



Amended Pursuant to Order 36.04

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION**

Case: S CI 2017 00891

Filed on: 25/10/2018 04:26 PM

No. S CI 2017 00891

MICHELA JOY BURKE

Plaintiff

and

**ASH SOUNDS PTY LTD trading as THE FALLS MUSIC AND ARTS FESTIVAL (ABN 67
160 019 152)**

Defendant

**SECOND AMENDED STATEMENT OF CLAIM PURSUANT TO ORDER 1 OF HIS
HONOUR JUSTICE MCDONALD DATED 25 OCTOBER 2018**

Date of Document:	25 October 2018
Filed on behalf of:	The Plaintiff
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Preliminary

1. At approximately 9.50pm on 30 December 2016 a large number of young people were injured when attending the Falls Music & Arts Festival ("the Festival") at Lorne in the State of Victoria ("the incident").
2. The injuries were suffered when people at the festival were attempting to exit "the Grand Theatre" ("the Theatre") being one of the venues for patrons to listen to music at the Festival.
3. The plaintiff suffered injuries in the incident.
4. The plaintiff brings this proceeding on her own behalf and on behalf of group members.
5. The group members are all those persons who suffered injury as a result of the incident.

6. As at the date of the commencement of this proceeding there are seven or more group members who have claims against the defendant.
7. The defendant is a company incorporated pursuant to the Corporations Act trading as "The Falls Music & Arts Festival" ABN 67 160 0189 152.
8. The defendant is:
 - (a) the promotor of the Festival;
 - (b) the occupier of the area where the Festival is conducted;
 - (c) the body responsible for condition of the premises;
 - (d) the body responsible for the scheduling of musical entertainment at the Theatre.

Contract, occupier's liability and negligence

9. The plaintiff and group members each by reason of purchase of a ticket to attend the festival and in exchange of that ticket for a wristband at the Festival had contracted with the defendant to attend the Festival ("the contract").
10. Pursuant to the contract it was implied that the Festival would be conducted so as to ensure that attendees would not be subject to risk of injury by reason of the state of the premises or things done or omitted to be done by the defendant on the premises and in the conduct of the festival.
11. The defendant was pursuant to s14B(3) of the *Wrongs Act 1958* (Vic) ("Wrongs Act") the occupier of the theatre.
12. The defendant as promotor of the Festival and occupier of the Festival area owed to the plaintiff and group members pursuant to:
 - (1) contract;
 - (2) s14B(3) of the *Wrongs Act*;
 - (3) common law

a duty to ensure that the Festival was conducted in a manner which did not expose the attendees thereat to risk of injury by reason of condition of the premises, of

things done or omitted to be done in respect of the premises and in the scheduling of events and movement of persons throughout the premises.

13. The plaintiff suffered injury, loss and damage by reason of the defendant's breach of the duty it owed to the plaintiff in contract, pursuant to s14B(3) of the Wrongs Act and at common law.

PARTICULARS OF BREACH OF DUTY

- (a) Failing to ensure that the Theatre had an adequate means of safe exit;
 - (b) Restricting the area of exit from the Theatre in a manner which caused crushing of persons attempting to do so;
 - (c) Scheduling events at the Festival and in particular around the time of the incident so that large numbers of people would be moving quickly between venues and failing to accommodate such movement;
 - (d) Failing to have systems in place to ensure that there would be safe movement between venues at about the time of the incident;
 - (e) Failing to have any or any adequate surfacing placed at the exit of the Theatre so as to ensure safe passage of those exiting from the Theatre;
 - (f) Failing to have any or any adequate marshalling of patrons at the conclusion of the events at about the time of the incident;
 - (g) Failing to provide any or any adequate instruction to patrons as to their movement at about the time of the incident;
 - (h) Failing to undertake any or any adequate risk assessment in respect of the movement of patrons from the Theatre about the time of the incident and to accommodate the risks associated therewith;
 - (i) Adopting a different style of marquee for the Theatre as compared to previous years without undertaking any or any adequate risk analysis in respect of the alterations thereof and the effect thereof upon the movement of patrons.
14. As a consequence of the defendant's breach of duty the plaintiff has suffered injury, loss and damage.

PARTICULARS OF INJURY

The Plaintiff suffered injury, loss and damage to personal property including:

- (i) Neuroplaxia to her left brachia plexus
- (ii) Loss of sensation and movement in her left arm
- (iii) Sleeplessness and nervous reaction to trauma
- (iv) Grazes and bruising to ankles and groin area

And the Plaintiff further suffered damage to personal property.

Further particulars of the Plaintiff's injury, loss and damage will be provided prior to trial.

PARTICULARS PURSUANT TO ORDER 13 RULE 10(4)

Full particulars of the Plaintiff's claim for loss of earnings and loss of earnings capacity will be provided prior to the trial of this proceeding.

Australian Consumer Law

- 14A. Further or in the alternative to paragraphs 9 to 14, in respect of the plaintiff and the group members, the defendant was:
- (a) engaging in trade or commerce; and
 - (b) supplying services within the meaning of the Australian Consumer Law ("ACL") to the plaintiff and the group members ("Festival services").
- 14B. Each of the plaintiff and group members were consumers within the meaning of the ACL.
- 14C. The defendant guaranteed that the Festival services would be rendered with due care and skill ("guarantee as to due care and skill").

PARTICULARS

The guarantee arose by reason of section 60 of the ACL.

- 14D. The plaintiff and group members each made known to the defendant that the Festival services were being acquired by them for entertainment and leisure, and for

the result of receiving entertainment, in each case without being injured or subject to risk of injury by reason of the state of the premises or things done or omitted to be done by the defendant on the premises and in the conduct of the Festival (~~“the ACL purpose”~~).

PARTICULARS

The knowledge is to be implied from the defendant’s promotion of the Festival and by the proper construction of the contract.

- 14E. The defendant guaranteed that the Festival services would be reasonably fit for the ~~ACL purpose~~ and result set out in paragraph 14D (“guarantee as to fitness for purpose”).

PARTICULARS

The guarantee arose by reason of subsections 61(1) and (2) of the ACL.

- 14F. The conduct of the defendant contravened the guarantee as to due care and skill.

PARTICULARS

The conduct of the defendant is that set out in the particulars to paragraph 13.

- 14G. ~~The conduct of the~~ defendant contravened the guarantee as to fitness for purpose.

PARTICULARS

~~The conduct of~~ way in which the defendant proposed to provide the services was that set out in the particulars to paragraph 13. Such conduct meant that the services were not reasonably fit for the purpose, nor could be reasonably expected to achieve the result, set out in paragraph 14D.

- 14H. The loss or damage suffered by the plaintiff and each of the group members was because of the conduct of the defendant.

PARTICULARS

The loss or damage of the plaintiff is that set out in the particulars to paragraph 14. Particulars of the loss or damage of the group members will be provided after the trial of the plaintiff’s claim.

Common questions of law or fact

15. The questions of law or fact common to the claims of the plaintiff and each group member are:
- (a) whether a duty of care was owed to the plaintiff and group members and if so the content of that duty;
 - (b) whether the defendant breached the duty of care owed to the plaintiff and group members;
 - (c) whether the defendant's provision of the Festival services was a supply, within the meaning of the ACL, to the plaintiff and group members;
 - (d) whether the plaintiff and group members were consumers within the meaning of the ACL;
 - (e) whether the guarantee as to due care and skill applied to the Festival services, and if so, whether the conduct of the defendant contravened the guarantee as to due care and skill;
 - (f) whether the guarantee as to fitness for purpose applied to the Festival services, and if so, whether the conduct of the defendant contravened the guarantee as to fitness for purpose.

AND THE PLAINTIFF CLAIMS on behalf of herself and on behalf of group members:

- A. Damages, including damages under sections 236 and 237 and 267 of the ACL.
- B. Interest.
- C. Costs.
- D. Such other orders as the Court thinks fit.

~~7 April 2017~~ 25 October 2018

Timothy P. Tobin S.C.
Min Guo

Delivered with Writ.