Sources of International Disaster Law: Focus on Case Law (2021)

*Dug Cubie**

1 Introduction

As reported in last year's volume of this Yearbook, in 2020 the International Federation of Red Cross and Red Crescent Societies (IFRC) launched a new IDL Database, which is a repository of a wide range of IDL texts covering international conventions, domestic legislation, academic and practitioner reports, as well as summaries of relevant judicial decisions which examine aspects of the intersection between law and disasters.[1] Considering the increasing number of judicial cases which touch on the legal implications of disasters, this IDL in Practice section of the Yearbook will highlight a selection of relevant case law, decided during 2021, from a variety of jurisdictions.

Understanding developments in domestic legal practice is important since courts and judges are increasingly exploring the modes of liability and legal consequences (both civil and criminal) arising from natural hazards and human-made disasters. Such decisions can supplement national disaster or emergency management legislation, and may also engage with regional or global IDL texts, as well as provide an insight into relevant State practice and interpretation of terms and concepts in the context of disasters. This is to be welcomed, as such judicial scrutiny will help to clarify and formalise the rights, responsibilities and obligations which arise in disasters. One can also hope that, as seen with the seminal European Court of Human Rights cases of Öneryildiz[2] and Budayeva,[3] national courts will highlight the importance of

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1 See Dug Cubie, 'Sources of IDL: The New IFRC Disaster Law Database' (2021) 3 Yearbook of International Disaster Law 637–641. Postgraduate researchers from a number of different universities have worked researching and summarising relevant case law for the IFRC Disaster Law Database. In particular, I would like to acknowledge the work of Laura Braid and Alex Davies on case law from the Pacific region, and Giovanni Chiarini for his work on Italian case law, which forms the basis of much of this contribution. The database is freely available at <https://disasterlaw.ifrc.org/disaster-law-database>, last accessed (as any subsequent URL) on 4 July 2022.

2 *Öneryildiz v. Turkey*, ECtHR, Application 48939/99, judgment of 30 November 2004.

3 *Budayeva and others v. Russia*, ECtHR, Applications 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008.

 | DOI:10.1163/26662531_00401_040

risk reduction and prevention measures to prompt responsible actors to take proactive measures in advance, rather than disputing liability after an event has taken place.

2 Negligence and Compensation: *Grace v Orion New Zealand Ltd* (High Court of New Zealand)[4]

In February 2017, two major fires lasting over three days devastated properties in the Port Hills area of Christchurch, New Zealand. The two fires (the Early Valley Road fire and the Summit Road fire) were started within 2 hours of each other on the evening of 13th February 2017, at a distance of 4 km apart. At least one of the fires was started deliberately.[5] The plaintiffs in the case were a group of 80 property and business owners and residents who were living or working in the vicinity of the fires, and who suffered damage as a result.

Over the course of the evening of 13th February, the Summit Road fire progressed into the Christchurch Adventure Park. To avoid isolated fire damage to the main haul rope, the Park continued to run their 1.8 km long four-seater chairlift which operated within a 12-metre corridor in the forest. Although the fire was largely contained by the afternoon of the 14th, on the 15th flames were evident around two of the chairlift towers. The decision was made to remove some of the chairs and bike carriers from the chairlift to avoid bunching at the top; however, only 30–35 of the 84 carriers were removed. Later on that day, the flames in the trees reached a height above the chairlift line, which meant that the flammable plastic chairs had to pass through the burning forest as it continued to operate. Consequently, the chairs ignited, melted and dropped molten plastic onto the uncleared dry pine slash and erosion-preventing coconut matting below, causing spot fires along the line of the chairlift. These spot fires "developed rapidly", merging to create a new front. This new front, which in turn merged with the Early Valley Road fire, consumed nearby properties.

The plaintiffs acknowledged that Adventure Park did not cause the fire; however, they questioned the Park's responsibility for the spread and outbreak of the fire within its property. They argued that the Park breached its

4 *Grace v Orion New Zealand Ltd* [2021] NZHC 705. Available at <https://forms.justice.govt.nz/search/Documents/pdf/jdo/d5/alfresco/service/api/node/content/workspace/SpacesStore/e1624a40-cd88-4d75-a5cd-34eeccb95abc/e1624a40-cd88-4d75-a5cd-34eeccb95abc.pdf>.

5 'Port Hills fire started deliberately, criminal investigation begins', New Zealand Herald (17 July 2017). Available at <https://www.nzherald.co.nz/nz/port-hills-fire-started-deliberately-criminal-investigation-begins/M5NQEHH4JNSXNISAUQMKBRRMNA/>.

obligations under the Forest and Rural Fires Act 1997, so that: i) their actions were negligent; and ii) that they committed a nuisance.

Although they did not start the initial fire, the Court held that this was not necessary under Forest and Rural Fires Act 1997, as parties were also responsible under the Act for the outbreak or spread of a fire, not just its initial ignition. The Court found that the Park breached the Act by causing the ignition of a fire ahead of its initial ignition source, an act which they considered to be a new outbreak or spread. The Park could not avoid responsibility under the Act by claiming an extraordinary event as there had been "ample opportunity" to take steps to avoid the chairlift fire. Additionally, they had failed to comply with their own Fire Safety Management Plan by not removing the pine slash, and the ignition of a fire due to molten plastic dropping onto slash and coconut matting was the logical and ordinary outcome of their actions. They also noted that the damage to the plaintiffs' property would not have occurred if not for the new outbreak, as the Summit Road fire was largely contained at that point. In a detailed, 123-page judgment the Court ruled:

i) Negligence: the Court found it was fair and reasonable to impose a duty on the Park, and that this duty was owed to the plaintiffs as they were sufficiently proximate. They held that the Park had breached this duty, as a reasonable chairlift operator would have been aware that a major forest fire was likely to ignite the plastic chairs and that falling molten plastic would cause fire, so would have removed all the chairs. Therefore, they had been negligent.
ii) Nuisance: while acknowledging that, based on their finding that the Park was negligent, it was not strictly necessary for the Court to then rule of the issue of nuisance, for completeness the Court also examined the liability of the defendants in this regard. Private nuisance provides a remedy in respect of unreasonable indirect or consequential interference by a defendant with a plaintiff's use or enjoyment of an interest connected to land. Based on their finding that the Adventure Park failed to either anticipate or to abate the dangerous conditions created by the fire, the Court also found the defendants were liable in nuisance.

As there was a causal nexus between the Park's negligent actions and the loss, they were ordered to compensate the 80 plaintiffs' insurers for their losses, as well as the 80 plaintiffs for their uninsured losses, including an award of interest and costs. This amounted to roughly NZ$12 million.

3 COVID-19 Measures: *Ligohr et al v Panuelo* (Supreme Court of the Federated States of Micronesia)[6]

The COVID-19 global pandemic has been extensively litigated in many jurisdictions. Examples include individuals who have brought cases to the courts to challenge the legality of lockdown measures,[7] whether travel restrictions were reasonably proportionate,[8] the constitutionality of emergency measures to prevent the spread of COVID-19,[9] and the alleged negligence of cruise ship operators resulting from a failure to warn of the risk of catching COVID-19.[10]

The case of *Ligohr et al v Panuelo* challenged the constitutionality of an emergency declaration made by President David Panuelo of the Federated States of Micronesia (FSM) in March 2020 barring all persons from entering the FSM due to the COVID-19 pandemic. The plaintiffs were citizens of the FSM who were unable to return home due to the declaration. They claimed that the President lacked the authority to close the borders as the emergency declaration was not based on any of the grounds authorised by the Constitution, so was therefore invalid. They also claimed that there were less drastic alternative measures available for the President in order to preserve public peace, health, and safety. They sought a declaration stating that the declaration contravened the Constitution and was invalid *ab initio*, as well as stating that the President had acted beyond his constitutional authority when he closed the borders.

The Court first considered whether the declaration of a state of emergency was a non-justiciable political question, as argued by the defendants. As per the Constitution, for the first 30 days following a Presidential declaration of a state of emergency, the FSM Congress has the sole power to interfere with or review the declaration. During this period, the Court held that the constitutionality of the declaration is a non-justiciable political question. However, since the Constitution only refers to the first 30 days, even if Congress agrees to extend the state of emergency, challenges can be brought before the court once the 30-day period has passed.

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6 *Ligohr et al v Panuelo & the Government of the Federated States of Micronesia*, Civil Action No. 2021-007. Available at <https://gov.fm/files/Partial_Dismissal_-_Stranded_Citizens.pdf>.

7 See for example: *Nottingham v Arden* [2021] NZCA 144 (New Zealand).

8 See for example: *Palmer v State of Western Australia* [2021] HCA 5 (Australia).

9 See for example: *O'Doherty & Waters v The Minister for Health, Ireland and the Attorney General & Dáil Éireann, Seanad Éireann and An Ceann Comhairle* [2020] IEHC 209 (Ireland).

10 See: *Karpik v Carnival plc* (*The Ruby Princess*) (*Stay Application*) [2021] FCA 1082 (Australia).

The Court then considered whether the President had the power to make such a declaration under the Constitution. Under section 9(a) of art. X, the President may declare a state of emergency and issue decrees where it is required to "preserve public peace, health, or safety, at a time of extreme emergency caused by civil disturbance, natural disaster, or immediate threat of war, or insurrection". Citing Black's Law Dictionary's definition of 'natural' and 'disaster',[11] as well as court judgments from other jurisdictions, the Court concluded that the COVID-19 pandemic satisfied the definition of a 'natural disaster'.

Furthermore, noting that there had not been any cases of COVID-19 in the FSM, the Court held that the threat of COVID-19's imminent arrival in the FSM was a sufficient basis for the President to issue an emergency declaration. In a strongly worded ruling, the court stated that they 'would not take such a cavalier attitude towards the public health and safety of the FSM and its people (…) The court fails to understand how a raging worldwide pandemic could not be considered a natural disaster until it has started killing people in the FSM'.[12] Consequently, they did not intend to read the President's emergency powers so narrowly that they only empowered the President to act when it was too late to stop the virus or to have any beneficial preventative effect. The Court, therefore, dismissed the plaintiffs' claim that the President lacked the authority to issue the March 2020 emergency declaration barring all persons from entering the FSM.

The Court then considered whether there were less drastic measures available since, under the Constitution, any declared state of emergency is likely to impair some civil rights. Although the right to return to your country was not mentioned in the Constitution, the Court acknowledged that it was an inherent right in the concept of citizenship or nationality and human rights. However, since any civil rights impacted by a Presidential degree may only be impaired to the extent actually required for the preservation of peace, health, or safety, the Court granted a declaratory judgment that less drastic measures (without mentioning what these measures might have been) could have been imposed to preserve health and safety in the FSM.

11 Bryan A. Garner (ed), *Black's Law Dictionary* (West 2009[9]).

12 *Ligohr et al.* (n 6) 7.

4 Jurisdiction and Choice of Laws: *Royal Caribbean Cruises Ltd v Reed* (Federal Court of Australia)[13]

The following case provides an example of the complexity of determining the relevant legal jurisdiction which may arise as a result of a disaster – both for the survivors and the people or entity which is potentially liable for the harm caused. The case concerned Whakaari/White Island, a popular tourist destination off the coast of New Zealand with an active volcano which at the time was on Alert Level 2 indicating moderate to heightened volcanic unrest. On 9th December 2019 the volcano erupted. 22 of the 47 people who were taking part in tours of the island at the time died as a result of the injuries they sustained in the eruption. The rest received serious injuries, in particular burns.[14]

The respondents in this case, Paul and Ivy Reed (who reside in the United States), were passengers on a cruise around New Zealand chartered and operated by RCL Cruises Ltd (registered as a foreign company in Australia, with an office in New South Wales). They were amongst those on Whakaari/White Island at the time of the eruption; although they survived, they suffered significant injuries.

The Accident Compensation Corporation – New Zealand's no-fault compulsory personal injury insurance mechanism – prohibits bringing civil proceedings for most personal injuries in New Zealand courts. However, as the Reeds bought their tickets to the island from the cruise itself, rather than the New Zealand-based adventure activity operator, they sued Royal Caribbean Cruises Ltd (RCCL, incorporated in Liberia with its principal place of business in Florida) in tort and negligence in Florida, USA.

In an attempt to prevent litigation in Florida, RCCL applied to the Federal Court of Australia for a declaration stating that the applicable law was that of New South Wales and that the dispute was subject to the exclusive jurisdiction of the courts in New South Wales. They also sought an order restraining the respondents from continuing with proceedings in Florida.

In order to grant the RCCL leave to serve the Reeds, as per Rule 10.43(4) of the Federal Court Rules 2011 (Cth), the Court had to be satisfied that: i) they had jurisdiction in the proceeding; ii) the proceeding is of a kind referred to

13 *Royal Caribbean Cruises Ltd v Reed* [2021] FCA 51. Available at <www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0051>.

14 A series of prosecutions arising from the eruption were also brought against the owners of Whakaari/White Island and other tour operators. See for example: *Worksafe NZ v Whakaari Management Ltd et al* [2021] NZDC 3971.

in Rule 10.42; and iii) they have a *prima facie* case for all or any of the relief claimed in the proceeding. On these three points, the Court ruled that:

i) The Court was satisfied that they did have jurisdiction through section 9(1) of the Admiralty Act 1988 (Cth).
ii) The Court was also satisfied that the proceeding was of a kind mentioned in Rule 10.42, as the proceeding was in relation to a contract within the meaning of item 3(b) of the schedule in Rule 10.42.
iii) In order to have a *prima facie* case, the Court stated that the material presented must show that a controversy exists between the parties and that this warrants the use of the Court to resolve it. Although the tickets for the cruise did include an exclusive jurisdiction clause (this being New South Wales), the contract of carriage was between the Reeds and RCL Cruises Ltd. Therefore, the Court stated that RCCL would not appear to be able to rely on the exclusive jurisdiction clause as they were not a party to that contract. However, the Reeds claimed that their contractual counterparty was RCCL. If this was correct, the contract was between the Reeds and RCCL, so RCCL would enjoy the benefit of the exclusive jurisdiction clause. As a result, the Court stated that there was at least a *prima facie* case that the Florida proceeding was brought in breach of the contract, so there was a *prima facie* case for the anti-suit injunctive relief sought by RCCL.

The Court was therefore satisfied that RCCL should have leave to serve the originating papers on the Reeds in their home state (Maryland, USA) in accordance with a method of service permitted by the law applicable there.

5 Prevention and Criminal Culpability: *Andronico et al v Prosecutor* (Italy)[15]

The following case from Italy highlights the potential for criminal sanctions to be brought against individuals who are considered to be liable for causing, or not preventing, a disaster.

The Viareggio train disaster resulted from the derailment of a freight train, comprised of 14 carriages containing liquified natural gas, and a subsequent

15 *Andronico et al v Prosecutor* [2021] Sez. IV, 6 settembre 2021 (ud. 8 gennaio 2021), n. 32899 (Cassazione Penale).

fire which occurred on 29 June 2009 in a railway station in Viareggio, Lucca, a city in central Italy's Tuscany region. Thirty-two people were killed in the fire and a further twenty-six were injured.

In 2017, the Lucca Trial Chamber commenced criminal proceedings against thirty-three people. Ten defendants were acquitted and the others were convicted, including the former CEOs of the Italian National Railway ('Rete Ferroviaria Italiana' RFI) and the representatives of the companies responsible for the mechanical problems that caused the accident, including Gatx Rail Germany, Gatx Rail Austria, and Jungenthal.

In June 2019 the Court of Appeal of Florence partially confirmed the Trial Chamber decision; which in turn was appealed to the Supreme Court of Cassation in Rome (Corte Suprema di Cassazione) in December 2020. The Supreme Court ruled that the disaster would have been preventable with proper maintenance of the track and railway carriages. Additionally, the Court reviewed the existence of aggravating circumstances referred to in art. 589(2) of the Italian Criminal Code, according to which 'if the offence is committed in violation of the rules for the prevention of accidents at work, the penalty is imprisonment from two to seven years'. Based on their analysis, in an extensive 584-page judgment, the Court confirmed the convictions for the crime of 'culpable railway disaster'[16] for eleven of the defendants. Nine of those convicted were, when the derailment occurred, responsible for maintenance activities and employed by the companies. The Court acquitted the rest of the defendants and declared the extinction of the criminal liability of manslaughter due to the statute of limitations.

16 'Disastro ferroviario' under art. 430 of the Criminal Code (R.D. 19 October 1930, n. 1398), which states: 'Anyone who causes a train wreck is punished with imprisonment from five to fifteen years'.