



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

Case: S CI 2016 05027  
S CI 05027 of 2016  
Filed on: 18/06/2019 05:10 PM

BETWEEN

**MICHAEL KARL SCHMID**

Plaintiff

and

**ROGER JAMES SKIMMING & ORS**

Defendants

AND BETWEEN

**EL MINING SOLUTIONS PTY LTD**  
**(ACN 151 983 603)**

Plaintiff by counterclaim

and

**MICHAEL KARL SCHMID & ORS**

Defendants by counterclaim

### **AMENDED DEFENCE AND COUNTERCLAIM**

**(Pursuant to the Orders of Judicial Registrar Clayton dated 6 June 2019)**

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Date of document: 5 June 2019

Filed on behalf of: The Fourth Defendant

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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](http://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 – Skimming and Johns**

46. Further 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) the acts and omissions of Harley Industrial Pty Ltd (**Harley**) alleged in paragraphs 47(j) to (m) below also caused that loss;
  - (iii) ~~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.

#### **Proportionate Liability – Harley**

47. Further or alternatively:

- (a) Harley Industrial Pty Ltd (ACN 115 230 905) (**Harley**) is, and was at all material times in and from 2011:
    - (i) a corporation able to be sued;
    - (ii) carrying on business as, inter alia:
      - (1) a manufacturer, within the meaning of s.141 of the ACL; and
      - (2) a supplier;
- of commercial-grade steel chain for use in, inter alia, agricultural machinery;



- (b) in or about late 2011 Agrison purchased from Harley commercial-grade steel chain, including the Chain, for use as stabilising chain in slashers manufactured by Agrison;
- (c) at all material times during 2011 it was or ought to have been reasonably foreseeable to Harley that:
  - (i) chain supplied to Agrison was likely to be used as stabilising chain on tractors and slashers sold by Agrison to its customers;
  - (ii) the tractors and slashers used by Agrison's customers were likely to be used to slash grass in paddocks in rural areas;
  - (iii) defects in the welding joints on links in chain supplied to Agrison could lead to a failure of the chain while in use, leading to dislocation of machine parts while being operated;
  - (iv) a dislocation as aforesaid could result in sudden contact between moving machine parts contrary to their design use, leading to sparks or the dislodgment of hot metal parts or fuel;
  - (v) a machine failure, dislocation, sparking or dislodgment as aforesaid (together and severally, **chain failure**) could ignite fire in nearby vegetation or other combustible material;
  - (vi) in summer conditions, such fire could develop into a wildfire and spread across a wide geographic area depending on, inter alia, fuel paths and wind effects;
  - (vii) persons who were, by themselves or their property, in the area across which such fire might spread may suffer death or personal injury, loss of or damage to real and personal property, and economic loss as a result of the fire;
  - (viii) the risks referred to in (iii) to (vii) inclusive were not insignificant as to their likelihood of occurring, and were potentially very serious if they did occur (including by threatening human life);
- (d) at all material times in the course of supplying chain to customers including Agrison, Harley:
  - (i) held itself out as a specialist supplier of chain for use in inter alia industrial and agricultural applications;
  - (ii) had the opportunity to inspect chain supplied by it, for signs of defective welds;
  - (iii) in the premises, had control over the quality of chain supplied by it;
- (e) at all material times in and from 2011 persons who, by themselves or their property, were or might from time to time be in the vicinity of machinery utilising chain supplied by Agrison (**neighbours**):
  - (i) had no or no practicable ability to inspect machinery owned by other persons which utilised chain supplied by Harley;
  - (ii) had no or no practicable ability to control the use of machinery owned by other persons

- which utilised chain supplied by Harley;
- (iii) had no or no practicable ability to prevent chain failure in machinery owned by other persons;
  - (iv) had no or no practicable ability to protect their persons or property from damage by fire caused by chain failure in machinery owned by other persons;
  - (v) in the premises in (i) to (iv), were vulnerable, for the protection of their persons and property, upon Harley taking reasonable care to ensure that chain supplied by it for use in industrial and agricultural applications, like the chain supplied to Agrison, was safe for use in such applications;
- (f) in the premises in (a) to (e) inclusive, at all material times when supplying chain to Agrison, Harley owed to neighbours a duty to take reasonable care to ensure the chain was safe and fit for use in agricultural applications such as use as stabilising chain on slashers (neighbours duty);
- (g) the plaintiff and group members:
- (i) were neighbours within the meaning of (e) above; and
  - (ii) in the premises, were owed the neighbours duty by Harley;
- (h) at all material times Harley knew or ought reasonably to have known that the risk of harm described in paragraph 47(c)(iii) to (vii) above was likely to be materially reduced if Harley had and implemented systems complying with good Australian industry practice for inspecting the alignment and adequacy of joint welds in chain supplied by it for use in agricultural applications such as use as stabilising chain on slashers, like the Chain supplied to Agrison;
- (i) in the premises in (h), the neighbours duty required Harley to have and implement systems complying with good Australian industry practice for inspecting the alignment and adequacy of joint welds in chain supplied by it for use in agricultural applications such as use as stabilising chain on slashers, including the Chain supplied to Agrison;
- (j) Harley did not have or implement systems complying with good Australian industry practice for inspecting the alignment and adequacy of joint welds in the Chain supplied to Agrison;

#### **Particulars**

Harley did not have or implement any or any adequate manufacturing, testing and inspection procedures to:

- i) prevent misaligned welding joints on links used in its chains;
- ii) detect the presence of defective chain links;
- iii) test its chains to verify they were of sufficient quality so as not to fail during the operation of tractor and slashers of the type supplied by Agrison to its customers.

Further particulars will be provided following discovery and receipt of expert reports.

- (k) in the premises in (i) and (j), Harley breached the neighbours duty;
- (l) by reason of Harley's breach of the neighbours duty:
  - (i) misaligned and inadequate weld joints in in links on the Chain supplied to Agrison were not detected by Harley and withheld from supply to customers including Agrison;
  - (ii) by reason of the misaligned and inadequate weld joints, the Chain was not able safely to bear loads which the Chain otherwise would have borne;
  - (iii) in the premises, the Chain supplied by Harley to Agrison:
    - (1) was not safe for use in agricultural applications such as use as stabilising chain on slashers;
    - (2) had a safety defect within the meaning of s.141 of the ACL;
  - (iv) by reason of the defects in (ii), there was a chain failure while the Chain was in service on the slasher;
  - (v) if (which is denied) the Tractor and Slasher caused or contributed to ignition of the Scotsburn fire as alleged in the 3SOC, then the ignition was caused by the chain failure;
  - (vi) the Scotsburn fire caused loss and damage to:
    - (1) the plaintiff and group members; and in particular
    - (2) land, buildings and fixtures used by the plaintiff and group members for private uses within the meaning of s.141(1) of the ACL;
- (m) if, which is denied, Agrison is liable to the plaintiff and any group members in respect of any loss arising from the Scotsburn bushfire, then in the premises:
  - (i) in (a), (b), (l)(iii)(1), (l)(iv) and (l)(vi)(1) above (**factual causation**); alternatively
  - (ii) in (a), (b), (l)(iii), (l)(iv) and (l)(vi)(2) above (**ACL causation**); alternatively
  - (iii) in (a) to (l) above (**negligence causation**);

the acts and omissions of Harley alleged above also caused that loss;

#### **Particulars**

- Agrison relies upon the expert report of Professor Simon Barter filed on behalf of the Plaintiffs in the proceeding. Further particulars may be provided following discovery and receipt of expert reports.
- (iv) Harley is a concurrent wrongdoer, with Agrison, within the meaning of s 24AH of the Wrongs Act; and
  - (v) 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.

**COUNTERCLAIM**

48. Agrison repeats the matters set out in paragraph 47 above and seeks declaratory relief as set out below.

**AND AGRISON CLAIMS:**

- A. A declaration that Harley is a concurrent wrongdoer within the meaning of s.24AH of the *Wrongs Act*.
- B. Costs.
- C. Such further or other relief as the Court deems fit.

LWL ARMSTRONG

E BATROUNEY

DATED: 10 October 2018

  
Hall & Wilcox  
Solicitors for Agrison

**SCHEDULE OF PARTIES**

**BETWEEN:**

MICHAEL KARL SCHMID

Plaintiff

And

ROGER JAMES SKIMMING

First Defendant

MAUREEN LYNETTE JOHNS

Second Defendant

AUTO AND GENERAL INSURANCE COMPANY  
LIMITED  
(ACN 111 586 353)

Third Defendant

EL MINING SOLUTIONS PTY LTD  
(ACN 151 983 603)

Fourth Defendant

AUTO AND GENERAL INSURANCE COMPANY  
LIMITED  
(ACN 111 586 353)

Plaintiff by Counterclaim

MICHAEL KARL SCHMID

Defendant by Counterclaim

HARLEY INDUSTRIAL PTY LTD  
(ACN 115 230 905)

Third Party