
**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY**

**FULL COURT**

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# BUSH FIRES APPEAL

## *Electro Optic Systems Pty Ltd v State of New South Wales; West & Anor v State of New South Wales* [2014] ACTCA 45

**Murrell CJ, Jagot and Katzmann JJ**

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## SUMMARY

This is a case in which there has been considerable public interest. For the benefit of the parties and the public, a summary has been prepared to accompany the reasons for judgment delivered today.

The summary is intended to assist understanding of the decision of the Court. It is not a complete statement of the conclusions reached by the Court or the reasons for those conclusions. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment. The published reasons for judgment and this summary will be available on the Supreme Court website at www.courts.act.gov.au.

# SUMMARY

These appeals concern the bush fires that burned from the Brindabella National Park (the **Park**) in New South Wales (**NSW**) into the Australian Capital Territory (the **ACT**) and Canberra in January 2003. The plaintiffs were property holders in NSW and Canberra whose properties had been burned in the bush fires. They sued NSW for damages claiming that NSW was vicariously liable for the negligence of the incident controllers in charge of co-ordinating the response to the bush fires, the first an officer of the NSW National Parks and Wildlife Service (the **NPWS**) and the second a member of the NSW Rural Fire Service (the **RFS**).

The primary judge found that the incident controllers were negligent and that their negligence had caused the plaintiffs damage. But he dismissed their actions because he was satisfied that NSW had made out defences under s 128 of the *Rural Fires Act 1997* (NSW) and s 43 of the *Civil Liability Act 1995* (NSW). All these findings were challenged on appeal, the latter by the plaintiffs, the former by NSW in a notice of contention.

The ACT Court of Appeal (the **Court**) has decided that the appeal against the primary judge's decision must be dismissed.

On the appeal the plaintiffs submitted that the primary judge had misconstrued s 128 and that NSW had not proved that it was entitled to the benefit of the section. They also submitted that s 43 of the Civil Liability Act was inapplicable. The property holders in Canberra argued that NSW was liable to them in negligence because the Commissioner of the RFS had failed to warn them of the risk that the bush fires would burn their way into the western suburbs of Canberra (the **second duty of care**).

By the notice of contention NSW argued that there could have been no finding of negligence because, amongst other reasons, there was no duty of care and, even if there was, the plaintiffs had not proved it had been breached. Nor, NSW argued, had the plaintiffs shown that any such acts or omissions of their employees as found by the primary judge caused the plaintiffs' properties to burn.

In response to the notice of contention the plaintiffs defended the primary judge's findings that the incident controllers owed a duty to people whose property was at risk of damage from the bush fires to take reasonable care to avoid that risk of harm (the **first duty of care**) and that they breached that duty by failing to directly

attack a spot fire on the Baldy Range on the morning after the bush fires ignited and to clear and back-burn vegetation along the Goodradigbee River.

The plaintiffs also defended the primary judge's findings on the cause of damage. According to the plaintiffs, if the incident controllers had caused a direct attack on the spot fire on the Baldy Range on the morning after the bush fires ignited and the clearing and back-burning of vegetation along the length of the Goodradigbee River then the bush fires would not have escaped the national park and damaged their properties.

All members of the Court held that NSW had proved that it was protected from civil liability by s 128 of the Rural Fires Act, which provides a complete defence from liability for matters or things done or omitted to be done by a "protected person or body" "for the purpose of executing any provision .. of [the] Act or any other Act". For this reason alone, the appeals had to be dismissed.

In these circumstances, Katzmann J considered that it was unnecessary to determine the other issues but, like Murrell CJ, agreed with Jagot J that NSW did not owe the plaintiffs the first alleged duty of care.

Jagot J (Murrell CJ and Katzmann J agreeing) held that such a duty would be inconsistent with the statutory scheme established by the Rural Fires Act under which the incident controllers were exercising powers to co-ordinate responses to the bush fires. Imposing such a duty would potentially distort the important functions of an incident controller. Other indicia relevant to the imposition of such a duty of care also weighed against the imposition of any such duty:

- The fires were caused by lightning strikes and not by any action by or on behalf of NSW.

- The incident controllers did not, by their conduct, increase the risk of harm to any property from the bush fires.

- The bush fires increased in intensity because they could not be controlled before the onset of extreme weather conditions which caused the bush fires to burn across containment lines.

- The incident controllers did not have available to them unlimited resources to fight the bush fires and, in particular, did not receive aerial incendiaries until too late for effective use.

- The plaintiffs could take some action to attempt to protect themselves from the risk of harm of bush fires.

- The incident controllers had not assumed responsibility for the protection of the property of the plaintiffs in particular.

- The bush fires could have burned in any direction from the Park so that the class of people to whom a duty of care was owed would be indeterminate.

- The alleged duty, in substance if not in form, would have required the incident controllers to take positive action to avoid the risk of harm to the property of the plaintiffs in particular.

Further, Jagot J (Murrell CJ and Katzmann J agreeing) held that NSW did not breach the first duty of care. If the first duty of care was owed, the evidence did not establish any lack of reasonable care by the incident controllers in not directly attacking the spot fire on the Baldy Range on the morning after the fires ignited or in not clearing and back-burning vegetation along the length of the Goodradigbee River.

Jagot J (Murrell CJ and Katzmann J agreeing) also held that the evidence did not establish that the alleged breaches of the first duty of care caused the harm which the plaintiffs suffered.

In respect of the second duty of care, all members of the Court held that if any such duty to warn the residents of Canberra existed, the evidence did not establish that the Commissioner of the RFS had acted in breach of that duty.

Finally, and in any event, Jagot J (Murrell CJ agreeing) held that the incident controllers were entitled to rely, not only on the defence created by s 128 of the Rural Fires Act, but also on s 43A of the Civil Liability Act. Specifically, their Honours held that NSW could not have been found liable because the omissions of the incident controllers involved a failure to exercise special statutory powers as set out in s 43A of the Civil Liability Act and the plaintiffs conceded that the conduct in question was not so unreasonable that no authority having the special statutory power in question could properly consider the omission to be a reasonable failure to exercise its power.

Katzmann J considered it was unnecessary to decide whether the conduct of the incident controllers involved a failure to exercise special statutory powers within the meaning of s 43A of the Civil Liability Act.