PROTECTING THOSE WHO PROTECT US
Legal questions answered for emergency management volunteers

In November 2011, lawyer and emergency service volunteer Dr Michael Eburn made a presentation to the ACT Division of the Australian Institute of Emergency Services. Based on that presentation, Dr Eburn prepared a paper for all AIES members that addresses a number of legal questions relevant to emergency service volunteers. While Dr Eburn refers to the law in ACT, he says the answers will be similar in other state jurisdictions.¹

As an emergency volunteer, can I be sued?
We can never say never, but it is extremely unlikely. Despite rumors to the contrary, there is much legal protection in place. Civil liability legislation has been enacted to protect volunteers and provides that volunteers are not personally liable for acts or omissions made 'honestly and without recklessness' whilst carrying out community work.² If they are negligent or otherwise liable, the liability attaches not to the volunteer but to the organisation for which they are volunteering.

For emergency service volunteers, protection is also provided by specific emergency services legislation. In the ACT, an emergency services official, which includes a member of the emergency services, is not personally liable for anything that they do, or fail to do, provided they are acting 'honestly and without recklessness' when performing a function, or if they believe they are performing a function, under the relevant emergency management law.³ Where the Act applies, it is the territory that will be liable for the actions of the members.⁴

The importance of providing the protection when the official believes that they are performing a function under the Act is that it extends protection to well-intentioned actions. If they are acting 'honestly', that is to try to achieve the purposes of the Act, then they are protected even if it turns out that they were wrong and their actions were not justified or required by the law.

And one has to ask why would anyone want to sue a volunteer? The aim of suing someone is to receive money compensation to put the person who suffered the loss, whether physical injury or property loss, back in the position they would have been if they had not been wrongly injured. A volunteer is unlikely to have the resources to make good any damages whereas an action against the government will be funded through its insurance and self-insurance schemes and far better prospect for actually recovering damages.

Also, if you are insured, and you make a claim on your insurance, then your insurer is vested with your rights including the right to sue. Much litigation, including the litigation from the 2003 Canberra fires, was actually started by insurance companies seeking to recover money they had paid out, not by individuals. Insurance companies understand that there is no point suing a defendant who cannot pay and will have no interest in suing a volunteer when they could sue a territory or state government.

What is the role of the coroner?
A coroner has the jurisdiction to enquire into deaths,⁵ fires that have destroyed or damaged property⁶ and disasters.⁷ For the emergency services, in particular fire services, this means the coroner has jurisdiction to enquire into nearly all their responses.

When holding an inquest into a death, a coroner is to confirm the identity of the deceased, when and where they died, and the cause of their death.⁸ When holding an inquiry into a fire or disaster the coroner is to determine the cause and origin of the fire or disaster and the circumstances in which it happened.⁹ In any case, the coroner ‘may comment on any matter ... including public health or safety and the administration of justice’.¹⁰

The concept of 'cause and origin' of a fire that has been interpreted widely. In litigation to limit the coroner’s inquiry into the 2003 Canberra fires, the Supreme Court said:

If the concept of 'the fire' were to be interpreted narrowly, the jurisdiction might be confined to determining whether the initial ignition was due to arson or was caused by some accident or natural phenomenon such as a lightning strike.¹¹

The court accepted however that was not what was intended:

It would be quite unrealistic to regard a fire that had travelled long distances and/or burnt out vast areas of bushland as co-extensive with a fire that had been smouldering on the end of a cigarette when negligently thrown from a car window and, then to dismiss from consideration any intervening or contributing events.¹²

They went on to say:

For these reasons, we are satisfied that the term, 'the fire', in s 18 of the Act should be construed to mean the fire that caused the damage to property.
rather than merely the initial ignition from which that fire ultimately developed. The coroner can make adverse comments directed at individuals. Before making an adverse comment, the coroner must provide a copy to the person who is to be named and invite them to respond either in person or in writing. If the person responds in writing they can require the coroner to include their written response in the coroner’s final report.

The coroner cannot determine that anyone, or any organisation, was negligent or legally liable to pay compensation. The coroner cannot determine that any one is guilty of a criminal offence. If the coroner believes that the evidence suggests that someone is guilty of a serious criminal offence, he or she must notify the Director of Public Prosecutions (DPP) and stop the inquest or inquiry. The DPP will then determine whether or not anyone should be charged. The inquest or inquiry may be resumed if the DPP rules that there are no charges to be laid or charges are brought, the accused is put on trial and either convicted or acquitted of the charges.

What about the new OHS Act?
New uniform work health and safety legislation is being introduced across Australia in 2012. Originally intended to come into force in all jurisdictions on 1 January, it is now being phased in at different times. In the ACT, Work Health and Safety Act 2011 (ACT) has replaced the Work Safety Act 2008 (ACT).

The new law does not require that all workplaces are risk free. The duties imposed are duties to eliminate, or if that is not possible, then minimise risks only so far as is reasonably practicable. In deciding what is reasonably practicable, regard must be had to the likelihood of the hazard or the risk occurring, the degree of harm that might result from the hazard or the risk, the availability and suitability of ways to eliminate or minimise the risk, the cost associated with eliminating or minimising the risk and whether the cost is grossly disproportionate to the risk. What is reasonable must take into account the nature of the task including the inherent risks to workers and volunteers. Where a residual risk remains, it is appropriate to ask ‘is the objective worth the risk?’ and often it is. Turning out to a house fire carries a residual risk to fire fighters but if it is a risk that has been minimised as far as is reasonably practical, it is worth turning out to obtain the benefits of suppressing the fire rather than allowing it to spread.

Under the Act, volunteers are treated like employees. Volunteers are owed, and owe, health and safety duties. Volunteers may be prosecuted for failing to take reasonable care to protect the health of safety of themselves and others, however the inclusion of volunteers in workplace health and safety is not new in the ACT. The 2008 Act also defined ‘worker’ to include volunteers and there have been no reported case where a volunteer has been prosecuted for breaches of their own health and safety obligations.

Officers can also be prosecuted for failing to ensure an organisation has proper health and safety procedures in place, but ‘officer’ does not mean the same as it might in a uniformed organisation. An officer is a ‘person who makes, or participates in making, decisions that affect the whole, or a substantial part of the undertaking’. An officer is therefore the commissioner and the chief officers of the various emergency services, and perhaps some of the senior executive. How far down the chain of the command the concept goes remains to be seen but one thing is clear, a volunteer officer cannot be prosecuted for failing to perform an officers’ health and safety duties.

Can my boss refuse to let me respond?
The Fair Work Act 2009 (Cth) applies across Australia. That Act says:

(1) An employer must not terminate an employee’s employment for ...

(h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

Determining whether or not the absence is reasonable will depend on a myriad of factors including the work the person is employed to do, the terms of that employment, the nature of the emergency, the time away, whether or not they were able to give notice. The list of factors will vary with each job and each employee and employer. If a volunteer thinks that their absence was ‘reasonable’ they could seek
a remedy for unfair dismissal but that can be complex, time consuming, unpleasant and may not secure your job again.

The reality is that a volunteer needs permission from their employer if they are going to absent themselves from work and it will be up to each employer and employee to determine the circumstances in which absence for emergency services work will be acceptable.

How do lawyers and judges make judgments about emergency responses?

Of course some lawyers are emergency service volunteers but even if they are not, or never have been, judges are there to adjudicate disputes, assisted by lawyers. Because they are adjudicating between competing claims and interests, it should be remembered that just because a person or an organisation, including an emergency service organisation, is before a court or is subject to detailed cross examination, it does not mean that anything has gone wrong, or that you have done anything wrong. There is no filter to ensure that only the negligent are sued or only the guilty are prosecuted. It is the role of a court, assisted by lawyers, to determine if there was negligence or other liability.

That may not make court a more pleasant place to be, but it may go some way to give some confidence that if you are asked a question, you really are being given an opportunity to answer it. A person may allege some neglect but a court is a place to answer those questions, rather than get offended that they have been asked.

Conclusion

This paper represents the type of questions I am often asked by volunteers. There are undoubtedly many more questions and the answers will vary at least in the detail, in each state and territory. Whether these answers will raise or lower volunteer’s concerns about the law or how the law will treat them I cannot say. If anyone is looking for reassurance, the best that I can offer is that I have studied the law and the emergency services for many years, and I remain an emergency services volunteer.

References

1. The law does differ in the jurisdiction and the application of the law depends on the specific facts. Anyone with concerns about their legal position should seek advice from the service for which they volunteer, their volunteer’s association or a lawyer in their state or territory.
4. Ibid s 198(3).
6. Ibid s 18.
7. Ibid s 19.
8. Ibid s 52(1).
9. Ibid s 52(2).
10. Ibid s 52(4).
11. The Queen v Coroner Maria Doogan; Ex Parte Peter Lucas-Smith [2005] ACTSC 74, [20].
12. Ibid.
13. Ibid [22].
16. Ibid s 18.
17. Ibid s 7.
18. Or in the Northern Territory or Queensland.
21. Ibid s 34.

About the author

Dr Michael Eburn is a Senior Research Fellow at the ANU College of Law and the Fenner School of Environment and Society in the Australian National University, Canberra where he is engaged in a Bushfire CRC research project of the impact of law and policy on emergency management. He is the author of Emergency Law (3rd ed, 2010, The Federation Press) and numerous articles and conference papers on issues to do with law and the emergency services. Michael has been a volunteer with St John Ambulance Australia (NSW) and an honorary ambulance officer with NSW Ambulance. He is currently a volunteer with both NSW and ACT State Emergency Services. Questions and comments can be directed to michael.eburn@anu.edu.au