

# CHEMICAL DRIFT FROM HERBICIDE SPRAY ON NEIGHBOURING PROPERTY RESULTS IN \$6.5M DAMAGES AWARD FOR VICTORIAN VINEYARD OWNER

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Victorian farmer liable for \$6.5M damages (plus just over \$700,000 interest) for chemical spray drift damage to neighbour's vineyard.

## In Issue

- Whether the spraying of herbicides caused damage to the plaintiff's vineyard
- If yes, did that constitute a substantial and unreasonable interference with the plaintiff's use and enjoyment of its land
- Whether the defendant failed to take precautions against the risk of damage to the plaintiff's vineyard that a reasonable person in the same or similar position would have taken

## The Background

Mr and Mrs Caccaviello (directors of the plaintiff company) purchased land in Victoria in about 1999 and established a 62ha vineyard. They sold harvested crops to local wine makers. The defendant, Mr Rodney Hayden, was the owner and occupier of a neighbouring property which included a paddock known as 'Perrononies', upon which an animal feed crop (vetch) was being grown.

On 4 October 2013, Mr Caccaviello went to spray the part of the vineyard known as Mallee Block. He immediately noticed that the vines looked different, which he initially suspected was due to frost. However, the condition of the vines continued to deteriorate and Mr Caccaviello began to suspect that a chemical spray drift (and not frost) was the cause of the damage. The defendant conceded that he had sprayed his crop, in the adjacent paddock, with a mixture of chemicals which are toxic to grapevines.

The plaintiff issued proceedings seeking damages for nuisance and negligence. The defendant denied it had breached any duty of care and alleged any damage suffered was caused by water stress arising from inadequate irrigation, excessive pruning and general inadequate

management.

### The Decision at Trial

The court noted there was no direct evidence of spray drift but was satisfied, on the balance of probabilities, that it did occur. Bureau of Meteorology data indicated that there were strong gusty winds prevailing. The court was critical of the fact that defendant chose to apply the herbicide at above the recommended rate and noted that the defendant was intent on achieving an effective result with only one herbicide application, in order to minimise costs. The defendant's spray diary records, which were tendered as evidence that the conditions were favourable, were rejected as being neither reliable nor contemporaneous.

The claim in nuisance succeeded. The spray drift materially and substantially interfered with the plaintiff's use of the land because the physical and commercial effects of it were not limited to a single season and extended to the need to reinstate the entire area of land. The defendant's conduct was unreasonable because the weather conditions were unfavourable, the concentration of herbicides was inappropriate and the defendant was well aware of the risks.

The claim in negligence also succeeded. There was no dispute that a duty of care was owed. As to breach, the defendant acknowledged that there was an inherent significant risk to neighbouring properties when spraying with chemicals. The court had no hesitation in finding that the defendant fell short of the standard of a reasonable, prudent farmer by spraying in the prevailing conditions at the relevant time. The risk of damage could easily have been avoided by spraying a few days later when the winds had abated. The defendant was not relieved of breach of duty by reason of the fact that he had obtained advice from a consultant agronomist about the appropriate chemical mix, because he did not follow the advice given. For these reasons the court was satisfied that the spray drift event was the cause of the damage to the plaintiff's vineyard.

The court rejected the defendant's arguments that the plaintiff's damages were caused by his own mismanagement because there was evidence that the plaintiff had acted carefully on professional advice.

As to damages, the court accepted that remediation of the land was both necessary and reasonable, and awarded damages for loss of sales together with rehabilitation and mitigation costs amounting to \$6.5 M plus interest of just over \$700,000.

### Implications for you

This case highlights the importance of thorough trial preparation. The lack of contemporaneous weather records meant that the court was required to draw inferences from the evidence of the witnesses, some of which was unfavourable. The court was also critical of the defendant's witnesses who could not recall certain matters but could recall other conveniently favourable matters. Insurers need to be aware that if matters such as these

cannot be satisfactorily addressed at trial, there may be a significant exposure not only to a very substantial judgment, but also to a hefty interest bill as occurred in this case.

*Riverman Orchards Pty Ltd v Hayden* [2017] VSC 379

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