THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 11 – Part I

Liability for Stock Straying on to the Highway

WORKING PAPER

JUNE 1970

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INTRODUCTION

As part of its programme the Law Reform Committee has been asked to examine the law relating to liability for injury or damage occasioned by stock straying on to the highway and to consider whether it is practical to effect reforms.

The Committee having completed its first consideration of the matter now issues this working paper. The paper does not represent the final views of the Committee.

Comments and criticisms are invited. The Committee requests that they be submitted by the 18th September, 1970.

Copies of the paper are being forwarded to –

The Chief Justice and Judges of the Supreme Court.
The Judges of the District Court.
The Law Society.
The Magistrates Institute.
The Law School.
The Crown Law Department.
The Commissioner of Police.
The Royal Automobile Club of W.A.
The Country Party.
The Local Government Association of W.A.
The Pastoralists & Graziers Association of W.A.
The Farmers Union of W.A.
The Fire & Accident Underwriters Association of W.A.
Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The Committee may add to this list.

The research material on which this paper is based is at the offices of the Committee and will be made available on request.

TERMS OF REFERENCE

1. "To consider the law relating to liability for injury or damage occasioned by stock straying on to the highway and whether it is practical to effect reforms and if so, the extent of such reform."

PRESENT LAW

2. There are two statutory provisions in Western Australia, each of which makes it an offence to permit animals to stray on the highway - the *Local Government Act 1960-1969*, s.484, and Regulation 1702 of the *Road Traffic Code 1965*. The Committee however, assumes that its terms of reference are meant to apply essentially to civil liability, which is covered by common law and not by statute. See however, paragraph 10 below.

3. In *Searle v. Wallbank* [1947] A.C. 341 (in which a cyclist collided on the highway with a horse during the war-time black-out, the horse having escaped from a field adjoining the highway) the House of Lords laid down the general rule: the occupier of land adjoining the highway from which an animal strays on to the highway, is not liable for any injury or damage done to the user of the highway, even though in allowing the animal to escape he failed to exercise reasonable care, unless he knew that the animal was dangerous. Such a person thus has a special immunity not accorded other classes of persons.

4. The precise ambit of the rule laid down in *Searle v. Wallbank* has been questioned in subsequent English cases - see paragraphs 13 & 15 below.

5. The manner in which highways had been created in England influenced the view taken by the House of Lords in *Searle v. Wallbank* which regarded itself as affirming an ancient rule developed before inclosures, when roads ran largely over unfenced wastes and common lands and along which the public had no more than a right of passage subject to the risks of straying animals.

6. Three of seven judges in the Canadian Supreme Court, in *Fleming v. Atkinson* (1959) 18 D.L.R. (2nd) 81, expressed the view that the rule, does not apply in Ontario where the

roads were for the most part created when the Province was surveyed, the fee being vested in the Crown or local authority.

7. Professor Fleming (*Law of Torts*, 3rd ed., 332) has suggested that in view of the broadly similar history of highways in Australia to those in Ontario the immunity from liability for negligence may not apply in Australia either.

8. Apart from a passing reference by Herron J. in the N.S.W. Full Supreme Court in *Warren v. Anderson* (1958) 75 W.N. 494, who treated the rule as settled law, *Searle v. Wallbank* has not been considered in Australia by any Supreme Court or the High Court. Recently, however, Cross D.C.J. of the N..S.W. District Court in *Reyn v. Scott* (1968) 2 D.C.R. (N.S.W.) 13, distinguished it –

> "…on the different conditions in relation to traffic and animals that must exist between the United Kingdom and Australia, and on the basis that time alone (it is 20 years since, the decision was given) means that conditions today must be sufficiently changed for the decision to be distinguished".

The judge applied the general law of negligence to the situation and gave judgment against the defendant for damage resulting from his horses having strayed on to the highway. The case was not taken on appeal.

9. The Supreme Court in New Zealand, where conditions are broadly similar to Australia, has treated *Searle v. Wallbank* as authoritative (see *Simeon v. Avery* [1959] N.Z.L.R. 1345 and *Ross v. McCarthy* [1969] N.Z.L.R. 691).

10. The fact that the Legislature has made an owner criminally liable for his straying stock (see paragraph 2 above) probably does not affect his civil liability to a person who may be injured or whose property may be damaged by the animals straying on to the highway (see the observations of Lord du Parcq in *Searle v. Wallbank* [1947] A.C. at p. 362).

11. The law is thus uncertain.

Scope of rule in *Searle v. Wallbank.*

12. The rule certainly applies to horses, cattle, sheep and pigs.

13. In England it has been doubted whether it applies to dogs (Davies L.J. and Holroyd Pearce L.J. in *Gomberg v. Smith* [1963] 1 Q.B. 25 thought that it did not, but their view was rejected unanimously by three other judges of the Court of Appeal in *Ellis v. Johnstone* [1963] 2 Q.B. 8). In Western Australia the position is complicated by s.24 of the *Dog Act 1903-1967* which provides that the owner of a dog is liable in damages for injury clone by his dog, and that there is no need to show a previous mischievous propensity in the dog or that the injury was due to neglect on the part of the owner. It is uncertain whether the provision extends to making the owner liable for accidental caused on the highway by his dog. There are no reported decisions on this point.

14. The rule does not apply –

(a) if the animal is known to be dangerous or mischievous. A mere disposition to stray is not sufficient to exclude the rule, nor is a disposition of a non-aggressive nature common to a class of animals, such as excitability in young calves (*Simeon v. Avery* [1959] N.Z.L.R. 1345) and playfulness in young fillies *Fitzgerald v. Cooke Bourne* [1964] 1 Q.B. 249); nor

(b) to animals brought on to the highway (*Gomberg v. Smith* [1963] 1 Q.B. 25); nor

(c) to animals escaping from the direct control of a person on to the highway (*Bativala v. West* [1970] 1 All E.R. 332 - a horse escaping from a field where a gymkana was being held).

In cases falling under (a) above, strict liability would presumably apply; in (b) and (c) the normal rule of negligence applies.

15. The rule possibly does not apply to urban as opposed to rural areas (see the conflicting dicta of Holroyd Pearce, Harman and Davies L.JJ. in *Gomberg v. Smith* [1963] 1 Q.B. 25) and

there may be topographical circumstances which exclude the rule (see Ormerod L.J. in *Ellis v. Johnstone* [1963] 2 Q.B. 8 at p.21; but see Evershed M.R. in *Brock v. Richards* [1951] 1 K.B. 529 at p.534).

INCIDENCE OF ROAD ACCIDENTS CAUSED BY ANIMALS

16. It is difficult to estimate the extent of the problem in Western Australia. The following are statistics of road traffic accidents on public roads in this State involving animals (Source: *Road Traffic Accident Statistics* published by the Western Australian Office of the Commonwealth Bureau of Census and Statistics) –

AREA	**1966**	**1967**	**1968**
Metropolitan:			
total accidents	38	21	39
persons killed	nil	nil	1
persons injured	9	8	9

Rest of State:			
total accidents	215	238	240
persons killed	2	nil	1
persons injured	21	14	8

Accidents are recorded only where there were casualties or where more than $50 of property damage resulted.

The Bureau does not keep records of the species of animals which cause accidents. An officer of the Bureau informed the Committee that most accidents in rural areas are caused by kangaroos. Nevertheless some accidents are caused by animals to which the rule in *Searle v. Wallbank* applies.

THE MOVEMENT FOR REFORM IN WESTERN AUSTRALIA

17. The Law Society of Western Australia in September 1966 wrote to the Minister for Justice urging that the law be amended to provide that the ordinary law of negligence apply to stock straying on the highway. The letter drew attention to a paper delivered by Mr. J. L. Toohey, Q.C. at a legal convention of the Law Society in August 1966 in which he had strongly urged the abolition of the immunity.

PROPOSALS FOR REFOFM IN OTHER JURISDICTIONS

18. The English Law Commission in October 1967 recommended that this immunity from liability for negligence be abolished (see Report, *Civil Liability for Animals* - Law Com. No. 13). The recommendation, which was part of a complete review of the civil law relating to animals, was in general accordance with that of a committee under the chairmanship of Lord Goddard which reported in 1952 (1953 Cmd. 8746). The recommendations of the Commission were adopted by the United Kingdom Government and a Bill embodying them was introduced into the House of Lords in November 1969, but has not yet been passed.

19. The English Law Commission recommended that the legislation lay down matters to which the courts must have regard in determining whether or not negligence existed in a particular case. This was accepted by the United Kingdom Government and clause 8 of the Animals Bill contains the following provision:-

> "(2) The following matters shall be included among those to which regard must be had in determining whether any damage caused by animals straying from any land on to a highway was wholly or partly due to a breach of the duty to take care: -
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> (a) the nature of the land and its situation in relation to the highway;
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> (b) the use likely to be made of the highway at the time the damage was caused;
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> (c) the obstacles, if any, to be overcome by animals in straying from the land on to the highway;

(d) the extent to which users of the highway might be expected to be aware of and guard against the risks involved in the presence of animals on the highway;

(e) the seriousness of any such risk and the steps that would have been necessary to avoid or reduce it, and, where it could have been avoided or reduced by fencing, the extent (if any) to which fencing is the normal practice in the area in which the land is situate".

20. The New South Wales Law Reform Commission has recently (September 1969) circulated tentative proposals for a Bill concerning liability for animals, and imposing liability in negligence for stock straying on a highway.

21. The New South Wales Commission suggests that the need to fence be limited. It makes alternative suggestions qualifying the general imposition of liability. One alternative is that a person is not to be liable in negligence by reason only of having refrained from fencing or repairing fences in circumstances where he was reasonably entitled to expect that the person suffering the damage, or other persons, would be aware of and would assume the entire responsibility for guarding against the risk giving rise to the damage. The other alternative is that if a person's land is situated outside a municipality, village, town, urban or prescribed area, he is not to be liable merely because he refrained from fencing or repairing fences in any case in which he could do so lawfully.

COMMITEES TENTATIVE VIEWS

22. The Committee is of opinion that in so far as there is uncertainty in the law the uncertainty should be resolved by statute.

23. There would appear to be no overriding reasons which would justify granting the occupier of land immunity in the law of negligence from liability for damage caused by his stock straying on to the highway. As Professor Fleming has pointed out (*Law of Torts*. 3rd ed., p.332) the effect of the rule in *Searle v. Wallbank* is to subsidise one section of the community at the expense of others.

24. The Committee is therefore of the view that statutory provisions should be enacted abolishing the rule in *Searle v. Wallbank*, and that liability for damage caused by stock straying on to or on the highway should be determined under the general principles of the law of negligence.

25. To ensure that any special circumstances in determining negligence are not overlooked the statute could (as in the English Bill, see paragraph 19 above) list matters to which regard must be had in determining whether the occupier of the land has been negligent.

26. The Committee has been informed that insurance cover against claims for damage done by animals straying on the highway would be readily available, and that farmers could obtain cover under a "Public Liability" policy (which the Committee is informed most farmers have) for a small additional premium.