



SUPREME COURT OF WESTERN AUSTRALIA

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JUDGMENT SUMMARY

Daniel Herridge & Ors v Electricity Networks Corporation t/as Western Power [No 4] [2019] WASC 94

This summary issued by the Court is provided as an aid to obtaining a prompt understanding of the outcome of the lengthy reasons for decision delivered in this matter. It is not an addition to, or qualification upon, those reasons and has no purpose or effect beyond that stated.

On 12 January 2014, a jarrah pole supporting electrical cables fell towards the ground causing electrical arcing which ignited dry vegetation around the base of the pole. The fire spread and became the Parkerville bushfire. The fire burnt approximately 392 ha of bushland resulting in the destruction of 57 homes and a number of outbuildings. A further six homes were partially damaged.

The plaintiffs owned property destroyed or damaged by the fire. In these actions, they claim damages for loss and damage they allege was caused by the negligence of, or the nuisance created by, each of the defendants.

These proceedings have been managed and were tried together notwithstanding that they consist of four separate actions. The first action, CIV 2259 of 2015, was commenced in 2015 by a number of owners of properties damaged or destroyed by the fire (the Herridge plaintiffs) against the defendants. The Herridge proceedings lead plaintiffs are Mr Gary Elwood and Mrs Sandra Elwood. In CIV 1239 of 2016, CIV 1841 of 2016 and CIV 1445 of 2016 the plaintiffs, by their insurers, also claim damages against the defendants in negligence and nuisance for loss and damage suffered as a result of the fire.

The issues determined at the trial were the questions of the defendants' liability (if any) for the failure and collapse of the jarrah pole, and the subsequent fire and damage. The trial also concerned the individual loss claims of the nominated test case plaintiffs, Mr and Mrs Elwood.

The jarrah pole fell because fungal decay and damage by termites had caused it to be unable to withstand the forces applied to it by the wind, the lean of the pole and the overhead electrical cable (the service cable) which ran from a network pole to the jarrah pole.

The jarrah pole was owned by, and embedded in land owned by, the third defendant, Mrs Campbell. The plaintiffs say that Mrs Campbell was negligent in failing to inspect and maintain the jarrah pole in a condition that was safe and fit for use.

The first defendant, Western Power, is the network operator which distributed electricity from its network to Mrs Campbell by a service cable. The plaintiffs say that Western Power was negligent in failing regularly to inspect and maintain the jarrah pole in a safe and fit condition for use. The plaintiffs further say that Western Power was negligent in failing to inspect and maintain the jarrah pole in a safe and fit condition for use when doing work on the pole on 19 July 2013.

Western Power engaged the second defendant, Thiess, to carry out the 19 July 2013 works which involved detaching and reattaching the service cable from and to the jarrah pole in the course of replacing the network pole from which the service cable ran. The plaintiffs say that Thiess was negligent in failing to properly train and supervise its line crew which carried out the works such that the line crew failed to properly inspect the jarrah pole and left it in a condition that was unsafe and unfit for use.

The plaintiffs further say that Western Power owed a non-delegable duty of care to the plaintiffs to inspect and maintain the jarrah pole or alternatively, Thiess was Western Power's agent and Western Power is liable for the failure of Thiess to properly inspect the jarrah pole and to leave it in a condition that was safe and fit for use.

The plaintiffs say that the fire was a nuisance for which each of the defendants is liable in damages to those plaintiffs who were owners or occupiers of land within the fire area for having created the nuisance.

Each of the defendants deny they are liable in damages to the plaintiffs in negligence or in nuisance. The defendants say that if they are liable for damages to the plaintiffs then the damages are apportionable and should be apportioned pursuant to the *Civil Liability Act 2002* (WA).

For the reasons published, these are the findings.

1. Thiess and Mrs Campbell are each liable to the plaintiffs in negligence and in nuisance.
2. Thiess breached the duty of care it owed to the plaintiffs by failing to adequately train and supervise the line crew and by failing to exercise due care and skill in inspecting the jarrah pole in accordance with its contractual obligations and industry standards. Thiess participated in the creation of a nuisance by failing to inspect the jarrah pole properly, as a result of which the pole remained in service when it was unsafe and unserviceable, and constituted a potential nuisance.
3. Mrs Campbell breached the duty she owed to the plaintiffs to take reasonable care to inspect and maintain the jarrah pole in a safe and serviceable condition by failing to make any inspection of the pole. Mrs Campbell participated in the creation of a nuisance by retaining and continuing to use the jarrah pole to receive electricity, and not replacing it when it became unserviceable.
4. Thiess is liable for 70% of the plaintiffs' damages and Mrs Campbell is liable for 30% of the plaintiffs' damages.
5. The plaintiffs' claims against Western Power should be dismissed.
6. Western Power did not owe to the plaintiffs a duty to take reasonable care to regularly inspect and maintain the jarrah pole. The imposition of such a duty of care is incompatible with the legislative scheme of the *Electricity Act 1945* (WA) in conferring powers, and imposing duties, on Western Power in relation to the maintenance of assets. Furthermore, Western Power did not have the requisite control over the source of the risk of harm, which is the risk that the pole might fail in service due to rot, termites or other damage and cause harm to life or property.
7. Western Power did owe to the plaintiffs, when undertaking works on the jarrah pole, a duty to take reasonable care to inspect the pole to ascertain whether it was in a safe and fit condition for use in the supply of electricity. That duty was not non-delegable and Western Power discharged that duty by taking reasonable steps to engage and instruct Thiess to do the relevant work. Thiess carried out the work as an independent contractor and not as Western Power's agent. Western Power is not liable in nuisance because it did not create the nuisance.
8. Mr and Mrs Elwood are entitled to damages of \$774,733.22.