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Matthews v AusNet Electricity Services Pty Ltd & Ors [2014] VSC 663

I have previously reported on the settlement of the 2009 Victorian Bushfires class action (see 'Black Saturday bushfire survivors secure $500 million in Australia's largest class action payout' (July 15, 2014)). A class action is brought by a representative plaintiff on behalf of people who suffered losses in the same event, as such it can affect the legal rights of people who are not actively engaged in the litigation. To ensure that those people's rights are properly considered, settlement of a class action must be approved by the Court. In *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663 Justice Osborn of the Supreme Court of Victoria approved the settlement. It should be noted that Osborn J was not the judge who had been hearing the case. A different judge had to consider the settlement offer so that, should he have rejected the settlement, the trial judge could continue to hear the case without being exposed to issues, disclosures and evidence that were relevant to the settlement but not to the trial.

The terms of the settlement are that SPI Ausnet will pay $378.6 million, UAM (which was the defendant responsible for powerline inspections) will pay $12.5 million and the State of Victoria, on behalf of the CFA, police and land management agencies will pay $103.6 million. The damages are to be distributed among 5847 claimants (which includes claims by insurers to recover amounts that they paid out under insurance policies). The money will be used to pay the legal fees ($60 million) and then to meet claims for damages; 3/8, will be used to meet claims for personal injury or death and 5/8, will be used to meet claims for property damage and economic losses. The state's contribution will go to the personal injuries and death claims

only. It was estimated that personal injury claimants would receive about 70% of their total claims, and those claiming for property and economic losses would obtain about 33% of their total claims. When taking into account insurance the average claimant would actually obtain about 2/3 (66%) of their total losses. Whilst these figures were necessarily 'broad brush' and unlikely to reflect final outcomes, in particular as no-one is really the 'average' it was accepted that there had been conscientious modelling by the parties to determine the likely outcomes for claimants.

In approving the claim, the Court has to consider whether or not the settlement is a fair compromise for everyone in the class not just fair as between the representative plaintiff and the defendants. In this case the court accepted that this was a fair compromise. In coming to that conclusion the court noted that the case, despite taking some 208 days of hearing, 100 witnesses, over 10 thousand documents as evidence, had not yet reached a stage where the trial judge had determined whether or not any of the defendants had been negligent. The issue of negligence had been contested so the plaintiff faced a risk that if they did not settle, and the case proceeded, the plaintiff could lose and get nothing.

The plaintiff's case was that 'the underlying cause' of the failure 'was lightning strike' at some indeterminate time in the past and that, having been struck by lightning, 'wind dynamics propagated fatigue' ([140]) in the line so that it failed on the 7th February 2009 starting the Kinglake fire. The case at trial involved 35 experts' reports and 6 meetings of all the experts to produce joint reports and to identify areas where they agreed, and areas where they disagreed. Despite all this science there was not agreement as to what caused the powerline to fail so 'the plaintiff was at risk that her case as to causation of the conductor failure would be rejected' ([134]). If the plaintiff could not establish why the line failed, her allegations of negligence, ie what the power companies should have done to mitigate the risk would also fail.

Osborn J said (at [149]) 'It was disputed inter alia that the risk of harm to the Valley Span … was one of which SPI knew or ought to have known. It was also disputed that a reasonable person in the position of SPI would have taken the precautions which the plaintiff asserted with hindsight it should have.' If all that time, effort and expert opinion couldn't reach a definitive conclusion as to cause after the event, it does seem reasonable to ask what SPI could have known before the event.

The plaintiff also alleged that given the line was 43 years old, it should have been replaced. Expert evidence was to the effect that the sort of failure that occurred was much more common on the coast (presumably because of the presence of salt?) and that if SPI had been replacing the type of conductor that failed on the basis of risk, it would have taken to 2038 before the conductors that failed were replaced. That was disputed by the plaintiff but as Osborn J said (at [184-185] emphasis added):

> The plaintiff's criticisms of SPI's procedures might be regarded as constructed with hindsight rather than fairly reflecting reasonable practice prior to the fire.
>
> Whatever view the Court ultimately took of the very detailed evidence on this aspect of the case as a whole (which I have not sought to fully summarise), it follows that **the plaintiff faced a real risk that the Court would not be persuaded that even if an enhanced asset replacement program was justified by the overall systemic risk of conductor failure due to fatigue, the Valley Span would necessarily have been prioritised and replaced prior to the fire.**

The plaintiff alleged that SPI was negligent when it changed its inspection regime so powerlines such as the one that failed were now inspected every 5 years instead of every 3. The case had to be that had there been more frequent inspections the failure in the assets would have been detected. Here the plaintiff faced the problem that the move to 5 year inspection accorded with industry practice and this power line had in fact been inspected within 12 months prior to the fire. There was therefore a real risk that this allegation of negligence too, would not be accepted.

The next allegation was that circuit breakers should have been set to trip on the first failure rather than, as was the case, to recharge the line and only lock out after a third failure. This procedure was to ensure that communities were deprived of power due to a transient fault. Osborn J said ([219]-[220]):

> It is sufficient to say that the plaintiff was confronted with a real risk that the Court might conclude that the likely effectiveness of suppressing OCR re-close functions was so low that it was not reasonably required to be undertaken…In particular, it was necessary to persuade the Court that the fire did not start by reason of contact with the ground before the OCR's first trip consequent upon contact by the conductor with the stay wire.

That is (without going through them) there were many and good reasons not to disconnect the power on first fail and even if they did, there was a real risk that this fire would have started before the circuit breakers had tripped.

Action against the state

Readers of this blog are probably most interested in the basis of the claims against the state agencies. These claims were really brought by SPI to shift its losses but the plaintiff also joined them.

Hazard reduction burns

SPI alleged that the Secretary to the Department of Sustainability and Environment (DSE) were negligent in not conducting greater hazard reduction burns and that if they had done so the fire would not have spread so far with such devastating consequences. Osborn J saw many problems with this claim. He said:

> Whilst it was plain that DSE had entered into the field of planned burning for the purposes of bushfire mitigation and control:
>
> (a) DSE had limited control over the risk of harm;
>
> (b) the fire was caused on private property by the operation of a privately owned electricity distribution network;
>
> (c) a duty will not ordinarily be imposed on a party which does not, by its positive conduct, create or contribute to the risk of harm;
>
> (d) the extent and content of the duty was ultimately difficult to define;
>
> (e) the duty would potentially apply across all public land in Victoria over which DSE had fire management responsibilities (7.7 million hectares);
>
> (f) the duty was not to be defined with hindsight;
>
> (g) the class to whom the alleged duty was owed was difficult to define;
>
> (h) the statutory powers in issue were not granted for the purpose of protecting the claimants;
>
> (i) the statutory powers involved the exercise of a discretion dependent on the making of policy decisions;
>
> (j) there were significant legal and practical constraints which affected DSE's power to carry out planned burning; and
>
> (k) any breach of the suggested duty would involve the Court in evaluating financial and policy considerations bearing on the allocation of public finances over a period of many years.

Even if there had been a duty to conduct more prescribed burns ([265]-[267]),

> There were a range of practical and operational constraints to planned burning, including such matters as windows of opportunity created by the weather and climatic conditions (which were characterised by an extended drought throughout the whole of the relevant period leading up to the fire), the need to take account of water catchment and logging operations, and the extent of financial and other resources available to DSE.

The complaint made was not with respect to planned burning that had in fact been conducted over the years prior to Black Saturday but simply that DSE had failed to do materially more.

There was, in turn, a real difficulty in defining what burning should, as a minimum, have been carried out in order to fulfil the duty alleged. This was the subject of extended contested evidence.

Failure to warn

This was the case against the police and CFA alleging (at [270], [272]) that:

> … as a consequence of the failure of the State parties to provide proper and adequate warnings to the claimants, the [injury and death] claimants suffered injury loss and damage…
>
> It was alleged that, from early in the afternoon of 7 February 2009 and certainly by the time the fire was burning uncontrollably in the Mount Disappointment State Forest, the CFA had sufficient knowledge to predict the path, spread and speed of the fire, and the communities it was likely to impact. It was then argued that, in the circumstances, the CFA had a duty to provide warnings and information as to :
>
> (a) the source of the fire;
>
> (b) the direction of the fire;
>
> (c) the spread and the speed of the fire;
>
> (d) the communities that might be or would likely be impacted by the fire;
>
> (e) the approximate time that the fire might or would be likely to impact particular communities;
>
> (f) the impact of any forecast wind change during the course of the fire;
>
> (g) the unpredictability of the fire as to intensity, speed and spread; and
>
> (h) the possible consequences of not heeding a warning.

In response (at [280]):

> The State parties pointed to a number of factors weighing against the existence of the duty alleged, including the following:
>
> (a) the case was again one of alleged failure to act, not one of duty in respect of positive action;
>
> (b) the relationship between the CFA and [the] claimants which the State parties argued emphasised personal responsibility and autonomy and discouraged the expectation of an official warning of bushfire threat;
>
> (c) warnings of the kind contended for would have been contrary to the historical practice of the CFA and DSE;
>
> (d) the CFA did not exercise control over the fire;
>
> (e) the claimants had knowledge of the risk of bushfire on the day in any event;
>
> (f) there is no legislative provision governing the power or responsibility of the CFA to give bushfire warnings;

(g) the CFA did not convey to the claimants that it had assumed responsibility for the giving of warnings to them;

(h) the CFA is not under a general duty to protect people from bushfire;

(i) vulnerability must be addressed separately for each individual claimant. The circumstances of the plaintiff and each of the sample group members did not demonstrate vulnerability on behalf of the class;

(j) section 83 of the Wrongs Act 1958 requires that, in determining whether a public authority owes a duty of care, resource limitations must be recognised and the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities.

Reading this summary, and selective quotes (which I admit does not do justice to Osborn J's detailed reasoning and discussion of the evidence), one might wonder why the defendants offered to settle at all. It has to be remembered however that Osborn J was not the trial judge and was not deciding whether or not the parties were liable. He was deciding whether the settlement was reasonable and in undertaking that task he was identifying the potential weaknesses in the plaintiff's case. That is the issue in any trial, any case has its strengths and weaknesses and he was exploring the potential weaknesses. It can not be inferred that the trial judge would have rejected all the plaintiff's claims but it was certainly possible that he could so, as Osborn J concluded (at [292]):

> Once it is understood that each of the claims made by the plaintiff faced some real risk of complete failure, it is difficult to conclude otherwise than that the proposed settlement is within the range of reasonable compromise. There is also a series of further consequential risks in respect of the plaintiff's claim which must next be addressed.

With this settlement the plaintiff (and the members of the class action) would receive significant damages where, if the matter when to trial they may get nothing, or much less; the settlement would bring the action to an end whereas continuing with the litigation may take a number of years [309] and would be complicated by likely appeals, possibly to the High Court of Australia [310] whereas it is expected that with the settlement, individual claims will be resolved within 18 months [330].

Commentary

This post cannot do justice to the judgement that runs for some 442 paragraphs plus appendices, but it does I think raise some interesting issues. The ABC reports ('Black Saturday class action: Judge approves $494m Kilmore East bushfire settlement', *ABC Online*, 23 December 2014) that the plaintiff:

> Ms Matthews said the settlement brings "an element of relief and a sense of comfort" and will help ease the financial struggles of the victims of the fire.
>
> But she said power companies like SP Ausnet must heed the finding.
>
> "I'm really hopeful that the evidence that was presented at the trial will encourage all the parties involved to renew and review their standards of operation," she said.
>
> "And [I] would like to say that the electricity companies, whether it be SP Ausnet or the newly-branded Ausnet Industries, need to take into account the rationale behind this record breaking class action settlement and they need to do everything they can to stop another avoidable disaster from destroying so many lives."

I'm afraid to say I suspect Ms Matthews is unduly hopeful. This is a settlement it is not a judgement. It is being made as a commercial assessment, by both sides, as to their risks in litigation. There is no 'finding' (and to the extent I've reported findings, above, it was that the plaintiff's case had real problems). No-one can really believe that companies like Ausnet 'need to do everything they can to stop another avoidable disaster from destroying so many lives' because the obvious 'everything' is to not have an electricity grid, but no community will tolerate that (see '[Bushfires; the price we pay for electricity]' (May 20, 2014)).

What this shows, in my view, is that there has to be a better way. As Osborn J says, apart from 208 sitting days ([10]), there were ([24]):

(a) … 26 pre-trial directions hearings; and

(b) 34 pre-trial applications;

(c) 60 major evidentiary and procedural rulings were made by the judge;

(d) evidence was ultimately heard from 40 expert and 60 lay witnesses;

(e) some 22,466 documents were loaded onto the electronic court book;

(f) some 10,364 documents were tendered in evidence; and

(g) in excess of 20,300 pages of transcript were generated in the course of the trial.

The plaintiff's legal costs were $60 million. Add to that the costs of providing the court, the costs of each defendant and no doubt costs that each member of the class met that will not be recovered just in putting together the details of what they lost. Apart from these legal proceedings, the 2009 Victorian Bushfires Royal Commission

- held 26 community consultations
- received almost 1,700 public submissions

■ conducted 155 days of hearings—including eight days of regional hearings and 23 days examining the 173 fire-related deaths, the hearings for which were attended by more than 450 family members and friends of the deceased

■ heard from 434 witnesses, including 100 lay witnesses and two panels of expert witnesses

■ received 31 submissions from counsel assisting and 107 submissions in response from interested parties

■ webstreamed the hearings live

■ produced 53 internal research papers

■ prepared and released one discussion paper

■ prepared one information paper

■ generated over 20,767 pages of transcript

■ received more than 1,000 exhibits into evidence—encompassing nearly 17,000 documents, photos, maps, and audiovisual and other material

■ issued five practice notes

■ produced two interim reports and this final report

■ filed over 98,000 documents in its electronic data management system 2009 Victorian Bushfires Royal Commission Final Report Volume 4, [1])

And cost $40 million (2009 Victorian Bushfires Royal Commission *Final Report* Volume 4, [4.3]) - $20 million LESS than the plaintiff's costs in bringing this case to court! There has also been other litigation over these fires that has settled; see Further settlement of Black Saturday claims (May 17, 2012) and *Thomas v Powercor* – First Black Saturday case to settle (December 5, 2011).

Despite all the money spent on legal costs (putting aside the actual damages paid) there has been no definitive determination of legal rights and obligations (given all the cases settled) and as the evidence in *Matthews v AusNet Electricity Services Pty Ltd & Ors* shows, even if there is consensus as to the cause of the fire (failure of electrical assets) there is no consensus yet on what could or should have been done to prevent that fire or what can be done to prevent future fires.

Further, as noted here despite the $500 million payout, the claimants are not receiving the total cost of their losses. The solution is not to suggest that people need to take responsibility and insure against such losses as, in this case, some 5000 claims were by insurance companies. Much of these damages paid out here will be transferring money from those that insure the defendant to those that insure the claimants.

Worse than the money being wasted is the trauma experienced by those that have to keep reliving events and being subject to rigorous legal scrutiny and judgement (see 'ACT Court of Appeal upholds verdict in favour of NSW over Canberra 2003 bushfires' (November 3, 2014)). Whilst I'm sure the royal commissioners, judges and counsel will all believe in their contribution to community safety and allowing every one, and every view to be heard and tested, I am left with an uncomfortable feeling that little has been added. In Canberra there was the original McLeod Inquiry followed by the lengthy coroner's inquiry and inquest, with several trips to the Supreme Court, and finally litigation in the ACT Supreme Court and then Court of Appeal. In terms of 'learning lessons' was anything really learned beyond the McLeod Inquiry – (see Ignatious Cha, *Learning Lessons from Fires: A Study of Post-Disaster Inquiries in the 2003 Canberra Fires* (2013, Unpublished Individual Research Project, Fenner School of Environment and Society, Australian National University)?

Anyone who thinks that, following the various inquiries into fires going back to 1939 and including inquiries into the 1983 Ash Wednesday fires, the 2003 fire season and now the 2009 fires we now have reached a stage where we understand fires and can, and will 'do everything they can to stop another avoidable disaster from destroying so many lives" is bound to be disappointed. Given the Australian climate, landscape and choices we make about where and how to live, another fire event is inevitable.

Given that bushfire and other natural hazards are inevitable, a new way of reviewing these events to identify causes, potential action to mitigate risk and to spread the risk of losses must be found.