MANAGING EXPECTATIONS IS A LEGAL ISSUE – NOT.

Michael Eburn
School of Law
University of New England
ARMIDALE NSW 2351

The theme of this conference is “Managing Expectations”. I intended to argue that managing, or more importantly failing to meet expectations is, amongst other things, a legal issue. My premise was to be that people, as potential plaintiffs, and the courts as adjudicators, ‘expect’ the emergency services to meet certain standards. Where it is believed that the standards have not been met then people are more likely to seek a legal remedy and defendants are more likely to lose in court. Accordingly if the emergency services can manage expectations, that is persuade the courts and the community to have reasonable expectations of their emergency services, the risk of legal action would be reduced.

In fact, and rather disappointingly for the theme of this conference, in writing this paper I have come to the conclusion that managing and meeting expectations will only be marginally relevant to the question of whether or not the emergency services are likely to be sued or to successfully defend a lawsuit.

Meeting the expectations of individuals
It is axiomatic that if a person rings 000, asks for assistance from the fire brigade and the brigades come, and extinguish their fire and save the lives of their family and pets, the callers’ expectations will have been met and they won’t sue or complain.

Legal issues arise when that doesn’t happen, for example when a person rings 000 and cannot get through, or is advised that, due to the size of the fire event, there are simply no appliances to send to their way. As we have seen in Victoria and Canberra it arises when people say they were not warned that the fire would impact upon them and so their homes were lost when they ‘expected’ the Emergency Services Bureau or the Government to be there, to protect them.

Those expectations may or may not be reasonable, but let us assume that the caller knew that the fire was of a scale that it was beyond the capacity of the emergency services or that they are cynical enough to think, when told they are on their own ‘well that’s what I expected’. What impact does that have on whether they take legal action or not?
The reality behind why people sue, or don’t, is largely unknowable\(^1\) so although we might surmise that if people’s expectations are met, they are unlikely to sue, this cannot be established.

We know that many more people could sue, than do.\(^2\) Whether it is in road accidents, medical negligence or other events, many people who might have the basis for a legal action will not bother to sue. The reasons for that may be many: they may not realise they could seek a legal remedy, they may not be able to afford to consult a lawyer or commence proceedings, they may have language barriers, live in remote areas where access to legal services are more difficult, have other commitments that mean they do not have the time, perhaps they couldn’t be bothered as the issue isn’t significant to them, their needs are being met by insurance including the universal health insurance scheme (ie Medicare) and the like. We may think, but cannot confirm, that some people may not sue because the service they received, even though substandard, was in accordance with their expectations.

We do know that people who do sue do so for a variety of reasons. In the context of the doctor/patient relationship, it has been found that money is not the principal objective in commencing a legal action.\(^3\) One survey identified four themes that motivate a legal action, they are

1. To prevent similar incidents occurring in the future;
2. To know and understand what happened and why;
3. To obtain monetary compensation; and
4. To hold individuals and institutions accountable.\(^4\)

Except for point number (4) these motives do not necessarily depend on a belief or feeling that expectations have not been met.

Where the claim is for money damages arising out of property damage the situation is complicated by insurance. In those cases the property owner may have claimed on their insurance policy and the insurer then has the rights of the insured, including the right to sue in the insured’s name. In the litigation before the ACT Supreme Court arising from the 2003 Canberra bushfires there are in excess of 3000 plaintiffs. In fact what is happening is the insurers are seeking to recover damages and their obligation is not to the community, not to the fire service and not to the policy holders. Their primary obligation is to their shareholders and to try and recover funds where they can to maximise their profit and to

---


minimise the impact of the fires on their balance sheet. The question of what they could ‘reasonably expect’ from the fire brigades or the Emergency Services Bureau will not be relevant to their decision to sue.

Although the evidence is missing, it seems likely that whether or not a person’s expectations have been met is only one factor that may be considered when deciding whether or not taking legal action will be worthwhile. The exception will be when the person expects that the fire brigade will come and quickly extinguish the fire, and that is in fact what happened. But that is no more than saying you won’t get sued when nothing goes wrong, the issue is only of interest when things do go wrong.

What the law expects
The difficulty with trying to meet the expectations imposed by law, via the courts, is trying to understand what those expectations are.

Trying to understand when an authority such as a fire brigade will owe a legal duty to an individual is not at all clear. In trying to answer the question “when does an authority created by statute owe a duty to protect an individual?” Kirby J (as he then was) said:

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, 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.  

That day has not yet come.

Kirby J went on to say:

The search for such a simple formula may indeed be a "will-o'-the wisp". ... [W]e seem to have returned to the fundamental test for imposing a duty of care, which arguably explains all the attempts made so far. That is, a duty of care will be imposed when it is reasonable in all the circumstances to do so.

The problem with that determination is whether it is reasonable will depend on the facts of each case and the opinion of each judge. As the facts of each case are different, trying to distil or identify expectations from one case, to be applied to another, is very difficult if not impossible.

The confusion and lack of clarity in the law has lead to a search for a unifying doctrinal concept that can be used to identify when it is that a statutory authority will owe a duty of care to a particular individual. There is an argument that a cohesive test could be developed

---

6 Ibid, [244] (Kirby J) (emphasis added).
based on the legitimate expectations of the community. Amirthalingam argues that the standard of care should not be based on the reasonable person but what “the community or relevant class of plaintiffs may reasonably expect” from the defendants; in our context, from their fire service. He warns however that this is a “double edged sword” as “greater emphasis on expectations tends towards recognition of greater positive duties such as rescues and warnings”.

The courts have not adopted a test based on reasonable expectations. At the moment they say the issue of whether or not there is a duty requires the court to look at the whole relationship between the plaintiff and the defendant and consider the ‘salient features’ of that relationship. Two key features are the vulnerability of the plaintiff and the ability of the defendant to control or take charge of the risk. Where a plaintiff is vulnerable to a hazard and unable to protect themselves, but the defendant has the authority and ability to protect them, then a duty is more likely to be found.

Here is an issue where expectations may be relevant. If the community, and ultimately the courts, think that people who live in bush fire prone areas are vulnerable and the relevant fire authority has the power, the ability and the resources to protect them, either by responding to the fire call or giving advice on how to prepare and defend the property, then there is a stronger argument that the authority owes a legal duty to protect the plaintiff. In NSW v West, Higgins CJ said:

A bushfire hazard is clearly a danger to persons and their property and only an organised, trained and equipped service such as the Rural Fire Service could have any prospect of averting danger from a serious bushfire.

The vulnerability of the prospective victims is self-evident, particularly if they are or may be assumed to lack the resources to protect themselves.

That reasoning denies the existence, and fundamental rationale for the “prepare, stay and defend or leave early” policy. That policy is predicated on the assumption that there will be times when the fire services will not be able to attend to avert the danger and people need to be prepared, and can, take steps to protect themselves. If the fire authorities can convince property owners and the courts that in fact people are not vulnerable, that they can do much to protect themselves, and the fire authority cannot be relied upon to respond or if they do respond, there will be fires that they simply cannot extinguish, then it will be easier to argue that there can be no duty that sounds in damages when the worst case scenario occurs.

8 Ibid 89
9 See Pyreness Shire Council v Day 998) 192 CLR 330.
That sort of argument has its own risks. In effect if a fire service wants to create an expectation that the community cannot rely on them to come when called, that there will not be an appliance on every street corner, they will run into political problems as well as legal problems. The NSW Fire Brigades, for example must, on the raising of an alarm

... despite anything to the contrary in any Act, proceed with all speed to the fire and try by all possible means to extinguish it and save any lives and property that are in danger.¹¹

Convincing the community that in some circumstances that may not happen may mean that a person whose house is lost will sue the brigades for failing to comply with their statutory duty rather than negligence.

Where the court finds that there is a duty of care, the court expects the defendant to act as a reasonable defendant. If we limit the discussion to negligence litigation, the plaintiff has to show that the defendant did not do what the ‘reasonable’ fire authority would do. The test of reasonableness is not based on what the average or most defendants would do, nor is it based on whether or not the defendant did the best they could in the circumstances.¹² It is measuring the defendant’s performance against a hypothetical reasonable person. The reasonable person is however a cautious, clear thinking individual who perceives all possible outcomes and weighs up the risks and benefits of each action before embarking on a course of action. It is not the average or ordinary person.

Tort law does not formally recognise that the reasonable expectations of the community or the plaintiff determines whether or not there is a duty owed or whether or not the defendant’s actions were negligent. I may reasonably expect that my doctor will, like all human beings, make a mistake, that he or she will attempt to ‘do their best’ but things may go wrong that could and should have been avoided. None of that will protect the doctor from liability should the poor outcome occur.

In terms of reasonable expectations, it is not reasonable to expect that my doctor will never make a mistake, that he or she will meet the standard of the ‘reasonable doctor’ 100% of the time. Regardless of that reasonable expectation, the law expects that standard to be met each and every time. It is no defence to say ‘I get it right most of the time and that is all anyone can expect’. A particular plaintiff is entitled to expect that their doctor (or anyone else providing a service) will get it right in their case and will make good the damage if they do not.

To say that the law does not require a guarantee of safety, only reasonable actions to protect a plaintiff, fails to identify that the idea of the ‘reasonable person’ is a legal fiction and the standard of ‘reasonableness’ is hard if not, at times, impossible to reach.

¹¹ Fire Brigades Act 1989 (NSW) s 11.
¹² “They did their best. It was not, in the Coroner’s view "the best". Lucas-Smith v Coroner’s Court of the ACT [2009] ACTSC 40 (8 April 2009) [261].
The court’s expectations are only know well after the event
Delays in litigation mean that the lessons learned, the expectations delivered, can only be identified well after the event. The Canberra bushfires occurred in 2003, the first litigation, *West v NSW* is due to be heard this year. Assuming the court delivers a verdict there is likely to be an appeal. If the matter goes to the High Court of Australia (which I would think is likely as it would deal with critical issues about whether or not a fire brigade owes a duty of care to an individual property owner) then the litigation won’t be resolved for another few years. The lessons learned, the statement of expectations will by then, be so out of date as to be meaningless in terms of practical application.

If we look at some recent cases involving the emergency services we can see the problem. There is a great delay in the court setting out what it could or should have expected from the defendants, and in many cases there is no clear opinion as to the legal result.
<table>
<thead>
<tr>
<th>Case</th>
<th>Incident occurs</th>
<th>Date of judgment</th>
<th>First Appeal</th>
<th>Appeal to the High Court</th>
<th>Approximate time to finalisation</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Nelligan v Mickan</em></td>
<td>8 December 1993</td>
<td>Not known</td>
<td>13 November 1988</td>
<td></td>
<td>5 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>P’s damages reduced for contributory negligence</td>
<td>P’s appeal upheld</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Keller v MAS and Victoria</em></td>
<td>21 September 1994</td>
<td>12 June 2002</td>
<td></td>
<td>Special leave to appeal refused 8 September 2005</td>
<td>8 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>V for D</td>
<td>V for D</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Neal v Ambulance Service of NSW</em></td>
<td>27 July 2001</td>
<td>6 June 2007</td>
<td>10 December 2008</td>
<td>Special leave to appeal refused 8 September 2005</td>
<td>7 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>V for P</td>
<td>V for D</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>West v NSW</em></td>
<td>18 January 2003</td>
<td>6 July 2007</td>
<td>5 September 2008</td>
<td>Special leave to appeal refused 13 February 2009</td>
<td>6 years and still ongoing</td>
</tr>
<tr>
<td></td>
<td></td>
<td>V for P</td>
<td>V for D</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>State of NSW v Tyszyk</em></td>
<td>13 November 2004</td>
<td>Not known</td>
<td>26 May 2008</td>
<td>Special leave to appeal refused 1 May 2009</td>
<td>5 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>V for P</td>
<td>V for D</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

13 Keller v MAS and Victoria [2002] VSC 222 was an unusual case as the defendants, the Metropolitan Ambulance Service and the State of Victoria on behalf of Victoria Police settled Mr Keller’s claim and then went on to litigate what proportion of fault lay with each service. The court found that responsibility fell 60% to the Ambulance service and 40% to the police.

14 West v NSW is litigation arising from the Canberra fires of 2003. The litigation so far has only dealt with the question of whether or not the claim should be struck out as disclosing no reasonable cause of action. That has been dismissed so the litigation can now proceed to hearing. It is listed for hearing in 2009. It is likely that there will be appeals to the ACT Court of Appeal, and then to the High Court of Australia. There are another 3000 claims filed just before the limitation period expired that are, presumably, waiting on the outcome in West to determine whether or not they will proceed.
In *Nelligan v Mickan*\textsuperscript{15} the first judge found the plaintiff contributed 20% to his own accident. The appeal turned on the question of whether or not the defendant had been negligent at all. Milhouse J would have found the defendant was not negligent. Olsen and Debelle JJ dismissed the appeal (agreeing with the trial judge that the defendant had been negligent) but found no contributory negligence by the plaintiff. Out of four judges, there were three distinct opinions!

In both *Neal v Ambulance Service of NSW*\textsuperscript{16} and the *State of NSW v Tyszyk*\textsuperscript{17} the plaintiff won at first instance but lost on appeal. In both cases the appeal was upheld unanimously but it still took many years for the court’s to correct the error of the trial judges.

**Conclusion**

I started this paper expecting to conclude that if an emergency service educated a community on what they could expect from their service, then the service would be in a better legal position when the worst case scenario occurred. If people knew that they could not expect a fire appliance to come and extinguish the fire, if they knew they might be on their own but they could do something to protect themselves they would not seek a legal remedy and if they did, the fire service would be able to defeat that claim.

In writing that paper I have come to the conclusion, in fact, that meeting expectations will only have a marginal impact. People who have lost everything have had many of their expectations defeated, not just their expectations of the fire service. They did not expect to face life with a destroyed property and without their loved ones. They will react to that experience in many ways and some will seek to blame others or seek answers to unanswerable questions as part of that process.\textsuperscript{18} It is not only their expectation of the fire service that is relevant; it is their expectation of what they can expect from Government, from the courts and from life that will also be relevant. Whether they will sue or not depends on too many factors to say that if the service did all that they thought it would do, they will not sue. They can still argue that the service, even if expected, was inadequate.

On the question of whether or not meeting the plaintiff’s or the community’s expectations will assist in defending a matter, the review of the law shows that this is not part of the law of torts. The law of negligence at least judges the defendant’s conduct against a hypothetical ‘reasonable’ person not the average or normal person. The standard of the reasonable person may be much higher than any of us achieve.\textsuperscript{19} Convincing people that they should expect less than they do may well lead to other, equally complex legal problems.

\textsuperscript{15} [1998] SASC 6935.
\textsuperscript{16} [2008] NSWCA 346.
\textsuperscript{17} [2008] NSWCA 107.
Meeting the law’s expectations is difficult as they are unclear. Even the judges, with the benefit of counsel, in the cool of the court room, with time on their hands, cannot determine what they are. How an incident controller or manager is meant to do that is beyond knowing.

Meeting expectations is a worthwhile objective, but my conclusion ultimately, is that it is not a legal issue. There is no evidence that it will stop people suing you, and the court’s expectations are that a defendant will act as the reasonable defendant but you cannot in any meaningful way determine what that means before the event. It follows that despite my initial hypothesis, meeting expectations is not in fact a significant legal issue.