

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

No S CI 05027 of 2016

B E T W E E N:

**MICHAEL KARL SCHMID**

Plaintiff

-and-

**ROGER JAMES SKIMMING and ANOTHER OTHERS  
(in accordance with the Schedule)**

Defendants

**FURTHER AMENDED WRIT**

(Filed pursuant to the Orders of the Honourable Justice John Dixon made 22 May 2017)

Date of document:	<del>8 December 2016</del> <u>28 April</u> <u>2017</u> <u>29 May 2017</u>	Solicitor's Code: 102650
Filed on behalf of:	The Plaintiff	DX: 28001
Prepared by:	Maddens Lawyers	Tel: (03) 5560 2000
219 Koroit Street		Fax: (03) 5560 2099
Warrnambool VIC 3280		Ref: B Pendergast/S Maraldo:
		161346
		<a href="mailto:smm@maddenslawyers.com.au">smm@maddenslawyers.com.au</a>

TO THE DEFENDANTS

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearances stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the *Trans-Tasman Proceedings Act* 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

FILED: ~~8 December 2016~~ 28 April 2017 29 May 2017

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

## **AMENDED STATEMENT OF CLAIM**

### **The Parties and Group Members**

#### *The Plaintiff and Group Members*

1. On 19 December 2005, a fire started at 260 Finns Road, Scotsburn, in the State of Victoria (**the Scotsburn bushfire**), and burnt over the area highlighted on the map annexed to this statement of claim (**the Scotsburn bushfire area**).
2. The plaintiff is and was at all material times the owner of land at 140 Fischers Road, Scotsburn, which was in the Scotsburn bushfire area and was damaged by the Scotsburn bushfire.
3. The plaintiff brings this proceeding on his own behalf and on behalf of the group members.
4. The group members are:
  - (a) all those persons who suffered personal injury (whether physical injury, or psychiatric injury) as a result of the Scotsburn bushfire;
  - (b) all those persons who suffered loss of or damage to property as a result of the Scotsburn bushfire; and
  - (c) the legal personal representatives of the estates of any deceased persons who came within paragraphs (a) or (b) at the time of the Scotsburn bushfire.
5. As at the date of the commencement of this proceeding there are seven or more persons who have claims against the defendants.

#### *The Defendants*

6. The first defendant (**Mr Skimming**) is and was at all material times since 20 December 2012, owner of land at 260 Finns Road, Scotsburn, being the land in certificate of title Volume 05995 Folio 803 (**the Skimming land**).

#### Particulars

From 20 December 2012 to 19 January 2016, Mr Skimming was the registered proprietor of the Skimming land as tenant in common as to 3 of 10 equal undivided shares, with Suzanne Mary Williams, being the registered proprietor as to the remaining 7 equal undivided shares.

Since 19 January 2016, Mr Skimming has been the sole registered proprietor of the Skimming land.

7. The second defendant (**Ms Johns**) was at all material times the owner of land at 260 Finns Road, Scotsburn, being that land described in certificate of title Volume 11499 Folio 869 (**the Johns land**).

#### Particulars

Ms Johns was the sole registered proprietor of the Johns land from 10 June 2014 until 11 January 2017.

8. The Johns land neighbours the Skimming land to its south and, at all material times, the Johns land included a grass paddock (**the paddock**) located along part of the southern boundary of the Skimming land.

8A. The third defendant (**Auto & General**) is and was at all material times:

- (a) a corporation incorporated under the *Corporations Act 2001 (Cth)* and capable of being sued;
- (b) carrying on business as a general insurer in Australia.

### **Claim Against Mr Skimming**

#### *Duty of Care*

9. At all material times, Mr Skimming lived on, had control, and was the occupier of the Skimming land.
10. On a date prior to 19 December 2015, but otherwise unknown to the plaintiff, Ms Johns gave Mr Skimming authority to enter onto the Johns land to slash the grass in the paddock from time to time for the purpose of reducing the risk of the ignition and spread of bushfire in and from the paddock.
11. At all material times, it was or ought to have been foreseeable to Mr Skimming that slashing grass at 260 Finns Road, Scotsburn, involved the following risks (**Risks**):
  - (a) the operation of a tractor and slasher might result in the discharge of sparks, flames or heat from the tractor or slasher, including by a slasher blade striking a rock or metallic object or by a mechanical failure of the tractor or slasher;
  - (b) the sparks, flames or heat might ignite nearby fuel and result in a fire;

- (c) such a fire could:
  - (i) spread over a wide geographic area;
  - (ii) cause death or injury to persons;
  - (iii) cause loss or damage to property within the area affected by the fire;
  - (iv) cause consequential economic loss, including by:
    - (A) disrupting or impairing their incoming earning activities;
    - (B) impeding the use or amenity of their properties;
    - (C) reducing the value of real property or businesses located within the area affected by the fire;
- (d) the risk that a spark, flame or heat might ignite a fire and the risk that such a fire might spread over a wide geographical area was higher on a day of high bushfire risk.

12. At all relevant times, members of the public who might be, or who owned or had an interest in property that might be, within the area across which a fire, caused by the discharge of sparks from the use of plant at the Property, might spread (**the Class**):
  - (a) had no ability, or no practical or effective ability, to prevent or minimise the Risks materialising;
  - (b) were vulnerable to the Risks materialising;
  - (c) for the purposes of protecting themselves and their property against the Risks, were dependent on the defendant exercising reasonable care in slashing grass, including the grass in the paddock.
13. As at 19 December 2015, the plaintiff and group members were members of the Class.
14. In the premises, at all relevant times, Mr Skimming owed to the plaintiff and the group members a duty to exercise reasonable care to eliminate or reduce the Risks.

*Ignition of the Scotsburn Bushfire*

15. At all relevant times on 19 December 2015:

- (a) Mr Skimming was the owner of a 2012 Agrison 50 horsepower tractor and grass slasher (**the tractor and slasher**);
- (b) the weather and fuel conditions at and in the vicinity of the paddock were favourable for the ignition and spread of fire.

#### Particulars

In the early afternoon of 19 December 2015, at Scotsburn, the temperature was approximately 35<sup>0</sup> C; there was low humidity and a hot, dry wind. The paddock was vegetated with long, dry, fully cured grass.

- (c) a Total Fire Ban had been declared and was in effect for the Central Total Fire Ban District, which included 260 Finns Rd, Scotsburn;
16. At about 2.50 pm on 19 December 2015:
- (a) Mr Skimming used the tractor and slasher to slash the grass in the paddock;
  - (b) the operation of the tractor and slasher caused a spark, flame or other heat source to discharge;
  - (c) the spark, flame or other heat source so discharged contacted and ignited dry grass or other fuel in the paddock;
  - (d) the ignition started a fire which spread over a wide geographic area, being the Scotsburn bushfire.

#### *Breach of Duty*

17. On 19 December 2015:
- (a) the probability of the Risks materialising was not insignificant by reason that:
    - (i) the use of the tractor and slasher in the paddock could create the discharge of sparks, flame or other heat source;
    - (ii) there was dry vegetation, including long, fine, cured grass in the paddock;

- (iii) the high temperature, low humidity and strong, dry winds would assist in the sparks, flame or other heat source igniting a fire and in the propagation and spread of that fire;
  - (b) the probability that the harm referred to in paragraph 11(c) above would occur if Mr Skimming failed to take reasonable care to avoid the materialisation of the Risks was not insignificant;
  - (c) in the event that the Risks materialised, the harm was potentially catastrophic;
  - (d) any burden on Mr Skimming in taking precautions to avoid the Risks was slight and not unreasonable having regard to the probability of the Risks materialising and the seriousness of the harm.
18. In the circumstances, a reasonable person in the position of Mr Skimming would have taken the following precautions to avoid the materialisation of the Risks on 19 December 2015:
- (a) refrained from using the tractor and slasher to slash grass in the paddock; or
  - (b) had in place adequate fire suppression systems and equipment to control and suppress any fire that was ignited by the operation of the tractor and slasher.
19. In breach of his duty of care, on 19 December 2015, Mr Skimming:
- (a) used the tractor and slasher to slash grass in the paddock; and
  - (b) failed to have in place any fire suppression systems or equipment to control and suppress the fire ignited by his use of the tractor and slasher.

*Mr Skimming's Breach Caused the Scotsburn Bushfire*

20. Had Mr Skimming not been negligent and had he taken either of the precautions referred to in paragraph 18, the Scotsburn bushfire would not have occurred because:
- (a) had he not used the tractor and slasher on 19 December 2015 to slash grass in the paddock, the sparks, embers or other hot molten material which ignited the fire in the paddock could not have been emitted or discharged;

- (b) if he had had in place adequate fire suppression systems and equipment, the fire which resulted from the emission of the sparks, flame or other heat source from the use of the tractor and slasher would have been suppressed before it spread from the paddock.

- 21. In the premises, the Scotsburn fire was caused by Mr Skimming's negligence.
- 22. The Scotsburn fire was a natural and foreseeable consequence of Mr Skimming's negligence.

### **Claims against Ms Johns**

#### *Duty*

- 23. At all material times, Ms Johns:
  - (a) by reason of her ownership of the Johns land:
    - (i) had the exclusive right to possession of the Johns land;
    - (ii) had the power to authorise others to enter upon and engage in activities on the Johns land;
    - (iii) had control over the state of, and the activities conducted on, the Johns land; and
  - (b) in the premises, was the occupier of the Johns land.
- 24. From the time when Ms Johns authorised Mr Skimming to enter onto the Johns land to slash the paddock, Ms Johns knew or ought to have known that:
  - (a) it was likely that Mr Skimming would use plant or equipment, such as a tractor and slasher, to slash the paddock;
  - (b) there was a risk of the discharge of sparks, flame or other heat source from the operation of a tractor and slasher;
  - (c) Mr Skimming might use a tractor and slasher to slash the grass in the paddock under high bushfire risk conditions;
  - (d) the use of a tractor and slasher to slash the grass in the paddock under high bushfire risk conditions, was a dangerous activity.



25. At all material times, the Risks were or ought to have been foreseeable to Ms Johns.
26. By reason of the matters alleged in paragraphs 10, 12, 13 and 23 to 25, at all material times, Ms Johns owed to the plaintiff and to group members:
  - (a) a duty to ensure that reasonable care was taken by Mr Skimming in slashing the paddock to eliminate or reduce the Risks;
  - (b) a duty to exercise reasonable care to eliminate or reduce the Risks.

*Breach of Non-delegable Duty*

27. Ms Johns failed to ensure that Mr Skimming exercised reasonable care in slashing the paddock.
28. By operation of section 61 of the *Wrongs Act 1958* (Vic), Ms Johns is vicariously liable for Mr Skimming's negligence.

*Breach of Duty*

29. Further or in the alternative, at all material times after Ms Johns authorised Mr Skimming to slash the paddock:
  - (a) the probability of the Risks materialising was not insignificant by reason that:
    - (i) it was likely that Mr Skimming would use a mechanical slasher such as the tractor and slasher to slash the paddock;
    - (ii) the use of the tractor and slasher in the paddock could create the discharge of sparks, flame or other heat source;
    - (iii) at the time that Mr Skimming slashed the paddock, there was likely to be long, dry grass in the paddock;
    - (iv) Mr Skimming might slash the paddock when the temperature, humidity and wind could support the ignition, propagation and spread of fire;
  - (b) the probability that the harm referred to in paragraph 11(c) above would occur if Ms Johns failed to take reasonable care to avoid the materialisation of the Risks was not insignificant;

- (c) in the event that the Risks materialised, the harm was potentially catastrophic;
  - (d) any burden on Ms Johns in taking precautions to avoid the Risks was slight and not unreasonable having regard to the probability of the Risks materialising and the seriousness of the harm.
30. In the circumstances, a reasonable person in the position of Ms Johns would have taken the following precautions to avoid the materialisation of the Risks:
- (c) instructed or directed Mr Skimming not to use any means of slashing the paddock that involved the risk of the discharge of sparks, flames or other heat sources on days of high fire risk; or
  - (d) instructed or directed Mr Skimming not to use any means of slashing the paddock that involved the risk of the discharge of sparks, flames or other heat sources on days of high fire risk without having in place adequate fire suppression systems and equipment to control and suppress any fire that was ignited by such discharge.
31. In breach of her duty of care, on 19 December 2015, Ms Johns failed to take either precaution set out in paragraph 30.

*Ms Johns' Breach Caused the Scotsburn Bushfire*

32. Had Ms Johns taken either of the precautions referred to in paragraph 30, the Scotsburn bushfire would not have occurred because:
- (c) had she instructed or directed Mr Skimming not to use any means of slashing the paddock that involved the risk of the discharge of sparks, flames or other heat sources on days of high fire risk, he would not have used the tractor and slasher to slash the paddock on 19 December 2015;
  - (d) had she instructed or directed Mr Skimming not to use any means of slashing the paddock that involved the risk of the discharge of sparks, flames or other heat sources on days of high fire risk without having in place adequate fire suppression systems and equipment to control and suppress any fire that was ignited by such discharge, Mr Skimming would have only used the tractor and slasher with adequate fire suppression equipment and the fire would have been suppressed before it spread from the paddock.

33. In the premises, the Scotsburn fire was caused by Ms Johns' breach of duty.
34. The Scotsburn fire was a natural and foreseeable consequence of Ms Johns' breach of duty.

### **Loss and Damage**

35. By reason of the defendants' breaches alleged above, the plaintiff and each of the group members suffered loss and damage.

#### Particulars of loss and damage to property of the plaintiff

The plaintiff suffered loss and damage including:

- i. destruction of property including home, gardens, boundary and subdivisional fencing and outbuildings;
- ii. destruction of motor vehicles;
- iii. destruction of trees including an orchard;
- iv. consequential loss of business income and equipment.

#### Particulars of injury of the plaintiff

Psychiatric injury, including depression and anxiety.

#### Particulars Pursuant to Order 13 rule 10(4)

#### ***Medical & like expenses***

The plaintiff claims his hospital, medical and like expenses.

#### ***Particulars of Economic Loss***

The plaintiff is aged 61, having been born on 26 April 1956.

At the time of his injury the plaintiff was a self-employed builder. The plaintiff was totally incapacitated for employment for the period from 19 December 2015 to about 7 March 2016; and partially incapacitated for employment in that he worked only 3 days per week for the period from about 7 March 2016 to 6 June 2016.

The plaintiff as at the date of his injury was earning \$2,000 gross per week together with contributions to superannuation.

As a result of his injury, the plaintiff remains partially incapacitated in his employment and has restricted residual earning capacity.

Full particulars of the plaintiff's injury, loss and damage including his claim for loss of earnings and loss of earnings capacity will be provided prior to trial.

Particulars relating to individual group members will be provided following the trial of common questions or otherwise as the Court may direct.

### **The Claim against Auto & General**

36. By a contract of insurance policy number 115513169 02 (the policy), in consideration of Mr Skimming paying to Auto & General the premium specified in the policy, Auto & General agreed to indemnify Mr Skimming against his legal liability as owner or owner occupier of his home for:

- (a) death or bodily injury to other people;
- (b) loss or damage to other people's property

caused by an accident which occurs during the policy period at the insured address.

#### Particulars

The policy was in writing and comprises:

- (i) a cover letter from Auto & General to Mr Skimming dated 13 November 2015;
- (ii) the Insurance Certificate for the policy;
- (iii) Mr Skimming's Declarations for the policy; and
- (iv) Auto & General Product Disclosure Statement – Home and Contents Insurance Policy General Terms and Conditions prepared 28 May 2013.

A copy of each of the above documents is in the possession of the plaintiff's solicitors and is available for inspection by appointment.

37. Under the policy:

- (a) the policy period was from 4.00 pm on 14 November 2015 until 4.00 pm on 14 November 2016;
- (b) the insured address was 260 Finns Road, Scotsburn.

38. Under the policy, the ignition of the Scotsburn bushfire alleged in paragraph 16 above was an accident which occurred:

- (a) during the policy period; and
- (b) at the insured address.

39. Mr Skimming's legal liability to the plaintiff and group members alleged in this proceeding is legal liability as owner or owner-occupier of his home for bodily injury to other people and/or loss or damage to other people's property.
40. Under the policy, Auto & General is obliged to indemnify Mr Skimming against his liability to the plaintiff and group members alleged in this proceeding.
41. On 12 February 2016, Mr Skimming lodged a legal liability claim on Auto & General claiming a right to be indemnified under the policy in respect of the losses suffered by persons whose properties were damaged as a result of the Scotsburn bushfire.
42. In breach of its obligations under the policy, Auto & General refused to indemnify Mr Skimming against his legal liability arising from the Scotsburn bushfire, which includes his legal liability to the plaintiff and group members alleged in this proceeding.

#### Particulars

The refusal is in writing and contained in a letter from Auto & General to Mr Skimming dated 18 February 2016.

43. In the event that the plaintiff establishes that Mr Skimming is liable to him and the group members:
  - (a) Mr Skimming will not be able to meet his legal liability for damages to the plaintiff or group members without the indemnity from Auto & General under the policy;
  - (b) without the indemnity from Auto & General under the policy, Mr Skimming will be bankrupted;
  - (c) in which case, pursuant to section 117 of the *Bankruptcy Act* 1966 (Cth):
    - (i) Mr Skimming's right to indemnity will vest in his trustee; and
    - (ii) any amount received by the trustee from Auto & General under the policy in respect of Mr Skimming's liability to the plaintiff and group members will be payable forthwith in full to the plaintiff and group members.
44. The plaintiff is entitled to a declaration that, pursuant to the policy, Auto & General is liable to indemnify Mr Skimming against his liability to the plaintiff and group members in this proceeding.

### Common Questions

~~36~~45 The questions of law or fact common to the claims of the plaintiff and each of the group members are:

- (1) What was the cause of ignition of the Scotsburn bushfire?
- (2) What areas were damaged by the Scotsburn bushfire?
- (3) Did Mr Skimming owe a common law duty to the plaintiff and group members to exercise reasonable care to reduce or eliminate the Risks so as to avoid:
  - (a) personal injury; and/or
  - (b) physical damage to property;
  - (c) economic loss resulting from damage to property?
- (4) Did Mr Skimming breach his common law duty of care?
- (5) If Mr Skimming breached his common law duty of care, was such breach a cause of any of the losses suffered by the plaintiff?
- (6) Did Ms Johns owe a common law duty to the plaintiff and group members to ensure that reasonable care was taken by Mr Skimming to reduce or eliminate the Risks so as to avoid:
  - (a) personal injury; and/or
  - (b) physical damage to property;
  - (c) economic loss resulting from damage to property?
- (7) Did Ms Johns owe a common law duty to the plaintiff and group members to take reasonable care to reduce or eliminate the Risks so as to avoid:
  - (d) personal injury; and/or
  - (e) physical damage to property;
  - (f) economic loss resulting from damage to property?

- (8) Did Ms Johns breach any such duties to the plaintiff and group members?
- (9) If Ms Johns breached any such duties, was such breach a cause of any of the losses suffered by the plaintiff?
- (10) Is Auto & General liable under the policy to indemnify Mr Skimming against any liability he has to the plaintiff or group members?

**AND THE PLAINTIFF CLAIMS on his own behalf and on behalf of the group members:**

Against the first and second defendants

- A. Damages.
- B. Interest.
- C. Costs.

Against the third defendant

- D. A declaration that the third defendant is liable under the policy to indemnify the first defendant against his liability to the plaintiff and group members in this proceeding for damages, interest and costs.
- E. Costs.

G D Dalton QC

Andrew Fraatz

*Maddens*  
Maddens Lawyers  
Solicitors for the plaintiff



1. Place of trial - Ballarat
2. Mode of trial - Judge alone
3. This writ was filed for the Plaintiff by Mr Brendan Pendergast of Maddens Lawyers, Warrnambool
4. The address of the Plaintiff is 140 Fischers Road, Scotsburn VIC 3352
5. The address for service of the Plaintiff is:  
Maddens Lawyers,  
219 Koroit Street  
WARRNAMBOOL 3280  
Ref: BFP/SMM
6. The address of the First Defendant is 260 Finns Road, Scotsburn, VIC 3352  
The address of the Second Defendant is 316 Ripon Street, South Ballarat VIC 3350  
The address of the Third Defendant is Level 13, 9 Sherwood Road Toowong QLD 4066

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

No S CI 05027 of 2016

B E T W E E N:

**MICHAEL KARL SCHMID**

Plaintiff

-and-

**ROGER JAMES SKIMMING and ~~ANOTHER~~ OTHERS**  
**(in accordance with the Schedule)**

Defendants

**SCHEDULE OF PARTIES**

**MICHAEL KARL SCHMID**

Plaintiff

**ROGER JAMES SKIMMING**

First Defendant

**MAUREEN LYNETTE JOHNS**

Second Defendant

**AUTO & GENERAL INSURANCE COMPANY LIMITED**

**(ACN 111 586 353)**

Third Defendant