

PRESUMPTION OF NEGLIGENCE

Section 34 – National Veld & Forest Fire Act 1010, 1998

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Lions River Fire Protection Association
By Landowners – For Landowners

INTERPRETATION OF THE 'PRESUMPTION OF NEGLIGENCE' CLAUSE

If a fire which has started on your land, or has spread across your land from somewhere else causes a loss to your neighbour, your neighbour may lodge a civil claim against you for damages. In such a case, you are presumed to have been negligent, unless you can prove otherwise. However, if you are a member of an FPA, you are not presumed to have been negligent, so it is more difficult for your neighbour to successfully claim damages.

WHAT IS A COMMON INTERPRATATION SECTION 34?

Often people interpret s34 to mean that if you are a member of a FPA, you cannot be found guilty of negligence and so cannot be made to pay compensation for a fire that started on your land - This is incorrect and hence, we look at the law of delict to understand what s34 means.

DELICTUAL LIABILITY

Why do you need to know about the law of delict? Because generally when someone suffers a loss due to fire they turn to the law of delict for a remedy. To win your case, you must show that all five elements of a delictual action are satisfied.

Elements of delictual liability - the five requirements (or elements) necessary for delictual liability are:

- Conduct.
- Wrongfulness.
- Fault (intention or negligence).
- Causation.
- Harm.

Each requirement must be proved for a person to be held delictually liable.

CONDUCT - The starting point in asking whether there is delictual liability, is to determine whether there was conduct (i.e. something that was done or not done). This may be an act or an omission: doing something or failing to do something.

WRONGFULNESS - Conduct must be legally wrongful in order for one to be liable. It cannot just be something which is morally wrongful.

- If someone's legal right has been violated then there has been a wrong. If I punch someone, this violates their right not to be harmed and is wrongful.
- Every violation of a duty in an Act is wrongful. Therefore, failing to prepare a firebreak when one is required to according to section 12(11) is wrongful.
- If a clearly defined right or duty cannot be found, one still may have conducted oneself wrongfully if the 'test' is satisfied.
- The 'test' to determine if there is wrongfulness is referred to as "the legal convictions of the community" test (also called boni mores).

In other words, the courts ask whether the conduct was so unreasonable in the eyes of the community that one should be held to have committed, not merely a moral wrong, but a legal wrong.

Defences to wrongfulness

There are defences to wrongfulness that allow a person to show that their conduct was not, in the special circumstances, wrongful. While there is no closed list (as the list is also a product of the "boni mores") the most common defences include:

- consent and assumption of risk
- private defence or necessity

LAW OF DELICT:

- Conduct.
- Wrongfulness.
- Fault (intention or negligence).
- Causation.
- Harm.

NON-MEMBER OF AN FPA!

Causes damage to another property – negligence is assumed, until the defendant can prove to the contrary

MEMBER OF AN FPA!

- Causes damage to another property – not deemed to be negligent until the injured party (plaintiff) can prove to the contrary.
- For so long as the member has complied with the Rules & Regulations of the FPA
- Non-compliance could point towards negligence.

- impossibility
- superior orders
- statutory authority and official capacity.

FAULT - For delictual liability to exist, there must be fault. The conduct must have occurred intentionally or negligently. Intentional wrongdoing takes place where the wrongdoer intends to cause the harm.

Negligence arises where someone acts without taking proper care -they have not acted as a "reasonable person" would have acted. The test for negligence is:

- would a reasonable person in the position of the defendant [wrongdoer] foresee the possibility of his or her conduct causing damage to another person;
- would a reasonable person have taken steps to guard against the possibility of harm, and did the defendant fail to take the steps that a reasonable person would have taken to guard against this possibility of harm?

The reasonable person

Who is the reasonable person? This fictional person is:

- the average man or woman,
- not reckless or overcautious,
- aware of their surroundings and the dangers inherent in various activities.
- Should the person concerned also have particular expertise, then their conduct is measured against that of the reasonable expert (e.g. electrician or mechanic).

Defences to negligence?

The most straightforward defences are - that a reasonable person would not have:

- foreseen the harm; or
- taken the steps necessary to guard against the harm;
- that one acted reasonably (i.e. if a reasonable person would not have done it then I do not need to do it either).

A partial defence is to establish that someone else was also at fault so as to have one's damages reduced according to the degree of fault of the other person.

CAUSATION - Defences include arguing that:

- the damage was too remote;
- that a new cause intervened; or
- that the damage was disproportional to the wrong and negligence on the part of the defendant.

DAMAGE/HARM

If there is no legally recognised damage, then there is no delict. For instance, if you break up with a boyfriend and his feelings are hurt. The only defence is that the harm caused is not legally recognised.

HOW DOES S34 HELP A MEMBER OF AN FPA?

Plaintiff - Inured party (property owner whom incurred damages) - Section 34 helps the person who is trying to prove the delict, i.e. the injured

Defendant not a member of an FPA

Defendant – the wrongdoer or person causing the injury – when such a person is not a member of a FPA, the Plaintiff (injured party) does not have to prove negligence in respect of the wrongdoer, because the Court automatically presumes the wrongdoer to be guilty of negligence in terms of S34 of the National Veld & Forest Fire Act 101, 1998.

The wrongdoer can rebut the presumption by proving that s/he was not negligent e.g.:

- a reasonable person would not have foreseen harm
- a reasonable person would not have taken any steps to guard against the harm.

Summary i.r.o member compliance:

- Adhere to the rules & regulations at all times
- Obtain a permit to burn fire breaks and undertake grass management burns
- Ensure fire breaks are implemented along all joint boundaries of your property
- Ensure fire breaks surround all areas to be burn off for grass management

The Plaintiff (injured party) will still have to prove the other four elements of the delict to succeed.

Summary:

If the wrongdoer is not an FPA member, the injured party must prove?

- conduct – yes
- wrongfulness – yes
- **negligence – no – the presumption clause comes into being**
- harm – yes
- causation – yes

Defendant is a member of an FPA

Where the Defendant (wrongdoer) is a member of an FPA, the injured party will have to prove negligence. This is because the presumption of negligence does not apply to members of FPAs.

Therefore, the presumption assists the injured party only in cases where the wrongdoer is not a member of an FPA.

Summary:

If the wrongdoer is a member of an FPA, the injured party must prove?

- conduct – yes
- wrongfulness – yes
- **negligence – yes**
- harm – yes
- causation – yes