

# Supreme Court

## New South Wales

**Medium Neutral  
Citation:**

**Warragamba Winery Pty Ltd v State of New  
South Wales (No 9) [2012] NSWSC 701**

**Hearing dates:**

24-28, 31 October, 1-4, 7-11, 14-18, 21-25, 28-30  
November 5-8, 12-16 December 2011, 30, 31  
January, 1-3, 6-10, 13-17, 20-22, 27-29 February, 1,  
2, 5, 6, 8, 9, 12, 16, 19, 20-23, 26-30 March, 2-5,  
10-13 April, 21-24 May 2012

**Decision date:**

26 June 2012

**Jurisdiction:**

Common Law

**Before:**

Walmsley AJ

**Decision:**

1. Judgment in favour of the defendants in all matters.
2. Order the plaintiffs in each case to pay the defendants' costs.
3. Direct the Principal Registrar to refer the judgment as it concerns Mr Nix to the Director of Public Prosecutions.

**Catchwords:**

Torts - negligence - public authorities - bushfire caused by lightning strike spreading to and burning houses and factories in towns near national park - whether a duty of care - occupiers duties - whether breach of duty - nuisance - whether breach of statutory duty - Civil Liability Act 2002, s 43A - Rural Fires Act 1997, s 128 - whether immunity available - Jones v Dunkel - unexplained failure to call witnesses - experts - bias allegation - assumptions - whether expert ought go beyond them - damages - method of valuation for tortiously destroyed buildings - emergency grants - whether defendants should benefit - real property - whether demountable home has become part of the land

**Legislation Cited:**

Civil Liability Act 2002  
Crown Proceedings Act 1988  
Community Welfare Act 1987  
Evidence Act 1995  
Fire Brigades Act 1989

Local Government Act 2007  
National Parks and Wildlife Act 1974  
Public Sector Management Act 1988  
Rural Fires Act 1997  
Sydney Water Catchment Management Act 1998

**Cases Cited:**

Allianz Australia Insurance Ltd v Roads and Traffic Authority of NSW; Kelly v Roads and Traffic Authority of NSW [2010] NSWCA 328  
Anthoness v Bland Shire Council (1960) 60 SR (NSW) 659  
Australian National Airlines Commission v Newman [1987] HCA 9; (1987) 162 CLR 466  
Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex rel CAC (1981) 148 CLR 121  
Bankstown City Council v Alamo Holdings Pty Ltd [2005] HCA 46; (2005) 223 CLR 660  
Bennett & Wood Ltd v Orange City Council (1967) 67 SR (NSW) 426  
Billing v Pill [1953] 3 WLR 758  
Board of Fire Commissioners (NSW) v Ardouin (1961) 109 CLR 105  
Board of Fire Commissioners v Rowland (1960) 60 SR (NSW) 322  
Boatswain v Crawford [1943] NZLR 109  
Bourne v Australian Oil Refining Pty Limited (Unreported, Supreme Court of New South Wales, Court of Appeal, Hutley, Mahoney, Reynolds JJ, 2 July 1979)  
Brodie v Singleton Shire Council; Ghantous v Hawkesbury Shire Council [2001] HCA 29; (2001) 206 CLR 512  
Browne v Dunn (1893) 6 R 67  
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13; (1994) 179 CLR 520  
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258; (2009) 259 ALR 616  
Capital & Counties Plc; Digital Equipment Co Ltd v Hampshire County Council [1997] QB 1004  
Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59; (1999) 200 CLR 1  
Dilosa v Latec Finance Pty Ltd [1966] 1 NSW 259  
Dodd Properties Ltd v Canterbury City Council [1980] 1 WLR 433  
Edwards v Blue Mountains City Council [1961] NSW 803  
Elitestone Ltd v Morris [1997] 1 WLR 687  
Elliot v Ivey (Unreported, New South Wales

Supreme Court, Sperling J, 23 April 1998)  
Evans v Balog [1976] 1 NSWLR 36  
Fabre v Arenales (1992) 27 NSWLR 437  
Gagner Pty Ltd t/as Indochine Cafe v Canturi Corp  
Pty Ltd [2009] NSWCA 413; (2009) 262 ALR 691  
Gardner v Northern Territory of Australia [2004]  
NTCA 14  
Gill v Australian Wheat Board [1980] 2 NSWLR 795  
Gillett v Murphy [2001] NSWCA 199  
Goldman v Hargrave [1967] 1 AC 645  
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA  
54; (2002) 211 CLR 540  
Harbutt's Plasticine Ltd v Wayne Tank & Pump Co  
Ltd [1970] 1 QB 447  
Jones v Dunkel (1959) 101 CLR 298  
Kent v Griffiths [2001] QB 36  
Little v The Commonwealth (1947) 75 CLR 94  
Manly Council v Byrne [2004] NSWCA 123  
Maynard v Rover Mowers Ltd [2000] QCA 26  
Mid Density Developments Pty Ltd v Rockdale  
Municipal Council (1993) 44 FCR 290  
Murphy v Brentwood District Council [1990] 2 All ER  
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National Justice Compania Naviera SA v Prudential  
Assurance Co Ltd (The Ikarian Reefer) [1993] 2  
Lloyd's Rep 68  
Oceanview Holdings Ltd v Clarry M O'Byrne Ltd  
[1989] 1 NZLR 574  
O'Connor v SP Bray Ltd (1937) 56 CLR 464  
Parramatta City Council v Lutz (1988) 12 NSWLR  
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Payne v Parker [1976] 1 NSWLR 191  
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Council [2008] NSWCA 278; (2008) 74 NSWLR 102  
Puntoriero v Water Administration Ministerial Corp  
[1999] HCA 45; (1999) 199 CLR 575  
Pyrenees Shire Council v Day [1998] HCA 3; (1998)  
192 CLR 330  
The Queen in right of Ontario v Eliopoulos (2006)  
276 DLR (4th) 411; (2006) 288 DLR (4th) 411  
Re Cosslett (Contractors) Ltd [1998] Ch 495  
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Standard Portland Cement Co Pty Ltd v Good [1982]  
2 NSWLR 668  
State of New South Wales v West [2008] ACTCA 14;  
(2008) 165 ACTR 47  
Stephens v Stephens [1970] 3 NSW 168  
Stuart v Kirkland-Veenstra [2009] HCA 15; (2009)  
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59; (2001) 207 CLR 562  
Sutherland Shire Council v Heyman [1985] HCA 41;  
(1985) 157 CLR 424  
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Westwood v Cordell [1983] 1 Qd R 276  
Whitehouse v Jordan [1981] 1 All ER 267  
Williams v The Queen in right of Ontario (2009) 310  
DLR (4th) 710; (2009) CanLII 71462 (SCC)  
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**Category:**

Principal judgment

**Parties:**

Warragamba Winery Pty Ltd (Plaintiff)  
Lionel Rupert Fowler (Plaintiff)  
Joseph David and Jodie Ann Gauci (Plaintiffs)  
Ernest and Gillian Hausler (Plaintiffs)

Vitomir Kuzmanovic (Plaintiff)  
 Michelle and Mark Larden (Plaintiffs)  
 Bruno Lopreiato (Plaintiff)  
 Alexander and Suzanne Lynch (Plaintiffs)  
 Darryl and Tracy Nix (Plaintiffs)  
 Michael O'Brien (Plaintiff)  
 Michael and Jane Passlow (Plaintiffs)  
 Antol and Wanda Plachozki (Plaintiffs)  
 Paul and Josephine Mary Quigley (Plaintiffs)  
 Richard and Joanne Sheppard (Plaintiffs)  
 Russell and Joanne Sheppard (Plaintiffs)  
 State of New South Wales (First defendant)  
 Sydney Catchment Authority (Second defendant)

**Representation:**

D Nock SC with K Odgers, J A Rose (from 5 December) (Plaintiffs)  
 L King SC with S Gregory, C A Webster, N Newton (Defendants)  
 McLachlan Chilton (Plaintiffs)  
 GILD (Defendants)

**File Number(s):**

2005/00269559 and Others

**NOTE:** This decision contains over 1900 paragraphs and 34 images. Because of it's size the decision has been published in five parts via PDF documents. To view and print you will need to select the hyperlinks to each part provided in the index below.

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## **SOME COMMONLY ENCOUNTERED ACRONYMS**

# AND EXPRESSIONS

Air desk	Part of an administrative arm of the RFS, which coordinates allocation and use of aircraft, and determines priorities
Bimlow map	Exhibit A
BK	A helicopter
BM	Blue Mountains
BMRFS	Blue Mountains Rural Fire Service
BMRFSD	Blue Mountains Rural Fire Service District
Cat 1	A category 1 fire truck used by the RFS with capacity to carry a large quantity of water, and a crew
Cat 2	A category 2 fire truck also used by the RFS with capacity to carry a large quantity of water, and a crew
Cat 9	A category 9, also called a striker, usually a Toyota Landcruiser, used by the RFS, with a capacity to carry up to 500 litres of water
Class 3 fire	A major bush fire, or major bush fires, usually the subject of a s 44 declaration
CLA	Civil Liability Act 2002
Composite	Vehicle used by the FB, smaller than a pumper and a tanker, but capable of pumping from a hydrant and carrying some water
FB	New South Wales Fire Brigade
FB39	A Jet Ranger helicopter used by the NPWS

FB44	A Squirrel helicopter used by the NPWS
FBA	Fire Brigades Act 1989
GPS	Global positioning system
HT26	A Helitac helicopter
IAP	Incident action plan, a document prepared by an IMT, containing strategies, and referring to resources to be used in the strategies for the next 12 hours. It is intended for the use of the shift following that which prepares it
IMT	Incident management team: the team set up to manage a fire after a s 44 RFA declaration.
Jet Ranger	Small sized helicopter which can be used to bucket fires, convey passengers and conduct surveillance
LGA	Local Government Act 2007
MICC	FB's major incident control centre in Sydney
NPWS	National Parks and Wildlife Service
NPWA	National Parks and Wildlife Act 1974
PRFSD	Penrith RFS District
Pumper	A FB vehicle which can use mains water from hydrants at the fire scene: it also carries water
RAFT	Remote area fire team
RFA	Rural Fires Act 1997
RFS	Rural Fire Service of NSW
SCA	Sydney Catchment Authority



Sitrep	A situation report, designed to give a snapshot of a fire, and a description of resources committed to it, at a particular time
Squirrel	A medium sized helicopter which can be used to bucket fires, convey passengers, and conduct surveillance
SOP	Standard operating procedure
State ops	An administrative arm of the RFS based at Rosehill, which operated at times of high fire activity
SWCMA	Sydney Water Catchment Management Act 1998
Tanker	A FB vehicle capable of carrying more water than a pumper
Tender	A FB bus which conveys a fire fighting crew
WRFS	Wollondilly Rural Fire Service
WRFSD	Wollondilly Rural Fire Service District

## **SOME COMMONLY ENCOUNTERED NAMES**

Mr Healey	NPWS supervisor of seasonal fire fighting team, and air observer
Mr Jacobs	RFS deputy fire control officer at BMRFS
Mr Kondek	SCA employee
Mr Koperberg	Commissioner of the RFS at the time of the fire
Mr Luscombe	NPWS regional manager of the BM region
Mr Manna	SCA employee
Mr McTaggart	Deputy fire control officer at WRFS
Mr Phillips	District manager and fire control officer at WRFS
Mr Tolhurst	Deputy fire control officer at BMRFS
Mr Waldron	Catchment operations manager for SCA
Mr Williams	RFS fire tower operator and observer at Narrow Neck
Mr Wolter	NPWS area manager of the BM region

## Amendments

02 July 2012 - typographical errors

Amended paragraphs: many

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