

# Legal Liability for Fire

Changes to civil, criminal and statutory liability for fire  
by the Fire and Emergency New Zealand Act 2017  
and 2018 Regulations

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# Overview of key changes

- Civil liability after repeal of s 43 of the Forest and Rural Fires Act 1977
- A new enforcement regime including:
  - Serious criminal offences
  - Strict liability criminal offences
  - Infringement offences
- Increased FENZ powers that have liability and insurance implications

# Civil liability

- Now no statutory provision for civil recovery of fire losses
- Common law causes of action still available but reasonable foreseeability required
- Three causes of act often pleaded in fire cases:
  - **Negligence:** failing to take reasonable precautions against a known hazard that could cause foreseeable harm
  - **Nuisance:** causing a foreseeable and unreasonable interference with the use or enjoyment of land on a continuing or recurring basis
  - The rule in ***Rylands v Fletcher*** (1868) LR 3 HL 330: allowing a foreseeable escape of something potentially harmful
- These were recently discussed in *Double J Smallwoods Ltd v Gisborne District Council* [2017] NZHC 1284

# *Double J Smallwoods Ltd v Gisborne District Council* [2017] NZHC 1284

## **The fire**

- Origin was scrub, weeds and pampas on Council land and was spread by wind blown embers on to Smallwoods' sawmilling operation
- Cause was an unknown stranger on Council land who probably lit the fire deliberately (although accident possible)
- Spread onto Smallwoods' property because: vegetation on Council property, high winds, and extreme fire conditions

## **Liability**

The council was negligent because it knew about the fire risk but failed to take reasonable steps to reduce it

Nuisance and *Rylands v Fletcher* were not established on the facts

## **Damages**

Smallwoods' losses quantified at \$1,616,155.27 but damages were reduced by 50% for contributory negligence and final award was \$875,254.68

# Criminal and statutory liability

The FENZ Act 2017 and regulations that will come into force in late 2018 will together create a statutory enforcement regime that includes:

- Serious criminal offences
- Strict liability criminal offences
- Infringement offences

*For information about the 2018 regulations, see Cabinet documents at [www.dia.govt.nz/Fire-Services-Transition](http://www.dia.govt.nz/Fire-Services-Transition). In particular:*

- *Cabinet Minute: GOV-18-MIN-0058; and*
- *Paper three: Policy approval for Fire and Emergency New Zealand regulations (enforcement regime): GOV-18-SUB-058*

# Serious criminal offences

- For intentional and risky behaviour with fire that puts people or property at risk
- Punishable by
  - fines of up to \$600,000 for organisations and \$300,000 for individuals and/or
  - imprisonment of up to 2 years for individuals
- Require proof beyond reasonable doubt of all elements of the offence, including intent (e.g. “knowingly or recklessly” engaging in prohibited behaviour)
- Conviction will result in a criminal record
- These offences are set out in the FENZ Act and have been in effect since 1 July 2017

## Examples of serious criminal offences:

- “knowingly or recklessly” causing or allowing a fire to get out of control and spread to vegetation or property (s 60)
- “knowingly or recklessly” leaving a burning substance in the open air without taking precautions (s 61)
- pretending “with intent to deceive” to be FENZ (S 156)
- “knowingly” giving false alarm of fire (s 157)
- “knowingly” obstructing, hindering, resisting, or deceiving FENZ (s 158)
- “knowingly or recklessly” storing spontaneously combustible material in breach of the FENZ Act or regulations (s 159)

# Strict liability criminal offences

- For moderately serious non compliance with the FENZ Act or regulations
- Punishable by maximum fines of between \$5,000 and \$30,000
- Intent not required
- Conviction will result in a criminal record
- Regulations to be in force by December 2018
- Arguably unlawful

## Appendix B: proposed strict liability criminal offences

General description of conduct	Relevant FENZ Act Section	Penalty tier (see Table 2 for penalty amounts)
Lighting or allowing another person to light a fire in open air in an area that is in a prohibited fire season, unless the fire is lit in accordance with a permit issued under the regulations made under s190	57(1)	Moderate
Landholder failing to comply with a notice under s62 to make and clear a firebreak, or remove vegetation or other thing from a firebreak, in breach of s64	64	Moderate
Owner or occupier failing to comply with notice under s65 (Removal or destruction of vegetation or other thing increasing fire risk)	67	Moderate
Failing to keep the documents that the FENZ Act requires	94(1)	Low
Owner of building failing to provide an evacuation procedure	N/A Clause 7 in FENZ Evacuation Regulations	Moderate
Owner of building failing to ensure that information about the evacuation procedure is readily available to the building's occupants including failure to erect signs indicating specified matters	N/A Clause 7 in FENZ Evacuation Regulations	Moderate

# Infringement offences

- For lower level breaches of the FENZ Act or regulations
- Punishable by payment of either:
  - a fixed infringement fee; or
  - court imposed fine up to maximum limits ranging from \$250 to \$30,000
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- FENZ has choice of procedure:
  - Issue an instant infringement notice; or
  - File a summary proceeding in the District Court
- FENZ personnel can issue infringement notices if they “believe on reasonable grounds” an infringement offence has been committed
- No criminal record results from infringement

## Appendix A: proposed infringement offences

General description of conduct	Relevant FENZ Act Section	Penalty Tier (see Table 2 for penalty amounts)
Lighting or allowing another person to light a fire in open air in an area that is in a restricted fire season unless the fire is lit in accordance with a permit issued under the regulations made under s190, or in accordance with a restriction made under s56(4)	58	Moderate
Failure to carry and provide on demand a permit when preparing for fire, lighting fire and until the fire is extinguished	59	Low-Moderate
Causing or allowing a fire to get out of control and to spread to vegetation or property	60	Moderate
Leaving a burning or smouldering substance in the open air in a way that increases the likelihood of harm or damage arising from the spread or start of fire	61	Moderate
Owner of a relevant building set out in s75 (e.g. an early childhood education centre) failing to provide and maintain an approved evacuation scheme	76	Moderate
Failing to provide, on time, returns that must be provided to FENZ under the FENZ Act	93	Moderate
Failing to provide additional information, when required by FENZ under the FENZ Act, where FENZ considers that additional information is necessary or relevant for administering or enforcing the levy provisions	95	Low-Moderate
Entering a site of emergency in breach of a prohibition or restriction placed under s175	175	Moderate

# Penalty tiers for low to moderate offending

Penalty tier	Offending conduct	Infringement fee (fixed amount)	Infringement fine (maxima)	Strict liability Criminal Offence (maxima)
		<b>Appendix A</b>	<b>Appendix A</b>	<b>Appendix B</b>
Low	Action is unlawful but does not increase the risk of fire, the risk to life or property, nor affect the integrity of the FENZ Act	Individual: \$250 Corporate: \$1,250	Individual: \$750 Corporate: \$3,750	Individual: \$5,000 Corporate: \$10,000
Low-Moderate	Action is contrary to a prohibition or restriction that may lead to a fire, may increase the risk to life or property, or may affect the integrity of the FENZ Act	Individual: \$500 Corporate: \$2,500	Individual: \$1,500 Corporate: \$7,500	Individual: \$10,000 Corporate: \$20,000
Moderate	Action could directly lead to a fire, increases the risk to life or property, or affects the integrity of the FENZ Act	Individual: \$750 Corporate: \$3,750	Individual: \$2,250 Corporate: \$11,250	Individual: \$15,000 Corporate: \$30,000

INTERNAL AFFAIRS

# FENZ powers

- Power to prohibit or restrict access to the fire scene
- Emergency powers to destroy and remove buildings, structures and vegetation
- Search and seizure powers
- Insurance and liability implications

Under the FENZ Act, an “**Emergency**” is “an event requiring an immediate action to protect and preserve life, prevent injury, or avoid damage to property” and includes fire and an alarm of fire (s 6)

# FENZ power to restrict access to the fire scene

Section 175 empowers FENZ to restrict or prohibit access to any land or building that is the site of an emergency if FENZ personnel believe on reasonable grounds it is necessary:

- to preserve or record evidence; or
- to prevent tampering, alteration, mutilation, or destruction of anything involved in the emergency.

If FENZ restricts or prohibits access, a written application can be made to FENZ (under s 176 ) by:

- the owner;
- the occupier; or
- the insurer (or a duly authorised agent).

Further application can be made to the District Court if FENZ refuses an application for access or grants access on conditions that are unacceptable (s 177)

# Emergency powers to remove or destroy

## Buildings, structures and contents

Under section 42 FENZ may if “... necessary or desirable” to perform functions:

- enter any land, building or structure
- break into any building that is: on fire, “otherwise endangered”, or “near the emergency”
- remove any flammable, combustible, explosive or dangerous material
- pull down or shore up any building or structure that is:
  - on fire,
  - “otherwise endangered”, or
  - “adjacent to or in the vicinity of” any other building that is burning or endangered
- pull down or shore up any building or structure that in FENZ’s opinion has suffered damage that is likely to be dangerous to life or property
- remove (at FENZ’s discretion) building contents before pulling down or shoring up

## **Vegetation**

Section 43 provides FENZ with similar powers to destroy or remove vegetation in an emergency

“Vegetation” is very broadly defined in s 7 as:

“any plant or produce, whether dead or alive, and includes peat and fossil fuels lying on, or within 20 meters below the surface of the land.”

FENZ also has fire control powers to order land occupiers and owners to create or clear fire breaks and destroy or remove vegetation on their properties: before, during, or after a fire incident (ss 62 to 68)

# FENZ search and seizure powers

- **Enter and inspect** any land or building (except a home or marae) under s 170 to:
  - Obtain information necessary for pre-incident planning;
  - Assess compliance with fire safety legislation; or
  - Conduct “post-incident analysis” (i.e. Determine fire cause or origin)
- **Seize, destroy, suppress, or take a sample** of anything FENZ reasonably believes to be defective or hazardous to a degree that it is likely to be an imminent danger (s 172)
- **Seize or take samples** of anything for the purpose of assessing compliance with fire safety legislation or conducting post-incident analysis (s 173)
- Authorise the **search** of any land or building, vehicle, or other thing if FENZ is satisfied that there are reasonable grounds to believe:
  - an offence has been committed; and
  - the search will find evidential material (s 174)

# Liability and insurance implications of FENZ powers

Under the FENZ Act:

- FENZ damage to property is deemed to be “fire damage” in any contract of fire insurance (s 160(1))(unless a natural disaster fire)
- No proceedings may be taken against FENZ or the Crown for loss or damage to property resulting from FENZ’s good faith execution of functions, duties, or powers under the Act (s 161(1))(except FENZ motor vehicle liability)
- It is a defence in any proceeding against FENZ for negligent act or omission in providing for FENZ services that all relevant FENZ policies, standards and operational instructions were complied with (s 34A)

# Closing observations

- Insurance cover for civil liability for fire losses at common law is still essential
- Statutory liability covers will need careful review in light of the wide range of offences under the FENZ Act, overlaps between categories of offence, and differing degrees of mental intent required
- Defence counsel in strict liability criminal offence cases should consider the lawfulness of the regulations creating this category of offence
- Recommend maintaining good relationships with FENZ and continuing to get investigators and adjusters to the fire scene early
- Expect continuing changes to other parts of the FENZ Act over the next 12 months and to the enforcement regime in the future