

PC  
-GDI-G-6

Judgment  
12, 1966

IN THE PRIVY COUNCIL

No. 30 of 1965

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :

ALLAN WILLIAM GOLDMAN (Defendant)  
- and - Appellant

RUPERT WILLIAM EDESON HARGRAVE  
and WINIFRED HAZEL HARGRAVE  
(Trading under the firm name of  
GIDGEGANNUP AGENCY) (Plaintiffs)

Respondents

A N D BETWEEN :

ALLAN WILLIAM GOLDMAN (Defendant)  
- and - Appellant

EDWARD R. TAYLOR and ELIZABETH  
E. TAYLOR (Plaintiffs)

Respondents

A N D BETWEEN :

ALLAN WILLIAM GOLDMAN (Defendant)  
- and - Appellant

RICHARD BRENDAN (Plaintiff)

Respondent

A N D BETWEEN :

ALLAN WILLIAM GOLDMAN (Defendant)  
- and - Appellant

FREDERICK W. PRICE and GLADYS  
J. PRICE (Plaintiffs)

Respondents

A N D BETWEEN :

ALLAN WILLIAM GOLDMAN (Defendant)  
- and - Appellant

REGINALD V. COUSINS (Plaintiff)

Respondent

A N D BETWEEN :

ALLAN WILLIAM GOLDMAN (Defendant)  
- and - Appellant

PETER W.WILLIAMSON and EILEEN  
G.WILLIAMSON (Plaintiffs)  
Respondents

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
25 APR 1967  
25 RUSSELL SQUARE  
LONDON, W.C.1.

A N D BETWEEN :

ALLAN WILLIAM GOLDMAN (Defendant)  
- and - Appellant

JOHN R.GARSDIE and GWENDOLINE  
M. GARSDIE (Plaintiffs)  
Respondents

(CONSOLIDATED BY ORDER DATED 13th APRIL, 1962)

CASE FOR THE RESPONDENTS

RECORD

1. This Appeal by special leave granted on the 10th August 1964 is by the Appellant against the judgment of the High Court of Australia dated the 22nd November 1963 which allowed the Respondents' Appeal and set aside the Order and judgment of the Supreme Court of Western Australia dated the 9th January 1963.

2. At all material times the Appellant and the Respondents carried on their respective businesses in a farming area known as Gidgegannup in Western Australia.

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A 12/17

3. The Appellant carried on business as a farmer and in the course of developing and farming his property cultivated pastures and cleared land. In the course of clearing the land he ring barked trees to kill them and from time to time sold dry wood thus obtained.

4. In February 1961 at the end of the summer the vegetation in the Gidgegannup area and particularly the dry pastures and dead trees were highly inflammable.

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## RECORD

5. On the 25th February 1961 one of these ring barked trees, a red gum, was struck by lightning and commenced to burn. On the 26th February 1961 burning debris from it set fire to a jarrah tree to the east of the red gum. In the prevailing conditions, the burning trees were as the Appellant recognised an obvious danger likely to cause great damage if the fire escaped. A 13/1  
A 12/28  
A 13/43  
A 12/33
- 10 6. On the 26th February 1961 the burning red gum tree was felled under the Appellant's directions. A 14/9
7. Had the Appellant taken reasonable care, he could by the evening of the 26th February or at the latest by the morning of the 27th February 1961 have put out the fires by using water. He elected however to allow any fire to burn itself out. A 26/3  
A 21/40
- 20 8. On the 1st March 1961 the fires were still burning and on that day the atmospheric temperature increased to 105.2° F. the direction of the wind had changed to the north-east and its velocity increased so that if fire escaped the properties of the Respondents to the south and west of the Appellant were threatened and the fire risk was classified as dangerous. A 21/44  
A 17/24
- 30 9. The Appellant still did nothing to extinguish the fire but on the contrary left it unattended which he knew it was dangerous to do and with a cleared area around it insufficient in the prevailing conditions to prevent its escape.
10. During the Appellant's absence the fire escaped causing damage to nearby properties including those occupied by the Respondents. A 17/16
- 40 11. During 1961 and 1962 seven separate actions including H. No. 52 of 1961 by the Respondents, Rupert William Edson Hargrave and Winifred Hazel Hargrave (trading under the firm name of Gidgegannup Agency) were commenced against the Appellant in the Supreme Court of Western Australia for

RECORD damages caused by the fire.

12. The Respondents as plaintiffs claimed the Appellant was liable in damages :

- (a) in accordance with the rule in Rylands v. Fletcher,
- (b) in nuisance,
- (c) in negligence,
- (d) for breach of a statutory duty imposed by the Bush Fires Act.

13. On the 13th April 1962 the Supreme Court of Western Australia ordered by consent that the other six actions be consolidated with action H. No. 52 of 1961. 10

14. On the 6th, 7th, 8th and 9th November and the 4th December, 1962 the consolidated actions were heard before the Honourable the Senior Puisne Judge Mr. Justice Jackson sitting without a jury. By consent the issue of damages was reserved for further consideration. On the 9th January 1963 the Learned Trial Judge gave judgment dismissing all actions. 20

A 24/5 15. The Learned Trial Judge rejected all claims of the Respondents specified in paragraph 12 above. He did not distinguish between (a) and (b) but held that the Appellant had not used or adopted the fire and therefore the Appellant could not be liable under (a) or (b).

A 26/29

16. In respect to (c) the Learned Trial Judge adopted as correct a view that the Appellant was under no duty at common law to extinguish a fire on his property which occurred by accident nor to prevent its spreading to the property of his neighbour. At the same time however he held as set out in paragraph 7 that had the Appellant exercised reasonable care he could have put out the fires on the evening of the 26th February or at the latest by the morning of the 27th February 1961 but that 30 40

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he failed to do so.

RECORD

17. The Learned Trial Judge made no other express finding regarding any efforts by the Appellant to prevent the spread of the fires.

10 18. On the 29th January 1963 the Respondents gave notice of Appeal to the High Court of Australia and the Appeal was heard in Perth on the 17th, 18th and 19th of June 1963 when judgment was reserved.

19. On the 22nd November 1963 the High Court gave judgment allowing the Respondents' Appeal and setting aside the order and Judgment of the Supreme Court of Western Australia given on the 9th January 1963.

20 20. All three Justices of the High Court agreed that the Appeal should be allowed. Two of them (Taylor and Owen JJ) gave joint reasons and the third Justice (Windeyer J) gave separate reasons.

30 21. The majority (Taylor and Owen JJ) after considering a number of authorities concluded that "the basis upon which the occupier in each case was held liable was that the damage complained of by the plaintiff could have been avoided by the exercise of reasonable care on the former's part. These later decisions were in accordance with the test of liability which we think has been authoritatively established and which is correctly stated in the brief passage we have quoted from Salmond and accordingly we think the Learned Trial Judge erred on this branch of the law".

B 52/9

B 51/3

40 The majority further said that "when the tree in question here was cut down a hazard of a different character was created and it is beyond doubt that the respondent was under a duty to use reasonable care to prevent it causing damage to his neighbours in the countryside. The finding that in the circumstances prevailing he failed to discharge

B 53/10

- RECORD this duty with the result that the Respondents sustained the damage of which they complain is we think unassailable. We add that on this view it is of no consequence whether his liability rests in negligence or nuisance". They further stated that having reached the view they had it was unnecessary to determine whether the Appellant was liable for a breach of statutory duty but they were inclined to the view that the Trial Judge was correct in rejecting this claim. 10
- B 53/16
- B 53/26
22. The third member of the High Court (Windeyer J) in separate reasons concluded that the Appellant was liable in damages in negligence but not in nuisance nor on the rule in Rylands v. Fletcher.
23. As to the claim under the rule in Rylands v. Fletcher Windeyer J. said that Rylands v. Fletcher was excluded "simply because the Respondent did not bring the fire upon his land nor did he keep it there for any purpose of his own". His Honour also said that the Appellant did nothing to make the presence of the fire more dangerous to his neighbour. 20
- B 59/14
24. As to the claim in nuisance His Honour said that "an occupier of land who passively suffers a nuisance to continue may be liable although he did not originally create it" but that here the Appellant had taken steps "to eliminate the potential nuisance" and "trying to get rid of a thing can hardly be evidence of approval of it." 30
- B 60/26
- B 61/33
25. As to the claim in negligence His Honour said "the trend of judicial development of the law of negligence has been, I think, to found a duty of care either in some task undertaken, or in the ownership, occupation, or use of land or chattels. The occupier of land has long been liable at common law, in one form of action or another, for consequences flowing from the state of his land and of happenings there, not only 40
- B 66/33

10 to neighbouring occupiers, but also to those persons who come upon his land and those who pass by. . . . . To hold that the respondent had a duty to his neighbours to take reasonable care to prevent the fire on his land spreading would be in accordance with modern concepts of a land occupier's obligations." After reviewing a number of authorities His Honour said "that a man has a duty to exercise reasonable care when there is a fire upon his land (although not started or continued by him or for him) of which he knows or ought to know if by the exercise of reasonable care it can be rendered harmless or its danger to his neighbours diminished."

B 71/37

20 26. His Honour further said that he agreed with the Learned Trial Judge in thinking that S.28 of the Bush Fires Act did not itself create any civil right.

27. The High Court of Australia therefore remitted the action to the Supreme Court of Western Australia in order that the Trial Judge might consider an application by the Appellant to reopen his case and if the application were refused to assess damages.

30 28. On the 16th December the Trial Judge having heard the Appellant's application to reopen his case refused the same and entered judgment for the Respondents for damages to be assessed. Damages were assessed on the 9th day of June 1964.

40 29. The Respondents contend that the Appellant is liable in damages to them on one or more of the causes of action referred to in sub-paragraphs (a), (b) and (c) of paragraph 12 hereof and they will contend that the judgment awarding them damages is right and should be upheld for the reasons given by members of the High Court of Australia and in addition for the following reasons :-

RECORD

(a) Rylands v. Fletcher:

The Bush Fires Act of Western Australia prohibited burning off at the material time and required the Appellant forthwith to take all possible measures to extinguish the fire on his property. He could have extinguished it by water at the latest by the morning of the 27th February. He elected to heap the burning debris together and to "burn it out", that is, to continue it under his control, which he did until the 1st March 1961 when the fire escaped causing damage to the Respondents. The heaping together of the burning debris and the continuance of the fire in breach of the Bush Fires Act constituted a non-natural user by the Appellant of his land.

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(b) Nuisance:

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An occupier who continues a nuisance is liable for damage caused by it. To establish liability an active user of the land is not necessary. The course of conduct referred to in 29(a) is sufficient.

Alternatively, it is sufficient to show that the occupier:

- i. had knowledge or the means of knowledge,
- ii. had the ability to abate.
- iii. failed to do so.

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On each of these matters (i), (ii) and (iii) there was an express finding against the Appellant.

(c) Negligence:

In the whole of the circumstances the Appellant owed a duty to the Respondents to take reasonable care to prevent or minimise damage to

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the Respondents caused by the fire. RECORD  
He failed in this duty in :

- i. failing to extinguish the fire,
- ii. failing to contain the fire,
- iii. leaving it unattended.

GRESLEY CLARKSON

MARCUS ANWYL-DAVIES

30 OF 1965

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT  
OF AUSTRALIA

G O L D M A N

- v -

HARGRAVE AND OTHERS

RESPONDENTS' CASE

MONTAGU'S AND COX & CARDALE,  
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Respondents' Solicitors.