

Litigation for failure to warn of natural hazards and community resilience¹

Michael Eburn discusses liability in relation to hazard warnings in the Australian context and examines whether 'blaming, naming and claiming' poses a threat to community resilience.

Abstract

Kumar and Srivastava, in their book, *Tsunami and Disaster Management: Law and Governance*, argue that governments should be strictly liable for failure to warn of impending disasters. In this paper Eburn looks at that argument in the context of Australian law and finds that bringing a legal action for failure to warn may be easier than suing responders, but such an action would still face considerable legal hurdles and may pose a threat to long term community resilience. The paper is particularly timely given the current litigation arising from the 2003 Canberra bushfires and the alleged failure of ACT emergency services to issue adequate and timely warnings.

This paper considers, in the Australian context, the potential liability of those involved in communicating hazard warnings to the community. It considers the proposition that suing the authorities for 'failure to warn' will be a reasonably attractive litigation strategy but that, if adopted, may pose a threat to community resilience. It will argue that reliance on tort (or fault based litigation) may pose a threat to community resilience.

The argument in favour of liability

Kumar and Srivastava (2006) argue that traditional tort law provides too many barriers for those affected by disasters so, they argue a new strict liability is required. They say:

... the compensatory approach to tort law adds a vital element to the discourse on providing justice to disaster victims. Tort law is developing towards establishing a primary duty on those in whose hands lay the security and welfare of hundreds and thousands of people in the aftermath of a disaster. **It needs to be recognised that when government authorities, businesses or individuals fail to give adequate warnings** or take reasonable precautions

against an impending danger or disaster (when possible to do so), or fail to take adequate relief and rescue measures, **they could be strictly liable.** (Kumar and Srivastava, 2006, p.40 (emphasis added)).

The role of tort law

The role of tort law is to compensate a person for the injury or losses suffered due to the neglect or misfeasance of another, rather than to allocate blame in a moral sense. Notwithstanding this, Wells, Morgan and Quick (2000) have identified three stages that form part of a tort claim; they call these the stages of 'naming, blaming, and claiming' and say these 'mark the move from acceptance of death and disaster to the widefelt need to blame.' (Wells et al, 2000, p.504). Apart from a sense of moral vindication, the identification of someone to blame brings the ability to transfer the cost of the disaster from the affected individual (or their insurer) to someone else – the government, another government or another insurer.

The Australian context

Assuming that someone wants to 'blame, name and claim', is that going to be likely or easy?

As far as likely is concerned one has to say 'yes'. First it must be remembered that that 'disasters do not label themselves' (Wells et al, 2000, p.504) that is an event like a fire, a flood, an earthquake or a tsunami are not a disaster unless and until they impact upon a vulnerable community. It is that impact that converts an 'event' or a hazard into a 'disaster' (Kent, 1987, p. 2). Once an event has impacted upon a community it 'is not surprising that post mortems ... reveal weaknesses and shortcomings' (McLeod, 2003, p.iii) and affected communities can point to some decision, process or institutional failure that, had it been avoided, may have lead to different outcomes. It is relatively easy therefore, after a disaster, to find some one or some institution that can be labelled as negligent, inadequate or worse 'incompetent' (Doogan, 2006, p.165).

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Failure to warn will be an attractive theory of liability

Inquiries, and courts, are unwilling to blame front line responders for decisions made in the heat of the moment when faced with an unpredictable event (Eburn, 2005, p.40). Legislatures have also attempted to limit the liability of the emergency services and/or their officers for decisions in the field, particularly when an incident is classed as a state of disaster or emergency (see for example *State Emergency and Rescue Management Act 1989* (NSW) ss 62 and 62A; *Emergencies Act 2005* (WA) Part 7 and s 100; *Emergencies Act 2004* (ACT) s 198).

A failure to warn of the risk of an incident impacting upon a community is somewhat different. For the Bureau of Meteorology there is no particular legal protection, for the managers of the emergency services, choosing whether, and how to warn an at risk community, is not an exercise of a 'special statutory power' (*Civil Liability Act 2002* (NSW) s 43A) so that, in each case, they will be judged by the ordinary law of tort.

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

The other question posed was 'would such an action be easy?' The answer to that question is 'no, it will not be easy, but it will be easier than suing other potential defendants such as responders'.

Duty of care

The first issue that must be addressed is whether any identified organisation owes a legal duty to issue a warning. This is complex but at least arguable.

First some authorities have a statutory obligation to warn (*Meteorology Act 1955* (Cth) s 6(1)(c); *State Emergency Service Act 1989* (NSW) s 8(1)(a)). Other services, including the fire brigades, police, ambulance and health services have general duties to protect people and communities from risks. Even if they are not specifically charged with a duty to issue warnings, such a power would exist as an incidental power, that is it is implied by their more general obligations.

Just because an authority has a statutory obligation or power does not mean a person affected can sue for the negligent exercise of that obligation or power. Deciding when an authority will owe a duty of care is not easy. Notwithstanding the absence of a 'clear and universal test' (*Amaca*, 2004, ¶19) some key factors that may suggest an authority owes a duty of care have arisen.

In this context the relevant factors are

- Control – does the authority control the hazard; and
- Knowledge – that is where the authority has knowledge of a particular risk coupled with a power to intervene and there is a vulnerability on the part of others, either because they cannot know of the risk or cannot take steps to protect themselves from that risk.

McHugh J of the High Court of Australia said:

Some powers may be vested in the authorities for the protection of a specific class of persons who may be exposed to risks of harm that they are powerless to avoid and sometimes unable to identify. ... If the authority is aware of a situation that calls for the protection of an individual from a particular risk, the common law may impose a duty of care. (*Graham Barclay*, 2002, p359).

An organisation involved in hazard management may not be in control of the hazard (ie the fire or the storm) but they are in control of the information and whether, and how, that information is given to the public. Further the public may be in a position of vulnerability as they not only cannot know the information they cannot know what its significance is for them. Where people cannot inform themselves particularly because the information required is specialised and requires professional skill to understand (eg information about the weather or a fire system) then an individual must depend on a professional to explain the implications so that they can make their own decisions about what is best for them.

If we consider the case of a particular fire or flood the people likely to be affected by that hazard will be reasonably identifiable (it will be the people in the predicted path of the fire or living by the river, not an unidentifiable part of the community). Although they may know they live in a fire or flood prone environment and could be expected to take general precautions they cannot know the particular risk (how will the weather impact on *this* fire, how high is *this* flood expected to go) but that is something the combat and weather agencies may be expected to know. In that context there is a situation where the authorities have particular, specific, knowledge and are aware of a specific risk to an identifiable, vulnerable individual or group. It would be arguable therefore that a common law duty to warn can arise where an identifiable group is at risk from an event and they are unable to predict the consequences of the event themselves.

Breach of duty

If a legal duty to warn is found, there must then be evidence of a breach of that duty. This will be very problematic. Kumar and Srivastava argue that:

Neither the state nor the individual should be allowed to escape liability on the ground of lack of resources or error of judgment by weathermen or by rescuers. The liability in such cases must be strict. The state must compensate those who have suffered, become destitute, or lost their property, possessions and livelihoods. (Kumar and Srivastava 2006, p.144).

That view does not reflect the law in Australia. In Australia

A public body or statutory authority only has those powers that are conferred upon it. And it only has the resources with which it is provided. If the common law imposes a duty of care on a statutory authority in relation to the exercise or non-exercise of its powers or functions, it only imposes a duty to take those steps that a reasonable authority with the same powers and resources would have taken in the circumstances in question. (Crimmins, 1999, p.10, Gaudron J).

State legislatures have made it even harder to sue a public authority. In New South Wales for example, a person can only sue an agency for breach of a statutory duty if the action, or inaction, of the authority was '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.' (*Civil Liability Act 2002* (NSW) s 43; see also *Civil Law (Wrongs) Act 2002* (ACT) s 111; *Civil Liability Act 2003* (Qld) s 36; *Civil Liability Act 2002* (Tas) s 40; *Wrongs Act 1958* (Vic) s 84(2)). A plaintiff will therefore have to show that a failure to warn, or a failure to issue an adequate warning was not merely negligent but so unreasonable that no authority could have considered it was performing its statutory obligations in all the circumstances that were then present.

Further despite Kumar and Srivastava's (2006) argument that authorities should not escape liability due to a lack of resources the question of resources is an essential consideration in Australia. Again legislation has made it clear that in asking whether a statutory authority has acted reasonably, the court must take into account the resources available to that authority and the other responsibilities that the authority may have. A court cannot question how an authority may allocate its resources between its particular functions (*Civil Liability Act 2002* (NSW) s 42). Again this makes suing responders problematic. A plaintiff cannot complain that the fire brigade only despatched one, two or even no units to a reported fire particularly in a major event when all the resources are on the ground. The courts will not generally hear an allegation that the resources should have been deployed in some other way. This is equally true when it comes to failure to warn, particularly for the emergency service where the duty to warn of oncoming hazards is only one of its functions, so how it allocates its resources between

the various tasks, including responding to the emergency as well as managing its media relations, is not subject to judicial review.

What this does mean is that an agency charged with warning a community will not be negligent for the decisions it made when it comes to establishing its resources, the weather bureau cannot be sued for failing to invest in the biggest and best satellite systems when it has to make resource decisions based on a number of competing resource demands. Unlike the fire brigades however, the decision to issue a warning using the resources one has carries, presumably, little opportunity cost so a court may be unlikely to see whether a warning was issued or not, or the nature and scope of the warning, as a question of resource allocation. Again the point to be made here is not that suing a warning agency for failure to warn will be easy, but it will be easier than attempting to sue a response agency for failure to respond to the hazard.

Damage

Finally the plaintiff will have to prove damage, that is had the warning been given the outcome for them would have been different (Rogers, 1992; Chappel, 1998, Rosenberg, 2001). In the case of fire that may mean, as the ACT Coroner found, that people would have been better prepared to defend their homes or could have made earlier decisions to remove valuable items, pets or themselves out of harms way. The High Court, when dealing with negligent failure to warn by medical practitioners, has warned that one must approach a plaintiff's claims that they would have responded differently if warned of a risk, with caution. It must be remembered that after the event, the plaintiff knows exactly what will happen, but the duty to warn is not a duty to accurately predict an outcome but to warn of a risk (Rosenberg, 2001). In context that may mean a plaintiff will argue 'If I'd been told the fire was going to impact upon my home I would have stayed or moved my possessions' but that is not the correct test. The authorities, before the event, can at best predict, with varying degrees of confidence, that a certain area or population may be affected. They are unlikely to be able to predict the exact impact or who exactly will be impacted. The question for a court in subsequent litigation is, therefore, would the plaintiff have done something differently if warned 'There is a risk that you may be affected', not if told 'your house will be destroyed by fire'.

The threat to community resilience

None of the issues raised by the litigation are insurmountable, but they are arguable. To say that they are arguable, rather than they are clear cut, means that the litigants may well spend many months or years bringing evidence and making legal argument. The path to tort compensation will be rocky, time consuming, stressful and unpredictable.

Relying on tort action to bring out the failings in the emergency management (including the failure to warn) or to provide financial compensation can pose a threat to community resilience. 'The term community resilience recognises that communities operate as networks and groups, rather than as discrete individuals' (O'Neill, 2004) litigation is however, an intrinsically individual process, where the focus is on the individual's relationship with the defendant (in order to determine if there is a duty of care) and the individual's losses. This means that litigation can be a threat to community resilience; that is the ability of people to operate in networks and to develop a community response to hazards and hazard management. Some potential examples of how litigation is a threat to community resilience are:

- '[N]aming, blaming, and claiming' converts a disaster from an event for which we are all responsible to one for which an individual or an authority can be blamed. The disaster becomes an abnormality caused by a failure rather than an event that the community can take responsibility for. Kumar and Srivastava (2006) refer to those 'in whose hands lay the security and welfare of hundreds and thousands of people in the aftermath of a disaster'. The Canberra Coroner referred to 'those charged with responsibility for keeping the community safe from fire.' (Doogan, 2006, p.30). A successful tort action means that the event was someone's 'fault' and the 'victim' does not have to take responsibility for their own actions or failure to prepare (Cohen et al, 1996). This may well persuade the community that disasters are unnatural, avoidable and some one else's (generally the government's) responsibility.

To rely on tort litigation to remedy alleged defects in performance, after the event, reinforces the belief or the expectation that the emergency services will, with 'lights and sirens come flying down the road ... and they'll take the responsibility away from you.' Communities, if they are to be resilient need to '... understand the nature of where they live and the fact that fire [or flood or storms are] ... part of the natural environment, and at some time quite often, if it's not "if", it's "when" you're going to have to experience it.' (Gardner, 2004, ¶58) By seeing adverse events as the fault of someone else, the requirement on communities to take an interest in the hazards they face is reduced.

- Tort litigation is a threat to community resilience by forcing people to remain locked in the past. To yet again take the Canberra bushfires as an example, the people involved in that event have had to give evidence to, and wait for a number of public enquiries including the *Inquiry into the Operational Response to the January 2004 Bushfires in the ACT*; the *House Select Committee on the Recent Australian Bushfires*; the ACT Coroner's inquest (2003 – 2006) and now the associated civil litigation. Each inquiry or trial is looking at the events over a short period, at actions taken in the hours and minutes as the fire progressed. Members of the community and the

emergency services are asked again and again to go over the decisions made at that time. Community resilience cannot be established by repeatedly asking the same questions.

- Tort litigation does not encourage recovery.

Recovery is defined as: 'The coordinated efforts and processes to effect the immediate, medium and long term holistic regeneration of a community following a disaster'. (Norman, 2006, p.16.)

A community may want to recover, but there is an incentive in tort litigation for the plaintiff to remain focused on the poor outcomes rather than the possibilities of recovery. If the plaintiff has 'recovered' their damages will be less than if they can show ongoing adverse consequences.
- Tort litigation is a blunt tool for delivering justice. The only remedy the court has is to award money damages though for some plaintiffs there may be a desire that some other sense of vindication will come through. In many cases the money will flow not to the victims of the disaster but from the resources of the government (or the governments' insurer) to another insurer. As a loss shifting exercise it is of limited value in major disasters where governments, the community, non-government organisations and insurers already come to make good the losses as far as money can do that. The costs of disasters are already spread across the community by way of insurance premiums, government and insurer support for the emergency services and the overwhelming generosity of the broader community who donate to emergency relief funds. The situation is not the case where a person must sue in negligence or receive no assistance or compensation for their losses.
- Tort litigation is not designed to discover 'the truth' rather it is an adversarial process designed to establish the legal elements required to succeed. It is a complex process surrounded by legal processes and rules of evidence. It does not have the objectives of a public inquiry that is set up to actually consider the lessons that may be learned from the process. Where there is a fear of litigation, potential witnesses may be unwilling to give evidence to public enquiries. Wells, Morgan and Quick (2000) report that

Where the institutional processes relating to major accidents (disasters) is primarily focused on apportioning blame, facts will be concealed or seriously distorted by the adversarial process ... (Wells et al 2000, p. 5, , citing Hood and Jones, 1996).
- Parties to civil litigation may settle a matter on confidential terms thereby restricting the flow of information and avoiding the public naming that a plaintiff may desire. The share of the tort damages are not spread across the community but only to those ready willing and able to embark on the litigation process.

Conclusion

This paper was inspired by the chapter in Kumar and Srivastava's book *Tsunami and Disaster Management: Law and Governance* where they argued for an increased use of tort litigation as a way of enhancing justice for disaster 'victims'. They argued that '... those in whose hands lay the security and welfare of hundreds and thousands of people in the aftermath of a disaster' should be strictly liable for any failure to warn the community of the impending disaster.

It is argued here that this is the wrong approach. Tort liability is an individualistic response to a disaster and could divide a community and threaten their resilience. It is unlikely that tort actions will actually enhance responders and managers desire to act in the best interests of the community. Tort action with its culture of blame will discourage volunteers, and distort the distribution of funds so that resources are expended on litigation and what is available for relief is not distributed on the basis of need, but the basis of blame. A community response, based on community ownership of prevention, preparation, response and recovery will do far more to benefit both the community's, and the individual's recovery, than encouraging people to litigate.

References

- Christopher Hood & David K.C. Jones, 1996, 'Liability and Blame: Pointing the Finger or Nobody's Fault' in Christopher Hood & David K.C. Jones (eds), 1996, *Accident And Design: Contemporary Debates In Risk Management*.
- Doogan, M., 2006, *The Canberra Firestorm: Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003*, ACT Coroners Court, Canberra.
- Eburn, M., 2005, *Emergency Law (2nd ed)*, The Federation Press, Sydney.
- Kent, Randolph C., 1987, *Anatomy of Disaster Relief: The International Network in Action*, Pinter Publishers, London.
- Kumar, C. Raj and Srivastava, D.K., 2006 'Tort Law Perspectives on Disaster Management' in Kumar, C. Raj and Srivastava, D.K. (eds), 2006, *Tsunami and Disaster Management: Law and Governance*, Sweet & Maxwell Asia, Hong Kong.
- McLeod, R., 2003, *Inquiry into the Operational Response to the January 2003 Bushfires in the ACT*, ACT Government, Canberra.

Norman, S., 2001, 'New Zealand's holistic framework for disaster recovery', *Australian Journal of Emergency Management* Vol 21, No. 4, pp.16-20.

O'Neill, P. 2004, *Developing a Risk Communication Model to Encourage Community Safety from Natural Hazards*, 15 June 2007.

Cohen E., Hughes P., White P., 2006, 'Battling ferocious flames: bushfires in the media' *Australian Journal of Emergency Management* Vol 21, No. 1, pp.47-52.

Wells, C., Morgan, D. and Quick, O., 2000, 'Disasters: A Challenge for the Law', *Washburn Law Journal* Vol 39 pp 496-525.

Cases

Amaca Pty Limited (Formerly known as James Hardie & Coy Pty Limited) v The State of New South Wales & Anor [2004] NSWCA 124 revised - 27/05/2004.

Bennet and Wood v Orange City Council (1967) 67 SR(NSW) 426.

Capital and Counties v Hampshire County Council (1997) 2 All ER 865.

Chappel v Hart (1998) 195 CLR 2.

Crimmins v Stevedoring Industry Finance Committee (1999) 167 ALR 1.

Gardner v NT [2004] NTCA 14.

Graham Barclay Oysters v Ryan (2002) 194 ALR 337.

Rogers v Whitaker (1992) 175 CLR 479.

Rosenberg v Percival (2001) 205 CLR 434.

About the Author

Michael Eburn is a Senior Lecturer at the School of Law, University of New England, Armidale NSW with a particular interest in the law governing the emergency services. He is the author of *Emergency Law* (2nd ed, 2005, The Federation Press) and a regular speaker at the Emergency Management Australia Institute, Mt Macedon, Victoria.

Michael can be contacted at meburn@une.edu.au