



IN THE SUPREME COURT OF VICTORIA AT BALLARAT
COMMON LAW DIVISION
MAJOR TORTS LIST

S CI 05027 of 2016
Case: 3 CI 2016 05027

Filed on: 11/10/2018 08:48 AM

BETWEEN

MICHAEL KARL SCHMID

Plaintiff

and

ROGER JAMES SKIMMING & ORS

Defendants

DEFENCE

Date of document: 10 October 2018

Filed on behalf of: The Fourth Defendant

Prepared by:

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KALM PM 142042

In answer to the plaintiff's third amended statement of claim dated 16 May 2018, the fourth defendant (**Agrison**) says as follows:

The Parties and Group Members

The Plaintiff and Group Members

1. It admits the allegations in paragraph 1.
2. It admits the allegations in paragraph 2.
3. It does not plead to the allegations in paragraph 3 as it contains no material allegations against it.
4. It does not plead to the allegations in paragraph 4 as it contains no material allegations against it.
5. It does not plead to the allegations in paragraph 5 as it contains no material allegations against it.

The Defendants

6. It admits the allegations in paragraph 6.
7. It admits the allegations in paragraph 7.
8. It admits the allegations in paragraph 8.
- 8A. It does not plead to paragraph 8A as the paragraph raises no material allegations against it.
- 8B. It admits the allegations in paragraph 8B.

The Claim against Mr Skimming

Duty of Care

9. It does not plead paragraph 9 as the paragraph raises no material allegations against it.

10. It does not plead to paragraph 10 as the paragraph raises no material allegations against it.
11. It does not plead to paragraph 11 as the paragraph raises no material allegations against it.
12. It does not plead to paragraph 12 as the paragraph raises no material allegations against it.
13. It does not plead to paragraph 13 as the paragraph raises no material allegations against it.
14. It does not plead to paragraph 14 as the paragraph raises no material allegations against it.

Ignition of the Scotsburn Bushfire

15. As to paragraph 15:
 - (a) it does not admit the allegations in sub-paragraph (a); and
 - (b) it admits the allegations in sub-paragraphs (b) and (c).
16. As to paragraph 16:
 - (a) it admits the allegations in sub-paragraphs (a) and (d); and
 - (b) it does not admit the allegations in sub-paragraph (b) and (c); and
 - (c) says further that if the operation of the Tractor and Slasher caused a spark, flame or discharge of other heat source (which is not admitted) it was caused by:
 - (i) the incorrect operation of the Tractor and Slasher by the first defendant (**Mr Skimming**); and/or

Particulars

In contravention of the instructions provided in the relevant Tractor Operations Manual and the Slasher Operations Manual (referred to in paragraph 34I(b) below), Mr Skimming lifted the slasher too high and started the tractor when the PTO drive-shaft was engaged with the slasher. Further particulars may be provided after the receipt of expert reports.

- (ii) the Slasher coming into contact with a star picket;

Particulars

Agrison refers to the statement of Rachel Ann Noble, Scientist, Victoria Police Forensic Services Centre, dated 3 May 2016 a copy of which has been produced by Victoria Police pursuant to a subpoena issued on it dated 2 February 2017. Further particulars may be provided after the receipt of expert reports.

Breach of duty

17. It does not plead to paragraph 17 as the paragraph raises no material allegations against it.
18. It does not plead to paragraph 18 as the paragraph raises no material allegations against it.
19. It does not plead to paragraph 19 as the paragraph raises no material allegations against it.
20. It does not plead to paragraph 20 as the paragraph raises no material allegations against it.

21. It does not plead to paragraph 21 as the paragraph raises no material allegations against it.

22. It does not plead to paragraph 22 as the paragraph raises no material allegations against it.

Claims against Ms Johns

Duty

23. It does not plead to paragraph 23 as the paragraph raises no material allegations against it.

24. It does not plead to paragraph 24 as the paragraph raises no material allegations against it.

25. It does not plead to paragraph 25 as the paragraph raises no material allegations against it.

26. It does not plead to paragraph 26 as the paragraph raises no material allegations against it.

Breach of Non-delegable Duty

27. It does not plead to paragraph 27 as the paragraph raises no material allegations against it.

28. It does not plead to paragraph 28 as the paragraph raises no material allegations against it.

Breach of Duty

29. It does not plead to paragraph 29 as the paragraph raises no material allegations against it.

30. It does not plead to paragraph 30 as the paragraph raises no material allegations against it.

31. It does not plead to paragraph 31 as the paragraph raises no material allegations against it.

Ms Johns' Breach caused the Scotsburn Bushfire

32. It does not plead to paragraph 32 as the paragraph raises no material allegations against it.

33. It does not plead to paragraph 33 as the paragraph raises no material allegations against it.

34. It does not plead to paragraph 34 as the paragraph raises no material allegations against it.

The Claim against Agrison

Duty of care

34A. Save that it says that in or around 2012, it stocked Agrison branded Gen III 50 horsepower tractors (**Tractors**) and Agrison branded 6ft slashers (**Slashers**) and offered them for sale to customers (typically as a package), it does not admit the allegations in paragraph 34A.

34B. It does not admit the allegations in paragraph 34B.

34C. As to paragraph 34C, it says that:

- (a) it does not admit the allegation of control over the supply of its products and says that the allegation is vague and embarrassing;
- (b) it denies the allegation of control over the supply of the Tractor and Slasher by Cesil Nominees to Mr Skimming.

34D. As to paragraph 34D:

- (a) it admits the allegations in sub-paragraph (a);
- (b) it does not admit the allegations in sub-paragraph (b) and says further it expected that the Tractor and Slasher would be used:
 - (i) in accordance with the tractor operation manual (**Tractor Operation Manual**) and slasher operation manual (**Slasher Operation Manual**) (together and severally **Manuals**) published by the manufacturer and available on the Agrison website; and

Particulars

The warnings and instructions in the Manuals included:

- i. when the tractor is started the gear shift levers should be in the neutral position, the power take off operating handle and the front drive operating handle at the separation status, and the lifter operating handle at the neutral position (Tractor Operation Manual, Safety Notes, 3);
 - ii. when the tractor performs operations such as reaping, thrashing and transport of inflammable materials, a fire extinguisher should be available (Tractor Operation Manual, Safety Notes, 23);
 - iii. the power take-off handle should be placed in the neutral position before starting the tractor (Tractor Operation Manual, operating instructions, 2.3.1);
 - iv. a fire extinguisher should be available for use should the need arise (Slasher Operation Manual, 2.1);
 - v. all tractor and slasher controls should be in neutral before starting (Slasher Operation Manual, 2.5);
 - vi. do not operate the slasher in the raised position (Slasher Operation Manual, 2.5 & 3.7);
 - vii. never operate the slasher in an area that has hidden obstacles and remove sticks, stones, wire or other objects from the working area before starting (Slasher Operation Manual, 2.5); and
 - viii. the setting of the height of the slasher deck using the trailing jockey wheel (Slasher Operation Manual, 3.7).
- (ii) responsibly in accordance with applicable laws, including ss 39A and 39E of the *Country Fire Authority Act 1958* (Vic); and
 - (iii) by persons exercising due skill and care.

34E. As to paragraph 34E, it says that:

- (a) it admits the allegations in sub-paragraph (a);
- (b) it denies the allegations in sub-paragraph (b) and says further that operation of a Tractor and Slasher, maintained and operated in accordance with the Manuals did not create a risk as alleged;
- (c) it denies the allegations in sub-paragraph (c), and refers to and repeats sub-paragraph 34D(b) and 34E(b) above.

34F. It does not admit the allegations in paragraph 34F and refers to and repeats paragraph 34D(b) above.

34G. It denies the allegations in paragraph 34G.

Breach of Duty

34H It denies the allegations in paragraph 34H and refers to and repeats paragraph 34D(b) above.

34I. It denies the allegations in paragraph 34I and says further that:

- (a) the Tractors and Slashers were manufactured by a Chinese company in China (**Manufacturer**);

Particulars

So far as Agrison is presently able to say, the manufacturer was Lou Yang Engineering Co Ltd (LYE) or Changlin Deutz Fahr (CDF).

- (b) the Manufacturer supplied the Tractors and Slashers to Agrison, together with the Manuals and a Wheeled Tractor Parts Catalogue (**Parts Catalogue**);
- (c) the Manuals and the Parts Catalogue were supplied by Agrison to its customers with the Tractors and Slashers, and further were at all material times accessible on the Agrison website (agrison.com.au) for reference by operators of Tractors and Slashers;
- (d) it was not involved in or responsible for the design or physical manufacture of the Tractors or Slashers; and
- (e) upon receiving Tractors and Slashers from the Manufacturer, it:
 - (i) assembled the Tractors and Slashers;
 - (ii) affixed "Agrison" branded decals and warning decals to the Tractors and Slashers; and
 - (iii) visually inspected and tested the Tractors and Slashers in accordance with reasonable industry practice.

34J. It denies the allegations in paragraph 34J and refers to and repeats paragraphs 34I above.

Competition and Consumer Act 2010

34K. As to paragraph 34K:

- (a) it admits that it was the manufacturer of the Tractors and Slashers for the purposes of s 7(1) of the Australian Consumer Law;
- (b) it otherwise does not admit the allegations in paragraph 34K.

34L. As to paragraph 34L:

- (a) it does not admit that it supplied the stabilising chain that was used by Mr Skimming on 19 December 2015; and
- (b) it otherwise denies the allegations in paragraph 34L.

Scotsburn Bushfire

34M. It denies the allegations in paragraph 34M and says further that the Scotsburn bushfire was caused

by:

(a) Mr Skimming's use of the Tractor and Slasher:

(i) otherwise than in accordance with the Manuals;

Particulars

Mr Skimming:

- i. started the tractor with the PTO drive engaged: cf Tractor Operation Manual, Safety Notes, 3; Tractor Operation Manual, operating instructions, 2.3.1; Slasher Operation Manual, 2.5;
- ii. operated the tractor near flammable material without a fire extinguisher available: cf. Tractor Operation Manual, Safety Notes, 23; Slasher Operation Manual, 2.1
- iii. operated the slasher in the raised position; cf. Slasher Operation Manual, 2.5 & 3.7);
- iv. operated the slasher in an area that had hidden obstacles, without removing objects like the star picket from the working area before starting: cf. Slasher Operation Manual, 2.5.

(ii) not in compliance with applicable laws in effect at the time of the fire; and

Particulars

Mr Skimming operated the Tractor and Slasher in a place subject to a declaration of Total Fire Ban, in contravention of s.39A of the *Country Fire Authority Act 1958*.

(iii) failing to exercise due skill and care;

Particulars

Mr Skimming:

- i. failed to obtain, read or familiarise himself with the Manuals;
- ii. failed adequately to check the Slasher and in particular the stabilising chains before operating the Slasher; and
- iii. failed to operate the Tractor and Slasher in accordance with the Manuals (as to which Agrison refers to and repeats the particulars under (a)(i)) above);
- iv. used the Tractor and Slasher, being farm machinery operated by a combustion engine and generating heat in the ordinary course of its operation, in a place subject to a declaration of Total Fire Ban.

(b) the Slasher blades coming into contact with a star picket.

Particulars

Further particulars may be provided after receipt of expert reports.

34N. It denies the allegations in paragraph 34N.

34O. It denies the allegations in paragraph 34O.

34P. It denies the allegations in paragraph 34P.

Loss and damage

35. Insofar as paragraph 35 raises allegations against it, it denies the allegations.
- 35A. Insofar as paragraph 35A raises allegations against it, it does not admit the allegations.

The Claim against Auto & General

36. It does not plead to paragraph 36 as the paragraph raises no material allegations against it.
37. It does not plead to paragraph 37 as the paragraph raises no material allegations against it.
38. It does not plead to paragraph 38 as the paragraph raises no material allegations against it.
39. It does not plead to paragraph 39 as the paragraph raises no material allegations against it.
40. It does not plead to paragraph 40 as the paragraph raises no material allegations against it.
41. It does not plead to paragraph 41 as the paragraph raises no material allegations against it.
42. It does not plead to paragraph 42 as the paragraph raises no material allegations against it.
43. It does not plead to paragraph 43 as the paragraph raises no material allegations against it.
44. It does not plead to paragraph 44 as the paragraph raises no material allegations against it.

Common questions

45. It does not plead to paragraph 45 as the paragraph raises no material allegations against it.

Proportionate Liability

46. Further and/or alternatively, in answer to the third amended statement of claim (**3SOC**) it says:
- (a) the claims against it include claims for economic loss and/or damage to property arising from alleged failures to take reasonable care;
 - (b) the said claims against it are apportionable claims within the meaning of s 24AE and 24AF of the *Wrongs Act 1958* (Vic) (**Wrongs Act**);
 - (c) if, which is denied, it is liable to the plaintiff and any group members in respect of any loss arising from the Scotsburn bushfire:
 - (i) the acts and omissions of Mr Skimming and the second defendant (**Ms Johns**) alleged in the 3SOC also caused that loss; and
 - (ii) Mr Skimming, Ms Johns and Agrison are concurrent wrongdoers within the meaning of s 24AH of the *Wrongs Act*; and
 - (d) accordingly, pursuant to s 24AI(1) of the *Wrongs Act*, any liability to the plaintiff and group members on the part of Agrison is limited to an amount that the Court considers just having regard to Agrison's responsibility for the loss or damage, and judgment must not be given against it for more than that amount.

L ARMSTRONG

E BATROUNEY

DATED: 10 October 2018

Hall & Wilcox

Hall & Wilcox
Solicitors for Agrison