIDE

This case did not decide matters of great legal significance. The claim from the Rural Fire Service was that the documents filed by the Plaintiff disclosed no possible grounds to establish legal liability. To win the Rural Fire Service had to establish '… both that the statement of claim "discloses no reasonable cause of action" (*Court Procedures Rues 2006* (ACT), r 425(1)(a)) and that no amendment of the statement of claim could disclose any reasonable cause of action.' ([71]). In finding that the Rural Fire Service had not established those requirements the Court did not say that the Rural Fire Service owed a duty of care to the plaintiff, nor did they decide that there had been negligence by the Rural Fire Service. In effect all the Court decided was that there might be an argument that would establish negligence so the case should be allowed to proceed to a hearing in the normal way.

Both Chief Justice Higgins and Justice Penfold recognised that the difficulty in striking out the claim was that determining whether or not there had been negligence required a detailed consideration of the particular facts and that had not taken place. Although the Plaintiff may face considerable difficulty in his action, Justice Penfold could not say, with certainty, that 'the state of claim, in its current form or in any possibly repleaded form, does not and could not disclose a reasonable cause of action.' [88].

SOME OBSERVATIONS

Because the case did not decide that the Rural Fire Service had been negligent or that there was a duty of care, the comments by the judges on the relevant law and facts are not definitive rulings, but are interesting observations on how the Court views the law and fire-fighting.

Chief Justice Higgins recognised that whether a statutory authority such as the Rural Fire Service owed a duty of care to an individual depended upon a number of factors including the vulnerability of 'persons put at risk' [23]. With respect to the Rural Fire Service he said:

> [26] … a bushfire hazard is clearly a danger to persons and their property and only an organised, trained and equipped service such as the Rural Fire Service could have any prospect of averting danger from a serious bushfire.
>
> [27] The vulnerability of the prospective victim is self-evident, particularly if they are or may be assumed to lack the resources to protect themselves.

The vulnerability of the prospective victim should not be either self-evident or assumed. The focus of fire authorities is to encourage people who live in fire prone areas (and this plaintiff was not living in the Canberra rural/urban interface but on a rural property 'Wyora Station') to take responsibility for their own fire protection. This is evidenced in the well publicised 'Stay and Defend, or Leave Early' policy issued by the Australasian Fire and Emergency Service Authorities Council (Australasian Fire and Emergency Service Authorities Council *Position Paper On Bushfires and Community Safety (2005)* <http://www.afac.com.au/__data/assets/pdf_file/0019/3673/PositionPaperonBushfiresandCommunitySafety.pdf> pp 4-6).

This assertion of the Chief Justice flies in the face of efforts by fire agencies to convince land holders that in a major event they cannot rely on a fire service to come with 'lights and sirens … flying down the road and … [to] take the responsibility away from you'. Rather, people are encouraged 'to understand the nature of where they live and the fact that fire is part of the natural environment, and at some time quite often, if it's not "if", it's "when" you're going to have to experience it and that's a simple fact of life'. (*Gardner v The Northern Territory* [2004] NTCA 14 [58]).

Justice Penfold discussed the case of *Kent v Griffiths* ([2001] QB36), which is an English case involving the liability of the London Ambulance Service which failed to respond in a timely manner to a '999' call for urgent assistance. In *Kent v Griffiths*, the Court distinguished an ambulance service from a fire service and held that an ambulance service could owe a duty of care to an individual that called for assistance, whereas a fire service did not. This was because the role of the fire service is inherently for the public, not the individual, good. The English Court distinguished an 'emergency service' such as a fire brigade, from a health service, such as an ambulance service (and it is interesting to note that in both Victoria and New South Wales the ambulance services come under the responsibility of the Minister for Health not the Minister responsible for emergency services).

Justice Penfold queried whether Australian law would recognise a distinction between the ambulance services and the fire services based on the nature of their activities. He said 'it is possible that distinguishing between the ambulance service and the fire brigade by reference to the services they provide might not find the same favour in Australia'. Accordingly he went on to say:

> [83] By analogy with *Kent v Griffiths*, then, the making of a specific request to a local fire authority might produce a different result in terms of duty of care, from the result in a case where a range of people whose identities and circumstances are unknown to the fire authorities might possibly be affected, in unknown ways, by any of the infinite number of decisions available to those authorities from moment to moment.

It simply cannot be that a person who rings 000 and calls the fire brigade is owed a duty of care where other people who do not make the phone call are not owed a duty of care. That proposition, if true, would mean that where a house caught on fire the fire brigade would be duty bound to attempt to extinguish the fire in that house, even if it meant allowing other properties to burn, on the basis that they have been called by the home owner, but not the perhaps unidentified owner of the next door property. Where those neighbouring assets are community assets (eg a TAFE college, power station, school, etc) the people who may be affected by its destruction may be unknown and they may be affected in unknown ways, but it would be perverse to hold that the brigade could let those assets burn in order to direct their attentions to the home of the person that called them. The person who rings a fire brigade notifies them of the fire but the presence of other assets near the fire may mean that the service is better used protecting those assets and allowing the fire to burn out in situ, and that would be inconsistent with a finding of a duty owed to the property owner that rang the brigade.

The fire brigades are given extensive powers to fight fires including the power to make fire breaks, knock down walls and destroy property (*Rural Fires Act 1987* (NSW) s 25 see also *Malverer v Spinke* (1538) 73 ER 79). It would be inconsistent to hold both that the fire brigade owed a duty of care to the person who rang them and reported the fire and yet they are entitled to damage that very property to extinguish the fire. In the circumstances the distinction between ambulance and other emergency services can be justified in principle. It remains to be seen how the trial court and ultimately the appellate courts will determine this matter in the final litigation.

Both judges discussed the effect of section 128 of the *Rural Fires Act 1987*. This is the 'Protection from liability' provision that provides that no one, including a member of the Rural Fire Service, the Minister, the Crown or the Commissioner of the Service is to be personally liable for any action undertaken 'in good faith for the purpose of executing any provision … of this or any other Act…'. Neither judge was prepared to hold that this section meant that the Plaintiff's claim was doomed to failure. It would be open to the plaintiff to argue that the actions complained of were either not in good faith or where not done for the purpose of executing the Act ([96] – [98]).

Chief Justice Higgins pointed out that the Courts have taken a very narrow view of these provisions and 'such provisions are to be given that interpretation which least deprives the individual of lawful remedies otherwise available to him or her' ([62]), and further the scope and application of the immunity 'depends on the facts and circumstances' which need to be proved at the full hearing of the matter ([65]). Whilst s 128 may provide a bar to the plaintiff's action, the Court could not say, at this preliminary stage, that this must be the case and so that did not justify striking out the claim.

What this observation does is remind both legal and fire fighting practitioners that clauses such as s 128 (and there are similar clauses in most legislation dealing with the emergency services) does not guarantee that the service or an individual will not be sued. The question of when and how the immunity applies is a matter to be tested in the courts with the outcome depending on the particular facts.

Justice Graham came to a different conclusion and would have struck out the statement of claim. He reviewed the law and the legislative history behind the *Rural Fires Act 1987* (NSW) and found that there were no facts alleged that could give rise to a duty of care to the plaintiff. He found that '… the scope and purpose of the Rural Fires Act, including the Parliament's regard for the volunteer spirit and culture of the volunteer bush fire fighting movement … militate against the finding of a duty of care' ([241]). His Honour considered, amongst other things, that:

- the alleged negligence arose not from actions that the fire service had taken that increased the risk to the landowner but were 'all matters of inaction and/or decisions taken on the question of whether or not to take action ([239]),
- there was a considerable delay between the ignition of the fire, the alleged negligence in not attacking it, and the destruction of the plaintiff's property by fire ([245(a)]),
- there was only 'limited control capable of being exercised by instrumentalities of the State of New South Wales over the risk of loss that eventuated' ({245(c)], and
- the competing demands upon the Rural Fire Service ([245(e)].

These facts supported his conclusion that there was no, and could not be any, duty owed.

CONCLUSION

This decision has not determined that the Rural Fire Service owed a duty of care to the plaintiff, that there was negligence or that any default by the Rural Fire Service caused the plaintiff's damage. All this case determined was that those arguments were not clearly fatally flawed. It will now be up to the plaintiff to bring his evidence and make his arguments before a trial court. It seems inevitable however, regardless of the result at trial, that this matter is far from resolved. It is likely there will be an appeal or appeals, perhaps all the way to the High Court of Australia.

What the decision does do is remind us how complex the law is and there is no way of knowing, in advance, whether actions or decisions will or will not be considered 'negligent' when reviewed by a court many months, or in this case years, after the events in question. The case also shows, once again, that attempts by legislatures to make clear that actions should not be brought against emergency services are not effective (see also Eburn, M *Emergency Law: Rights, liabilities and duties of emergency workers and volunteers* (2nd ed, 2005), 138-143). It has been argued elsewhere (Eburn M, 'Litigation for failure to warn of natural hazards and community resilience' (2008) 23 *Australian Journal of Emergency Management* 9-13) that litigation following an event such as the Canberra bushfires poses a threat to community recovery in part because of its inherent retrospective focus. This case and the litigation that will inevitably follow again demonstrate that reality.

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