Fire Brigades before the Courts

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Fire agencies have been under intense public scrutiny following several severe fire events over the last decade or two. The 2003 Canberra fires and the 2009 Victorian fires are currently before judicial officers with civil proceedings in the ACT Supreme Court and the Black Saturday Royal Commission winding up its public hearings before the release of its final report in July.

My brief, when I was invited to speak, was to discuss topics that I addressed at last year's AFAC conference, update on the ACT litigation and to address issues of warning and hazard reduction. They are big topics but I'll try to address them with an overall picture of where I see the law and fire services.

Courts and the law

Courts have three different, but related roles. The first is to identify the facts; what happened. The second is to apply the law to those facts to come to a conclusion on the legal issue, that is whether the accused is guilty of the offence charged or the defendant is liable to pay compensation. The third is to determine what the law is where that is unclear, ambiguous or the facts raise new and novel issues.

Royal Commissions and coronial inquests are court like proceedings, they are held in court rooms, a coroner is also a magistrate and a Royal Commissioner is often a retired judge (as is the Chair of the Victorian Commission) but these inquiries do not determine any legal issues. A Royal Commission or a Coroner cannot find anyone guilty of a criminal offence, cannot award compensation and cannot make a definitive ruling on the law. These tribunals are intended to be investigative or fact finding tribunals that, unlike adversarial court proceedings, can explore a whole range of issues to identify 'lessons learned' from an event.

In the context of our discussion we can distinguish the roles of the courts, as follows:

Type of court or tribunal	**Rulings on facts and law.**
Royal Commissions and coronial inquest	Determine the facts; can make no binding legal decisions.
Trial courts, that is a magistrate, a single judge or judge and jury hearing a case for the first time	Hears the evidence, makes a ruling on what the facts are and makes a binding legal determination on what the consequences of the law, applied to the facts as determined by the court.
Appeal court – Court of Appeal, Court of Criminal Appeal or High Court of Australia. A panel of judges.	Reviews the decision of the trial judge on the law. Determines whether the trial judge accurately identified the law and applied the law to the facts as established by the trial court. They do not conduct a further investigation into the facts.

There is room for a divergence of opinion on the importance of these tribunals. From a lawyer's point of view it is the appeal court decision that is most important. The appellate courts set the precedent that identifies for the lower courts (and in theory, the community) what the relevant law is. An appeal court can settle a legal issue once and for all so that further litigation is avoided as we all know what the law is, and adjust our behaviour accordingly.

From the community's point of view, and in our context, from your point of view, the decisions of the appeal courts probably appear remote and irrelevant. An appeal is conducted in the very sombre, refined, cool atmosphere of the court room. There are usually no witnesses, no examination in chief or cross examination, no lawyers jumping to their feet to object. It is an intellectual debate between the lawyers and the three, five or seven judges on what the state of the law is (or should be) and how that relates to the facts established in the court below. An appeal decision may get a brief mention in the paper but its effects are not well understood, the reasoning (which may run to hundreds of pages) will not be explored or explained in detail. Worst of all, the decision may be handed down five or more years after the event so the effect on practice and behaviour may be somewhat muted.

The litigation arising from the Canberra bushfires is only now before the Court, seven years after the fires occurred. Assuming the court delivers a verdict there is likely to be an appeal. If the matter goes to the High Court of Australia (which I would think is likely) then the litigation won't be resolved for another few years. The lessons learned, the statement of expectations will by then, be so out of date as to be meaningless in terms of practical application.

If we look at some recent cases involving the emergency services we can see the problem. There is a great delay in the court setting out what it could or should have expected from the defendants, and in many cases there is no clear opinion as to the legal result.

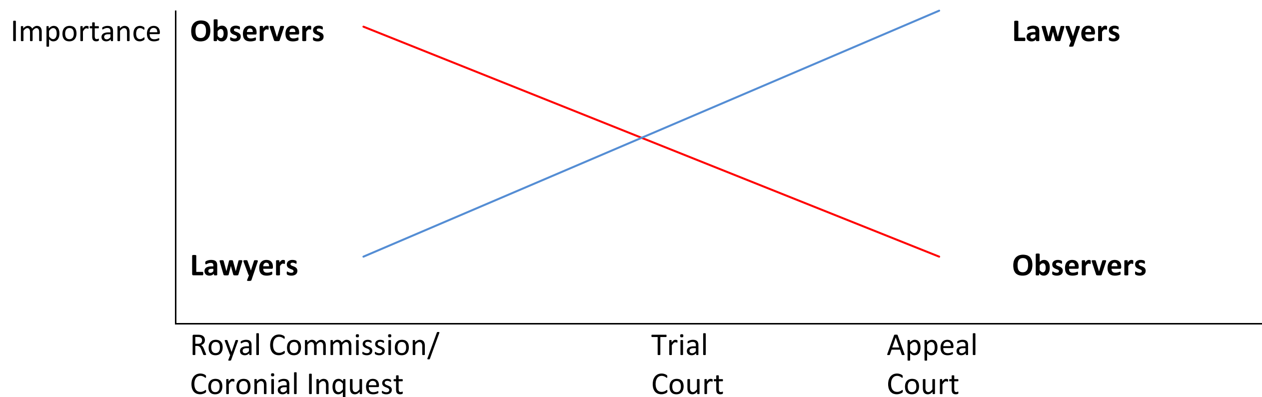
Case	**Incident occurs**	**Date of final judgment**	**Approximate time to finalisation**
Nelligan v Mickan	8 December 1993	13 November 1988 (SA Court of Appeal)	5 years
Keller v MAS and Victoria	21 September 1994	12 June 2002 (Vic Supreme Court)	8 years
Gardner v NT	10 September 1995	8 September 2005 (High Court – Special Leave refused)	10 years
Neal v Ambulance Service of NSW	27 July 2001	10 December 2008 (NSW Court of Appeal)	7 years
NSW v Tyszyk	13 November 2004	1 May 2009 (High Court – Special Leave refused)	5 years
Stuart v Kirkland-Veenstra	22 August 1999	22 April 2009 (High Court)	10 years
West v NSW	18 January 2003	(High Court – Special Leave refused)	7 years ***and still ongoing in the ACT Supreme Court***

From the community's point of view the importance of the proceedings is probably the inverse. The Royal Commission or the inquest is the most important. It happens soon after the event, the rules of evidence do not apply and there are no parties to the litigation. That means you may be called to give evidence and your decisions may be subject to severe criticism but,

because this is not a trial, you are not represented by a lawyer, you may be caught by surprise by the questions or issues raised and because the issue is still raw in the community, your name and your evidence is widely reported. Look at the current Royal Commission where the entire event is being broadcast on the web and daily transcripts are available! As a firefighter you would be right to feel that giving evidence before the Royal Commission is much more personal even if it does not resolve legal rights.

A trial court (such as the ACT Supreme Court) can actually determine legal issues. It will determine if the State (on behalf of the RFS) has to pay damages and in extreme cases, whether or not someone will go to gaol, so the consequences can be much more severe. In a trial court however there are parties that are represented by lawyers to protect their interests. The Court has a very specific question to be answered that depends on and is limited by the cause of action; that is the legal issue before the court. It is not a wide ranging enquiry like an inquest or Royal Commission so will be much more focussed. Photographic media are still prohibited in Australian Courts so video footage and transcripts will not be online. The parties have to know what the issues are before they go to court so a witness or defendant will know, before they go into court, the areas in issue and the decisions and actions that are subject to scrutiny.

The way lawyers and other observers might see these matters may be represented by the diagram, below.



Volunteers are concerned about whether they will be 'liable' or 'sued' for their actions. My answer is usually 'no you will not be liable; it is the agency that will wear the liability for their actions, even if legally negligent'. What I mean is that they will not have to pay damages; I suspect what they mean is will they be called before the Royal Commission, cross examined, criticised, or just made to spend days in a court room several years after the event thinking 'I could have avoided this if I just didn't turn out that day'. If that is what they mean, the answer, regrettably is 'yes'. I also suspect that is more important to them, the idea of paying out money

is probably remote but it's the personal issue of having one's name in the local or national papers (on online forever) and the emotional angst that is more of an immediate concern.

The fire brigades before the courts

We can now look at some of the issues that have taken up the minds of the courts in recent times and consider what implications they may have for fire brigade practice in the future. No doubt the two big events are the litigation in the ACT arising from the 2003 fires that burned in New South Wales and the ACT and moved into urban Canberra on 18 January and the 2009 Victorian Bushfires Royal Commission that completed taking evidence last week and is due to release its final report at the end of July.

The 2009 Victorian Bushfires Royal Commission

I can make some comments about the Commission's findings and counsel's closing statements but not about witness testimony ; just because a witness, or counsel, raises an issue or complaint it does not meant the Commission will accept that or make suggested recommendations.[1] It is the Commissioners' recommendations that are important. Even so, it should be remembered that the Commission cannot make binding rulings. The Commission may make recommendations and criticisms, but that is all they are; whether governments or fire agencies accept them is up to them and already the Brumby government is reserving its rights to reject some or all of the Commission's recommendations.[2] It is clear however that the fire services, in particular the CFA under Chief Officer Russell Rees has come under particular scrutiny as have issues of Victoria's fire management policy.

The first thing that I would observe about the Commission relates the Chairman's opening remarks. Commissioner Teague, in opening the Royal Commission asked:

> What can be done to ensure that so many lives are not lost, that so much devastation is not caused, in such bushfires in the future?[3]

More people died in the 2009 fires than in the 2003 fires, the Ash Wednesday fires of 1983 or the 1939 Victorian fires but that does not mean the response to the 2009 fires was less efficient, less well organised or that the preparations were less suitable or adequate. It is impossible to know how many more people would have died were it not for the actions of the Country Fire Service on the day, or the preparations that were put in place before 7 February.

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1 'Leak presents scathing review of bushfire policy' *ABC Online*, 23 May 2010 <http://www.abc.net.au/news/stories/2010/05/23/2906919.htm> at 23 May 2010.

2 Jane Cowan, 'Stay or go policy unlikely to be overturned' *ABC Online*, 17 May 2010, <<http://www.abc.net.au/news/stories/2010/05/17/2901597.htm>> at 19 May 2010.

3 Bernard Teague, *Chairman Opening Remarks - 20 April 2009* <http://www.royalcommission.vic.gov.au/getdoc/ee8eec7c-da6c-4c97-9ec8-3553d705f102/Opening-Remarks---Chairman> at 14 May 2010, 1.

Assuming the recommendations of the current Royal Commission are acted upon, it will be impossible to know, after the next major fire, how many lives were saved because of those recommendations or how many other lives may have been saved if other recommendations had been made or acted upon.

Julian Burnside QC, counsel appearing for Mr Rees made this point in his closing submissions when he said:

> "… what I think has not been done is to ask, "How many lives were saved?" The fact is that on a catastrophic day of fires almost all the fires were managed. A couple escaped, the consequences were disastrous, but to point to the number who died is to look at only half the equation and to judge the performance of Mr Rees or anyone else by reference to the number who died is to ignore the larger part of the picture." [4]

Fire management requires a clear policy objective; that is an answer to the question "What is it that we are trying to achieve?" An objective 'to ensure that so many lives are not lost, that so much devastation is not caused, in such bushfires in the future'[5] is neither specific or measurable.

Let me now turn to three recommendations that were made in the Commission's Interim Report; these are imposing a duty on the Chief Officer to issue community warnings, the nomination of community safer places and the recommendation that the CFA should give personal advice on whether or not a property is defendable. These recommendations have been put into law by amendments to the Victorian legislation.[6]

Warnings

The issue of warnings to the community has arisen in respect to both the 2003 and 2009 fires. I will return to the issue of warnings when we look at the final days of the Commission's hearings.

Neighbourhood safer places

Neighbourhood safer places are designated by local councils[7] after an assessment by the CFA[8] using published CFA Guidelines.[9] The council is responsible for conducting, with the CFA, an annual inspection of,[10] and maintaining, designated neighbourhood safer places.[11]

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4 2009 Victorian Bushfires Royal Commission, *Transcript of Proceedings 27 May 2010*, 20695.

5 Bernard Teague, *Chairman Opening Remarks - 20 April 2009* <http://www.royalcommission.vic.gov.au/getdoc/ee8eec7c-da6c-4c97-9ec8-3553d705f102/Opening-Remarks---Chairman> at 14 May 2010, 1.

6 *Country Fire Authority Act 1958* (Vic) ss 50E – 50P.

7 *Country Fire Authority Act 1958* (Vic) s 50G.

8 *Country Fire Authority Act 1958* (Vic) s 50G(4) – (6).

9 *Country Fire Authority Act 1958* (Vic) s 50E.

10 *Country Fire Authority Act 1958* (Vic) s 50J.

The problem with designated neighbourhood safer places is that people will expect them to be safe or safer. If we consider the issues that lead to liability, in particular vulnerability and control, the 'safer places' will bring together the most vulnerable people, perhaps people for whom their plan A or B has failed and they have moved to Plan C, sheltering in a designated neighbourhood safer place. Even if there is no legal duty of care to protect people's homes it will be a different case about the need to divert resources to protect these safer places and that may impact upon decisions about how and where to fight the fire.

One can see the issues that will arise if and when people perish in a neighbourhood safer place. There will be the possibility of legal fights between the CFA and Councils as to whether the CFA guidelines were appropriate and appropriately used, whether the CFA devoted sufficient fire fighting resources to protect the safer place and whether council has maintained the site. How will these sites be maintained five or ten years after Black Saturday if no significant fire event occurs in that time?

Individual assessment of homes

The individual assessment of homes was also recommended by the Commission.[12] The CFA Act now says:

> The Chief Officer may provide advice to the community or to any person on ways to improve the defendability of a home or other building in the event of a bushfire.[13]

The evidence before the Commission was that the policy of the CFA was that members would not give specific advice. This was based on the policy view that the decision to stay or go was always a matter for the landowner and that the assessment was necessarily complex depending on:

> A range of factors... These include house design, construction and maintenance, vegetation management, fie intensity. These factor are very complex and may vary significantly through the fire season or even on any given day...[14]

To these factors can be added the personal factors; a house may be defendable by a person who is fit, in good health on the day. If a landholder is told that his or her property is defendable but it is lost, because it turns out that they were not as capable as either he, or she, or the CFA assessor assumed they would be, or they were sick, or the fire did not behave as

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11 *Country Fire Authority Act 1958* (Vic) s 50I.

12 Bernard Teague, Ron McLeod and Susan Pascoe, *2009 Victorian Bushfires Royal Commission: Interim Report* (Government of Victoria, Melbourne, 2009), 203 (Recommendation 7.2).

13 *Country Fire Authority Act 1958* (Vic) s 50P.

14 Bernard Teague, Ron McLeod and Susan Pascoe, *2009 Victorian Bushfires Royal Commission: Interim Report* (Government of Victoria, Melbourne, 2009), 199 ([7.81]).

expected, or their pump failed, there will again be debate, perhaps legal debate, as to what was said and done and how the assessment was made.

I recently purchased a house and I, like everyone, received the necessary pre-purchase inspections; a report on the building and whether there is any evidence of a pest infestation. In our case the report was 29 pages long. On 18 of those 29 pages (62%) there were explanatory notes, disclaimers or warnings about the limitations of the report. Reports on the defendability of homes will surely require something similar; disclaimers to indicate that the inspector can only make a visual inspection of the property, that the assessment is based on the property at that time and date and if things change then the assessment may be different. Whether a home is defendable must depend on who is at home and their capacity on the day. The assessor cannot know who will be at home to defend the property on a given fire day, that given the usual experience of fires in that region it is defendable but as Black Saturday shows there may be extreme days and perhaps there will be a fire that is beyond anything previously experienced.

Worse will be the debates about who said what to whom. The homeowner (whose home has been lost) will say 'but I followed the CFA officers' advice' and the CFA officer, who may have inspected hundreds of homes will have to try to recall what was said and in what context. Courts will have to decide was there a misunderstanding or miscommunication and how long has passed since the advice was given.

In medical negligence cases the courts have preferred the testimony of patient/witnesses who are being asked to recall one of the few conversations that they had with a doctor about their own condition. Naturally they can be expected to have a better recollection of the conversation than the doctor who may have had many similar conversations, with different patients and who is not as intimately concerned with the outcome as the patient is. Similar issues will arise with fire assessors who would be well advised to keep detailed notes of every conversation that they have when making this assessment. For what it's worth, if I was a volunteer fire fighter, there is no way I would be getting into that business. If you want to take action that will see volunteers in court, many years later, trying to remember what they did or said some years before, then this is the way to do it.

The final report

The Commission's final report is due to be handed to the Governor on 31 July. It will then be up to the Premier to table it in Parliament and make it publically available. There may be a delay if the Government wants to prepare a response but given the public interest and investment in the Commission I think we can safely assume that it will be available on, or very shortly after, that date.

What the final report will contain is a matter of speculation as of course it has covered much material and time. In his final statements the Chairman noted that the Commission had:

- Looked at the causes and circumstances of 13 fires.
- Sat for 155 days of hearings.
- Took part in 26 community consultation sessions.
- Heard from 434 witnesses.
- Received nearly 1700 submissions and over 990 exhibits; and
- Produced over 20,000 pages of transcript. [15]

The closing submissions of Counsel addressed three matters that I will comment on. They were

- The fate of Stay or Go;
- Organisational structure and
- Leadership.

The Fate of Stay or Go

The problem that Counsel assisting had with the Stay or Go policy was that it failed to address the way people actually behave and presented the options as either or, there is one of two options. In one sense that is of course true, you either stay or you go, and the policy documents tried to explain what you had to do; if you decided to stay, you had to prepare and actively defend your property, if you were going to leave, leave early. What it failed to do was take into account that people would not or could not necessarily do either and the fire service role was not to simply leave people to their own devices. It is counsel assisting's view that the fire service must take into account the real behaviour of everyone and have plans on how to deal with them. It follows that there should be refuges and safer places of last resort that have been identified in the interim report, but that there will also need to be planning for warning communities and, where necessary, evacuating them.

It was Counsel's submission that although the Victorian DISPLAN required incident controllers to consider evacuation, the adoption of 'stay and go' meant that when it came to fires they did not so they were not adopting an all hazards approach but in fact a fire specific approach that could not be justified.

It is interesting to note I think the response of New South Wales SES in the past week that evacuated a community near Wollongong when there was a threat of a dam failure and again put them on notice due to the severe weekend weather. That is not an approach adopted by the fire agencies and it may be that the fire agencies are too concerned with 'fire fighting' rather than taking the holistic approach, that the Commission is recommending, of acting to save lives which may at times mean taking resources from fighting the fire to say, evacuation.

[15] 2009 Victorian Bushfires Royal Commission, *Transcript of Proceedings 27 May 2010*, 20756-7.

The SES probably understands that they cannot stop the storm or the flood which may explain their focus on the people in the path of the flood whereas fire agencies and volunteer firefighters, are perhaps more focused on dealing with the hazard (which is often productive) but less well prepared to focus on its impact when it can't be fought.

Organisation

I wont deal with this in detail as it was a particularly Victorian issue dealing with how the borders between the areas that are managed by the MFB and the CFA should be adjusted. I understand that unlike NSW they don't have the equivalent of NSW Fire Brigade town brigades nor do they appear to have an equivalent to our section 44 of the *Rural Fires Act* to put ultimate command for multiple agency firefighting in one agency.

The recommendations in any event, were that the Commission should recommend a single board to govern both the CFA, the MFB and the fire fighting operations of DSE but they stopped short of recommending a single fire agency, in part because of the recognition of the value provided by CFA volunteers and the fear that a sharp change would disenfranchise the volunteers and cost the community. It was certainly planned though that the new board would manage the firefighting in the growing urban fringe and increasing numbers of career CFA firefighters.

Leadership and Warnings

The most controversial aspect of the final days of the Commission was the recommendation that adverse findings should be made against named people in particular

- Police Chief Commissioner Christine Nixon;
- CFA Chief Officer Russell Rees;
- DSE Chief Fire Officer Ewan Waller;
- Senior CFA and DSE Staff;
- The Minister; and
- The Emergency Services Commissioner, Bruce Esplin.

There was much debate about whether or not the Commission should make those findings. Burnside QC appearing for Russell Rees said

> … this Commission should try … to reach findings that are constructive, not destructive. … It is more important for this Commission to identify ways in which the improvement of the fire services can continue rather than to identify individuals whose individual performance on the day in extraordinary and unprecedented circumstances fell short of the standard which counsel assisting in the tranquillity of this room would urge was necessary.[16]

[16] 2009 Victorian Bushfires Royal Commission, *Transcript of Proceedings 27 May 2010*, 20702.

He was concerned about the impact adverse findings may have on future volunteers and potential IMT members. He said

> The criticism of Mr Rees which is urged by counsel assisting will do … a good deal of harm to the organisation and likely retard the improvement of its systems because it will very likely dissuade senior appropriate people from taking senior positions in the CFA or the DSE for fear of being subjected to similar criticisms after the event when the next unprecedented catastrophe occurs.[17]

Mr Myers, appearing for Christine Nixon said

> … these recommendations are apt to undermine morale … The persons who work in those organisations are apt to say, "We did our best and all we do is cop criticism in most extraordinary circumstances."… [T]he criticisms give no adequate recognition to the extraordinary situation that existed on 7 February 2009. The individuals who were involved in dealing with the catastrophe of that day were subject to, necessarily, extraordinary pressures and it would be human to have overlooked things, to have made mistakes. We say please don't criticise them for it; that won't help.[18]

Mr Myers pointed to evidence of human behaviour and the natural desire that we may have to blame someone when things go wrong but suggested this was not the appropriate approach for the Commission.

> … it is an attitude which is quite inconsistent with the way in which a modern and complex society works. If this is the response to problems that arise because of the presence of bushfires … then no solutions will ever be found. You just blame someone and that's that. The true task is to develop policies and solutions and organisational structures that are continuously improved…[19]

No solutions will ever be found if we think the solution is simply to find the person to blame them and remove them from the system. That just leaves us searching for the next person to blame when the next catastrophe happens.

Counsel appearing for the State of Victoria agreed and he said:

> … for the reasons that have already been put to the Commission … there is no utility in making findings of that kind. Indeed, we submit with respect they would be counterproductive.[20]

Whether the Commission will make the recommended findings remains to be seen. What we can see is that the recommendations largely dealt with the failure to issue, or ensure that they were issued, warnings to the communities that were going to be affected by the fire so that the

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[17] Ibid.
[18] Ibid, 20717.
[19] Ibid, 20718.
[20] Ibid, 20751.

people knew that fire was coming and it was a fire that could not be defeated. To warn people like on scene firefighters and police to consider evacuation and to otherwise prepare themselves to meet the fire.

The model that was being suggested for the leadership was not clear. On the one hand Counsel assisting wanted the chief officers to be held responsible for the failure to issue warnings and there is some attraction to that on the basis that the 'buck stops' with the head of the organisation. On the other hand, as various counsel noted, it was not good management to appoint people to command positions and then spend ones time second guessing them or questioning their judgment. The role of Chief Officers must be also to put people in place and let them get on with it. One concern that has arising in this and previous enquiries is the need to utilise local knowledge, so having incident controllers from local brigades or regional staff makes better use of local knowledge than running matters from the IECC in Melbourne (or Sydney). Naturally I have not heard or read all the evidence so it will be interesting to see what the final recommendations are.

Staff of IMTs may feel supported if they know their Commissioner or Chief Officer will take responsibility for the response, and not supported if the Commissioner/Chief Officer is going to pass responsibility down the line – 'don't blame me; it was the IMT's fault, blame them...'. Equally a potential Commissioner may be less willing to take on that role if they are going to held personally responsible for every action of everyone in their very large organisation in a day of extreme circumstances.

As I have noted, the issue that concerned counsel assisting and which form the basis of the suggested adverse findings was the issue of warnings. Another quote:

> With the climatic conditions prevailing ... and the intensity of the spread of the fire, loss of immovable property may have been unavoidable, but it likewise appears clear that, with adequate warning, lives could, and would, have been saved.
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> Many questions, of course, come to mind arising from the management and the attempts to control this fire. But, in the long run, they all revolve around the crucial question, that of lack of communication, and lack of warning to the residents. [21]

And later

> ... there does not appear to be any logical reason or excuse why adequate warning was not given to the residents ... I note in this regard ... that a plan is currently being prepared to avoid similar situations in the future. All I can do, I feel, is encourage the responsible persons in their

[21] 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.

> deliberations and sincerely hope that such a plan is in operation before any further disasters are likely to occur.[22]

The tragedy is that these quotes come from the Coroner's report into deaths at Mt Macedon following the 1983 Ash Wednesday fires.

In this latest Royal Commission, Rush QC noted that

> … there is a long history in relation to the importance of warnings. Inquiry reports, commentaries over the years have all indicated and emphasised that a key agency responsibility is to provide informative, timely warnings to communities potentially threatened by bushfire. … What the history demonstrates is … the imperative of warnings, … the community expectation for warnings, the community reliance on the agencies giving timely and informative warnings.[23]

It has always been possible to argue that there may have been a legal duty to warn on the basis that the community is vulnerable, in that they cannot obtain the information themselves but need it to make an informed decision. The fire agencies have a great degree of control, not of the fire but of the information regarding the fire, where it is, where it is expected to go and what it may mean for particular communities. Further, there will be relatively little opportunity cost in making the information available so it would be much easier to establish a duty to warn than say, a duty to actually attend and extinguish a fire. The Victorian legislation now provides that:

> It is the duty of the Chief Officer to issue warnings and provide information to the community in relation to bushfires in Victoria for the purpose of protecting life and property.[24]

Expressing this role as a duty, and not merely a power, will suggest that it must be met and so failure to give effective warnings, and to have in place sufficient information gathering to allow warnings to be issued, may expose the State to further legal risk.

What the Royal Commission can and can't do

As has been noted, the Royal Commission is a fact finding tribunal. With broad ranging terms of reference it can explore all aspects of the fire management but it can't make binding decisions. It cannot declare what the law is, and any adverse findings may affect a person's reputation but they do not affect legal rights. The Commission cannot award compensation or send a person to gaol. The Commission can make findings and recommendations. They may be adopted, they may not. If people don't have confidence in the Commission its report may sit on a shelf. Acceptance of the Commission's recommendations will depend on political will.

Courts of law are different. To again quote Burnside QC

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22 Ibid, 22a-23a.

23 2009 Victorian Bushfires Royal Commission, *Transcript of Proceedings 27 May 2010*, 20624.

24 *Country Fire Authority Act 1958* (Vic) s 50B.

> In ordinary litigation … the objective is to ascertain what happened, attribute blame and lead to consequential adjustment of rights.[25]

A court makes a binding order; adjusts rights; sets the benchmark of what the law expects, not what the law should be. A Royal Commission can recommend changes to the law; a Court applies the law. These issues are before the Courts; and a critical issue will be warnings.

The issue of warnings will, I anticipate,[26] prove to be the legal Achilles heel for the emergency services and will, in my view, be the way legal action against the emergency services will develop in the future.[27] Courts will remain reluctant to make judgments about the conduct of fire fighters on the fire ground, and decisions by commanders are limited by the resources that they have at their disposal so tactical decisions about how to fight a fire will always be very difficult for a court to judge. Questions about what warnings should have been given to a vulnerable community will be seen in a different light.

West and ors v ACT and NSW

This is the case currently before the ACT Supreme Court. It was expected to end this year but already hearing dates have been set down for 2011. There are a number of important issues that will be dealt with in this case.

The first thing to observe is that, originally, there were about about 3000 plaintiffs but it's now down to around 200. The fact is that there were only three or four significant plaintiffs and they were the NRMA, QBE and Suncorp Metway, that is insurance companies. Insurers have a right of 'subrogation'. That means that when they pay out to their insured, they get, in return, all the insured's rights including the right to sue. In this case the named plaintiffs were people who had lost homes or suffered other insured losses, had claimed on their insurance, and their insurance companies were now exercising their rights to sue in the insured's name. The reason that the number of plaintiffs has dropped is that these three insurance companies have pulled out of the litigation. The litigants that are left are the uninsured, and QBE Insurance which is continuing its claims against NSW, but not against the ACT. [28]

What we should learn from this is that it is not necessarily the property owners or the community that are suing, and the fact that the litigation is proceeding, does not mean that home owners are not satisfied with the performance of the fire agencies or that they are somehow being irresponsible by not preparing their homes or not getting the message that

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[25] 2009 Victorian Bushfires Royal Commission, *Transcript of Proceedings 27 May 2010*, 20704.

[26] Eburn, above n 19.

[27] Michael Eburn, 'Litigation for failure to warn of natural hazards and community resilience' (2008) 23 *Australian Journal of Emergency Management* 9.

[28] 'Third insurer drops bushfire compo claim' ABC News Online, 16 April 2010 <<http://www.abc.net.au/news/stories/2010/04/16/2874389.htm>> at 17 May 2010.

they need to prepare their properties, prepare themselves, stay and defend and to understand that in significant fire events the fire service will not be able to have a fire truck at every home.

Litigation such as this is about insurers are seeking to recover damages and their obligation is not to the community, not to the fire service and not to the policy holders. Their primary obligation is to their shareholders and they must try and recover funds where they can to maximise their profit and to minimise the impact of the fires on their balance sheet. It is not personal and does not reflect either the community's expectations, or assessment of, the performance of the fire service.

Uninsured litigants are a bit different, they are obviously committing a huge amount of time and money to try and recover their losses and they are unlikely to do so unless they have a genuine sense of being wronged. Wayne West is a personal litigant and he's been represented in the coronial hearing in NSW[29] so we can certainly assume that he, for one, is bringing his action out of a sense of grievance and because he genuinely believes he has been let down by the fire service and the NSW Government.

The critical legal issue that this litigation will deal with is the answer to the question "Does a fire service owe a duty of care to individuals?" For someone to successfully sue they need to prove that the defendant, in this case the governments owed them a duty of care, that they breached that duty and that caused their damage. The question of when an organisation like a fire service will be held to owe an individual a duty of care is not settled.

What the court's have said is whether or not there is a duty requires the court to look at the whole relationship between the plaintiff and the defendant and consider the 'salient features' of that relationship. Two key features are the vulnerability of the plaintiff and the ability of the defendant to control or take charge of the risk. Where a plaintiff is vulnerable to a hazard and unable to protect themselves, but the defendant has the authority and ability to protect them, then a duty is more likely to be found.

A duty of care can arise when the plaintiff is vulnerable, the defendant knows of that vulnerability and the defendant can do something to protect the plaintiff and is given powers for that purpose. The issue of whether or not the fire service owes a duty of care will be at the centre of the Canberra litigation. In a preliminary judgment in *NSW v West* Chief Justice Higgins said:

> … 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.

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[29] Carl Milovanovich, *Coronial Inquiry into the Circumstances of the Fire(s) in the Brindabella Range in January, 2003* (NSW Coroners Court, Westmead, 2003), 8.

> The vulnerability of the prospective victim is self evident, particularly if they are or may be assumed to lack the resources to protect themselves.[30]

The assertion that vulnerability is self evident and that only an organised fire service can avert the danger from a serious bushfire denies the existence, and fundamental rationale for the "prepare, stay and defend or leave early" policy. That policy is predicated on the assumption that there will be times when the fire services will not be able to attend to avert the danger and people need to be prepared, and can, take steps to protect themselves. If the fire authorities can convince property owners and the courts that in fact people are not vulnerable, that they can do much to protect themselves, and the fire authority cannot be relied upon to respond or if they do respond, there will be fires that they simply cannot extinguish, then it will be easier to argue that there can be no duty that sounds in damages when the worst case scenario occurs.

With respect to warnings or failure to warn, the residents of Duffy and the other impacted Canberra suburbs will argue that they were vulnerable as they were not aware of the risk to their urban properties. The Emergency Services Bureau (as it then was) they will argue, was in control, not necessarily of the fire, but of the information about the fire that they needed to protect themselves.

The hurdle for plaintiffs in a failure to warn case is demonstrating that had they been warned about the nature of the risk they would have done something that would have lead to a better outcome, whether that would have been to evacuate or to be better prepared when the fire hit. That is always problematic and the courts have warned against taking people's assertions on what they would have done with a 'pinch of salt',[31] and that is also now set out in legislation.[32] The fact that plaintiffs have a hurdle to jump does to mean, that they cannot jump it, and it is interesting to observe, if we go back to the 2003 fires, how far the Canberra Coroner went in taking evidence on the warnings and what the people claimed they would have been able to do with more timely warnings.[33] With respect to the Coroner, it did appear she was helping them to collect the very evidence they would need in the litigation now before the Court.

Wayne West's case is different. He owned rural property that was lost, he says because the RFS did not attack the fires that started in New South Wales with sufficient aggression on 8 January, that they did not respond when he warned them of the approaching fire and that he was left vulnerable as his water supply was taken by the RFS to fight to the fire other than on his property. Without his dam full, he could not defend his own home.

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30 *NSW v West* [2008] ACTCA 14, [26] and [27].

31 *Rosenberg v Percival* (2001) 205 CLR 434.

32 *Civil Liability Act 2002* (NSW) s 5D(3).

33 Maria Doogan, *The Canberra Firestorm: Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003,* (ACT Coroners Court, Canberra, 2006), 43-180.

Mr West will, no doubt, argue that he was vulnerable, in part because the fire service had taken water from his dam to fight the fire elsewhere, they knew of it, and they should have responded when he rang and reported the fire approaching his property. He will argue that he was made more vulnerable by the actions of the fire service; he would have been better off if there was not fire fighting service and so he should win, even if the other plaintiffs do not.

In answering the question about duty of care, the court will make a significant ruling for the Rural Fire Service and other Australian fire agencies. If they are found to owe a duty of care to someone from whom the brigades have received a 000 call on the basis they are on notice, then brigades may be duty bound to respond to that address even if they think the fire can be better fought somewhere else. If taking the water from Mr West's property is significant then brigades will need to think whether to take water[34] and fight the fire where they think it is best to fight it, or leave everyone to their own devices on the basis that they will not owe a duty to control a fire they didn't start, but do owe a duty not to increase vulnerability by taking water.

If the court does finds that there was a duty of care, the next question will be whether the fire services were reasonable in their response to the fires; the plaintiffs' have to show that the NSW and ACT fire authorities did not do what the 'reasonable' fire authority would do. The test of reasonableness is not based on what the average or most defendants would do, nor is it based on whether or not the defendant did the best they could in the circumstances. It is measuring the defendant's performance against a hypothetical reasonable person. The reasonable person is however a cautious, clear thinking individual who perceives all possible outcomes and weighs up the risks and benefits of each action before embarking on a course of action. It is not the average or ordinary person.

Tort law does not concern itself with the ordinary person or what we might reasonably expect from an ordinary person. I may reasonably expect that my doctor will, like all human beings, make a mistake, that he or she will attempt to 'do their best' but things may go wrong that could and should have been avoided. None of that will protect the doctor from liability should the poor outcome occur. Equally it is not reasonable to expect that my doctor will never make a mistake, that he or she will meet the standard of the 'reasonable doctor' 100% of the time. Regardless of that, the law expects that standard to be met each and every time. It is no defence to say 'I get it right most of the time and that is all anyone can expect'. A particular plaintiff is entitled to expect that their doctor (or anyone else providing a service) will get it right in their case and will make good the damage if they do not.

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[34] Which is allowed by the *Rural Fires Act 1997* (NSW) s 26; "An officer of a rural fire … may for the purpose of controlling or suppressing a fire: (a) take and use without any payment any water from any source on any land …"

The Canberra litigation will deal with these issues in the context of the 2003 fires. Higgins CJ who is hearing the matter will have to make rulings on how the law applies to the facts as he finds them. It seems to me that the implications of his decision will have very serious ramifications particularly if the plaintiffs win. My guess is that if any of the plaintiffs win, the defendants, the ACT and NSW would have to seriously consider taking the legal issues to the Court of Appeal, and possibility the High Court of Australia, for a definitive ruling. If they do it will be some years before we get an answer on the legal issues arising from these fires. Should the plaintiffs be successful it may have significant implications for the way brigades plan to fight future fires.

Conclusions

There have been lots of issues raised in this talk – let me summarise them as a conclusion.

1. Looking to the Royal Commission, the Commissioner's interim report has already lead to changes in the law, and the Parliament has imposed a duty on the CFA Chief Officer to issue warnings, has created obligations with respect to neighbourhood safer places and has at least empowered, if not required, the CFA to make determinations about the defendability of private property. There have been many other recommendations from the Commission but it is those three that in my view, will create significant legal issues for the CFA. Of course the CFA legislation, and the Commission, are limited to Victoria, but organisations such as the RFS would be prudent to remember that what seems like a good idea in one State may well be copied by others.
2. The Royal Commission cannot make definitive or binding recommendations. As we have seen the Chief Officer and the then Chief Commissioner of Victoria Police have been subject to personal criticism, and we can anticipate that the actions of the CFA and the Government may also be subject to some harsh words[35] but the extent of the Commission's recommendations and importantly the response of the Government and the CFA remain to be seen.

[35] 'Leak presents scathing review of bushfire policy' *ABC Online*, 23 May 2010 <http://www.abc.net.au/news/stories/2010/05/23/2906919.htm> at 23 May 2010.

3. The most significant legal issues arising from the ACT litigation will be the court's answer to the question of whether or not there is a duty of care owed by the fire service to individual property owners. The answer to this question may have significant implications for how the fire service prepares for, and responds to future fires. It is my prediction that the answer will need a determination by a higher court, perhaps even the High Court of Australia, so the final legal answer to that question may still be some years away.

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