

The emerging legal issue of failure to warn

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ABSTRACT

This paper will review the legal obligation upon the emergency services to warn the community of impending natural disasters. The essential legal elements in 'failure to warn' cases will be identified and, with reference to findings from post event inquiries (including the *2009 Victorian Bushfires Royal Commission*), post event litigation (including litigation arising from the 2003 Canberra fires) and recent amendments to legislation (including the *Fire Services Commissioner 2010 (Vic)*) the implications for the emergency services and their media advisers will be discussed. This paper will show that agencies must, in future, put as much effort into 'putting out the information' as they do in 'putting out the fire'! ^R

Failure to warn cases

Failure to warn cases are not new, though they may be new in the context of the emergency services. The medical profession have faced litigation over failure to issue appropriate warnings for many years. The most significant medical case in this area is the decision of the High Court, in *Rogers v Whitaker*.¹ This case involved an ophthalmic surgeon who offered to perform surgery on Mrs Whitaker's eye but failed to warn her of a 1:14000 risk that she would end up permanently blind. That is what happened and she sued, not for negligent performance of the surgery as there was no doubt that the Doctor 'conducted the operation with the required skill and care', but for his failure to warn her of the risk of the adverse outcome.

Relevance to the emergency services

The relevance to the emergency services may not be readily apparent. The emergency services, we may think, are not in the business of giving people advice about options and then allowing them to make decisions; but that is not obviously true. The 'stay and go' policy for fires was predicated on the basis that people should make decisions based on an assessment of their own ability and the level of preparation around their property. The choice of whether to 'stay' or 'go' information about a particular day and a particular fire. People may not have much time to make a decision, but they do still need to make a decision, and they need to have information upon which to base that decision.

What can be inferred from the earlier cases is that for a plaintiff to sue, they would need to:

1. Establish that there was a duty to warn;
2. That there was an unreasonable failure to issue a warning or to issue a timely or meaningful warning; and
3. It would have made a difference to them if the warning had been issued. They would have acted differently to avoid the harm that falls upon them either by evacuating or staying to defend their property.²

The duty to warn

The 2009 Victorian Bushfires Royal Commission said:

The evidence before the Commission has demonstrated that the community **depends on** (and **has come to expect**) detailed and high-quality information prior to, during and after bushfires. In addition, the community is **entitled** to expect to receive timely and accurate bushfire warnings whenever possible, based on the intelligence available to the control agencies ...³

1. [1992] 175 CLR 479.

2. *Rogers v Whitaker* (1992) 175 CLR 479; *Chappel v Hart* (1998) 195 CLR 232; *Rosenburg v Percival* (2001) 205 CLR 434.

3. Teague, B., McLeod, R. and Pascoe S., *2009 Victorian Bushfires Royal Commission: Interim Report* (Government of Victoria, Melbourne, 2009), [4.2].



Even though there had been extensive reports on the need to issue warnings, on the 7th February 2009 there was

... a void in the responsibility for the issuing of bushfire warnings in Victoria ... no person or authority in Victoria [was] charged with a legal or formal procedural responsibility for issuing warnings to the community concerning the risk of bushfire.⁴

The Royal Commission concluded that it would be '... desirable to specify in legislation, a person who must shoulder direct responsibility for ensuring appropriate warnings during bushfire incidents.'⁵

Today, the Fire Services Commissioner 'must issue warnings and provide information to the community in relation to fires in Victoria for the purposes of protecting life and property.'⁶ The Commissioner may develop and issue 'guidelines, procedures or operating protocols' regarding the development and issue of community warning.⁷ The Commissioner may delegate his or her obligation to issue warnings to the Chief Officer of the Country Fire Authority, the Chief Officer of the Metropolitan Fire and Emergency Services, or to the Secretary or Chief Fire Officer of the Department of Sustainability and Environment.⁸ These officers are then, duty bound, to issue relevant warnings.⁹

Breach of Statutory Duty

The tort of breach of statutory duty is separate from (albeit similar to) the tort of negligence. A person injured, for example by a lack of warning, may have a right to seek a private remedy, that is money damages, where the Commissioner fails to perform their statutory duty. Whether or not a duty imposed by statute allows an aggrieved person to seek a private remedy depends on the intention of the Parliament as expressed in the Act. Rarely will an Act say that failure to perform the statutory duty is, or is not, intended to give a private right to sue; that intention must be inferred from the entire Act. Crennan and Keiffel JJ suggested that it may be appropriate to bring an action for breach of statutory duty where:

... a statute contains special measures directed towards a class of persons, where its evident purpose is their protection and when it may be inferred that the legislature expects that the powers will be used in particular circumstances...¹⁰

Brennan CJ after rejecting various competing theories to explain private liability for failure to perform a statutory duty said:

Where the power is a power to control "conduct or activities which may foreseeably give rise to a risk of harm to an individual" ...and the power is conferred for the purpose of avoiding such a risk, the awarding of compensation for loss caused by a failure to exercise the power when there is a duty to do so is in accordance with the policy of the statute.

... No duty breach of which sounds in damages can be imposed when the power is intended to be exercised for the benefit of the public generally and not for the protection of the person or property of members of a particular class. ...¹¹

The duty to sound a warning is not a duty to 'control' nor is it a duty to do, or not do, something that directly exposes another to harm; it is not a duty to control work practices to ensure worker safety or to exercise control over a dangerous area. It is not a duty to take steps to prevent the harm and this may suggest that it is not the type of duty that will give rise to a private right to sue.

On the other hand, the duty is expressed as a positive duty and was intended to overcome identified deficiencies in Victoria's emergency management arrangements; the various fire authorities had powers and obligations to control the fires but they were not required, or directed to issue warnings. The obligation is clearly directed at a particular risk and provides for 'special measures' but is debatable whether it is directed to a particular class of people (perhaps those at risk of fire) or whether the 'community' is equivalent to 'the public generally'.

Providing a private remedy is not inconsistent with the legislation. Many Acts relating to fire brigades provide a statutory immunity such that members of the brigade or its commissioner or chief officer are not liable for acts done in good faith in the purported performance of their duties.¹² There is no similar clause in the *Fire Services Commissioner Act*. There is provision to ensure that the Fire Commissioner is not personally liable for any act or omission done in the good faith performance of his or her duties, but any liability that would, otherwise, fall on the Commissioner is to be met by the State of Victoria.¹³ That provision does not deny an aggrieved plaintiff the right to seek compensation

4. Ibid, [9.151].

5. Ibid, [9.155]. In their interim report, the Commissioners recommended that this obligation should fall to the Chief Officer of the CFA but after their final report, the responsibility was given to the newly appointed Fire Services Commissioner.

6. *Fire Services Commissioner Act 2010* (Vic) s 24.

7. The Commissioner has issued Strategic Control Priorities which indicate that the 'new direction' for fire management will 'focus on primacy of life and the issuing of community information and community warnings'; Office of the Fire Services Commissioner, *Strategic Priorities*, 2 February 2011, <http://www.firecommissioner.vic.gov.au/index.php?option=com_content&view=article&id=76&catid=34&Itemid=56>, (accessed 1 March 2011).

8. *Fire Services Commissioner Act 2010* (Vic) s 26.

9. *Country Fire Authority Act 1958* (Vic) s 50B; *Metropolitan Fire Brigades Act 1958* (Vic) s 32AA; *Forests Act 1958* (Vic) s 62AA.

10. *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, [146].

11. *Pyrennes Shire Council v Day* (1998) 192 CLR 330, [25].

12. See for example, *Rural Fires Act 1997* (NSW) s 127.

13. *Fire Services Commissioner Act 2010* (Vic) s 33.



or alter the law that would be applied in determining whether or not liability has been established.

It follows that although the Fire Services Commissioner is under a statutory duty to issue warnings, it remains to be seen whether that duty can be enforced by a private action for damages in the event that someone suffers a loss that they say they would not suffer had adequate warnings been issued.

Common law – negligence

Negligence is a similar, but separate tort. In negligence the duty that gives rise to an action for damages is imposed by the common law not by statute. Evidence of a failure to comply with a statutory duty may be evidence of negligence as it may be evidence of a want of proper care as the reasonable person would comply with their statutory obligations, but that failure is only one of the elements in a negligence claim.

The courts have been unable to provide a simple or consistent test on when a statutory authority such as the Country Fire Authority or the Fire Services Commissioner and their equivalents in each state and territory, will owe a common law duty of care. All the facts and circumstances must be considered in light of relevant, salient features. The salient features include, but are not limited to

- (a) the foreseeability of harm;
- (b) the nature of the harm alleged;
- (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
- (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- (e) the degree of reliance by the plaintiff upon the defendant;
- (f) any assumption of responsibility by the defendant;
- (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
- (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
- (i) the nature of the activity undertaken by the defendant;
- (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
- (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
- (l) any potential indeterminacy of liability;

- (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
- (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
- (o) the existence of conflicting duties arising from other principles of law or statute;
- (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
- (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.¹⁴

How those features will apply will depend on the facts in each case. It may be clear that a vulnerable community is at imminent risk of catastrophic injury in circumstances where a fire brigade is nearby and can warn the community without undue risk to themselves and where it is clear that a warning will be, or would have been effective in allowing the at risk population to take immediate and effective action to protect themselves. Alternatively there may be a situation where the community is able to determine the risk themselves from other sources of information so an official warning may not be essential or effective, where the danger is vague and where there is nothing further that could be done in any event. In between those extremes any number of factual situations may be envisaged that may or may not give rise to a common law duty of care.

With, however, a long history of inquiries¹⁵ identifying the need to warn communities and the fact that the issue keeps recurring, the Court may well hold that a 'reasonable fire agency' would have in place sufficient procedures to issue timely warnings, and that failure to do so constitutes negligence.

Would a warning have made a difference?

Where there is a duty to warn, whether imposed by statute or the common law, the plaintiffs would have to show that a warning would have made a difference. That is they would have to show that they both could, and would, have done something differently had they received the warning and that different thing would have been effective to avoid their loss or damage. The simplest way to do that is for the plaintiff to give evidence as to what they would have done if they had been warned.

Courts are, naturally, sceptical of this self serving testimony;¹⁶ the testimony is wise with hindsight and confuses the question of what a plaintiff might have done if warned of a risk compared with what they now think they would have done given the risk has materialised. There will be significant difference between a person's

14. *Caltex Refineries (Queensland) Pty Limited v Stavar* [2009] NSWCA 258, [103] (Allsop P).

15. Going back at least to the 1983 Ash Wednesday fires; see A. R Ellis, SM., *In the matter of the Inquests touching on the deaths of FE Archer, AS Carter, AR Farquer, J Fraser, SJ Henderson, NF Thompson, JA Farquer* (Victoria Coroners Court, Melbourne, 29 September 1983), 17a-18a; 22a-23a.

16. *Rosenburg v Percival* (2001) 205 CLR 434.



reaction to be warned that there is a 1:14000 chance of a bad outcome compared to being warned 'you will or may go blind' but in failure to warn litigation plaintiffs are likely to argue 'I would not have done what I did if I had been warned that 'this' would happen' but that is not the correct issue; the issue is what would they have done if warned that there was a risk, perhaps a very low risk, that a bad outcome might occur.

In response, the legislature has gone so far as to restrict the admissibility of this type of evidence and require that the Court determine what the plaintiff would have done taking into account 'all relevant circumstances'.¹⁷

That approach was demonstrated in *Neal v NSW Ambulance*. The plaintiff was intoxicated and had been assaulted suffering head injuries. He refused offers of assistance that were made by Ambulance paramedics but claimed that the paramedics should have advised the police that he needed to be assessed by a medical practitioner. If they had done that, he alleged, the police would have taken him into protective custody as an intoxicated person and then taken him to hospital where he would have been treated by doctors and not suffered permanent injuries. The court rejected that claim on the basis that:

The objective circumstances therefore provide no assistance to the plaintiff. ... The only available inference is that he would not willingly have gone to hospital and submitted to medical assessment, whether taken by the police (which was itself improbable) or in an ambulance. It follows that he failed to establish, affirmatively, that he would have accepted medical assessment and treatment.¹⁸

A plaintiff in a failure to warn case will need to bring evidence to support an assertion that they would have acted differently if warned of a fire. A person who has perhaps taken no action to prepare their property or otherwise act on previous fire danger warnings will have more difficulty than a person who can demonstrate that they have been attentive to, and acted upon, previous warnings.

As an aside it is interesting to observe that in the inquiry into the 2003 Canberra fires,¹⁹ the Coroner devoted a chapter of her report to the issue of warnings and 'Would people have acted differently if they had been warned?'²⁰ It was the coroners duty to determine the 'manner and cause' of each death, and the 'cause and

origin'²² of each fire so it might be thought she went further than was required with this part of her report.²³ Regardless of her motivation or the appropriateness of this part of her inquest and inquiry, that evidence would certainly assist in the subsequent civil litigation that is still before the ACT Supreme Court.

Conclusion

The Black Saturday Royal Commission report and the response to the recent fires in Perth²⁴ demonstrate that even if people are willing to forgive or accept that fires cannot be controlled they **expect** immediate and effective warnings from their emergency services. Whether they are, at law, **entitled** to those warnings remains to be seen. In Victoria at least, the legal right to demand warnings will be affected by the statute duties imposed by the *Fire Services Commissioner Act 2010* (Vic). Whether or not they will lead to liability in the event of a failure to warn remains to be seen and will depend on the particular facts and circumstances.

In an earlier paper I argued:

... that where a naturally occurring event impacts upon a community and people want to find someone to blame an easier and attractive target for the litigation will be those charged with issuing a 'warning' to the community rather than those charged with managing the response.²⁵

That appears to be born out by the facts. Litigation from a number of fire events ranging from 2001 to the litigation from the 2003 Canberra fires and now the Black Saturday fires is focussing on the duty to warn. That experience and the findings of the 2009 Victorian Bushfires Royal Commission show that warning to communities remains the emergency services' 'Achilles heel' both in practice and in terms of legal accountability.

About the author

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17. See, for example, *Civil Liability Act 2002* (NSW) s 5D(3)

18. *Neal v Ambulance Service of NSW* [2008] NSWCA 346, [49]

19. Doogan, M., *The Canberra Firestorm - Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003*: (ACT Coroners Court, Canberra, 2006), Volume II, Chapter 7, 43-187.

20. Ibid, 147.

21. *Coroners Act 1997* (ACT) s 13.

22. *Coroners Act 1997* (ACT) s 18.

23. But see *The Queen v Coroner Maria Doogan; Ex Parte Australian Capital Territory* [2005] ACTSC 74 and *Peter Lucas-Smith v Coroner's Court of the Australian Capital Territory* [2009] ACTSC 40 where challenges to the inquiry and assertions that the Coroner was exceeding her jurisdiction were largely dismissed.

24. Santow S., 'Bushfire victims 'didn't receive warnings''. ABC News, 8 February 2011 <<http://www.abc.net.au/news/stories/2011/02/08/3132859.htm>> accessed 11 March 2011; Prior N., and Thomas B. 'Phone alerts were delayed two hours' *thewest.com.au*, 10 February 2011 <<http://au.news.yahoo.com/thewest/a/-/breaking/8808297/phone-alerts-were-delayed-two-hours/>> accessed 11 March 2011; Hopewell L., 'WA defends SMS emergency system' *ZDNet*, 11 February 2011 <WA defends SMS emergency system> accessed 11 March 2011.

25. Eburn, M 'Litigation for failure to warn of natural hazards and community resilience' [2008] 23 *Australian Journal of Emergency Management* 9-13, 10.

