

DO AUSTRALIAN FIRE BRIGADES OWE A COMMON LAW DUTY OF CARE? A REVIEW OF THREE RECENT CASES

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The law regarding the fire service's liability for alleged negligence in the way they plan for or respond to a fire is reasonably untested. This paper reports on three cases that were decided in 2012 by the Supreme Courts of New South Wales, Tasmania and the Australian Capital Territory. It is argued that the weight of authority is that the fire brigades are established to provide fire services for the common good, not for individual benefit, and the financial burden of unfortunate operational decisions should be borne by insurers or by the uninsured. Even so, two Supreme Courts have arrived at different conclusions with respect to the question of whether or not the NSW Rural Fire Service owes a common law duty of care to those at risk from bushfire. It is therefore argued that the issue of duty of care would benefit from a determination by the High Court of Australia.

I: INTRODUCTION

This paper will report on three recent cases that considered whether Australian fire brigades owe a legal duty of care to those whose homes or properties are threatened by fires. This issue has not been tested in the Australian appeal courts, but it did, by coincidence, arise in three Supreme Court trials, all of which were decided in 2012.¹ In analysing these decisions, it will be shown that the ACT and NSW Supreme Courts have reached different conclusions on the existence of a common law duty of care owed by the NSW Rural Fire Service towards those at risk of fire. It is argued that the decision of Higgins CJ in *Electro Optics Systems & West v NSW*² is against the weight of authority, and the reasoning of Walmsley AJ in *Warragamba Winery v NSW*³ should be preferred to the reasoning of the ACT Chief Justice. Two Supreme Court judges, in different jurisdictions, reached different conclusions on the law applied to the NSW Rural Fire Service. Therefore, the issue of whether or not the fire brigades owe a duty of care would benefit from a determination by the High Court of Australia.

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¹ *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701; *Myer Stores Ltd v State Fire Commission* [2012] TASSC 54; *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184.

² [2012] ACTSC 184.

³ [2012] NSWSC 701.

II: BACKGROUND

Historically the fire and emergency services were made up of local volunteers effectively coming together to form a self-help group. Over time the various brigades were brought under the control of an organising authority or board, but they remained largely independent.⁴ Today, emergency management is seen as a core or central government activity. In some states, such as Victoria, boards are established to operate the fire brigades subject to the direction and control of the Minister.⁵ In other jurisdictions, such as New South Wales, the emergency services are centrally located as divisions of government service, rather than independent statutory authorities.⁶ Regardless of the management model, in all Australian states and territories the fire brigades are statutory authorities.⁷

The fire brigades are very busy. ‘In the period 1989 to 2010, the RFS responded to 184 888 fires and burned over 7.28×10^6 ha of land in hazard reduction activities’.⁸ Between 2007 and 2011 Victoria’s Country Fire Authority responded to 95,896 emergency incidents, an average of nearly 24,000 responses each year.⁹ Even with that response rate, litigation alleged negligence is reasonably uncommon;¹⁰ however, there appears to be an increasing tendency for people to look to the law after a fire.¹¹ Litigation following Victoria’s Black Saturday bushfires of February 2009 was commenced even before the fires had been extinguished,¹² and at the time of writing, a class action arising from the Kilmore East/Kinglake bushfire is before the courts; a hearing is expected to take place over several months. If the predictions that climate change will bring more severe fire weather days are correct, then associated post fire litigation may also increase due to expected severity of fire weather days.

The law regarding the fire service’s liability for negligence is virtually untested, and the question of whether or not the statutory fire authorities owe a duty of care to members of the public has not been authoritatively determined. Although there has been some litigation, most of it has either settled or been resolved at trial level. The exception is *Gardner v The Northern Territory* (‘Gardner’s Case’).¹³ Gardner’s case was determined by the Northern Territory Court of Appeal, but, in conducting that litigation, the state authorities admitted

⁴ Robert Murray and Kate White, *State of Fire: a history of volunteer fire fighting and the Country Fire Authority of Victoria* (1995 Hargreen, Melbourne); Julie-Anne Ellis, *Tried by fire: the story of the South Australian Country Fire Service* (2001 South Australian Country Fire Service, Adelaide).

⁵ *Country Fire Authority Act 1958* (Vic); *Metropolitan Fire Brigades Act 1958* (Vic).

⁶ *Public Sector Employment And Management Act 2002* (NSW) Schedule 1.

⁷ *Emergencies Act 2004* (ACT); *Fire Brigades Act 1989* (NSW); *Rural Fires Act 1997* (NSW); *Bushfires Act 1980* (NT); *Fire and Emergency Act 1996* (NT); *Fire and Rescue Service Act 1990* (Qld); *Fire and Emergency Service Act 2005* (SA); *Fire Service Act 1979* (Tas); *Country Fire Authority Act 1958* (Vic); *Fire Services Commissioner Act 2010* (Vic); *Metropolitan Fire Brigades Act 1958* (Vic); *Bushfires Act 1954* (WA); *Fire and Emergency Services Act 1998* (WA); *Fire Brigades Act 1942* (WA).

⁸ Michael Eburn and Stephen Dovers ‘Australian Wildfire Litigation’ (2012) 21(5) *International Journal of Wildland Fire* 488, 491.

⁹ Country Fire Authority, *Annual Report 2011* (Victoria, 2012), 24; Country Fire Authority, *Annual Report 2010* (Victoria, 2011), 15; Country Fire Authority, *Annual Report 2009* (Victoria, 2010), 22; Country Fire Authority, *Annual Report 2008* (Victoria, 2009), 37.

¹⁰ Eburn and Dovers, above n 8.

¹¹ ABC News Online, ‘Investigation launched into Harrietteville bushfire’, 27 February 2013, <<http://www.abc.net.au/news/2013-02-27/investigation-into-harrietteville-bushfire/4542736>>.

¹² *Matthews v SPI Electricity* (No 1) [2011] VSC 167.

¹³ [2004] NTCA 14.

that they owed the plaintiff a duty of care, so the issue was not the subject of judicial consideration.¹⁴

In 2012 the Supreme Courts of New South Wales, Tasmania and the Australian Capital Territory decided cases where negligence by the State fire authorities was alleged. The three cases, *Warragamba Winery v NSW*,¹⁵ *Myer v State Fire Commission* (Tasmania)¹⁶ and *Electro Optics Systems & West v NSW*¹⁷ were all decided by single Supreme Court judges. As the decision of single judges, these are not authoritative precedents, but, given the relatively few cases against the fire and emergency services in Australia and the lack of full court or High Court decisions, a review of the judgements gives some indication of how the Australian courts are addressing the question of whether or not the fire and emergency services owe a duty of care to those at risk. At the time of writing it is believed that the plaintiff in *West v NSW* has appealed to the Australian Capital Territory Court of Appeal, so that matter may, in due course, produce a more authoritative precedent.

The three cases decided in 2012 are now discussed in the order in which the judgements were delivered.

III: WARRAGAMBA WINERY PTY LTD V STATE OF NEW SOUTH WALES [2012] NSWSC 701

Fifteen plaintiffs alleged that the NSW Rural Fire Service ('the Rural Fire Service') was negligent for failing to combat a fire that commenced on Mount Hall on Christmas Eve 2001, arguing that if they had deployed ground fire fighters and helicopters, they would have succeeded in extinguishing the fire. The plaintiffs also argued that had the Rural Fire Service issued more effective warnings, they could, and would, have taken more active steps to prepare and defend their properties, and this would have reduced the extent of their losses.

The High Court has had difficulty formulating a comprehensive test to determine when and in what circumstances a statutory authority, established for public persons, will be found to owe a duty of care to an individual.¹⁸ In *Crimmins v Stevedoring Industry Finance Committee* McHugh J said:

In my opinion, therefore, in a novel case where a plaintiff alleges that a statutory authority owed him or her a common law duty of care and breached that duty by failing to exercise a statutory power, the issue of duty should be determined by the following questions:

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? **If no, then there is no duty.**

¹⁴ Michael Eburn, 'A Case Study of Tort Liability for Fire Damage' (2007) 22 *Australian Journal of Emergency Management* 44-48; see also *State of New South Wales v West & Anor* [2008] ACTCA 14, [182]; *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701, [728].

¹⁵ *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701.

¹⁶ *Myer Stores Ltd v State Fire Commission* [2012] TASSC 54.

¹⁷ *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184.

¹⁸ *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540, [210]-[213] (Kirby J).

2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? **If no, then there is no duty.**
3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? **If no, then there is no duty.**
4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? **If no, then there is no duty.**
5. Would such a duty impose liability with respect to the defendant's exercise of 'core policy-making' or 'quasi-legislative' functions? **If yes, then there is no duty.**
6. Are there any other supervening reasons in policy to deny the existence of a duty of care (e.g., the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? **If yes, then there is no duty** (emphasis added).¹⁹

When analysing the position of the Rural Fire Service vis-à-vis the residents of Warragamba, Walmsley AJ answered those questions as follows:

1. **Yes;** it was foreseeable that failure to take reasonable steps to control the fire could expose the residents of Warragamba, who were identified as being under threat, to danger.
2. **No;** the defendant, through its agencies the Rural Fire Service, Sydney Water and the National Parks and Wildlife Service, did not have relevant control; they did not cause the fire so were not in control of the hazard.
3. **No;** the defendants were not relevantly vulnerable, it was their case that had they been warned they could have taken steps to protect their own property so by implication they argued that they were not dependant on or reliant on the fire service to protect their assets. In more general terms:

"The plaintiffs here were no more vulnerable than other members of the public. The defendants could not have been expected to have concentrated their attentions on individual plaintiffs. They each had to consider the community as a whole. That included making choices, such as between fighting one fire or another, or between the assets of individuals, when deciding which house to save, and which house should be left to take the brunt of the fire so others could be saved."²⁰

If the plaintiff's vulnerability could not be distinguished from others, the defendant fire authorities could not owe a duty to them, as diverting resources to protect their properties would expose other, equally vulnerable people, to the risk of fire.

¹⁹ *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, [93] (McHugh J) (emphasis added).

²⁰ *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701, 708.

4. **Yes;** the defendant did know of the risk of harm to the plaintiffs the residents of Warragamba.

5. **Yes;** ‘the imposition of a duty of care would impose liability with respect to the defendant’s exercise of ‘core policy-making’ or ‘quasi-legislative’ functions’. To find a duty would impact on the decisions the defendant had to make about resources and operating policies, matters that should not be the subject of judicial determination.²¹

6. **Yes;** there were supervening policy implications that moved against a duty of care; ‘the Rural Fire Service has obligations, such as the need to fight fires on behalf of the community, and to protect the safety of its crews, which would conflict with obligations to the plaintiffs of the kind they have argued for’.²²

Having answered question 2 and 3 in the negative, and 5 and 6 in the affirmative, Walmsley AJ held there was no common law duty of care.

In *Graham Barclay Oysters v Ryan*, Gummow and Hayne JJ said ‘an evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered’.²³ In the NSW Court of Appeal, Allsop P identified a list of salient features that had been identified in earlier authorities. He said the salient features include:

- 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;

²¹ *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540, [6] (Gleeson CJ).

²² *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701, [149].

²³ *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540, [149] (Gummow and Hayne JJ).

- 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.²⁴

Approaching the issue of duty from that perspective also led to a conclusion that there was no duty of care. Walmsley AJ said:

the factors which militate strongly against the existence of a duty when adopting the McHugh J approach, argue just as strongly against the existence of a duty applying the *Caltex* approach. Among other reasons I would include:

- a) Lack of control over the ability to avoid harm;
- b) Lack of relevant vulnerability;
- c) Lack of reliance;
- d) Lack of any assumption of responsibility;
- e) Lack of physical proximity;
- f) Nature of the activity;
- g) Potential indeterminacy of liability;
- h) Conflicting duties which would arise;
- i) Lack of consistency with the relevant statutes.²⁵

²⁴ *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258, [103] (Allsop P).

²⁵ *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701, [719].

His Honour noted that there was no Australian authority ‘for the imposition of a duty of care on a public authority such as any of these three agencies for damage caused by fire ignited by lightning’²⁶ but that English²⁷ and Canadian authorities,²⁸ as well as academic writing²⁹ argued against the imposition of that duty. In all the circumstances his Honour held that the agencies, the Rural Fire Service, Sydney Water and the National Parks and Wildlife Service did not owe a duty to any of the plaintiffs to either respond to the fire or to exercise reasonable care in how they responded to the fire or issued warnings to the community.

IV: MYER STORES LTD V STATE FIRE COMMISSION [2012] TASSC 54

A fire that started in a roof void of the Myer Store in Hobart was initially controlled by the automated sprinkler system. The electricity was still connected to the building, so, in order to reduce the risk to fire fighters, the sprinklers were turned off before the source of the fire had been located. This allowed the fire to grow, and the building was destroyed. It was argued that the decision to turn off the sprinklers, rather than take steps to have the electricity disconnected, was negligent.

The parties agreed that Blow J should determine the effect of section 121 of the *Fire Service Act 1979* (Tas) prior to hearing the substantive allegations. Section 121 provides that there is no liability for acts done by fire fighters or the State Fire Commission in the good-faith performance of their duties. His Honour found that even if there was negligence, the section would provide a defence, so he did not need to consider the issue of whether or not there was a duty of care. In the course of his judgement, however, Blow J considered the history of fire brigades legislation, including provisions that limit liability³⁰ and provide that damage done by the fire brigades is deemed to be damage done by fire.³¹ He said:

At least in relation to property damage, legislation in this State since 1920 had reflected a policy that the financial burden of unfortunate operational decisions should be borne by insurers, or by the uninsured. That seems possibly to have been a quid pro quo for the State providing fire-fighting services which, in times long past, were provided by insurance companies, and not at the expense of the public.³²

Although not strictly deciding the issue of a duty of care, Blow J’s finding that ‘the financial burden of unfortunate operational decisions should be borne by insurers, or by the uninsured’ necessarily implies that the common law duty, if any, had been displaced by the statutory scheme.

²⁶ Ibid [725].

²⁷ Ibid [712].

²⁸ Ibid [726].

²⁹ Ibid [727].

³⁰ *Fire Service Act 1979* (Tas) s 121.

³¹ Ibid s 111.

³² [2012] TASSC 54, [41].

V: ELECTRO OPTIC SYSTEMS & WEST
V STATE OF NEW SOUTH WALES [2012] ACTSC 184

This litigation arose from the Canberra firestorm of 2003. Fires had commenced in both New South Wales and the Australian Capital Territory on the 8th of January 2003; they spread into Canberra on the 18th January, killing 4 people and destroying many homes. Originally both the Australian Capital Territory and New South Wales were defendants, as it was alleged that the fire-fighting and land-management agencies from both jurisdictions had been negligent in managing fuel in national parks and in their response to the fire. By the time the case came to final judgement, the case against the Australian Capital Territory had been settled, and allegations of negligence over fuel management were no longer pursued. The result was that the Australian Capital Territory court had to apply New South Wales law to determine whether the New South Wales Rural Fire Service had been negligent in their response to the fire.

Higgins CJ found that the Rural Fire Service did owe a duty of care to those that were affected by the fire. His Honour found that a duty arose from section 63 of the *Rural Fires Act 1997* (NSW), which he said imposed a duty on both the Rural Fire Service and the National Parks and Wildlife Service.³³ With respect to His Honour, that analysis simply does not make sense. Section 63 says:

It is the duty of a public authority to take ... any other practicable steps to prevent the occurrence of bush fires on, and to minimise the danger of the spread of a bush fire on or from: (a) **any land vested in or under its control or management** ... (emphasis added)

The land where the fire started was not under the control or management of the Rural Fire Service, so that section could not apply. In any event, that section is related to preparing for a fire rather than responding to a fire. The only way to make sense of this reasoning is to consider that the defendant, the State of New South Wales, was responsible for both the National Parks and Wildlife Service and the Rural Fire Service, and so the obligation, if there was one, could be said to apply to the State. Unfortunately, that is inconsistent with the judge's later statement, where he says 'there is an express statutory duty imposed on the two authorities by section 63 of the Rural Fires Act'.³⁴ It is simply unclear how His Honour views section 63 as imposing an express duty on the Rural Fire Service in these circumstances.

In finding a common law duty of care, His Honour relied on the decision of the High Court of Australia in *Pyrenees Shire Council v Day*³⁵ and, in particular, the judgement of Kirby J.³⁶ Kirby J, relying on the English case of *Caparo v Dickman*³⁷, said the issue of a duty of care required consideration of three questions:

³³ *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184, [202].

³⁴ *Ibid* [300].

³⁵ (1998) 192 CLR 330.

³⁶ *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184, [306].

³⁷ [1990] 2 AC 60.

1. Was it reasonably foreseeable to the alleged wrong-doer that particular conduct or an omission on its part would be likely to cause harm to the person who has suffered damage or a person in the same position?
2. Does there exist between the alleged wrong-doer and such person a relationship characterised by the law as one of 'proximity' or 'neighbourhood'?
3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrong-doer for the benefit of such person?³⁸

According to Higgins CJ, questions (1) and (2) were not controversial: that is it was foreseeable that, if the fire service failed to reasonably respond to the fire, others may suffer harm, and that there was sufficient closeness between the fire service and those put at risk that they could be called legal 'neighbours'. It was the answer to question (3) that was to determine the issue.³⁹ What Higgins CJ did not address was that the analysis used in *Caparo v Dickman* had been rejected by later High Court decisions, in favour of the 'salient features' test discussed above. Ultimately, Kirby J had to concede that his was the minority or dissenting view, and that the legal test formulated in *Caparo* did not reflect the law in Australia.⁴⁰ Accordingly, Higgins CJ, when he relied on the *Caparo* test, was not applying the current Australian law.

Higgins CJ distinguished the case before him from the decision of the High Court of Australia in *Stuart v Kirkland Veenstra*,⁴¹ a case that involved members of the Victoria Police who observed Mr Veenstra sitting in his car with a tube attached from the exhaust pipe to the cabin of his car. After talking with the police, Mr Veenstra went home and later took his own life. The police were sued for negligence; Mr Veenstra's widow argued that the police had a duty to take action under the *Mental Health Act 1986* (Vic) to detain Mr Veenstra for his own protection. The decision turned on the powers given to police by the *Mental Health Act*, but in obiter the judges made broader observations on the duty to rescue or protect others from harm. When considering the duty alleged in that case, Gummow, Hayne and Heydon JJ said, 'So expressed the duty would be a particular species of a general duty to rescue. The common law of Australia has not recognised, and should not now recognise, such a general duty of care'.⁴² Crennan and Kiefel JJ said:

The common law generally does not impose a duty upon a person to take affirmative action to protect another from harm ... The law draws a distinction between the creation of, or the material increase of, a risk of harm to another person and the failure to prevent something one has not brought about...

In principle a public authority exercising statutory powers should not be regarded by the common law any differently from a citizen. It should not be considered to have an obligation to act. But the position of a public authority is not the same as that of a citizen and the rule of

³⁸ *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184, [306].

³⁹ *Ibid* [307].

⁴⁰ *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540, [237]-[238] (Kirby J).

⁴¹ (2009) 237 CLR 215.

⁴² *Ibid* [99].

equality is not regarded as wholly applicable. It has public functions and it has statutory powers which the citizen does not. Some powers might be effective to avert or minimise a risk of harm to particular persons or their property, but the statute might not oblige their use. The relevant concern of the common law is whether a public authority might nevertheless be considered to be under a duty of care which obliges it to exercise its powers in a particular way.⁴³

Consistent with this discussion, Higgins CJ went on to consider whether the Rural Fire Service, being vested with the power and authority to provide rural fire services,⁴⁴ could be distinguished from the ordinary citizen and could be considered to be under a duty of care which obliges it to exercise its powers in a particular way.⁴⁵ In coming to that conclusion the Rural Fire Service was deemed different, and could and did owe a duty to effectively fight the fire. To support this conclusion, he referred to the decisions of the New South Wales Court of Appeal in *Woods v Lowns*,⁴⁶ the UK Court of Appeal in *Kent v Griffiths*⁴⁷ and the Australian Capital Territory Supreme Court in *Crowley v The ACT*.⁴⁸

*Woods v Lowns*⁴⁹ involved a doctor who failed to attend an emergency when asked to do so. It was found that the doctor had a duty to attend and could have helped if he had attended; therefore he was liable for the long term injuries suffered.

His Honour accepted that there is not a general duty to rescue imposed upon everyone, but went on to say:

The RFS and like fire-fighting authorities are, undoubtedly, dedicated to the saving of life and property. They willingly engage in hazardous operations, sometimes at risk of life and limb. To suggest that they have no responsibility, save to their superior officers, for the discharge of their duties, would, I expect, be regarded as bizarre by those so involved as well as the general public.

For the fire-fighting authorities to be held to have no accountability to the law for actions of neglect would offend the general sense of justice in the community...

Similarly, whilst it would not be just or reasonable to impose a general duty upon persons to rescue another in distress, a distinction may be observed in the role of those who, by profession, training or statutory role assume and hold out a preparedness to respond to those in distress. For example, police, lifeguards, medical practitioners and, relevantly, fire fighters...

[In *Woods v Lowns*] President Kirby (as he then was) affirmed that a medical practitioner, by reason of skill, training and professional obligation, had a duty to assist going beyond that imposed on an ordinary citizen.

In my view, the same would be the case in respect of trained rescuers who hold themselves out as skilled, willing and able to assist...⁵⁰

⁴³ Ibid [127]-[129].

⁴⁴ *Rural Fires Act 1997* (NSW) s 9.

⁴⁵ *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184, [388]-[389].

⁴⁶ Ibid [312]-[314].

⁴⁷ [2001] QB 36.

⁴⁸ Ibid [382].

⁴⁹ (1996) Aust Torts Reports 81-376.

And later:

That, as I have explained, distinguishes emergency services from the usual rule that no person is obliged to go to the aid of another in distress unless they have caused or contributed to the situation of peril or has some special duty or relationship. In my view, the dedicated fire services and by analogy other services created to protect the public have a duty to act where they reasonably can, so far as that is consistent with any relevant statutory provision.⁵¹

Just as a doctor was under a duty to attend when he could, ‘the same would be the case in respect of trained rescuers who hold themselves out as skilled, willing and able to assist’, including police and, in this case, fire fighters. Whilst that may be attractive logic,⁵² it fails to adequately deal with the fact that in *Stuart v Kirkland Veenstra* the High Court expressly found that the police, although a service ‘created to protect the public’⁵³, did *not* owe a common law duty to rescue a person who was at significant risk of harm. The community’s expectation of the police was not sufficient in that case to give rise to a common law duty of care. Subsequently, when their Honours Crennan and Kiefel JJ acknowledged that in some cases statutory authorities could be distinguished from ordinary citizens and have a duty to use their powers in a particular way, that did not extend to police ‘and by analogy other services created to protect the public’.⁵⁴

*Kent v Griffiths*⁵⁵ involved the London ambulance service. The ambulance service was held to owe a duty of care to a person who waited forty minutes for an ambulance when there was no reason given for the unreasonable delay or the repeated assurances that an ambulance was on its way when it was not. The defendants had argued that under English common law, an emergency service, including the ambulance service, did not owe a relevant duty of care. In making that argument the defendant relied on the decision of the United Kingdom Court of Appeal in *Capital and Counties PLC v Hampshire County Council*⁵⁶ (*‘Capital and Counties’*) where the Court said:

In our judgment the fire brigade are not under a common law duty to answer the call for help and are not under a duty to take care to do so. If therefore they fail to turn up, or fail to turn up in time because they have carelessly misunderstood the message, get lost on the way or run into a tree, they are not liable.⁵⁷

Kent v Griffiths was distinguished from *Capital and Counties* on the basis that the ambulance service should be seen as a health service rather than an ‘emergency service’ and like all health services, would owe a duty of care to people who came into its care.⁵⁸ Higgins CJ, who relied on *Kent v Griffiths* to find that a fire service owed a duty of care, did not address these points of distinction. With respect to *Capital and Counties* Higgins CJ said:

⁵⁰ *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184, [308]-[314].

⁵¹ *Ibid* [381].

⁵² Michael Eburn, *Emergency Law* (Federation Press, 3rd ed, 2009) 131-132.

⁵³ *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184, [381].

⁵⁴ *Ibid*.

⁵⁵ [2001] QB 36.

⁵⁶ [1997] QB 1004.

⁵⁷ *Capital and Counties PLC v Hampshire County Council* [1997] 2 All ER 865, [25] (Stuart-Smith, Potter and Judge LJ).

⁵⁸ *Kent v Griffiths* [2001] QB 36, [45] (Lord Woolf MR with whom Aldous and Laws LJ agreed).

Indeed, in my view, the case of *Capital & Counties plc v Hampshire County Council* and the general view that police and fire services owe no duty to respond to persons in danger where they are trained and able safely to respond is clearly inconsistent with public expectations and the intent shown by the legislative provisions imposing positive duties on such services to protect the public.⁵⁹

He did not explain how ‘public expectations’ are determined or how they form the basis of a legal conclusion.

In *Crowley v Commonwealth of Australia*⁶⁰, the trial judge held that police breached their duty of care when they shot a mentally ill man whom they had been trying to detain for his and the community’s benefit. That decision was overturned by the Australian Capital Territory Court of Appeal⁶¹ on the same day that Higgins CJ handed down his decision in *Electro Optic Systems & West v State of New South Wales*.⁶² The effect is that Higgins CJ cited these decisions to support his conclusion that the fire services did owe a duty of care when *Stuart v Kirkland Veenstra* expressly rejected the idea that police should, in this context, be distinguished from the ordinary citizen and did not owe either a common law or statutory duty to rescue; *Kent v Griffiths* was not a finding that an emergency responder owed a duty of care, but that a health care provider owes a duty of care; and *Crowley’s case*, as determined by the Court of Appeal, is an example of an emergency responder *not* owing a duty of care to the ‘person in distress’. In none of these cases, as ultimately determined, did an emergency service owe a common law duty of care.

Higgins CJ’s reasoning does not fully analyse the earlier cases and, with respect, are against the weight of authority.⁶³ Further, the Chief Justice did not analyse the reasoning in *Warragamba Winery v NSW*; he merely asserted that ‘It will be apparent that I do not accept that there was no duty to act with reasonable care, at least once the task was embarked upon, to avoid loss and damage to others’.⁶⁴

VI: THE RESULT

Notwithstanding His Honour’s findings that there was a duty of care and that the Rural Fire Service had been negligent, his Honour found there was no liability because of section 43 of the *Civil Liability Act 2002* (NSW). This provision provides that a statutory authority, such as the Rural Fire Service, is not liable for failing to perform the duties that are imposed by statute ‘unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions’.⁶⁵ For statutory authorities exercising a statutory power, the test for liability is not the common law test of whether or not the

⁵⁹ *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184, [334].

⁶⁰ [2012] ACTCA 52.

⁶¹ *Australian Capital Territory v Crowley, The Commonwealth of Australia and Pitkethly* [2012] ACTCA 52; An application for special leave to appeal to the High Court has been refused; *Crowley v The Commonwealth of Australia & Ors* [2013] HCATrans 128.

⁶² [2012] ACTSC 184.

⁶³ See also *Board of Fire Commissioners v Rowland* [1960] SR (NSW) 322; *Bennett and Wood Ltd v Orange City Council, Board of Fire Commissioners (Third Party)* (1967) 67 SR (NSW) 426; Eburn, above n 52, 125-141.

⁶⁴ *Electro Optic Systems & West v State of New South Wales* [2012] ACTSC 184, [353].

⁶⁵ *Civil Liability Act 2002* (NSW) s 43.

conduct met the standard of the hypothetical ‘reasonable man’, but this harder test that can best be summarised by the term ‘gross negligence’. Although there was negligence, this extra threshold had not been met, and so there was no liability.

The plaintiff, Wayne West, has said that he will appeal the decision. It is probable that the State will also appeal and ask the Court of Appeal to review whether or not there is found to be a duty owed to individuals. Depending on the reasoning of the ACT Court of Appeal, the parties may seek leave to appeal to the High Court of Australia. Appeals to the High Court are not automatic; the Court has to grant special leave and will only do so if it is satisfied that there is a legal issue that genuinely needs its consideration. The apparent conflict between the conclusion of Walmsley AJ in *Warragamba Winery Pty Ltd v NSW* and Higgins CJ in *West v NSW*, where two courts have come to different conclusions about the duties owed by the same fire service, may give the High Court grounds to consider that they should consider the issue of when and if a fire brigade owes a duty of care.

VII: CONCLUSION

It remains the case that litigation against the Australian fire authorities is relatively rare, but has risen after recent significant fires. If the predictions that climate change will bring more severe fire weather days are correct, then associated post fire litigation may also increase. In that litigation the issue of the existence of a common law duty of care will have to be determined.

This paper has reviewed decisions coming from the Supreme Courts of New South Wales, Tasmania and the Australian Capital Territory in 2012. The effect of the decisions in *Warragamba Winery v NSW* and *West v NSW* is that a single judge of the Supreme Court of NSW found that the NSW Rural Fire Service does not owe a duty of care to individuals that can be enforced by a private right of action for damages, whilst a single judge of the ACT Supreme Court held that a common law duty of care does exist.

The decision in *Myer Stores Ltd v State Fire Commission* did not need to address the issue of a common law duty of care, finding instead that even if there was a duty and even if there was negligence, the fire service was protected by the provisions of its Act. Even so, in obiter dictum, Blow J found that there was a policy, at least in Tasmania, to impose the burden of negligent decisions on property owners and insurers rather than the fire service. Finding a common law duty of care would be inconsistent with this identified legislative policy that is reflected in similar statutory provisions in each state and territory.⁶⁶

It has been argued that the weight of authority is that the fire brigades are established to provide fire services for the common good, not for individual benefit. Although there was ultimately a verdict in favour of the defendant, the reasoning of Higgins CJ in *West v NSW* appears to be against the weight of that authority and is inconsistent with the decision of Walmsley AJ in *Warragamba Winery v NSW*. The result is that two Supreme Courts have arrived at different conclusions with respect to the same fire service. The issue of duty of

⁶⁶ *Fire Brigades Act 1989* (NSW) s 78; *Rural Fires Act 1997* (NSW) s 128; *State Emergency and Rescue Management Act 1989* (NSW) s 41; *Disasters Act 1982* (NT) s 42; *Fire and Emergency Act 1996* (NT) s 47; *Disaster Management Act 2003* (Qld) s 144; *Metropolitan Fire Brigades Act 1958* (Vic) s 54A; *Fire and Emergency Services Act 1998* (WA) s 37.

care would benefit from a determination by the High Court of Australia. Should the parties elect to proceed with an appeal or appeals, *West v NSW* may be a useful case to test the liability, and the legal duties, of the fire and emergency services.