

# What a Nuisance! – Court refuses to consider claim against Statutory Body for nuisance without negligence

*Weber v Greater Hume Shire Council* [2018] NSWSC 667

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## Summary

The Supreme Court of New South Wales recently considered the liability of a Local Council in negligence and nuisance following a class action seeking compensation for property damage and personal injury, caused by a fire.

The class action failed as the Court concluded that the Council was not liable in negligence or nuisance on the basis that even if the Council had implemented adequate fire management plans, this would not have prevented the spread of the fire. The decision also confirmed that unless a statutory body is found liable in negligence, a claim in nuisance will also fail.

## Background

Greater Hume Shire Council ('the Council') operated a landfill waste facility known as the 'Tip' in Walla Walla, a rural township in south east NSW.

On 17 December 2009, a fire broke out at the Tip and as a result of strong winds it quickly spread and destroyed 5,200 hectares of land, including the property leased by Sharon Weber ('Weber').

It was argued that the Council was liable in both negligence and in nuisance on the basis that the Council failed to prevent the ignition of the fire and/or failed to prevent the spread of the fire.

## Negligence

The Court accepted that it was reasonably foreseeable that waste at a tip could ignite and that a duty of care was owed by the Council to take adequate precautions to prevent a fire igniting or to reduce or control the spread of the fire.

The actual or probable cause of ignition could not be identified after an expert conclave and experts giving their evidence concurrently at trial. On that basis the Court held that Weber could not prove that the ignition of the fire was caused by a breach of any duty owed by the Council to the plaintiffs.

However, the Council was found to have breached its duty of care by failing to prepare a fire management plan and adopting preventative measures to stop the spread of the fire where it had knowledge of the risk of fire occurring.

The Council put forward the defence available under section 42 of the *Civil Liability Act 2005* (NSW) and argued that it was unable to adopt the preventative measures because as a statutory body it was limited by financial and other resources that are reasonably available. The Court rejected this defence on the basis that the Council had specific resources allocated for waste management purposes under section 733 of the *Local Government Act 1993*.

In any event, the Court found that even though Weber was able to establish a breach of duty of care, she could not establish any negligence on the part of the Council because there was no evidence to suggest that, even if the relevant precautions had been implemented, those precautions would have been sufficient to slow the

progress of the fire to such an extent as to meet the time of the arrival of the first fire fighter to prevent its spread.

On that basis, the Court held there was no negligence on the part of the Council.

## Nuisance

Weber also pleaded that the fire substantially and unreasonably interfered with the use or enjoyment of the interests in the land held by her and the group and as a result of this nuisance, loss and damage was caused.

In dealing with the nuisance claim, the Court relied on a well-established principle that a party is not, without negligence on its part, liable for a nuisance attributable to the exercise of, or failure to exercise its statutory powers.<sup>1</sup>

As Weber's claim for nuisance was attributable to the exercise of, or failure by the Council to exercise its statutory powers in the provision of waste management services, the Court applied this principle and found it was necessary for Weber to prove the Council was negligent before a claim in nuisance could be successful. On that basis the Court held that the claim in nuisance must also fail.

## Implications

- Nuisance is a cause of action that can be argued if there is a proprietary interest in the land the subject of the claim. However, when seeking recovery from a Council or other statutory body, the prospects of establishing negligence must be considered prior to any consideration being given to a claim in nuisance.
- Causation is always an important consideration when seeking to establish negligence (or nuisance). A claim in negligence will be unsuccessful even if a breach of duty is established if there is no evidence that the breach of duty caused the damage.
- The defence available to statutory bodies in section 42 of the CLA always needs to be borne in mind in cases against Councils but it need not be seen as a deterrent to recovery, especially in circumstances where a statutory body is granted specific powers and resources allocated to exercise those.

<sup>1</sup> *Marcic v Thames Water Utilities Ltd* [2002] QB 929.

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