

# A case study of tort liability for fire damage

Michael Eburn calls for a 'realistic assessment' of rural firefighting

## Abstract

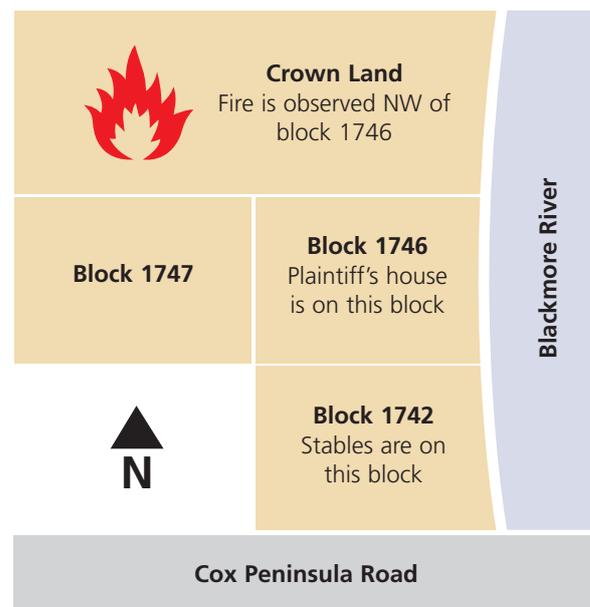
*Gardner v The Northern Territory* is a rare example of a person suing fire authorities in negligence for their failure to protect his property from bush fire. This article looks at the allegations that were raised and why the Northern Territory Court of Appeal found there was no negligence by the Northern Territory or its fire fighting authorities. The conclusion is that Courts, when dealing with the emergency services and the response to unpredictable phenomena such as fire, are willing to try and understand the realities that decision makers face and take into account the complex context in which those decisions must be made.

"...this Court must be careful not to impose unreasonable expectations and unreasonable duties which are based more on hindsight and a lack of appreciation of the practicalities and difficulties that exist ... than a realistic assessment of the care which a reasonably prudent person would exercise in these circumstances". (Gardner, 2004, [70])

*Gardner v The Northern Territory* is a rare case indeed as it is an example of a person suing fire authorities in negligence for their failure to protect his property from bush fire. The decision in this case gives a reassuring message for government authorities, fire services, and fire fighters everywhere. The Northern Territory Supreme Court and then the Northern Territory Court of Appeal found that there had been no negligence by the either the Conservation Land Corporation, the Parks and Wildlife Commission or the Bush Fires Council. The High Court of Australia refused to hear a further appeal (Gardner, 2005).

## The facts

Mr Gardner was the owner or part owner of three blocks of land (numbered 1742, 1746 and 1747) in a remote part of Australia's Northern Territory. On his northern border was Crown land; that is land that was owned by the Conservation Land Commission but managed by the Parks and Wildlife Commission (Gardner, 2004, [5]). A rough map, drawn by the author, shows the relative position of the various blocks of land:



Not to scale. Each of Mr Gardner's blocks had an area of 320 acres.

On the 9th September 1995, a fire was observed to the north-west of Mr Gardner's property. The captain of the local Bush Fire Brigade attended the property and discussed with Mr Gardner, where the fire was and whether there was a risk to his property. The Brigade captain said:

"I spoke to Mr Gardner about the fire, smoke from which I could see to the north-west of Daly's Creek [a creek which ran through Section 1746]. I do not recall Mr Gardner's exact words, but he advised me to the effect "as far as I can see it will stay the other side of the creek". Mr Gardner did not appear to be worried about the fire. I agreed with his assessment. In my opinion it was not then a threat to the Property [the appellant's

property being Sections 1746, 1747 and 1742]”. (Gardner, 2004, [20]).

The next day, the 10th September 1995, the Brigade captain again attended Mr Gardner’s stables on block 1742 and they again discussed the progress of the fire and the risk to Mr Gardner’s property. In his evidence the Brigade captain said:

“I do not recall Mr Gardner’s exact words, but he advised me to the effect “it’ll be right mate, don’t worry about it”. I replied in words to the effect “if you think it’s safe that’s fine by me”. (Gardner, 2004, [27]).

Between midday and 3pm the assessment by Mr Gardner and the Brigade captain proved to be wrong, as the fire did come across to block 1746 and destroyed Mr Gardner’s home. There was no evidence as to what the Fire Brigades were doing during that time but the Court accepted that had Mr Gardner rang 000 to ask for Fire Brigade assistance “the Berry Springs Bush Fire Brigade would have immediately abandoned other activities and gone to his assistance”. (Gardner, 2004, [32]).

## The allegation

In order to succeed in an action for negligence, a plaintiff has to show three things, they are:

1. That the defendant had a duty to do, or not do, some particular act;
2. That the defendant, unreasonably, failed to fulfil its duty; and
3. As a result Mr Gardner suffered some sort of loss or damage. (*Donoghue v Stevenson; Wyong Shire v Shirt*).

Mr Gardner’s allegation was that between them, the three authorities had duties to:

- Minimise the risk and intensity of fire that might occur on the Crown land and
- Once a fire broke out, take effective steps to stop it spreading from the Crown land onto his property. (Gardner, 2004, [8]).

The Northern Territory admitted the first element of negligence (that is item (1) above). In this context that meant that the Northern Territory admitted that it had a duty to take reasonable precautions to stop fire spreading from the Crown land onto Mr Gardner’s property (Gardner, 2004, [6]). The issue of damage (that is, item (3) above) was also beyond dispute as Mr Gardner had, indeed, lost his home.

The issue, therefore, was whether the various authorities (all represented by the Northern Territory) had breached their duty of care. To answer this question, the Court had to consider whether there was something else that

a reasonable person, in the position of the defendants would have done, or something the reasonable person would have done differently? If the answer to that question was ‘yes’ the Court would then have to consider whether or not that would have led to a different outcome for Mr Gardner?

Mr Gardner argued that the authorities should have reduced the risk of fire, and the intensity of any potential fire, by conducting controlled burns to reduce the fuel load. These burns had occurred in previous years and it was argued that they should have taken place during 1995. The failure to reduce the fuel load, it was argued, contributed to the size and spread of the fire (Gardner, 2004, [9]). Mr Gardner also argued that once the fire started, there was an obligation on the various authorities to monitor the fire, to advise him of its location and movement and to stop the spread of the fire onto his property (Gardner, 2004, [10]).

In response, the Northern Territory brought evidence to allow the Court to consider the realities of Mr Gardner’s position. He lived in the remote Northern Territory on inaccessible land. In the area around him were “bush style residences and associated outbuildings ... [but] no other residential buildings and sheds”. (Gardner, 2004, [11]).

Nearby, however, and within the area that was threatened by fire:

“... was a closely settled rural residential area or conservation and wildlife and park reserves with significant farms, buildings and other public and private infrastructure, throughout which was interspersed land under the control or ownership of the Crown”. (Gardner, 2004, [11]).

The Northern Territory explained what its authorities did to control fires in the area. They said:

- (a) The Bush Fire Council sought to protect lives and property from bush fires in the region and the locality by:
  - (i) public awareness campaigns directed at landholders having and maintaining fire access tracks along their property boundaries and creating and maintaining fire breaks and removing fuel load material around and adjacent to houses, sheds, orchards and other property infrastructure; and
  - (ii) in the case of the region installing fire access tracks around the boundaries of Crown land.
- (b) Volunteer Bush Fire Brigades provided at a local level:
  - (i) early dry season burning off programs on Crown Land and road reserves;

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Fire fighters are endangered without vehicular escape routes when fighting fires or backburning.

- (ii) assistance to landowners at their request for burning off and fuel load reduction on private property;
- (iii) on call assistance to property owners in the event of threatening fire to back burn in the face of fire and where necessary fight fires around endangered property;
- (c) Volunteer Bush Fire Brigades in the region and the locality attempted to prevent bush fires from burning persons and property by the provision of the services referred to in the immediately [sic] sub-paragraph;
- (d) Fire access trails on property boundaries do not and cannot prevent all bush fires. Their purpose is to provide access for fire fighters and fire fighting vehicles and heavy equipment to be placed in the way of approaching fire for grading, back burning and other fire fighting purposes;
- (e) It was and remains unrealistic, dangerous to fire fighters and beyond the financial and other resources of the Crown to reduce fuel loads and fight fires on Crown Land because:
  - (i) of the large areas involved;
  - (ii) Crown Land in the locality is variously rough, rocky, boggy, swampy and wet and comprised by areas of black soil, open savannah, paperbark or eucalypt woodland and not susceptible to permanent fire access trails of sufficient (sic) number and area coverage;
  - (iii) fire fighters are endangered without vehicular escape routes when fighting fires or backburning;
  - (iv) of the uncontrollable nature of fires and in particular a propensity to jump large distances over burnt and cleared area, fire access trails;
  - (v) of the cost involved relative to the measures referred to in sub-paragraphs (i) and (j) above;
  - (vi) fire is an integral part of the Northern Territory environment and landscape.
- (f) Fire protection and management in the region and the locality depends upon residents having high levels of awareness of the risks of fire and conducting themselves and their property in a way that ensures maximum co-operation with the Bush Fires Council and the Volunteer Bush Fire Brigades and creating the maximum possible protection from fire having regard to all the circumstances prevailing from time to time. In particular, the Bush Fires Council and the Volunteer Bush Fire Brigades depend upon residents to maintain high vigilance at times of fire danger and to call for assistance when it is needed to protect persons and property from loss and damage.
- (g) All rural residents in the region and the locality including Mr Gardner as a long time resident thereof know or should know the matters set out in particulars (a) to (f) above. (*Gardner*, 2004, [11]).

In essence, the Northern Territory said that it, via the authorities involved, had done what could be done and that people who chose to live in these remote areas had to accept that fire was part of the environment in which they chose to live and therefore they had to accept some

responsibility for maintaining fire trails, monitoring the progress of fire and taking action to minimise the impact that inevitable fires would have on their homes. As one witness said:

“People choose to live in these areas, they choose to make the distinction between having a fully paid fire service, that press with a triple O on your phone, you’ll have lights and sirens come flying down the road and do whatever you do and they’ll take the responsibility away from you. In our area they have to have the responsibility, they have to understand the nature of where they live and the fact that fire is 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 and that’s a simple fact of life. If you want a fully paid fire service then live in Darwin”. (*Gardner*, 2004, [58]).

## Decision

This matter was heard in the Supreme Court of the Northern Territory which found in favour of the Territory. Mr Gardner appealed to the Court of Appeal where Chief Justice Martin delivered the leading judgment, also in favour of the Territory. Justices Angel and Mildren agreed with Chief Justice Martin.

### No tort liability for failure to build fire breaks on Crown land

Failure to establish fire breaks at the boundary between the Crown land and Mr Gardner’s property was not negligent. Had they been built they would not have stopped the fire so whether there was a duty to build fire breaks or not, the failure to build them did not cause Mr Gardner’s damage. (*Gardner*, 2004, [44]).

### No tort liability for failure to reduce fuel load via controlled burns

Equally the Court found that failure to reduce the fuel load on the Crown land was not negligent as Mr Gardner had not reduced the fuel on his own land. Even if the authorities had burned off fuel, once the fire got to Gardner’s property (and the evidence showed that in the case of this fire no fuel reduction program would have actually stopped the fire spreading) it would have had sufficient fuel to burn out his property and destroy his home. (*Gardner*, 2004, [47]).

### No tort liability generally for the response to the fire threat

The Court further found there was no negligence by the Fire Brigade in its response to the fire. The Brigade was under a duty to make sure Mr Gardner was aware of the fire (*Gardner*, 2004, [51]) and that there was a system in place to monitor the spread of the fire (*Gardner*, 2004, [53]). The Brigade met the duty to warn of the presence of the fire when the Brigade captain attended

Mr Gardner’s property and spoke to him, thereby ensuring that Mr Gardner was aware of the fire.

With respect to monitoring the fire the court held that it was reasonable for the Fire Brigade to rely on Mr Gardner to monitor the fire and to contact the Brigade if and when he became aware that the fire was in fact spreading onto his land. (*Gardner*, 2004, [69]).

It is this part of the decision that will be of most interest to responders. The court accepted that there was no duty to attempt to extinguish the fire in inaccessible country. Also, given the context of the fire, it was reasonable to rely on the home owner to take responsibility for the monitoring of the progress of the fire. It was not necessary for the Brigade to deploy scarce resources to monitor a fire that, at midday on the 10th September, was believed not to be a threat to the home. The fact that that assessment was wrong did not mean that there was negligence.

In deciding what the reasonable Fire Brigade would do in the circumstances the Chief Justice said that:

“... particular regard must be had to the remoteness of the locality, the community practice and expectations in such situations, the appellant’s experience, the duties required of the resources available to the Crown and the limited nature of those resources, namely, the volunteer Fire Brigade”. (*Gardner*, 2004, [70]).

The combination of circumstances meant it was reasonable to rely on Gardner to monitor the spread of the fire.

## Commentary

The law of negligence involves judging the conduct of a defendant against a hypothetical ‘reasonable person’ but that reasonable person must have some contact with the reality faced by the defendant in particular circumstances. The question of whether or not a defendant has met the standard of reasonable care required by the law is a legal question and therefore falls to be determined by the Courts (*Rogers v Whitaker*) but the concept of the reasonable person must not be so divorced from the practice of real life as to lose all meaning.

“If negligence law is to serve any useful social purpose, it must ordinarily reflect the foresight, reactions and conduct of ordinary members of the community .... To hold defendants to standards of conduct that do not reflect the common experience of the relevant community can only bring the law of negligence, and with it the administration of justice, into disrepute”. (*Dovuro Pty Limited v Wilkins*).

That doesn’t mean it will always be reasonable to rely on home owners or others to take what might be considered common sense actions to look after their own interest. In this case the Brigade could have been

expected to be more pro-active if, at midday, they had formed the view that the fire would in due course pose a threat to the home, that it could be accessed for fire fighting purposes or for some reason the home owner would not be competent to monitor the fire.

In trying to determine what a reasonable person in the defendant's position would have done a Court is faced with a common difficulty. When a matter comes to trial they are faced with certain outcomes, in this case with the knowledge that the fire did spread and did burn out Mr Gardner's home. The Court is asked, however, to judge not the outcome but the decision that was made at a time when the outcomes were uncertain. In this case to judge whether the decisions made at midday were reasonable when it could not be known where the fire would go. All that could be done, and all that could be asked for, was a reasonable assessment or prediction. The question is 'was the decision at the time it was made, reasonable?' and the answer to that question does not depend on the ultimate outcome.

Just because a decision or assessment turns out to be wrong, does not mean that, at the time, it was unreasonable. In approaching its task the Court of Appeal gave this warning to itself and to other courts:

"It is in that total context that this Court must be careful not to impose unreasonable expectations and unreasonable duties which are based more on hindsight and a lack of appreciation of the practicalities and difficulties that exist with fires in remote areas during the dry season than a realistic assessment of the care which a reasonably prudent person would exercise in these circumstances". (*Gardner*, 2004, [70])

For emergency services, the relevant circumstances are not only the threat to the property in question, but the resources available, the broader obligation to deploy resources across a wide area and the fact that the responders obligations to extend to people beyond an individual home owner.

In this case the assessment, at midday, that the fire would not pose a risk to the homestead, and that Mr Gardner could be relied upon to keep an eye on the fire and contact the Brigade should the situation change, turned out to be wrong (on both counts) but not negligent.

This case should, again, provide reassurance for fire fighters and other emergency responders. Although it is a case decided in the Northern Territory (and the Northern Territory has its own unique circumstances given its remote and rugged area and very sparse and uniquely independent population), but the principles are consistent with the developing law across Australia. The High Court, in different contexts, has affirmed that when it comes to determining what is to be expected of a reasonable person, it is a legal issue to be determined by the court, but that evidence of commonly accepted

practice will have a significant if not a determinative effect (*Rogers v Whitaker*; *Rosenberg v Percival*). In this case the Court was willing to put the fire in context and not to require a remote and small Fire Brigade to provide the sort of fire protection that may be expected in an urban environment. The court not only had regard to the reality facing the Fire Brigade, but also the reality of the choices that Mr Gardner made when he chose to live where he did. A city resident might be able to expect the Fire Brigade to '... come flying down the road and ... take the responsibility away from you' (*Gardner*, 2004, [58]) but Mr Gardner could not.

The law of negligence is not concerned with developing a 'one size fits all' approach, nor does it require all service providers to provide services equal to the most well resourced service provider. The context is important and defendants can expect that the Courts will hear evidence about the context in which decisions are made, and the limitations that decision makers face (see also, for example, Civil Liability Act 2002 (NSW) s 42(a)).

Again we can see that with respect to the emergency services and a response to unpredictable phenomena, the Courts are willing to try and understand the realities that decision makers are facing. Just because, in the cool atmosphere of a court case (in this case 9 years later) it can be argued that another decision may have produced a different result, it does not mean that the Courts will label the relevant authorities negligent (*Eburn*, 2005, [40-41]).

## References

*Civil Liability Act 2002* (NSW).

*Donoghue v Stevenson* [1932] AC 562.

*Dovuro Pty Limited v Wilkins and Others* (2003) 215 CLR 317, McHugh J at 329 cited in *Gardner v NT* [2004] NTCA 14, [59].

*Gardner v NT* [2004] NTCA 14.

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