



TORT LIABILITY FOR FAILURE TO WARN OF NATURAL HAZARDS – A THREAT TO COMMUNITY RESILIANCE

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A proposition:

- Suing the authorities for ‘failure to warn’ will be a reasonably attractive litigation strategy but that, if adopted, it may pose a threat to community resilience.

Kumar and Srivastava

“It needs to be recognised that when government authorities ... fail to give adequate warnings or take reasonable precautions against an impending danger or disaster ... or fail to take adequate relief and rescue measures, they could be strictly liable.”

‘Tort Law Perspectives on Disaster Management’ in Kumar and Srivastava (eds), *Tsunami and Disaster Management: Law and Governance* (2006) 139, 140.

Wells, Morgan and Quick

- ‘naming, blaming, and claiming’;
- These stages ‘mark the move from acceptance of death and disaster to the widespread need to blame.’

‘International Torts: A Comparative Study: Disasters: A Challenge for the Law’ (2000) 39 *Washburn L.J.* 496, 504.

The Australian context

- It 'is not surprising that post mortems ... reveal weaknesses and shortcomings.'

McLeod Inquiry into the Operational Response to the January 2003 Bushfires in the ACT (2003), iii.

- Affected communities can then point to some decision, process or institutional failure that, had it been avoided, may have lead to different outcomes.

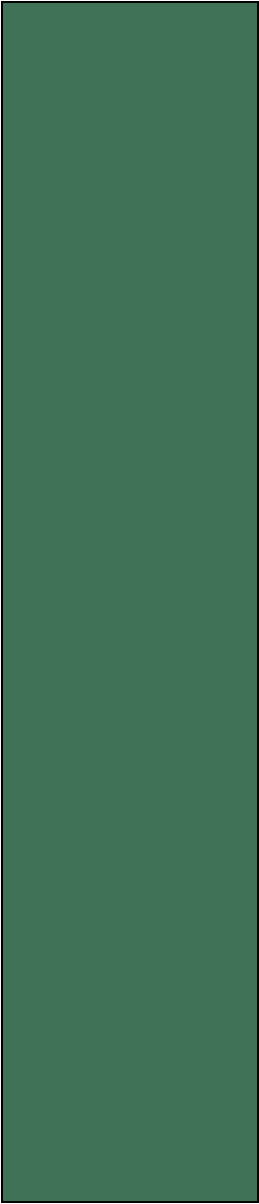
Failure to warn as a theory of liability

- Hard to bring an action against responders
- Failure to warn may be different

Duty of care

- 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.
- “A clear and universal test for determining whether a duty of care arises has not been laid down. Each case depends on its own circumstances ...”

Amaca v NSW [2004] NSWCA 124 [19].

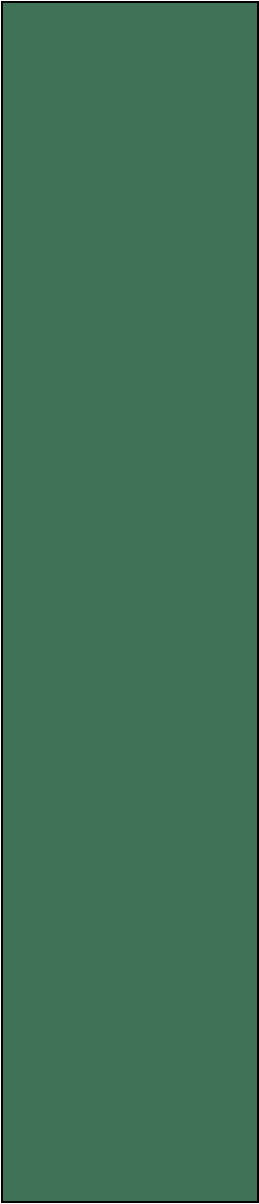
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- “Case law and judicial opinion do not provide clear paths for decision on the circumstances in which a duty of care is imposed on a public authority exercising statutory powers ...”

Sutherland Shire Council v Becker [2006] NSWCA 344 [82].

Key factors are

- Control;
- Knowledge.
- “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 v Ryan (2002) 194 ALR 337, 359 (McHugh J).

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- Control of the hazard is difficult – but authorities **HAVE** control over the release of information; and
 - The public is vulnerable;
 - This may → **a duty of care.**

Breach of duty

Kumar and Srivastava:

“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. ...”

(p 144).

High Court of 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 ... 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 v Stevedoring Industry Finance Committee (1999) 167 ALR 1, 10 (Gaudron J).



Civil Liability Act 2002
(NSW) s 43.

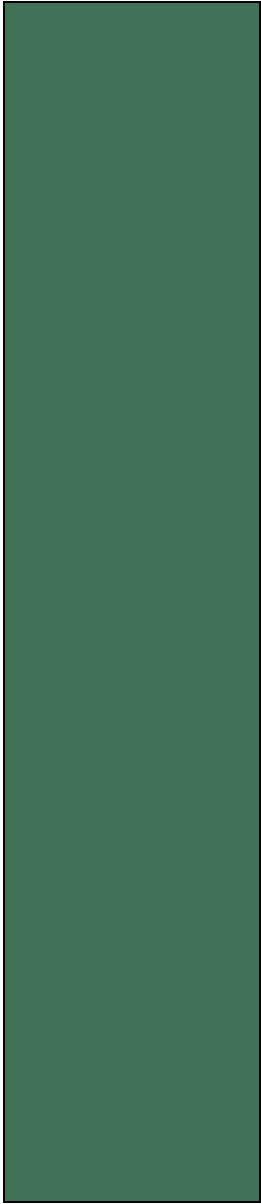
The act or omission must be ‘so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.’”



Civil Liability Act 2002 (NSW)

- The court must take into account the resources that the authority has; and
- The allocation of resources between various functions is not subject to judicial review (s 42).

Damage



The threat to community resilience

- ‘The term community resilience recognises that communities operate as networks and groups, rather than as discrete individuals.’

O’Neill, *Developing a Risk Communication Model to Encourage Community Safety from Natural Hazards*

<< <http://www.ses.nsw.gov.au/infopages/2305.html>>>

15 June 2007.

- Litigation is however, an intrinsically individual process.

Litigation

- Denies collective responsibility – the disaster is some **one's** fault;
- It is constantly retrospective;
- It discourages recovery;
- It only delivers \$\$ - not vindication or psychological/social recovery;
- It does not identify lessons to be learned.

Conclusion

- Kumar and Srivastava argue for tort litigation to achieve justice.
- It is argued here that this is the wrong approach.
- Thank you for your attention.