Chapter 6

LIABILITY OF EMERGENCY SERVICES

At the start of Chapter 3 it was said that legislation governing the emergency services usually has provisions to empower the services to do various things, and provisions designed to limit their legal liability. In this chapter we will consider the legal liability of the emergency services. This requires a consideration of the common law, the law that applies to authorities created by statute as well as the specific exemption clauses that apply to the emergency services.

Negligence

One likely cause of action against either an emergency service or a member of that service will be an action alleging negligence. A plaintiff claiming compensation on the basis of the negligence of the emergency services will need to show that the service owed him or her a duty of care, that they failed to act reasonably in the circumstances and that as a result the plaintiff suffered harm. Any person trying to bring this action will face considerable legal difficulties.

Duty of care – Common Law

In England it has been held that the emergency services do not owe a duty of care to individuals. In Capital and Counties,¹ the Court of Appeal (UK) had to deal with three cases involving the Fire Brigades. In the first case, the Fire Brigade attended a fire at premises owned by Capital and Counties PLC. The fire, at the time of the brigades' arrival, was being contained by the buildings automated sprinkler system.

¹ Capital and Counties plc v Hampshire County Council, Digital Equipment Co Ltd v Hampshire County Council, John Munroe (Acrilic) Ltd v London Fire and Civil Defence Authority, Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority (Capital Counties case) [1997] 2 All ER 865.
Although the seat of the fire had not been located the fire officer ordered the whole sprinkler system to be turned off. That had an adverse effect on restraining the fire, which spread rapidly across the roof and eventually destroyed the entire building.²

In the second case, the brigade attended a fire at premises adjoining the plaintiff's property. They extinguished the fire but did not check the neighbour's property and did not notice that sparks from the fire had fallen among debris and began to smoulder. Some time after the brigades' departure, a fire started and the plaintiff's property was damaged.

In the third case, the brigade attended a fire at the plaintiff's church.

No less than seven fire hydrants surrounded the chapel. Of these, four failed to work for one reason or another, and three were either never found, or found so late as to be of little use. One hydrant was not located until a late stage because there was no yellow marking sign: another was not found at all because the yellow hydrant sign was obscured by ivy. In the end, water had to be obtained from a mill dam over half a mile away.³

In deciding where legal liability lay for damage caused by fire, 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.⁴

The English court held that it was not, in the circumstances “just, fair and reasonable” to impose a duty upon the Fire Brigades to attend the scene and to actually extinguish the fire or minimise the harm suffered by any individual. The only obligation upon the brigade was to ensure that they did not make matters worse than if they had not been there at all. Accordingly the fault of the brigade in not inspecting and discovering the fire on the neighbouring property, and not finding (and before the fire maintaining) the hydrants did not amount to negligence for which the plaintiffs could recover.

On the other hand, with respect to Capital and Counties PLC, the Fire Brigade had in fact made the situation worse. Although they had not started the fire they turned off the sprinklers with the result that the fire that was being contained spread through the roof and the building was destroyed. Had the brigade failed to show up, or having arrived done nothing, the damage would not have been as great as it in fact was due to the fire officer's negligent conduct.

These cases were distinguished in Kent v Griffiths.⁵ This case involved an action against the London Ambulance Service for negligently taking 4 minutes to respond to an emergency call. Notwithstanding the decision in Capital and Counties it was held that an ambulance service, unlike the Fire Brigades, could owe a duty to respond when called upon in an emergency. The result in this case depended on two findings. The first was that the ambulance service as operated in England should be treated as a health service, whereas traditionally would owe a duty of care to its patients, and not an "emergent service". The second was that the primary duty of the Fire Brigades was to act for the public benefit. A Fire Brigade attending a fire is concerned not only to extinguish the fire for the benefit of the property owner, but also to ensure that the fire does not spread. As we have seen, Fire Brigades have extensive powers, both under statute and common law, to enter and damage premises in the course of their duties. This means that an individual whose house is on fire may ring the Fire Brigades who might, consistent with their duties, choose to abandon the house to the flames while they protect a neighbour's property, or even move to demolish the house. The fact that the brigades are entitled to damage the property of the person who rang them is inconsistent with holding that the brigades owe that person a duty to take reasonable care to protect their property.

For ambulance services there is no similar conflict. When a person rings an ambulance the ambulance is dispatched for the benefit of the patient rather than the public at large. Further, the patient may rely on the ambulance service in a way that one would not rely on the Fire Brigades. A person is unlikely to say something like, "I could put that fire out, but I'll wait for the Fire Brigade as I know they have been called". If a person could put the fire out, they will, but probably they cannot. The decision of whether to stay and fight the fire or evacuate is unlikely to be affected by whether or not the Fire Brigade has been called. Where the issue is transport to hospital however, person may well have a choice and decide to wait for an ambulance once they have been told by the ambulance service that one has been dispatched. In these circumstances it was held that an ambulance service did owe a duty of care to a person to respond within a reasonable time when called upon to do so.

The decision in Kent v Griffiths may have been influenced by the fact that there was no explanation as to why the ambulance was delayed and a finding

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² [1997] 2 All ER 865 at 865.
³ [1997] 2 All ER 865 at 873.
⁴ [1997] 2 All ER 865 at 878.
⁵ [2000] 2 All ER 474.
⁶ [1997] 2 All ER 865.
⁷ [2000] 2 All ER 474.
by the judge that the ambulance officers lied about their response time. In *Costello v Chief Constable of the Northumbria Police*, a police officer was found negligent in not going to the assistance of another police officer who was being assaulted. Again this was a case where there was no explanation for the failure, both officers were in the custody area of the police station and the evidence was that the defendant could see the officer being attacked and simply did nothing. Notwithstanding the ultimate finding that in this case the defendant police Inspector was liable for failing to assist his colleague, May LJ said:

Neither the police nor other public rescue services are under any general obligation, giving rise to a duty of care, to respond to emergency calls nor, if they do respond, are they to be held liable for want of care in any attempt to prevent crime or affect a rescue. But if their own positive negligent intervention directly causes injury which would not otherwise have occurred or if it exacerbates injury or damage, there may be liability.9

These are decisions of English courts so their application in Australia is uncertain. There have been two cases in New South Wales that could have added light to the issue of whether a rescue service owes a duty of care but in each case the matter was not resolved.

*New South Wales v Brown*10 involved an action against the police for their alleged negligence in coordinating a rescue. The plaintiff was a tow truck driver who was removing a car that had been involved in a serious collision. Police and ambulance officers had removed the driver and three of her children but had been unaware that there was a seven-week-old baby in the car. When police became aware that the baby was missing, they contacted the plaintiff who searched the vehicle and found the baby. The baby later died. The plaintiff sued the police alleging that they had been negligent in the conduct of the search of the accident site and in asking him to search the vehicle. The plaintiff won but the State appealed to the New South Wales Court of Appeal. The Court of Appeal held that there was no evidence to support a finding that the police had been negligent in their handling of the situation. This finding did not resolve the issue of whether or not the police as rescuers owed a duty of care. The first judge found that they did but the Court of Appeal said that the judge’s analysis faced “several difficulties”.11 The Court of Appeal did not, however, have to resolve these difficulties. Given the conclusion that regardless of whether the police owed Brown a duty of care they were not negligent, it was “not necessary to express any view on the duty question”.12 Neither the trial judge nor the judges in the Court of Appeal referred to the English decisions on the subject.

In *Evans v NSW Ambulance Service*13 the Ambulance Service was sued for, among other things, “[f]ailing to speedily arrange for medical assistance”14 after a call for help. The person who had called for help was himself an ambulance officer who suffered an acute asthma attack and died while working alone at a remote ambulance station. The principle allegation was that the ambulance service failed to take due care of their employee’s safety rather than some general obligation to come to the rescue when called. The court found that the ambulance service had not been negligent in the way it had dealt with the employment of the deceased and again did not need to address the more general question of whether an ambulance service in New South Wales owes a duty to rescue a person when called upon to do so.

**Actions against statutory authorities**

Statutory authorities are set up by parliaments for the purpose of achieving some public good and are limited in what they do by the terms of the law that sets them up and by the budget restraints that are imposed upon them by government. They may also have a number of obligations that have to be balanced out. Because of this, the courts have attempted to establish a number of rules or principles that apply when an aggrieved individual wants to sue a statutory authority (such as a council, the Fire Brigades, an ambulance service or a State/Territory Emergency Service) for negligence. Unfortunately the development of the liability of statutory authorities proceeds on a case-by-case basis without clearly identified or easily applied rules and principles. Even High Court judges have found difficulty in explaining exactly when statutory authorities will be liable to individuals. Kirby J said:

[T]his court is required to consider whether, in the particular circumstances of the case, the law entitles a person who can prove damage to bring home the consequences not only to any private organisation that owed him a duty of care which it breached but also to public authorities whose breaches are said to lie in their failure to properly discharge their statutory powers.

One day this court may express a universal principle to be applied in determining such cases. Even if a settled principle cannot be fashioned, it would certainly be desirable for the court to identify a universal methodology or approach.

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8 [1999] 1 All ER 550.
9 [1999] 1 All ER 550 at 563 (citations omitted).
11 [2005] NSWCA 21 at [18].
12 [2003] NSWC 21 at [37].
14 [2004] NSWCA 95 at [22].
to guide the countless judges, legal practitioners, litigants, insurance companies and ordinary citizens in resolving contested issues about the existence or absence of a duty of care, the breach of which will give rise to a cause of action enforceable under the common law tort of negligence ... 15

There is, however, in Kirby J’s view, no clear principle to be distilled from the various judgments of the High Court. Rather the judges have identified a number of differing approaches. According to Kirby J, these differences “concerning claims in negligence against public authorities impose special burdens in finding, understanding and applying the law. These burdens are intolerable”.16

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. The focus of analysis is the relevant legislation and the positions occupied by the parties.17

Because the issue of whether or not a statutory authority such as a council, or a Fire Brigade or an ambulance service, owes a duty of care to an individual is so multi-faceted and depends on the particular facts of any given case it is impossible to say, in advance, that in any particular case a duty of care will or will not exist. All that can be done here is to identify whatever principles can be identified and try and draw analogies with previous cases.

The rules that apply when trying to determine whether an individual can sue a statutory authority have been supplemented in some jurisdictions by legislation. The applicable rules can be summarised as follows:

A statutory authority is bound by the law of Australia which includes the common law of negligence, so an authority can be liable in appropriate circumstances but a statutory authority is in a different position to an individual, it only has the power and authority that is vested in it by the statute and it only has the resources that are allocated to it to perform its various functions.

In deciding whether or not an authority owes a duty of care to a particular individual it is necessary to start with the statute that creates the authority and/or vests it with power. An aggrieved individual will only be able to sue the authority if it is consistent with the statute to hold that the authority should owe a duty of care to that individual. The relevant question is “does the statute expressly or by implication allow for a common law duty or exclude such a duty?”18

A legislative grant of power to protect the general public does not ordinarily give rise to a duty owed to an individual or to the members of a particular class.19

Or, to put that another way:

[The more general the statutory duty and the wider the class of persons in the community who it may be expected will derive benefit from its performance, the less likely is it that the statute can be construed as conferring an individual right of action for damages for its non-performance.20

There is usually no duty to protect others from harm, so failure to exercise a statutory power will not usually lead to common law liability.21

The exercise of “quasi-legislative” powers (ie, the power to make by-laws, orders or exercise broad powers to regulate activity) are beyond judicial review and cannot be subject to a duty of care, neither can decisions regarding “the raising of revenue and the allocation of resources ...”.22

A duty of care will exist where the defendant authority is acting where there is a well-established duty, for example, employer/employee, occupier/invitee etc. Further, an authority will be liable where it has powers vested in it to protect a particular person or class of persons from a particular risk and has actual knowledge of a particular risk or where the plaintiff was particularly vulnerable to a particular risk and the defendant could protect the plaintiff, but the plaintiff could not protect themselves.23

The key is the amount of control that an authority has over a particular risk. Where the defendant has a large degree of control over the plaintiff or the activity that poses the danger to the plaintiff then there may be a duty to take reasonable care to protect the plaintiff.24

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17 Graham Barclay Oysters v Ryan (2002) 194 ALR 377 at 403 (Gummow J). See also Crimmings v SFIC (1999) 167 ALR 1 at 7 (Gaudron J).
18 Crimmings v SFIC (1999) 167 ALR 1 at 7-10 (Gaudron J), at 31 (Kirby J).
20 Brodie v Singleton Shire (2001) 180 ALR 145 at 151 (Hayne J); see also Pyremites Shire Council v Day (1998) 151 ALR 147 at 158 (Brennan CJ).
23 Crimmings v SFIC (1999) 167 ALR 1 at 33 (McHugh J), at 36 (Gummow J), at 75 (Hayne J); Perre v Apand (1999) 184 ALR 606 at 613 (McHugh J).
We can now try to apply these rules in the context of the emergency services.

The first question is whether or not the statutes that establish the particular service is consistent with finding that there is a duty of care to an individual. In New South Wales at least, it has been held that Fire Brigades legislation is inconsistent with a finding that the brigades owe an individual a duty of care.

In *Board of Fire Commissioners v Rowland*, a fire officer negligently set fire to a theatre he was inspecting and then negligently failed to extinguish the fire (using his hands to beat the fire out rather than the nearby fire extinguisher). The theatre was destroyed. It was held that the theatre owner could not sue the Fire Brigades for the damage done. This decision was based on the fact that the *Fire Brigades Act 1909* (NSW) provided that where damage was caused by the Fire Brigades in the course of their duties, that damage was (and is) to be attributed to the fire or other emergency. According to the person whose property is damaged by the emergency services, is entitled to look to their insurer (if they have one) to make good the damage. The parliament had provided a method to compensate injured property owners and this was inconsistent with a finding that the brigade owed a duty of care to individual. As a result, the court concluded that the Act did not give an aggrieved person the right to sue even if they could establish that the brigade or other emergency service had failed to perform its statutory duty.

In *Bennett and Wood Ltd v Orange City Council; Board of Fire Commissioners (Third Party)*, the plaintiff sued the local council, who in turn sued the New South Wales Board of Fire Commissioners following a fire at the plaintiff’s premises. The Council argued that the Board of Fire Commissioners had failed “to proceed with all speed to the place where the said fire was and did not endeavour by all possible means to extinguish the same”, as was required by s 28 of the *Fire Brigades Act 1909* (NSW). Here the issue was not what the brigade did, but what it did not do. In deciding the case, the court was concerned with the effect of s 46 of the *Fire Brigades Act 1909* (NSW). This section was designed to limit the liability of the Fire Brigades and fire-fighters. In the court’s view it would be inconsistent for the Parliament to provide a statutory limitation on the right to sue, and yet still allow people to sue for breach of statutory duty. Wallace P said:

Yet the substantial protection given by s 46 against liabilities which the common law would otherwise impose can be properly treated, I think, as a factor tending against imputing to the legislature an intention of imposing upon the board at the same time stringest liabilities to actions by individuals for breach of statutory duty. The intention to create such far-reaching additional rights to sue, in circumstances in which no common law rights existed, would seem incompatible with a drastic curtailment by the same Act of other rights which the individual would have at common law.

Where a statutory authority is given a power to do something, the decision whether to exercise that power is generally not open to question in the courts. The emergency services legislation gives various officers broad powers to enter premises, destroy buildings and property, close roads and the like. These are all examples of statutory power, not duty. The officer may do those things if he or she considers it necessary to do so in order to effectively control the fire or other emergency, but they are not required or obligated to do those things. It has been held that a list of powers does not “create a specific duty to put out all fires but merely defines the functions of the ... [emergency service] ... in a general way.”

Because decisions about the raising of finances and the allocation of resources cannot be questioned in courts, it would not be possible to sue the emergency services on the basis that they did not despatch sufficient resources to deal with an emergency or directed their resources to deal with another incident ahead of the plaintiff’s or had not invested in sufficient resources to deal with the particular emergency that had arisen. The fact that the fire appliance was at the scene of another fire when the plaintiff called and there was no appliance to send to the plaintiff’s fire is simply not a matter that can be considered by the courts.

Where authorities have been liable is where they have exercised a great degree of control either over an individual or a particular risk. To explain this point we can compare *Graham Barclay Oysters v Ryan* with *Pyrenees Shire Council v Day* and *Timbs v Shoalhaven Council*. In *Graham Barclay...*
Oysters v Ryan,\textsuperscript{36} there had been severe storms that lead to the contamination of the Great Lakes in New South Wales. This in turn led to contamination of oysters growing in the lakes with the result that the plaintiff contracted hepatitis as a result of eating the contaminated oysters. The plaintiff sued the local council, the State government and the oyster growers for failing to take steps to protect him from this risk. Here was a case where the statutory authorities, the council and the Health Department, were concerned to deal with a problem of broad application and in choosing how to respond were considering the general wellbeing of the whole community rather than any individual. It was found that there was no duty of care owed to the ultimate consumers of the oysters.

In Pyrenees Shire Council v Day,\textsuperscript{37} the council was aware of a defect in a chimney of a combined house and shop. The council had served a notice on the occupier requiring him to fix the defect and not to use the fireplace until it was fixed. The council had the power to enter the premises to inspect the chimney and could have undertaken to have the work done and then charged the occupier for that work. Having served a notice requiring the work to be done, however, they took no further action. The premises were subsequently leased to another tenant who was unaware of the defect. The new tenant lit a fire that spread into the adjoining premises with subsequent damage to those premises and a risk that an entire street of shops could have been lost. Here the council was found to owe a duty of care because of its high level of control and knowledge. The council knew of the risk when the new occupier could not have known of it. The council was given specific statutory powers to be used to reduce the risk of fire, powers that it failed to use.

In Timbs v Shoalhaven Council\textsuperscript{38} a member of the defendant's staff inspected trees on the plaintiff's property and indicated that in his view the trees were safe and the plaintiff's husband would not be allowed to remove them as to do so would be contrary to a Tree Preservation Order then in force. In fact the roots were rotten and one tree blew down landing on the house and killing the plaintiff's husband. Again the council was liable for the negligence of its staff because of the high degree of control that the staff member exercised over the actions of the plaintiff's husband. Of course the council staff member did not cause the trees to fall or cause them to be rotten but he did say, in circumstances where the plaintiff and her husband would rely on him, that the trees were safe and they would be prosecuted if they were removed.

These decisions have implications for the emergency services. In most cases the emergency services are not responsible for creating the actual emergency (an exception may be the "back burn" that goes wrong and burns out of control). As a result there will be cases where the emergency services are acting more like the defendants in Barclay's case.\textsuperscript{39} Where the emergency services are responding to an incident they must have regard to the general good they will need to make decisions about the allocation of resources and the best way to respond. A bushfire would be a good example where resources have to be allocated and decisions made in order to maximise the public good without regard to any particular individual. In this case, based on Barclay's case,\textsuperscript{40} it would be unlikely that there would be a particular duty of care owed.

Other cases may be more like Timbs\textsuperscript{41} and Pyrenees\textsuperscript{42} where the services have a great degree of control over the risk and/or the individual. The emergency services may be liable where by their conduct they expose a person to a particular risk. For example, if a member of the Fire Brigades were to direct a home owner to evacuate to an evacuation centre, they will have taken on a great degree of control over that person. It would be reasonable to expect the brigades to ensure that the evacuation centre was safe and that they were not in fact directing the evacuee into harm's way. Whether they would then owe a duty of care to protect the home would be a more difficult question.

The rules on when the emergency services might be liable for breach of statutory duty appear consistent with the common law as developed in Capital and Counties\textsuperscript{43} and Kent v Griffiths.\textsuperscript{44} The first case involved the Fire Brigades acting for the public good and so there was no duty of care (as with Barclay's case\textsuperscript{45}) but there was liability when it was the actions of the Fire Brigade that made the situation worse, thereby establishing liability where a great degree of control was being exercised by the authority. The second case involved a situation where the plaintiff relied upon the ambulance service and again establishing a direct relationship and reliance.

\textsuperscript{36} (2002) 194 A LR 337.
\textsuperscript{37} (1998) 151 ALR 147.
\textsuperscript{38} [2004] NSWCA 81.
\textsuperscript{39} (2002) 194 ALR 337.
\textsuperscript{40} (2002) 194 ALR 337.
\textsuperscript{41} [2004] NSWCA 81.
\textsuperscript{42} (1998) 151 ALR 147.
\textsuperscript{43} [1997] 2 All ER 865.
\textsuperscript{44} [2000] 2 All ER 474.
\textsuperscript{45} (2002) 194 ALR 337.
Damage does not prove negligence

Even if it were possible to sue the emergency services for negligence, it does not follow that any damage done by an emergency service would be considered negligent or otherwise the subject of compensation. The essential aspect of the tort of negligence is the question of what is reasonable. The plaintiff may show that in some circumstances the emergency services owed him or her a duty of care but that leads to the next question of what should the reasonable emergency service have done in the circumstances.

Having evacuated a home owner, it may be that the service has taken control over the risk to the persons home but that only imposes an obligation upon them to take reasonable care and what is reasonable must be judged by reference to the costs of taking action and any competing duties.\(^{46}\) Where a person is evacuated because the risk to them, or to fire-fighters who may have to come to his rescue later, is so great then the fire service may be acting as the reasonable fire service in ordering the evacuation even if it means the house will be lost. An ambulance service may owe a duty of care to respond to a person who calls but it may still be reasonable to divert the ambulance that has been despatched to another, more urgent, case. Merely holding that there is a duty of care does not mean that the duty is a duty to guarantee no harm befalls the plaintiff, it is only a duty to act reasonably in the circumstances.\(^{47}\)

Trespass

Linked to this discussion on damage is the tort of trespass. An aggrieved person may want to sue the emergency services on the basis that they intentionally interfered with his or her person or property. As has been discussed in earlier chapters, legislation gives the various emergency services and their members' broad powers to deal with an emergency. When the Parliament grants such a power it clearly intends that it will be exercised. In Vaughan v Webb,\(^{48}\) the Superintendent of Fire Brigades pulled down a wall that had been made dangerous by fire. The wall fell onto a neighbouring property and damaged it. Stephen ACJ said:

I need hardly say that, if the legislature authorises that to be done which must, of necessity cause injury, no liability can accrue to the person carrying out the

will of the Legislature ... So here the defendant would not be liable if the wall could not have been pulled down without injury to the plaintiff.\(^{49}\)

Where a member of the emergency service chooses to exercise a power granted by an Act, such as the power to pull down buildings, build fire breaks, enter premises or the like, the exercise of that power cannot lead to legal liability in circumstances where there was no way to perform that power without causing damage.\(^{50}\) The issue of negligence will only arise if the plaintiff can show that the power could have been exercised without causing damage.

In New South Wales the position is even clearer. Where an authority is exercising "special statutory powers" such as those set out for the emergency services and described in Chapters 4 and 5, even negligence will not be enough to establish liability. If an officer of the emergency service is doing something that is specifically authorised by the statute, liability can only be established if, 1) there was a duty of care; 2) the conduct of the officer was negligent, that is he or she has caused some harm that could reasonably have been avoided and 3) the act or omission of the officer was "so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.\(^{51}\) One can imagine a situation where an officer does something, like pull down a wall, in a negligent manner, but that is not enough. He or she would have to order a wall to be pulled down that was no where near the fire so that everyone would consider that the action was in no way related to his or her duties before there could be liability in New South Wales.

Coupled with these statutory rules, the common law of trespass, as we have seen in Chapter 3, provides a defence where a member of the emergency services acts in good faith to minimise the effects of an emergency.

It should be noted, however, that the protection provided by the defence of necessity and by the legislation will only apply to conscious and intended actions. A fire officer may decide that in the circumstances a wall should be

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47 Tame v NSW; Annetts v Australian Stations Pty Ltd (2002) 191 ALR 449.
48 (1902) 2 SR(NSW) 293.
49 Vaughan v Webb (1902) 2 SR(NSW) 293 at 299.
50 See also See also Council of Shire of Sutherland v Heyman (1985) 137 CLR 424 at 457 (Mason J) and 484 (Brennan J). Capital and Counties v Hampshire County Council [1996] 1 WLR 1553 (Judge Harvey QC at first instance) and the cases cited therein: Geddes v Proprietors of Rann Reservoir (1878) 3 App Cas 430; East Suffolk Rivers Catchment Board v Kent [1941] AC 74; X (Minors) v Bedfordshire County Council [1996] 2 AC 533; Dorset Yacht Co Ltd v Home Office [1970] AC 1004.
51 As in Vaughan v Webb (1902) 2 SR(NSW) 293 where the plaintiff could show that the wall could have been reasonably demolished in a way that would not have injured his property.
52 Civil Liability Act 2002 (NSW) s 43A.
pulled down and may arrange for that to be done. That would be an exercise of his or her statutory powers and there could be no legal obligation to compensate the wall owner in those circumstances. The defence would not apply however if the same officer accidentally drove the fire appliance into the wall and caused it to collapse. Although the result is the same, one is a deliberate action authorised by the common law and statute, and the other is negligence. Assuming that the officer owed the wall owner a duty of care, there could be liability for accidentally knocking the wall down when there would be none for deliberately causing the same result.

**Liability exclusion clauses**

In order to protect the emergency services and their members, the parliaments in each State have enacted provisions designed to remove or limit any legal liability. Given the confused state of the common law, one would hope that these clauses would clarify the legal position of the emergency services and their members, but unfortunately that is not necessarily the case.

An early example of a clause designed to limit the liability of the emergency services was s 46 of the *Fire Brigades Act 1909* (NSW). That section said:

> The board, the chief officer or an officer of the board exercising any powers conferred by this Act or the by-laws shall not be liable for any damage caused in the bona fide exercise of such powers.

This section was interpreted by the High Court of Australia in *Board of Fire Commissioners v Ardouin*\(^\text{53}\) In that case the plaintiff was injured when he was struck by a fire engine that was proceeding to the scene of a fire. The court established two significant principles. First, the Act had to apply when there had been negligence, because if it did not, there would be no reason to have the section there at all. Secondly, and most importantly, the court held that the words “exercising any powers conferred by this Act” meant that the section would only apply where the conduct of the Fire Brigades was expressly authorised by the Act and where it involved action that would be an unlawful interference with persons or property if not authorised by the Act.\(^\text{54}\) The court found that there was nothing in the *Fire Brigades Act* that authorised the Board of Fire Commissioners or anyone else to drive along a street to the scene of a fire. Accordingly when a fire-fighter was driving to the fire he was not exercising a power under the Act, and therefore the section did not apply.

Where an officer is doing something that does not require specific authorisation under law, then they are not exercising a power that is given to them by their Act, rather they are exercising powers that exist without the Act and the normal rules of negligence will apply. Accordingly in *McIntosh v Board of Fire Commissioners*,\(^\text{55}\) the Supreme Court of New South Wales held that the Board could be liable when a fire-fighter was killed in the course of firefighting operations allegedly due to the negligence of the Board in failing to provide proper equipment and training.

The functions of the Board in its selection of methods or systems of conducting its operations and its selection of equipment and clothing and so on do not involve “the exercise” by it “of powers which of their nature will involve interferences with persons or property.” The immunity granted to the Board should not “be carried further than a jealous interpretation will allow.”\(^\text{56}\)

A similar result occurred in Queensland where the Queensland Supreme Court\(^\text{57}\) held that the equivalent section in the *Fire Brigades Act 1964* (Qld)\(^\text{58}\) did not protect the Queensland brigade from liability for injuries sustained by a fire-fighter due to the negligence of another fire-fighter.

In *Stephens v Stephens*,\(^\text{59}\) a majority of judges of the Court of Appeal (NSW) held that s 48 of the *Bush Fires Act 1949* (NSW) did not apply to protect the brigade from liability after they negligently stopped a fire appliance on the road while the crew were attending a fire.

The *Bush Fires Act* did not expressly authorise the brigade to stop and fight fires and so the brigade was not exercising a power under the Act. Mason JA said:

> The section should be regarded as conferring immunity from action on the defendant as a person acting in execution of the Act only in respect of an act done pursuant to an authority which the Act itself confers. If the provisions of the Act conferred an authority on the defendant to have the truck of which he was the driver stationary on the highway, with its motor idling, while water from the truck was sprayed on the seat of the fire, then s 48 has the effect of protecting the defendant from the consequences of performing that act negligently and occasioning injury to the plaintiff.

And later:

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[The Act] ... does not in terms authorise the putting out of bush fires, evidently for the reason that the extinguishment of a bush fire is not in itself an unlawful act which requires authorisation by statute.  

On the other hand, in *Board of Fire Commissioners v Rowland* it was held that the brigade could rely on the protection from liability when a Superintendent who was inspecting a theatre to ensure that it complied with licensing requirements negligently set fire to a curtain, and then negligently failed to extinguish the fire. The section applied because the Superintendent was exercising a power specifically conferred by the Act that was a power to "enter any theatre ... to ascertain whether the provisions of any Act, ordinances or regulations, or by-laws for the prevention of fire or for the safety of the public have been contravened or have not been complied with."  

In *R and W Vincent Pty Ltd v Board of Fire Commissioners* it was held that s 46 did apply to protect the Board and its fire-fighters from liability after the brigade left the scene of a fire believing that the fire had been extinguished. The fire flared up again and the plaintiff's property was damaged. The allegation was that the brigade had been negligent in failing to properly extinguish the fire. The court said:

Extinguishing the fire was something they [the Brigade] were required to do under the Act, and if, in the bona fide exercise of their powers to extinguish fires they failed to extinguish the fire, but left the fire in the bona fide belief that it was extinguished, then for damage caused by it subsequently spreading to the plaintiff's premises they would be protected by s 46.  

More modern versions of statutory protection may be broader. Section 78 of the *Fire Brigades Act 1989* (NSW) says:

A matter or thing done by the Minister, the Commissioner, any member of staff of the Department, any member of a Fire Brigade or any person acting under the authority of the Commissioner does not, if the matter or thing was done in good faith for the purposes of executing this or any other Act, subject such a person personally, or the Crown, to any action, liability, claim or demand.

There is no longer a reference to exercising powers under the Act but to acts done in "good faith" for the "purposes of executing" the Act. Whether this has any broader application remains to be seen. Arguably however, a fire-fighter who is doing something that is not specifically authorised by the Act and does not require any particular authorisation to be lawful is no more executing the Act than exercising a power under the Act. The principle in *Ardouin's case*, that clauses such as this are not "be carried further than a jealous interpretation will allow" remains and it is likely that the courts will continue to restrict the operation of these sections.

Where the Act does provide legal protection, it will ensure that there is no liability for an action that causes damage where that act was deliberately done for the purposes of the Act. Accordingly, these provisions will ensure that there is no liability where a fire commander orders a wall pulled down. Pulling down a wall is an authorised activity that necessarily causes some damage to the owner of the wall. In normal circumstances the owner of the wall would be entitled to look to someone who deliberately damaged his or her wall to pay compensation but here it is clear that the members and brigades are not liable to pay compensation. The clauses may also extend where the test is one of "good faith" to a well meant but unreasonable decision, such as a decision to pull down a wall in circumstances where that was not required. The sections would not appear to cover a simple accident so, to use an example given earlier, if the same commander accidentally knocked a wall down by crashing a fire appliance into it, that would not be an exercise of powers pursuant to any Act, nor would knocking down the wall by accident be a thing done in "good faith" and one would not expect the protection contained in any of the Acts to apply.

With respect to first aid and the treatment of an injured person, an ambulance officer may chose to move the patient rather than complete the appropriate treatment protocol for the patient's condition because of an erroneous belief that the patient is in danger. Assuming the officer is acting "in good faith", but negligently, then it would appear likely that some provisions designed to limit the liability of ambulance officers would apply. The same may not be true if the officer simply forgot a step in the treatment. It is unlikely that a court would accept that an ambulance officer who is

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60 *Stephens v Stephens* (1970) 72 SR(NSW) 459 at 463. Manning JA disagreed and thought that the section would apply as the stopping of a fire engine while water from the engine was used to fight a fire was 'an integral part of an act being undertaken for the control or suppression of a bush fire or the protection of life and property, as distinct from an incidental act' (at 466) and was therefore within the section, but as Manning JA was in the minority, the Brigade was held to be liable.

61 [1960] SR(NSW) 323.

62 When the Superintendent's torch failed, he inspected the curtain with a cigarette lighter, thereby setting fire to it, he then attempted to put the fire out with his hands rather than with the fire extinguisher that was there. The curtain continued to smoulder and eventually set fire to the building.

63 See *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105 at 110 (Dixon CJ) and 116 (Kitto J).

64 [1977] 1 NSWLR 15.


56 *McInnes v Board of Fire Commissioners* (1969) 72 SR(NSW) 180 at 186.

treating a person suffering from trauma, and who forgets to immobilise their neck with an appropriate collar, was acting “in good faith” or is purporting to do something that is authorised by the legislation in question. In that case, the officer has not made a decision to act, or omit to act, that was, in retrospect wrong, rather they have failed to consider some aspect of the patient’s condition so their decision not to apply the collar (if it can be called a decision) was not made in “good faith” for the benefit of the patient.68

An ambulance officer who attends a patient and provides first aid before leaving the scene, only to find the patient collapsed at a later stage would be in a similar situation to the Fire Brigade in *R and W Vincent Pty Ltd v Board of Fire Commissioners,*69 provided the officer had examined the patient and in good faith, that is honestly and with the best interests of the patient in mind, decided that the situation was only minor, then the officer will, probably, be protected, even if turns out that the decision was both wrong and negligent.

When considering these examples two important points must be remembered. These sections will not add anything to the law if there was no negligence. The fact that the emergency services are authorised to conduct their services and in many cases given specific powers to enable them to meet their objectives means that a non-negligent performance of those duties cannot attract liability.70 Some clauses designed to limit liability do, in effect, simply restate this principle and although not strictly necessary, this may have some positive effect on the morale and confidence of the emergency service workers.

Secondly, it is important to remember the doctrine of vicarious liability.71 This doctrine says that an employer is liable for the torts of an employee. Most, if not all, emergency service workers will be employees or in the same position as employees of the service to which they belong. It follows that even if these sections did not exist, it would not be the officer that was required to pay any damages as a result of his or her negligent conduct, it would be the emergency service of which they are a member or the government of the particular State or Territory. Accordingly, these sections provide little practical extra protection for the officers concerned.

It is now possible to analyse some of the sections in detail and comment on their effect. The sections will be classified into three groups, the first are those that make no change to the common law, the second are those that merely reinforce the notion of vicarious liability and the third are those that appear to make some change to the common law.

**Exclusion clauses that do not do anything**

The following clauses do not appear to in any way limit the liability of either the emergency service concerned or the persons involved in providing that service.

In some Queensland72 and Victorian legislation,73 the relevant sections provide that there shall be no liability provided that the act or omission complained of was done “without negligence” or was not caused by “the negligence or wilful default” of the relevant officer or emergency worker. As has been seen, however, the common law only imposes liability in the event of negligence. The superintendent in *Vaughan v Webb,*74 who ordered a wall demolished but was negligent in how it was demolished so that it caused unnecessary damage, was only liable because he had been negligent. If he had not been negligent, because the damage done to the third party’s property was “unavoidable”,75 then there would be no liability. In effect what these sections do is reinforce the ruling in *Vaughan v Webb* that the exercise of statutory power, without negligence, cannot attract liability even if damage is caused.

The *Bushfires Act 1980 (NT)*76 provides that a person is not to be liable for the exercise of a power under the Act. That however, is also the position at common law. Because these clauses do not say that the protection extends to Acts done “in good faith” or “bona fide” it is open to a court to find that the section is not intended to apply in the case of negligence. If that is the case, the sections add nothing to the existing law.

**Some sections only reinforce the notion of vicarious liability**

As discussed in Chapter 1 above, vicarious liability applies when there is an employee and employer relationship and provides that an employer is liable for the torts of an employee. In some legislation there are clauses that appear to limit liability, but in effect merely transfer any potential liability from the member or employee to the emergency service organisation or the Crown.77

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69 *[1977] 1 NSWLR 15.*
70 See *Vaughan v Webb (1992) 2 SR (NSW) 293.*
71 Discussed in Chapter 1.
72 *Fire and Rescue Service Act 1990 (Qld) s 129 and Public Safety Preservation Act 1986 (Qld) s 17.*
73 *Country Fire Authority Act 1958 (Vic) s 92; Victoria State Emergency Service Act 1987 (Vic) s 17; and Emergency Management Act 1986 (Vic) s 37.*
74 (1992) 2 SR(NSW) 293.
75 See *Deaway v White (1827) M and M 54.*
76 *Bushfires Act 1980 (NT) s 53.*
77 See *Ambulance Service Act 1991 (Qld) s 39; State Emergency Service Act 1987 (SA) s 17; Emergency Management Act 2004 (SA) s 32; Emergencies Act 2004 (ACT) s 198.*
In the case of the Ambulance Service Act 1991 (Qld) the Ambulance Service is required to "indemnify" any relevant person carrying out duties under this Act. Indemnify means "secure ... from loss". In this context it means that if the member or person is found liable for any damage caused by them when acting pursuant to the Act, then the Service is to secure them from loss, that is ensure that they do not suffer any loss by in fact meeting the damages claim on their behalf.

The Ambulance Services Act 1991 (Qld) only applies to "service officers" but such officers are already employees and the Service would be required to meet the liability in any event. The section also applies to a person who is asked to assist an officer so in that case grants that person an indemnity that might not clearly apply in any event.

South Australian legislation provides that the relevant person is not liable for any act that is done in "good faith" or "honestly" pursuant to the relevant Act. In the ACT there is no personal liability for an act that is done "honestly and without recklessness". These provisions reduce the individual's liability by replacing the test of "reasonableness" required by common law, with one of "good faith" or honestly an absence of recklessness. The Acts then go on to provide, however, that any liability that would, but for the section, apply to the person is to lie against the Crown. The liability that would lie against the person, but for the section, would be liability where the person's actions were not reasonable. The sections therefore mean that if a person can prove that, for example, the emergency officer's conduct was not reasonable in the circumstances, even though it was performed in good faith, then the officer is not liable but the Crown is. Again this replicates the notion of vicarious liability but may serve some purpose in making it clear that the doctrine extends to volunteers who may not be classified as employees.

The Ambulance Service Act 1991 (NSW) has to be read in conjunction with the Law Reform (Vicarious Liability) Act 1983 (NSW). Taken together, these Acts have the same effect as the South Australian legislation.

The Ambulance Service Act itself purports to limit the liability of officers (both permanent and honorary) so that they are not liable for acts done in good faith, even if they are done negligently. Section 10 of the Law Reform (Vicarious Liability) Act 1983 (NSW) provides, however, that a clause such as this is to be ignored when determining questions of vicarious liability. What this means, in effect, is if the plaintiff can show that the ambulance officer was negligent, then the Ambulance Service is liable for that negligence even though the officer cannot, in any circumstances, be personally liable.

### Some Acts do make a difference

Some Acts do appear to change the relevant law in a significant way. The effect of these sections is that they change the standard of care expected from a duty to take reasonable care to a duty to act in good faith, on in Queensland to act "honestly and without reckless disregard for the possible occurrence of the personal injury or loss or damage to property". The concept of good faith was discussed in the Chapter 2. In effect it requires that the persons act with honesty of purpose, that is, really trying to achieve the objectives of the legislation concerning. Under each Act, if that is established, then the liability of the member concerned is removed, even if it can be shown that the conduct was not "reasonable" in the circumstances.

Some legislation expressly provides that neither the member the emergency service or the government are to be liable where the member acted in good faith. Other examples provide only that the member is not liable but is silent on whether or not an injured plaintiff can sue the emergency service and/or the government. In those circumstances the employer (either the emergency service or the government) will not be liable as the employer's liability depends on a finding that the employee is liable. If, because of the relevant section, the employee is not liable then neither is the employer.

The Fire Service Act 1979 (Tas) is an "amalgam" section. It provides that a fire-fighter is not liable for any action performed in good faith, but rather the Tasmanian Fire Service is liable. In that sense the Act is like those above that merely reinforce the notion of vicarious liability. The Act does, however, go on to provide that where the act or omission complained of occurred during actual fire-fighting or fire hazard reduction activities, then neither the fire-fighters

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79 State Emergency Service Act 1987 (SA) s 17 and Emergency Management Act 2004 (SA) s 32.
80 Emergencies Act 2004 (ACT) s 198.
81 Under the State Emergency Service Act 1987 (SA).
83 See Fire Brigades Act 1989 (NSW) s 78; State Emergency and Rescue Management Act 1985 (NSW) ss 41 and 59; State Emergency Service Act 1989 (NSW) s 25; Rural Fires Act 1997 (NSW) s 128; Disaster Management Act 2003 (Qld) s 144; Country Fire Act 1989 (SA) s 64; Emergency Services Act 1976 (Tas) s 5; Fire Service Act 1979 (Tas) s 121; Metropolitan Fire Brigades Act 1958 (Vic) s 54A; Bush Fires Act 1954 (WA) s 63; Fire Brigades Act 1942 (WA) s 64; Fire and Emergency Services Authority of Western Australia Act 1998 (WA) s 37; Disasters Act 1992 (NT) s 44; Fire and Emergency Services Act 1996 (NT) s 47.
84 Disaster Management Act 2003 (Qld) s 144.
85 Fire Brigades Act 1989 (NSW); Rural Fires Act 1997 (NSW); State Emergency and Rescue Management Act 1989 (NSW) s 41 relating to a state of disaster only; Emergency Services Act 1976 (Tas); Metropolitan Fire Brigades Act 1958 (Vic); Bush Fires Act 1954 (WA); Fire and Emergency Services Authority of Western Australia Act 1987 (WA) s 37; Disasters Act 1982 (NT).
involved, nor the fire service will be liable unless "bad faith" can be established. In this limited class of cases, the Act serves again to limit liability by reducing the standard of care from that of "reasonable care" to "good faith".

**Statutory rights to compensation**

Although the common law would suggest that in many cases an emergency service officer is not legally liable for damage done in the course of his or her duties, the legislation governing the particular emergency service may establish a scheme so that a person whose property is damaged by that service may recover some compensation.

There are two types of statutory schemes that operate. The first provides that any damage done by the emergency service is deemed to be damage caused by the emergency or incident and is therefore covered by any relevant insurance policy that the property owner may have. The second scheme provides that a person may approach the relevant Minister or emergency service and apply for compensation to be paid out of government funds.

**Insurance schemes**

These schemes operate with respect to all the Fire Brigades as well as some other emergency services. These clauses have limited application as they depend upon the property owner being insured against the risk involved. Accordingly, a person whose house is damaged by members of a Fire Brigade who are attempting to extinguish a fire in the house next door may claim the cost of any repairs, but only if they had insured their house against damage by fire. People who do not carry the relevant insurance do not receive compensation. The presence of this type of clause was one factor used in *Board of Fire Commissioners v Rowland* to find that the statute creating the New South Wales Fire Brigades did not give rise to a right to sue for breach of statutory duty.

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86 Fire Service Act 1979 (Tas) s 121.
87 See, eg, Fire Brigades Act 1989 (NSW) s 38; Rural Fires Act 1997 (NSW) s 28; Fire and Rescue Service Act 1990 (Qld) s 132; South Australian Metropolitan Fire Service Act 1936 (SA) s 71; Fire Service Act 1975 (Tas) s 111; Country Fire Authority Act 1958 (Vic) s 93; Metropolitan Fire Brigades Act 1958 (Vic) s 54; Bush Fire Act 1954 (WA) s 63(2); Fire Brigades Act 1942 (WA) s 64(4); Fire and Emergency Services Authority of Western Australia Act 1998 (WA) s 37(5); Emergency Act 2004 (ACT) s 193; Bush Fires Act 1980 (NT) s 53(2); Fire and Emergency Act 1992 (NT) s 42.
88 State Emergency Service Act 1989 (NSW) s 254; Employees Liability Act 1991 (NSW) s 37A, 61 and 62; Disaster Management Act 2003 (Qld) s 130; Emergency Management Act 2004 (SA) s 36; Victoria State Emergency Service Act 1987 (Vic) s 18.
89 [1960] SR (NSW) 322.

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**Government funds**

The other model provides that in certain circumstances a property owner may look to the Government for compensation for damage to their property arising out of the activities of the emergency services.

The *State Emergency and Rescue Management Act 1989* (NSW) provides that, during a state of emergency, a person authorised in writing by the Minister may use force to enter premises in order to undertake emergency work authorised under the Act. The Minister (acting through relevant officers) is also authorised to "take possession and make use of any person's property".

Where a person's property is damaged during the course of these operations, for example where a person's tractor is taken and used to clear the emergency operations and damaged in the process, then that person may look to the Minister for Emergency Services for compensation for the damage suffered. The amount of compensation is to be determined by the Minister subject to the person's right to appeal to the Premier if he or she is dissatisfied with the Minister's decision.

The *Public Safety Preservation Act 1986* (Qld) applies during a proclaimed "emergency situation". If a person's property is used and/or damaged as a result of the exercise of powers conferred on the "incident coordinator, the acting incident coordinator or any police officer" then the property owner may apply to the Minister for compensation. Such a claim for compensation must be made within 28 days after the declaration of the emergency situation is revoked. The Governor in Council may either approve an ex gratia payment of compensation or reject the application. The legislation does not provide for any appeal from the Governor's decision.

The *Disaster Management Act 2003* (Qld) has a similar scheme. People who suffer losses due to operations under this Act may apply to the Chief Executive of the SES for compensation. The application must be made within 90 days and must be determined within another 60 days. The
application may appeal to the Magistrate’s court if he or she is dissatisfied with the Chief Executive’s decision, that is they may appeal if the Chief Executive refuses to pay compensation or does not pay enough compensation.99

The State Emergency Services Act 1987 (SA) provides that a person whose property is damaged as a result of the exercise of powers under the Acts is entitled “to be compensated for any injury, loss or damage suffered”100 provided that the damage would not have occurred in any event as a result of the disaster or major emergency. Accordingly, a person whose property is damaged as a result of emergency workers lighting a fire break will not receive compensation if it can be shown that the event itself would have caused the same damage.

**Conclusion**

The conclusion from our review of the common law is that even without clauses designed to limit liability it would be hard for anyone to sue the emergency services, or their members, for actions taken in the face of an emergency. There are significant hurdles that must be overcome when trying to impose on organisations that act for the public good a duty to take reasonable care for the benefit of a particular individual. Setting out, in legislation, the rights and powers of an emergency service does not give an individual a right to sue if the service does not exercise its powers or does so negligently.

With respect to the law of trespass, since time immemorial it has been held that it is a justification for trespass to property and goods that the conduct was necessary to save life or to prevent further damage. This in turn would justify, even without legislation, the sort of conduct that is envisaged by the various Acts identified in Chapters 4 and 5 which give the Fire Brigades and other emergency services the power to enter and/or damage property, to take water and to do such other things as are necessary to deal with an emergency. The fact that such powers have been set out in legislation ensures that an emergency service, or a member of that service, is not legally liable for any damage done in the non-negligent performance of those powers. When the exercise of a power, such as pulling down a wall, necessarily involves damage to some other property, the owner of that property cannot complain, and is not entitled to compensation for the performance of that statutory power.

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99 Disaster Management Act 2003 (Qld) ss 125 and 126.
100 State Emergency Service Act 1987 (SA) s 13.