



Liability for damage caused by livestock straying on roads.

Introduction

- Significant media attention was directed in early 2003 to the case of a cancer-stricken single mother from Central Queensland who incurred personal injury and property damage when her car struck a cow wandering on to the road from an unfenced property. Suncorp Insurance denied a public liability claim for damage to her car on the basis of an old common law rule that protects landowners against liability for their straying livestock.
- Subsequently, a backbench State MP again highlighted the need for legislation to negate the common law rule regarding livestock on roads following the death of a disabled constituent whose vehicle collided with a horse on the Bruce Highway in North Queensland.
- Following these incidents the Attorney-General Mr Welford announced that a consultative review process was to be undertaken of the law relating to straying stock on roads.

Background

This statement is to formalise the RACQ's position on the respective liability and rights of motorists involved in collisions with straying livestock on roads and the owners of such livestock, and forms the basis for the RACQ's submission to the review announced by the Attorney-General.

The history of travelling stock on roads in Queensland embodies such issues as designated stock routes, the need for depasturing stock on road reserves in times of drought, and the need for movement of dairy herds across roads for milking sessions. This has obviously posed considerable problems for dealing with the perennial thorny issue of stock straying onto roads and the dangerous hazards this presents in terms of the causation of many accidents and deaths, often by drivers swerving to avoid straying stock as well as by impacting with them.

The Current Legal Situation

Queensland still relies on an old common law rule (*Searle v Wallbank*) for animals straying onto the road or highway, whereby owners will usually be immune from liability in negligence.

At common law, the owner or occupier of land adjoining a highway owes no duty of care to users of the highway for damage caused by straying stock. An owner or occupier does not even have a duty to maintain his or her fences to prevent cattle straying onto the road.

However, the affected motorist should check the council local laws for the area where the accident occurred to see if there are any local government requirements governing the control of animals on roads (e.g. fencing to prevent animals escaping from the land onto the road).

In the absence of council local laws saying otherwise, the property owner is immune from liability in negligence in regard to any damage resulting from a motor vehicle accident caused by straying livestock.

If an animal escapes onto a highway and injures a person lawfully using the highway, the owner or occupier of the adjacent land is liable only if:

1. knowledge of the animal's vicious or mischievous nature can be established;
2. where the animals escape in such large numbers so as to cause an obstruction; or
3. where other special circumstances can be established taking the particular case outside the normal rule and the owner is aware of these circumstances.

The Common Law Rule: should it be abolished?

The common law rule governing liability for damage caused by animals straying upon highways is colloquially known as "the rule in *Searle v Wallbank*," a 1947 decision of the UK House of Lords which discussed and affirmed the settled law of ancient England. It has since been abolished in England and Wales by the *UK Animals Act 1971*.

Queensland and Northern Territory are now the only state and territory jurisdictions in Australia where the common law rule conferring special immunity on landowners or occupiers still applies. All other States and the ACT have abolished the rule by legislation.

A Queensland Law Reform Commission (QLRC) Working Paper¹ issued in 1977 on *Civil Liability for Animals* recommended similar legislative abolition, based on relevant provisions of the U.K. Animals Act 1971, however any change in government policy has yet to eventuate.

The QLRC Working Paper argued for legislative abolition of the rule in Queensland on the grounds that: -

- it was based on historical considerations relating to conditions of the English countryside, where it was then customary for herds to be driven along the roads and users were expected to accept the risks flowing from this practice;

¹ Q.L.R.C. Working Paper No. 18, 1977: *Working Paper on a Bill to Remove the Anomalies Presently Existing with Respect to Civil Liability for Animals and to Rationalise the Existing Rules of the Common Law for damage Done by Animals*.

- it was difficult, in their opinion, to sustain, in this day and age, a proposition of law in these terms, especially with the growth of roads and highways and the advent of fast-moving motor vehicle traffic; and
- the more recent developments in the common law were able to accommodate this problem adequately without recourse to special rules creating immunity for owners/occupiers of land, irrespective of the particular circumstances in which the injury or damage occurred.

In considering the implications of such legislation in a State of vast dimensions such as Queensland with its substantial population of grazing animals and an immense network of roadways, it is interesting to note that under the Western Australian legislation abolishing the rule in *Searle v Wallbank*, the courts may take the following negligence criteria into account in determining liability for damage caused by animals straying on a highway: -

- the general nature of the locality in which the highway is situated;
- the nature and volume of traffic upon the highway;
- the extent to which the public on the highway would expect to encounter animals thereon and could be expected to guard against the risk associated with their presence;
- what measures are normally taken to prevent animals straying upon the highway or to warn users thereof of the likely risk of animals straying; and
- the cost of fencing or of other measures previously referred to, or both.²

The Western Australian legislation also imposes an upper limit on liability of \$500,000 for any one cause of action.³

In arguing that the general law of negligence should also apply to animals rather than the special immunity provided by the rule in *Searle v Wallbank*, the QLRC Working Paper referred to the modern-day risk principle in tort liability, where courts weigh up the likelihood of damage against the precautions necessary to avoid it (i.e., where each case depends on its own particular facts, including gravity of harm and frequency of occurrence, with liability ultimately determined on reasonableness of the precautions taken, given the landowner's state of knowledge and locality, whether suburban or rural, etc.)

The QLRC Working Paper did not anticipate that Queensland judges, faced with the problems referred to above, would absolutely hold that in all circumstances, owners of properties abutting any sort of roadway would be required to construct fences and ensure they were at all times properly maintained. It felt that this would impose an impossible strain upon an already economically threatened industry.

In case to case decisions, QLRC was confident that the courts would seek to strike a balance between safeguarding users of highways on the one hand, without imposing undue burdens on those engaged in agricultural pursuits. On the other hand, they saw

² Section 3(4) of the *Highways (Liability for Straying Animals) Act 1983 (W.A.)*.

³ Section 3(5) of the *Highways (Liability for Straying Animals) Act 1983 (W.A.)*

no reason why landowners should, in all circumstances, be exempt from liability particularly, as the burden may be cushioned by public liability insurance.⁴

Under recently-enacted Queensland legislation,⁵ local governments may now require landowners to construct stock-proof fencing to prevent stock entering a part of the stock route network, with increased penalties for allowing straying stock to enter onto the stock route network. These provisions extend a local government's power to make a local law requiring an owner of land adjoining a road to fence the land to prevent animals escaping from the land onto the road.

RACQ Analysis

Where damage is caused by animals straying from unfenced land onto a highway, it would appear reasonable for breach of a landowner's duty of care not to apply in circumstances where fencing is either not customary or where it would be unreasonable.

It is noted that the agenda for the LGAQ Annual Conference held in Cairns from 1 to 4 September 2003 included a motion calling on the Queensland Government to abolish, by appropriate legislation, the common law rule discussed in this paper. However this motion was not discussed at the conference, and has been referred to the LGAQ Executive to determine further action.

Insurance Aspects

RACQ Insurance has advised that: -

- the common law rule conveying immunity from liability for damage caused by straying animals applies only to public liability claims involving livestock and not domestic animals;
- should domestic animals escape and cause damage, home and/or contents policyholders would be indemnified, subject to compliance with relevant legislation regarding ownership and control of pets; and
- a third party claiming against the insured's policy would still need to prove that the negligence of the insured caused any loss.

In relation to CTP claims, the advice of RACQ Insurance is that: -

- injured parties must prove the injury as a result of the negligence of an owner or driver of a motor vehicle;
- the At-Fault Driver Injury Policy offered by RACQ Insurance may cover the at-fault driver if they were solely at fault in the accident, and an injury described in the policy's table of benefits was suffered; and that
- certain other conditions apply in relation to the insurer indemnifying the insured.

⁴ Pages 5-6 of QLRC Working Paper No 18, 1977.

⁵ Sections 148 and 166 of the *Land Protection (Pest and Stock Management) Act 2002 (Qld)*

RACQ Position

- 1. The RACQ recognises the impracticality of fencing of all of Queensland's extensive pastoral holdings. However, the RACQ believes that road users who suffer personal injury or property damage caused by straying stock and arising out of proven negligence of the stockowner should be entitled to fair compensation from that owner.*
- 2. The RACQ, therefore, calls upon the State Government to investigate the most appropriate ways to frame new legislation that will achieve the above outcome, taking into account the need for road users to exercise all reasonable care when travelling in remote areas where properties are unlikely to be fenced.*
- 3. In its investigation of the issue, the Government should look particularly at the relevant Western Australian legislation, which, while giving courts the power to decide liability under the general laws of negligence, also places a cap on liability.*

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