



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 11 – Part II

**Liability for Stock Straying
on to the Highway**

WORKING PAPER

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The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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PREFACE

The Law Reform Commission has been asked to consider and report on the law concerning the liability for injury or damage caused by livestock straying on to the highway.

The Commission has completed its first consideration of this matter and now issues this working paper. This paper does not necessarily represent the final views of the Commission.

Comments, with reasons where appropriate, on individual issues raised in the working paper, on the paper as a whole or on any other matter coming within the Commission's terms of reference, are invited. The Commission requests that they be submitted to it by 10 October 1980.

Unless advised to the contrary, the Commission will assume that comments received on this working paper are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

A notice has been placed in *The West Australian*, *The Countryman* and the *Western Farmer and Grazier* offering to send, without charge, a copy of the working paper to anyone interested in it and inviting comments thereon.

The research material on which the working paper is based will, upon request, be made available at the offices of the Commission.

This working paper is based on material available to the Commission in Perth on 22 July 1980.

CHAPTER 1

TERMS OF REFERENCE

"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".

1.1 As the most important aspect of the area of law delimited by this reference is the rule in *Searle v Wallbank*¹ the Commission has interpreted the terms of reference broadly so as to consider all the situations in which that rule applies. "Highway", therefore, has not been given a technical meaning but is understood to encompass any highway, road, street, lane, bridge or thoroughfare or place open to or used by the public for passage. Similarly, because the rule in *Searle v Wallbank* is not limited to livestock, the position pertaining to all animals covered by it has been considered. Finally, the rule has been considered in the context of the law relating to animals generally.

1.2 This reference was given to the Law Reform Committee (the predecessor of the Law Reform Commission) in 1969. In 1970 that committee submitted a report to the Minister for Justice recommending the abrogation of the rule in *Searle v Wallbank*; no action was taken on this report. However, in 1976 the Full Court of the Supreme Court of Western Australia decided that the rule did not apply in Western Australia; this decision in effect implemented the principal recommendations of the Law Reform Committee. Subsequent decisions by courts in other Australian jurisdictions, however, have cast doubt upon the correctness of the Full Court's decision and therefore, in November 1978, the Attorney General asked the Law Reform Commission again to review this area of law.

¹ [1947] 1 All ER 12.

CHAPTER 2 THE LAW IN WESTERN AUSTRALIA

1. LIABILITY FOR ANIMALS GENERALLY

(a) Strict Liability

(i) Cattle trespass

2.1 Briefly stated,¹ a person who owns² or is in control³ of cattle⁴ must prevent them trespassing on to another person's land. If a trespass should occur, liability will arise to pay compensation for any damage caused to the land⁵, goods⁶ or livestock⁷ belonging to the occupier⁸ of the land trespassed upon and for any personal injury⁹ suffered by that person as a result. Even if no actual damage is caused by the trespass, a reasonable payment must be made for any beneficial use made of the occupier's land.¹⁰

(ii) Dangerous animals

2.2 A person who owns¹¹ or is in control¹² of any animal¹³ known to be dangerous must keep it under control¹⁴ so as to prevent it causing harm to someone else's person or property.¹⁵

¹ For a more detailed discussion of both liability for cattle trespass and for dangerous animals see Higgins, *Elements of Torts in Australia* 181-194 ("Higgins") and Fleming, *The Law of Torts* 5th ed. 340-350 ("Fleming").

² Liability is imposed upon the owner, regardless of whether he is in control of the animal at the time the trespass occurs: *Alsop v Lidgerwood* (1916) 22 ALR (CN) 13. The reason for this is that, as liability is strict, it cannot be delegated to anyone else: *Higgins v William Inglis & Son Pty. Ltd.* [1978] 1 NSWLR 649. The same rule applies to the owner of a dangerous animal.

³ *Jackson v Croft* (1879) 2 SCR NS (NSW) 295.

⁴ Although the tort is called "cattle trespass" "cattle" in this context includes bulls, oxen, cows, horses, sheep, pigs, fowls, goats and geese, but not cats and possibly not dogs: see Higgins, 182-183.
⁵ Fleming, 341.

⁶ *Cooper v Railway Executive (Southern Region)* [1953] 1 All ER 477.

⁷ This includes physical injury to livestock: *Doyle v Vance* (1880) 6 VLR (L) 87; misbreeding: *Cousins v Greaves* (1920) 54 DLR 650; uncertainty whether the trespassing animal has served an animal belonging to the occupier: *Halstead v Mathieson* (1919) VLR 362 and starvation caused by the trespassing cattle eating all the feed on the occupier's land: *Challoner v McPhail* (1877) Knox 157.

⁸ Only the occupier of land can bring an action for cattle trespass.

⁹ *Wormald v Cole* [1954] 1 All ER 683.

¹⁰ *Yakamia Dairy Pty. Ltd. v Wood* [1976] WAR 57; and see also, *Local Government Act 1960-1979*, s 463.

¹¹ See note 2 above.

¹² *Fischer v Stuart* (1979) 25 ALR 336.

¹³ Unlike cattle trespass, liability here is not limited to domestic animals.

¹⁴ Liability will arise only if there was a failure to control the animal: *Marlor v Ball* (1900) 16 TLR 239; *Behrens v Bertram Mills Circus* [1957] 1 All ER 583, 591.

If the animal belongs to a species of animal normally dangerous¹⁶ to mankind, *ferae naturae*, knowledge that it is dangerous; will be imputed, as a matter of law, to the owner or person in control of it. If on the other hand, the animal belongs to a species not normally dangerous¹⁷ to mankind, *mansuetae naturae*, a plaintiff seeking compensation must prove that the owner or person in control of the particular animal actually knew¹⁸ that it was dangerous.

2.3 Although the matter is not free from doubt, liability for an animal *mansuetae naturae* probably only extends to damage or injury caused by the manifestation of its dangerous character, whereas liability for an animal *ferae naturae* may extend to injury or damage howsoever caused by it when it was out of control.¹⁹

2.4 Unlike cattle trespass, the right to claim compensation for damage or injury caused by a dangerous animal is not restricted to those in occupancy of land. Therefore it is available, for example, to someone injured whilst passing along a highway.²⁰

(iii) Nuisance

2.5 It is an actionable nuisance to keep an animal in a manner that unreasonably interferes with another person's occupation of land, An unreasonable interference can be constituted, for example, by the noise²¹ or smell²² of the animal, This kind of nuisance can be restrained by injunction²³ and damages can be awarded without the need to establish actual injury to or diminution in the value of the property occupied by the complainant.²⁴

(iv) The effect of liability being strict

2.6 Although certain defences are available,²⁵ liability for failing to prevent cattle trespass, failing to control a dangerous animal and for nuisance is strict.²⁶ Thus an action can be

¹⁵ *Higgins v William Inglis & Son Pty. Ltd.* [1978] 1 NSWLR 649. According to Fleming, 345 fn.50, although there are no reported cases on damage to property, that compensation can be recovered for property damage "...is hardly in doubt".

¹⁶ For example, lions and elephants.

¹⁷ For example, cows and sheep.

¹⁸ This knowledge is known as scienter.

¹⁹ Fleming, 347.

²⁰ *Scott v Edington* (1888) 14 VLR 41.

²¹ *Leeman v Montagu* [1936] 2 An ER 1677.

²² *Munro v Southern Dairies Ltd.* [1955] VLR 332.

²³ Ibid.

²⁴ *Bone v Seale* [1975] 1 All ER 787.

²⁵ See *Higgins*, 186-187, 193-191 and Fleming, 342-343, 348-350.

maintained against the owner or person in control of the offending animal even though reasonable care had been taken to prevent the occurrence of the event complained of. In addition, because liability is strict, no allowance is made, when damages are awarded, for "mere" contributory negligence on the part of the plaintiff.²⁷

(b) Criminal Liability²⁸

(i) Cattle

2.7 Section 484(1) of the *Local Government Act 1960-1979* makes it an offence, punishable by a fine of \$200, for the owner of *cattle* to permit the "cattle" to stray or to be at large in a "street" or other "public place" (all as defined in s .6). To be guilty of this offence it is not necessary for the owner to have been aware that the cattle were straying or to have been responsible for them doing so: s .484(2).

(ii) Animals

2.8 Regulation 1702(1) of the *Road Traffic Code 1975* makes it an offence for the owner or person in charge of stock to allow it to stray on to or along a road, be unattended on a road or obstruct any portion of a road. This provision, however, does not impose strict liability and it is a defence for the owner or person in charge of the stock to prove that reasonable precautions were taken to prevent, for example, the stock straying on to a road.

2.9 The effect of both these provisions is therefore, *inter alia*, to impose upon the owner or person in charge of stock an obligation to prevent it straying on to the highway.

(iii) Dogs

2.10 The *Dog Act 1976-1977* imposes a variety of obligations on the owner (or the person deemed under the Act to be the owner) of a dog and makes failure to fulfil each obligation punishable by a fine.

²⁶ *Higgins v William Inglis & Son Pty. Ltd.* [1978] 1 NSWLR 649.

²⁷ *Ibid.* It is a defence, however, to prove that the plaintiff's conduct was really the *only* cause of the damage or injury suffered: *id.* 654.

²⁸ In addition to the provisions considered in the text see also s.96(2) of the *Police Act 1892-1979* which makes it an offence to:

"...turn loose any horse or cattle, or suffer to be at large any unmuzzled ferocious dog, or set on or urge or permit any dog or other animal to attack, worry or put in fear any person, horse or other animal".

(c) Liability for Negligence

2.11 In addition to the obligations described in paragraphs 2.1 to 2.10 above, a person in control²⁹ of an animal is required by the law of negligence to exercise that control with reasonable care so as to try to prevent the animal causing foreseeable damage to the person or property of another.³⁰ If this duty of care is broken compensatory damages can be recovered, for the tort of negligence, by anyone to whom the duty is owed and who was injured, or whose property was damaged, as a result of the breach.³¹

2. THE RULE IN SEARLE v WALLBANK

(a) Introduction

2.12 There is one exception to the duty of care described in paragraph 2.11 above. This exception is known as the "rule in *Searle v Wallbank*" ("the Rule") after the House of Lords decision³² in which it was authoritatively stated.³³ The traditional formulation of the Rule is that owners and occupiers of land adjoining a highway owe no duty to the users thereof (i) to fence the boundary between their land and the highway in a manner preventing their animals straying on to the highway or (ii) (subject to certain exceptions considered below) to take reasonable care to prevent their animals from straying on to the highway.³⁴ As so formulated the Rule will protect only the owners and occupiers of land adjoining a highway. However, there is authority to the effect that the Rule is not limited in this manner but extends to protect any person who is in control of an animal.³⁵ Consequently, the present state of the law is that subject to certain exceptions considered in paragraphs 2.22 to 2.23 below, anyone who suffers damage or injury when passing along a highway because of the presence of a straying animal has no remedy against: the person from whose land or control that animal has strayed.

²⁹ Unlike liability for cattle trespass and dangerous animals, liability for negligence will only be imposed upon the owner of an animal if he was in control of it when the accident occurred or was vicariously responsible for the person who was: *Milligan v Wedge* (1840) 12 A & E 737.

³⁰ *Fardon v Harcourt-Rivington* [1932] All ER Rep. 81; *Draper v Hodder* [1972] 2 All ER 210.

³¹ Ibid.

³² *Searle v Wallbank* [1947] 1 All ER 12.

³³ The Rule was well established before that case was decided however, see for example, *Heath's Garages Ltd. v Hodges* [1916-1917] All ER Rep. 358 and paragraph 2.17 below.

³⁴ See for example, *Brisbane v Cross* [1978] VR 49, 51.

³⁵ See for example, *Higgins v Searle* [1908-1910] All ER Rep. 278; *Hall v Wightman* [1926] N.I. 92; *Brock v Richards* [1951] 1 All ER 261; 264.

2.13 In the House of Lords the Rule was justified³⁶ by reference to the state of the English countryside before the enclosure movement. At that time, fences were rare and roads were laid out over unenclosed land largely for the benefit to farmers to drive their stock to market. According to Viscount Maugham,³⁷ in these conditions and prior to the advent of fast moving traffic on proper roads, a duty to fence or take reasonable care to prevent animals straying on to the highway could not have existed, and because accidents due to straying animals were said [in England in 1947] to be exceedingly rare, nothing had happened to make farmers and others subject to such a duty for the first time.

2.14 Recent examples of the kinds of situations in which the Rule operates are –

- (i) the collision between a steer and a motorcyclist resulting in severe damage to the motorcycle;³⁸
- (ii) the collision between two motor cars, resulting in the death of the driver of one of the cars and personal injury to the driver and occupants of the other, occurring after one car swerved across the highway as a result of having collided with two straying sheep;³⁹
- (iii) the collision between a motor car and a mob of cattle crossing the highway, resulting in the motor car being damaged beyond repair;⁴⁰
- (iv) injury caused to a pedestrian through being knocked down by a prancing filly.⁴¹

(b) The Position in Western Australia

2.15 There is no equivalent in Western Australia to s.24 of the *Australian Courts Act 1828*⁴² which specifically provides that all laws and statutes in force within the realm of

³⁶ [1947] All ER 12, 14-17.

³⁷ Ibid.

³⁸ *Brisbane v Cross* [1978] VR 49.

³⁹ *State Government Insurance Commission v Trigwell* (1979) 26 ALR 67.

⁴⁰ *Bagshaw v Taylor* (1978) 18 SASR 564.

⁴¹ *Fitzgerald v E.D. & A.D. Cooke Bourne (Farms) Ltd.* [1963] 3 All ER 36.

⁴² 9 Geo IV, c.83. This Act applies in N.S.W., Vict., Qld., Tas., N.T., and the A.C.T. As far as the reception of statute law into Western Australia is concerned, see note 45 below.

England at the time the Act was passed shall be applied in the courts of New South Wales and Van Diemen's Land as far as they can be. None the less, the position in Western Australia is essentially the same because, as a matter of common law, all English law in force at the date of settlement, except to the extent it is incapable⁴³ of application therein, becomes part of the law of any British settled colony and remains so until abrogated by a statute applying to the colony.⁴⁴ Therefore the rules and principles of English law in force and capable of application in the colony of Western Australia on 1 June 1829, the date⁴⁵ Western Australia was proclaimed a British colony, became the law in the colony and have remained so ever since except where abolished by a statute applying in Western Australia.

2.16 As a result, the Rule in *Searle v Wallbank* forms part of the current law of Western Australia if the following conditions are fulfilled –

- (i) it was part of the law of England on 1 June 1829;
- (ii) it was reasonably capable of application in the conditions of the colony of Western Australia;
- (iii) it has not been abolished by a statute applying in Western Australia.

2.17 In the opinion of the Commission these conditions are probably fulfilled for the following reasons –

- (i) Although receiving its modern formulation in 1947, the weight of opinion⁴⁶ favours the view that the Rule in *Searle v Wallbank* considerably pre-dates the decision in that case. There are certainly decisions⁴⁷ applying the Rule well

⁴³ The test is not whether the rule or principle of English law is suitable or desirable to the colony, but whether it can be applied: *Delohery v Permanent Trustee Co. of N.S.W.* (1904) 1 CLR 283, 310-311; *Dugan v Mirror Newspapers* (1978-79) 22 ALJ 439, 441 and 444-445. Although these cases deal specifically with the operation of the *Australian Courts Act 1828*, the same principles presumably apply to the common law as the Act adopts the common law rule: *Dugan v Mirror Newspapers Ltd.* supra, 444.

⁴⁴ *Cooper v Stuart* (1889) 14 App. Cas. 286, 291; *Dugan v Mirror Newspaper* (1978-79) 22 ALR 439; *SGIC v Trigwell* (1979) 26 ALR 67, 72. See generally, Roberts-Wray, *Commonweath and Colonial Law*, p.539-541.

⁴⁵ Section 43 of the *Interpretation Act 1918-1975* deems this date to be the date upon which the State was established for the purpose of the applicability or otherwise of Acts of the Parliament of the United Kingdom.

⁴⁶ See for example, the discussion in *Bagshaw v Taylor* (1978) 18 SASR 564, 577-8; *Brisbane v Cross* [1978] VR 49, 52 and *SGIC v Trigwell* (1979) 26 ALR 67, 77.

⁴⁷ For example, *Higgins v Searle* [1908-1910] All ER Rep. 278; *Heath's Garages Ltd. v Hodges* [1916-1917] All ER Rep. 358. In *SGIC v Trigwell* (1979) 26 ALR 67, 77, Mason J. appears to regard dicta in *Mason v Keeling* [1558-1774] All ER Rep. 625, 627 as a statement of the Rule; it is arguable, however,

before 1947 and in *Searle v Wallbank* itself it was described as being of ancient origin. It has recently been held that the Rule was part of the law of England on 1 January 1829⁴⁸ and on 28 December 1836⁴⁹ and therefore part of the law of New South Wales and South Australia respectively.

- (ii) In *Kelly v Sweeney*,⁵⁰ *Brisbane v Cross*⁵¹ and *State Government Insurance Commission v Trigwell*⁵² it was held that the Rule was capable of application in the colonies of New South Wales (in 1828), Victoria (in 1828) and South Australia (in 1836) respectively. The Commission is of the opinion that nothing concerning the settlement of the colony of Western Australia on 1 June 1829 made the Rule less capable of application in Western Australia and, indeed, the contrary view has been rejected recently in the High Court.⁵³
- (iii) No statute applying to Western Australia has specifically abolished the Rule. There are, however, statutory provisions dealing with the fencing of land⁵⁴ and imposing an obligation to prevent cattle straying.⁵⁵ It was held in *Thomson v Nix*,⁵⁶ however, that these provisions do not create a private right of action against someone violating them and the same conclusion has been reached in relation to similar provisions in other jurisdictions.⁵⁷ Therefore, although the owner of cattle found straying on a highway may be liable to criminal prosecution, the Rule remains available to assist him to resist any civil claim arising out of an accident caused by the cattle.

that this dicta is concerned only with the conditions giving rise to a *scienter* action. See in this respect *Bagshaw v Taylor* (178) 18 SASR 564.

⁴⁸ *Kelly v Sweeney* [1975] 2 NSWLR 720; *Brisbane v Cross* [1978] VR 49.

⁴⁹ *Bagshaw v Taylor* (1978) 18 SASR 564; *SGIC v Trigwell* (1979) 26 ALR 67.

⁵⁰ [1975] 2 NSWLR 720.

⁵¹ [1978] VR 49.

⁵² (1979) 26 ALR 67.

⁵³ *Searle v Trigwell* (1979) 26 ALR 67, 73.

⁵⁴ An obligation to erect or maintain fences is imposed, for example, by the *Land Act, 1933-1978*, ss. 47(4)(f)(ii), 54(2)(f), 81(6) (but see s.59), and the *Local Government Act 1960-1979*, 55.291, 340(1), 647 and 671.

⁵⁵ See paragraphs 2.7 and 2.8 above.

⁵⁶ [1976] WAR 141.

⁵⁷ In *Brisbane v Cross* [1978] VR 49 the Victorian equivalents of ss.458(2) (which empowers in authorised council ranger or officer to impound cattle found straying upon, inter alia, a street) and 484(1) of the *Local Government Act 1960-1979* were considered; in *Heath's Garages Ltd. v Hodges* [1916-1917] All ER Rep. 358 and *Searle v Wallbank* [1947] 1 All ER 12 the provisions of the United Kingdom *Highways Act* equivalent to s.484(1) were considered; in *SGIC v Trigwell* (1979) 26 ALR 67 the South Australian equivalent of s.458(2) was considered.

2.18 The Commission acknowledges that its conclusion that the Rule applies in Western Australia is contrary to the decision on this issue in *Thomson v Nix*.⁵⁸ In that case, the Full Court, after examining the history of fencing and highway legislation in Western Australia⁵⁹ concluded that:⁶⁰

“...there are relevant differentiating local conditions in this State existing now and for many years, and almost since its foundation as a colony, which make the decision in *Searle v Wallbank* inapplicable here. That decision should not be held to express the law in this State. Instead the general rule of negligence should apply, so that there is the ordinary duty imposed upon a person who has animals in his charge to take care that his animals are not so placed or used or allowed to roam or stray' so as to be likely to injure his neighbour...”

2.19 The Commission is sympathetic to the Full Court's opinion that the Rule is unsuited to conditions in Western Australia and attracted to its view that liability for animals straying on to the highway should be governed by the ordinary law of negligence. However, the Commission considers that the Court's decision that this was already the law in Western Australia cannot be supported⁶¹ having regard to subsequent decisions elsewhere, in particular the decision of the High Court in *Searle v Trigwell*.⁶²

(c) The Scope of the Rule

2.20 The Rule applies equally to rural, urban and suburban areas.⁶³ Also, it is not restricted to farm animals such as cattle, sheep and horses but applies as well to domestic dogs⁶⁴ and probably cats.⁶⁵ As a result, a suburban pet owner in Perth is as much protected by the Rule as a Kimberley cattle station operator.

(d) Dogs

2.21 Although dogs come within the Rule, its effect as far as they are concerned has been abolished by s.46(2) of the *Dog Act 1976-1977*.⁶⁶ This provision imposes liability upon the

⁵⁸ [1976] WAR 141.

⁵⁹ The principal current provisions are referred to in notes 54 and 55 above; the *Road Traffic Code* was not mentioned in the case, however.

⁶⁰ [1976] WAR 141, 147, per Jackson C. J.

⁶¹ *Contra* E.J. Myers, (1979) 53 ALJ 230, letter to the Editor.

⁶² (1979) 26 ALR 67. The other decisions are *Bagshaw v Taylor* (1978) 18 SASR 564 (South Australian Full Court) and *Brisbane v Cross* [1978] VR 49 (Victorian Full Court).

⁶³ *Brock v Richards* [1951] 1 All ER 261.

⁶⁴ *Ellis v Johnstone* [1963] 1 All ER 286; *Brisbane v Cross* [1978] VR 49. But see paragraph 2.21 below.

⁶⁵ *Brisbane v Cross* [1978] VR 49.

⁶⁶ There are no reported cases interpreting this section of the Act. However, there are several reported cases considering the meaning and effect of s.20 of the New South Wales *Dog Act 1966* which was, until the

owner of a dog (or the person deemed under the Act to be the owner) for any injury caused by it, regardless of whether the owner has been negligent. Liability is not limited to canine acts such as biting and scratching but includes, for example, damaging a motor vehicle by colliding with it on a highway.⁶⁷ It is also not necessary for there to be physical contact between the dog and the person or property injured, so that compensation can be recovered in respect of an injury suffered as the result of moving to avoid a dog.⁶⁸

(e) Exceptions to the Rule

2.22 It is well established that there are exceptions to the Rule which, when applicable, result in the person responsible for the control of an animal being subject to the ordinary duty of care imposed by the law of negligence. However, although the existence of certain of these exceptions is beyond doubt, others have been suggested whose existence, although recognised in some authorities, can be advanced only tentatively. Indeed, because of judicial differences concerning them and because they are inherently difficult to apply in practice, the precise metes and bounds of all the exceptions are unclear.⁶⁹ The Commission therefore agrees with The Law Commission that:⁷⁰

"Whether or not it is desirable to modify or abolish the exception, [namely, the rule in *Searle v Wallbank*] it would seem important in the interests both of the occupiers of land as well as of those damaged by animals on the highway that the law should be made more certain".

2.23 The Rule does not apply in the following situations –

- (i) *If the animal is dangerous* - The immunity created by the Rule is only against liability in negligence⁷¹ and the members of the House of Lords in *Searle v Wallbank* were careful to exclude dangerous animals from its operation. Strictly speaking, therefore, dangerous animals are not within the Rule and consequently, the ordinary rules of law applicable to dangerous animals operate when a person is injured by such an animal on the highway, even

passage of the *Dog Amendment Act 1977*, substantially the same. Reference has therefore been made to these cases.

⁶⁷ *Martignoni v Harris* [1971] 2 NSWLR 102.

⁶⁸ *Twentieth Century Blinds Pty. Ltd. v Howes* [1974] 1 NSWLR 244.

⁶⁹ See paragraphs 2.25 and 2.26 below.

⁷⁰ *Civil Liability for Animals*, 1967 Law Com. No. 13, paragraph 30.

⁷¹ But see paragraph 2.24 below.

though it has escaped from adjoining land.⁷² The person who owns or is in control of the animal is therefore subject to strict liability and this applies equally to animals belonging to species not considered dangerous to mankind and those belonging to species that are.

- (ii) *If there are special circumstances* - If the person in control of a particular⁷³ animal knows or ought to know that it has a propensity making it unusually dangerous, a duty to take reasonable care to prevent it straying on to a highway will be imposed. This propensity is referred to in the cases as a "special circumstance". Examples given in dicta of such a propensity include a dog's habit of rushing out on to a narrow highway⁷⁴ and a horse's peculiar liking for leaping over hedges and on to the highway.⁷⁵ However, a mere proclivity to stray is insufficient.⁷⁶

It has often been suggested that there can be special circumstances displacing the Rule, other than those arising from the propensity of the particular animal; for example the topography of the place in which the accident happened.⁷⁷ However, this suggestion was firmly rejected recently by the High Court in *SGIC v Trigwell*.⁷⁸ Indeed, although in some respects ambiguous, the terms in which the High Court in this case asserted that only a known vicious or mischievous propensity can be a special circumstance, casts doubt upon whether there is a separate "special circumstances" exception, distinct from that of dangerous animals.⁷⁹

- (iii) *If the animal had been taken or allowed on to the highway* - The Rule does not apply if the animal responsible for an accident was on the highway because it had been taken there or if its presence there had been facilitated by the person in control of it. So for example, reasonable care must be taken to control stock

⁷² *Mason v Keeling* [1558-1774] All ER Rep. 625, 627; *Fitzgerald v E.D. & A.D. Cooke Bourne (Farms) Ltd.* [1963] 3 All ER 36.

⁷³ A propensity common to a group is not enough : *Simeon v Avery* [1959] NZLR 1345.

⁷⁴ *Ellis v Johnstone* [1963] 1 All ER 286,295 and 299.

⁷⁵ *Brock v Richards* [1951] 1 All ER 261, 266.

⁷⁶ *Brock v Richards* [1951] 1 All ER 261; *Brisbane v Cross* [1978] VR 49.

⁷⁷ See *Gomberg v Smith* [1962] 1 All ER 725, 729-730 and *Ellis v Johnstone* [1963] 1 All ER 286, 292, 294 and 297.

⁷⁸ (1979) 26 ALR 67.

⁷⁹ A distinction between the two exceptions, however, was clearly drawn in *Ellis v Johnstone* [1963] 1 All ER 286, 297.

being driven along a highway.⁸⁰ This exception has been given a wide interpretation; for example, it was applied in *Deen v Davies*⁸¹ where a pony, tethered in a stable at the end of a journey, broke loose and ran out on to the highway, and in *Gomberg v Smith*⁸² where the defendant's dog followed him out of his premises and on to the road. As a result of such decisions, it will not in some instances be possible to predict with certainty whether an animal's journey is to be regarded as having "started" or "ended" and hence whether the Rule will operate.⁸³

- (iv) *If the animal was engaged in activity* - It was suggested in *Bativa v West*⁸⁴ that the Rule might only apply to situations in which the straying animal had been left to its own devices and so would not confer an immunity where it escaped from an activity conducted under human control. Thus, in that case the defendant was held liable in negligence to a motorist injured when a pony escaped from a gymkhana the defendant was conducting and on to the adjacent highway. The existence of such an exception is also supported by remarks in *Hill v Clark*.⁸⁵

(f) Liability for Nuisance

2.24 It has been argued that if straying animals obstruct a highway and an accident results, liability can arise for the tort of nuisance although liability for the tort of negligence cannot arise because of the Rule. Recently, however, such an argument was rejected in the High Court⁸⁶ and would seem, therefore, to be no longer tenable.

(g) Areas of uncertainty

2.25 The Commission perceives the following areas of uncertainty -

⁸⁰ *Griffith v Turner* [1955] NZLR 1035.

⁸¹ [1935] All ER Rep. 9.

⁸² [1962] 1 All ER 725.

⁸³ See for example, the different opinions expressed by members of the Court of Appeal in *Wright v Callwood* [1950] 2 KB 515 as to whether the journey in that case had ended.

⁸⁴ [1970] 1 All ER 332.

⁸⁵ [1969] 2 NSW 733, 737.

⁸⁶ *SGIC v Trigwell* (1979) 26 ALR 67, 74 and 81.

- (i) When will an animal's dangerous habit be classified as a "special circumstance"? This is inherently a question of degree and incapable, in many cases, of determination prior to litigation.
- (ii) In certain instances it may be unclear whether a journey will be regarded as having "started" or "ended" for purposes of the exception relating to animals taken on to the highway.
- (iii) Is the exception to the Rule suggested in *Bativala v West*⁸⁷ good law in Australia?
- (iv) Although, as a result of the decision in *SGIC v Trigwell*⁸⁸ the Commission considers that the correct view is that the Rule does apply in Western Australia, the position will remain doubtful until and unless *Thomson v Nix*⁸⁹ is specifically overruled.

2.26 As a result of this uncertainty the Commission is of the opinion that it would be prudent for persons owning or responsible for the control of an animal, especially farmers and graziers having large numbers of livestock frequently left relatively unattended, to consider insuring against the event of being held liable to pay damages for injury or damage caused by the animal straying on to the highway.⁹⁰ Similarly, persons who already have public liability policies would be wise to review the scope of cover under those policies with reference to this possible liability. Although if the Rule does apply in Western Australia there is an area of immunity, in view of the high potential liability it may often be considered unwise to rely upon it in preference to taking out such insurance.

3. SUMMARY

2.27 The following duties are imposed upon the owner or person responsible for the control of an animal –

⁸⁷ [1970] 1 All ER 332.

⁸⁸ (1979) 26 ALR 67.

⁸⁹ [1976] WAR 141.

⁹⁰ See also paragraphs 5.5 to 5.9 below.

- (i) in the case of cattle, to prevent them trespassing on to another person's land;⁹¹
- (ii) in the case of a dangerous animal, to prevent it causing injury to another person or their property;⁹²
- (iii) in the case of a dog, to prevent it causing injury to another person or their property;⁹³
- (iv) in the case of cattle, to prevent them straying in a street or other public place;⁹⁴
- (v) in the case of a dog, not to permit it to wander at large.⁹⁵
- (vi) in the case of all animals, to keep them in a manner that does not unreasonably interfere with another person's occupation of land.⁹⁶

(In all these situations, liability for failing to fulfil the duty in question is strict).

- (vii) in the case of all animals, to take reasonable precautions to prevent them straying; on to a road;⁹⁷
- (vii) in the case of all animals, to take reasonable care to prevent them causing injury to another person or other property. With certain exceptions, however, this duty does not require the animal to be prevented from straying on to the highway.⁹⁸

2.28 Thus, despite the operation of the Rule the range of potential liability is wide. This serves to reinforce the Commission's view that, regardless of whether the immunity provided by the Rule is reduced or abolished altogether, it is generally speaking prudent, especially in the case of farmers and graziers owning large numbers of livestock, to consider liability insurance in respect of animals as an incident of ownership or control.

⁹¹ See paragraph 2.1 above.

⁹² See paragraph 2.2 above.

⁹³ See paragraph 2.21 above.

⁹⁴ See paragraph 2.7 above.

⁹⁵ *Dog Act 1976-1977*, s.32(1).

⁹⁶ See paragraph 2.5 above.

⁹⁷ See paragraph 2.8 above.

⁹⁸ See paragraphs 2.11, 2.12 and 2.23 above.

CHAPTER 3

THE INCIDENCE OF ROAD ACCIDENTS INVOLVING ANIMALS IN WESTERN AUSTRALIA

3.1 The following figures show, within various categories, the number of reported¹ road accidents involving animals that occurred in 1978 and 1979. The figures for accidents involving kangaroos² and the total number of accidents are included for purposes of comparison; all figures were supplied to the Commission by the Road Traffic Authority.

1978

PERTH STATISTICAL DIVISION³

Category	Total of all accidents	Kangaroos	Sheep	Cattle	Horses	Domestic	Others
Fatal accidents	143	0	0	0	0	0	0
Accidents causing personal injury	5 393	0	0	2	8	8	1
Accidents causing motor vehicle damage exceeding \$100	20 943	7	3	30	28	33	1

REST OF WESTERN AUSTRALIA

Fatal accidents	161	0	1	1	0	0	0
Accidents causing personal injury	1 816	23	3	17	6	4	6
Accidents causing motor vehicle damage exceeding \$100	4 947	199	45	97	18	7	9

¹ There is reason to suppose that many relatively minor accidents involving animals are not reported.

² A kangaroo would come within the ambit of the Rule only if it was found not to be dangerous) (see paragraphs 2.2 and 2.4 above) and was, prior to its escape on to the highway, subject to human control so that the person having that control was required by the law of negligence to exercise reasonable care.

³ The outer boundary of the Perth Statistical Division are the outer boundaries of the shires of Wanneroo, Swan, Mundaring, Kalamunda, Serpentine-Jarrahdale and Rockingham and the town of Armadale.

1979
PERTH STATISTICAL DIVISION

Category	Total of all accidents	Kangaroos	Sheep	Cattle	Horses	Domestic	Others
Fatal accidents	121	0	0	0	0	0	0
Accidents causing personal injury	5 026	0	0	1	4	16	0
Accidents causing motor vehicle damage exceeding \$100	19 207	15	3	11	25	40	3

REST OF WESTERN AUSTRALIA

Fatal accidents	136	0	0	1	0	0	0
Accidents causing personal injury	1 743	23	3	12	4	3	3
Accidents causing motor vehicle damage exceeding \$100	4 276	199	43	91	17	7	11

3.2 These figures show that in 1978 and 1979 together there were approximately 600 serious motor vehicle accidents involving animals within the scope of the Rule and that in three of these accidents a person was killed. It cannot be assumed, however, that in respect of all these accidents the Rule operated to prevent the recovery of compensatory damages for the damage or injury caused. The reason for this is that in some instances an exception to the Rule may have operated to permit a successful claim being brought against the person responsible for the control of the animal involved and in others damages may have been recovered, by a passenger for example, from the driver of the motor vehicle because that person was found to have been partly, at least, responsible for the accident.⁴ However, there are no figures available which indicate how often each of these possibilities in fact occurred.

⁴ In single vehicle accidents, passengers in the motor vehicle will be able to recover compensation from the driver if the driver was partly, at least, responsible for the accident. If more than one vehicle is involved in the accident the passengers of both vehicles will be able to recover compensation from the driver (or drivers) partly, at least, responsible for the accident and one driver may be able to recover from the other. For example, in *SGIC v Trigwell* (1979) 26 ALR 67, the driver and passengers of one vehicle were able to

3.3 If recently reported Australian cases are an accurate indication of the position in Western Australia in a large proportion of these accidents the Rule will have operated to prevent the recovery of compensation for damage to the motor vehicle,⁵ although the owner may have been indemnified under an insurance policy. Personal injury on the other hand is less likely to have gone uncompensated because of the availability of a remedy against the driver of the vehicle.⁶

recover damages from the driver of the other vehicle involved in the accident as the Court found that the accident was the result of the latter's negligence.

⁵ In two of the three most recent cases, the Rule prevented the recovery of such damages. In the third case, damages would probably have been recoverable by the driver of one of the two cars involved in the accident from the estate of the driver of the other vehicle. There are few reported cases almost certainly because people are being advised, on the basis of the Rule, that their claims would be unsuccessful and therefore should not be pursued.

⁶ See note 4 above.

CHAPTER 4

THE POSITION IN OTHER JURISDICTIONS

1. THE LAW, AND RECOMMENDATIONS FOR CHANGE, IN OTHER JURISDICTIONS

(a) Canada

4.1 The Rule does not apply in Canada having been rejected by the Supreme Court in *Fleming v Atkinson*.¹ In that case it was noted that the Rule originated at a time when the presence of animals on the highway did not greatly endanger the users thereof. The Court thought, however, that as the advent of fast moving vehicular traffic has made the presence of animals on the highway highly dangerous, the Rule was unsuited to modern conditions and should not therefore be applied.

4.2 In Canada, therefore, the ordinary rules governing civil liability apply to determine liability when a straying animal has caused an accident on the highway. In practice, most claims for compensation allege that the tort of negligence has been committed so that it is left:²

“ ...to the tribunal of fact to determine, with due regard to all the circumstances, including the nature of the highway and the amount and nature of the traffic that might reasonably be expected to be upon it, whether or not it would be negligent to allow a domestic animal to be at large”.

(b) New South Wales

4.3 The New South Wales Law Reform Commission in its report on *Civil Liability for Animals*³ recommended the abrogation of the Rule.⁴ Before making this recommendation, the Commission considered whether, because of varying conditions throughout New South Wales, different duties should be imposed in different types of localities. This idea was rejected, however, as being “...less satisfactory than the flexible tests which are to be applied

¹ (1959) 18 DLR (2d) 81. See also *Crosby v Curry* (1970) 7 DLR (3d) 188 and *Windrem v Hamill* (1978) 86 DLR (3d) 254; cf *Lane v Biel* (1971) 17 DLR (3d) 632.

² *Fleming v Atkinson* (1959) 18 DLR (2d) 81, 102 per Judson J.

³ (1970) LRC 8.

⁴ *Id.* paragraph 18.

under modern common law principles”.⁵ The Commission also rejected the suggestion, adopted in the Law Commission's report,⁶ that legislation abrogating the Rule specify some, at least, of the matters to be taken into account by courts when deciding whether there has been a failure to take reasonable care in a particular case. In the Commission's view “...to do so not only is unnecessary but might create difficulty which would not otherwise exist”.⁷

4.4 These recommendations were implemented by s.7 of the *Animals Act 1977*. It should be noted that this provision, as well as abrogating the Rule, also abrogated the other special rules applicable to animals described in paragraphs 2.1 and 2.2 above. As a result, liability for animals straying on to the highway in New South Wales is now governed only by the law relating to civil liability generally.⁸ In most cases in practice this will be the law of negligence.

(c) New Zealand

4.5 In 1975 the Torts and General Law Reform Committee of New Zealand, in its report on the *Law Relating to Liability for Animals*, recommended the abrogation of the Rule. Unlike most of the other law reform agencies that have made similar recommendations, the Committee did not simply suggest that the ordinary rules of negligence should be applied in place of the Rule. Instead, mindful of the evidentiary difficulties that would face a claimant when trying to prove negligence, it recommended:⁹

“...the enactment of provision under which the presence of unattended stock on the road should constitute evidence from which negligence may be inferred, except in an area in which it is not customary to fence”.

4.6 No action has been taken in respect of these recommendations.

(d) Queensland

4.7 In a working paper issued on 30 September 1977 the Queensland Law Reform Commission advocated the abolition of the Rule and recommended the enactment of an

⁵ Id. paragraph 20.

⁶ See paragraph 4.19 below.

⁷ *Civil Liability for Animals*, (1970) LRC 8 paragraph 22.

⁸ Section 10(1) of the *Animals Act 1977* does specify what is to be regarded as evidence of a breach of duty in certain cases. This provision does not apply to animals on the highway, however.

⁹ Page 52.

Animals Act based on the *Animals Act 1971* of the United Kingdom. These recommendations have not been implemented.

(e) Scotland

4.8 Although the Rule appears to have been adopted in *Fraser v Pate*,¹⁰ in more recent cases :It has been distinguished and the law of negligence applied instead. In *Gardiner v Miller*,¹¹ for example, Lord Thomson said that according to the law of Scotland:¹²

"...there is no absolute duty to fence or to keep gates shut so as to prevent domestic animals straying on to the public highway, but there may be, and in certain circumstances there is, a duty to take reasonable care to prevent such animals from straying on to the highway where there is a foreseeable risk of such straying causing injury to people using the highway".

4.9 According to His Lordship, this duty could¹³ be broken even when the escape on to the highway was facilitated by a third party leaving a gate open.

(f) South Australia

4.10 In 1969 the South Australian Law Reform Committee, having described the Rule as "anachronistic", recommended that:¹⁴

" ...the position should be that the liability of an owner in relation to his animals for not keeping them properly fenced in, penned up, chained or as the case may be should be determined in accordance with the ordinary law of negligence".

And that:

"...proof of the happening of the injury inflicted by the animal [should be made] *prima facie* evidence of negligence against the person for the time being who is or ought to have been in possession or control of the animal".

4.11 These recommendations have not been implemented.

¹⁰ 1923 SC 748.

¹¹ 1967 SLT 29;

¹² Id. 33; see also *Wark v Steel* 1946 SLT (Sh. Ct. Rep.) 17.

¹³ It was not decided whether, on the facts, the duty *had* been broken.

¹⁴ Seventh Report of the Law Reform Committee of South Australia, *Law Relating To Animals* (1969) paragraphs 3 and 7.

(g) Victoria

4.12 The Statute Law Revision Committee submitted a report on *The Law Relating to Animals on Highways* in November 1978. In this report, the Committee expressed the view that landowners¹⁵ should be made responsible for keeping their stock securely enclosed on their land. For this reason the Committee said that it could not support the Rule as it is presently being applied.¹⁶ However, the Committee rejected a suggestion that the ordinary common law rules of negligence operate instead, on the ground that this would place an unfair burden on landowners.¹⁷

4.13 The Committee recommended therefore that:¹⁸

"...the rule in *Searle v Wallbank* be retained only as a general principle and that legislation be introduced to specify under what circumstances a landowner could be held liable in cases of accidents involving his wandering stock".

4.14 The Committee suggested¹⁹ that in the following circumstances a landowner could be "deemed" to be negligent. If –

- "(i) he was aware that his livestock were on the road and had not taken adequate action to remove them; and
- (ii) he was aware that stock could stray on to the road and had not taken adequate action to prevent them or to remove the stock from the boundary paddock;".

4.15 According to the Committee,²⁰ a landowner should be regarded as being aware of the above situations if he –

- "(i) had been advised by the local council; and

¹⁵ Despite the title given to it, the report in its conclusions refers to "landowners" and "stock" rather than to "people" and "animals".

¹⁶ Paragraph 48.

¹⁷ Paragraph 51.

¹⁸ Paragraph 52.

¹⁹ Paragraphs 41 and 52.

²⁰ Ibid.

- (ii) had not taken sufficient action to either remove livestock or prevent them from wandering on to the road."

4.16 On the other hand, the Committee said²¹ that a landowner should not be liable for damage suffered by a road user if –

- "(i) the road user is negligent;
- (ii) the owner is unaware of the straying stock;
- (iii) the stock escaped due to a third party's negligence; and
- (iv) the stock escaped due to some 'Act of God';".

These recommendations have not been implemented.

(h) The United Kingdom

4.17 In 1952 the Goddard Committee²² recommended that the Rule be abolished and that, except where the highway passes over "common", "waste" or "unenclosed ground":²³

“... an occupier should be under a duty to take reasonable care that cattle or poultry lawfully on land in his occupation do not escape therefrom on to the highway, and that the occupier should be responsible for all damage caused to persons or chattels ... by cattle or poultry which escapes owing to a breach of that duty whether or not acting: in accordance with their ordinary nature...”

4.18 This recommendation was not implemented. In 1967, however, the Law Commission²⁴ also recommended that the Rule be abrogated so that people responsible for the control of animals could be held liable in negligence for accidents caused by their animals straying on to the highway if it could, be established that they had failed to exercise that control with reasonable care.

4.19 Apparently with the object of ensuring that in the application of the ordinary rules of civil liability the competing interests of highway users and animal keepers were properly considered, the Law Commission strongly suggested that when deciding whether there had

²¹ Ibid.

²² *The Committee on the Law of Civil Liability for Damage Done by Animals* 1953 Cmd. 8746.

²³ Id. paragraph 5.

²⁴ *Civil Liability for Animals*, 1967 Law Com. No.13.

been a failure to take reasonable care the courts should be required to have regard, among other matters, to:²⁵

- "(i) the nature of the land from which the animals strayed and its situation in relation to the highway;
- (ii) the use likely to be made of the highway at the time when the damage was caused;
- (iii) the obstacles, if any, to be overcome by animals straying from the land on to the highway;
- (iv) the extent to which users of the highway might be expected to be aware of and guard against the risk involved in the presence of animals on the highway;
- (v) the seriousness of any such risk and the steps that would have been necessary to avoid or reduce it."

4.20 However, the Commission recommended that, because the users of "common land" have no right to fence it, a person should not be regarded as committing a breach of duty to take care by reason only of placing animals on common land where it was lawful for that person to do so.²⁶

4.21 These recommendations were substantially embodied in the *Animals Act 1971*. The Rule was abolished by s.8(1) of the Act and s.8(2) provides:

"Where damage is caused by animals straying from unfenced land to a highway a person who placed them on the land shall not be regarded as having committed a breach of the duty to take care by reason only of placing them there if –

- (a) the land is common land, or is situated in an area where fencing is not customary, or is a town or village green; and

²⁵ Id. paragraph 57.

²⁶ Id. paragraph 44.

(b) he had a right to place the animals on that land."

4.22 In two notable respects the Law Commission's recommendations were not adopted. The Act does not require the court to have regard to certain specified matters in the manner suggested by the Commission; and s. 8(2) expands the category of land from which straying will not by itself be regarded as a breach of the duty of care.

2. EVALUATION

4.23 It is noted at the outset that whilst the Rule is still part of the law in New Zealand and all Australian jurisdictions except New South Wales, none of the law reform agencies that have examined the Rule have recommended its retention in its present form.

4.24 The approaches taken to liability for animals straying on to the highway in those jurisdictions in which the Rule does not apply and in the recommendations described above, can be categorised in the following manner. These approaches represent the principal forms abrogation or modification could take should it be decided not to retain the Rule, either at all or in its present form.

(a) Simple abrogation of the Rule

4.25 This appears to be the position in Canada and Scotland. Liability in these jurisdictions is governed by the rules of law described in paragraphs 2.1 to 2.6 and in paragraph 2.11 above and in theory therefore, people who own or who are responsible for the control of animals are subject to the various duties referred to in those paragraphs. However, in practice the duty to exercise reasonable care imposed by the law of negligence is by far the most important so that in the great majority of cases, when an accident is caused by an animal straying on to the highway, the claim brought in respect thereof will be based on negligence.

4.26 In neither Canada nor Scotland are the courts required by statute to give consideration to any specified matters when, applying the law of negligence, they decide whether or not there has been a breach of the duty of care. In practice therefore, in most cases the obligations and liabilities of people who own or who are responsible for the control of animals in these

jurisdictions are the same as, and are applied in the same manner as those applicable to people who own or control other dangerous or potentially dangerous things.

4.27 This was also the position in Western Australia created by the decision in *Thomson v Nix*.²⁷

(b) Abrogation of the Rule coupled with negligence criteria

4.28 The recommendations of the Law Commission and the Western Australian Law Reform Committee, and to a lesser extent, the *Animals Act 1971* (UK) and the recommendations of the Queensland Law Reform Commission fall into this category.

4.29 This approach, in addition to abrogating the Rule, seeks to ensure that the courts consider certain matters when determining liability in a particular case. The matters recommended²⁸ all appear to have been designed to bring to consideration factors favourable to the person responsible for the straying animal.

4.30 The Commission is mindful of the reservations expressed by the New South Wales Law Reform Commission about this approach.²⁹ However, having regard to the great variety in the means by which stock in particular are controlled and managed in Western Australia, the Commission is tentatively of the opinion that it would be desirable in any legislation abrogating the Rule specifically to require the courts, when determining liability, to consider, among other matters, the extent to which in the locality in question –

- (a) it was a common practice to erect fences or other barriers to keep animals off the highway;
- (b) other means of reducing the risk of accidents on the highway had been taken or could reasonably in the circumstances have been taken;
- (c) people using the highway would expect to encounter straying animals and could be expected to guard against the risk associated with their presence.

²⁷ [1974] WAR 141; see paragraph 2.18 above.

²⁸ See for example, the recommendations of the Law Commission, set out in paragraph 4.19 above.

²⁹ *Civil Liability for Animals*, (1970) LRC 8 paragraph 22; see paragraph 4.3 above.

4.31 As in the case of simple abrogation, this approach retains special rules applicable only to liability for animals. Implementation of the recommendations of the Western Australian Law Reform Committee would have left intact, for example, the common law rules described in paragraphs 2.1 and 2.2. Likewise the *Animals Act 1971* (UK), whilst abolishing those common law rules, created two special statutory obligations that are broadly equivalent.³⁰

(c) Abrogation of all special rules

4.32 The effect of s.7 of the New South Wales *Animals Act 1977* is to abrogate all the special rules that formerly operated only as part of the civil law relating to animals. The law in New South Wales therefore differs from that in Canada and Scotland in that in the latter jurisdictions liability can still arise for the torts described in paragraphs 2.1 and 2.2 above.

4.33 The Commission's terms of reference do not permit a thorough examination of the desirability of this approach. However, the possibility of abolishing the special rules and replacing them with the law of negligence in relation to the highway only, is considered in paragraph 4.42 below.

(d) Retention of the Rule but with exceptions

4.34 This is the approach advocated by the Victorian Statute Law Revision Committee.³¹ The Commission has formed the following tentative views about the effect of implementing this approach in the manner recommended by the Committee.

4.35 In certain parts of the country it would impose a greater obligation on landowners than would the mere abrogation of the Rule. The reason for this is that the Committee recommends that a landowner should be deemed³² to be negligent if he is aware that his stock could stray on to the highway and adequate steps are not taken by him to prevent this. This recommendation makes no allowance in respect of those areas where fencing is not customary or economically possible and where as a result, stock are known and permitted to wander on to the highway. Even in such areas, therefore, the landowner would be deemed to be negligent

³⁰ See s.2, liability for damage done by dangerous animals and s.4, liability for damage and expenses due to trespassing livestock.

³¹ See paragraphs 4.12 to 4.16 above.

³² See paragraph 4.14 above.

in an action brought by someone injured on the highway by the landowner's straying stock. On the other hand, the recommendations of the Goddard Committee, the Law Commission and the New Zealand Torts and General Law Reform Committee all provide in various ways, that where fencing is not customary, permitting stock to stray on to the highway will not necessarily amount to a breach of the duty of care owed to users of the highway. Similarly, the Commission is of the view that the courts, if left to apply the ordinary law of negligence, would also take account of local conditions when deciding what standard of care is required of persons responsible for the control of animals and whether that standard has been complied with.³³ Thus even without special provision being made, the abrogation of the Rule would not in all cases result in civil liability being imposed when animals stray on to the highway.

4.36 The creation of additional exceptions to the Rule would add to, rather than reduce, the already considerable uncertainty existing in the law. The Rule itself is an exception to the operation of the laws of negligence and nuisance. To specify circumstances in which the Rule does not apply would therefore be to create exceptions to an exception and circuitously to re-introduce the law of negligence and nuisance where those circumstances apply. The objective of this complicated exercise is to restrict the normal operation of the law of negligence and nuisance. If this is considered desirable, a simpler approach would be to abolish the Rule but to stipulate the situations in which permitting animals to stray on to the highway is not to be regarded as a civil wrong.

4.37 The Committee appears to recommend that road users in any way at fault should be unable to recover damages from the landowner. In the Commission's opinion it would be draconian to deprive road users entirely of a remedy against a negligent landowner merely because they also are in some way at fault. The Commission believes that the law relating to contributory negligence³⁴ applicable in other areas should also be applied when determining liability arising out of an accident caused by straying stock.

³³ This view was also expressed by the New South Wales Law Reform Commission in its report *Civil Liability for Animals* (1970), LRC .8 paragraph 21, and is supported by remarks in *Thomson v Nix* [1976] WAR 141, 147.

³⁴ Set out in the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*.

(e) Negligence with a shift in the burden of proof

4.38 The recommendations of the Torts and General Law Reform Committee of New Zealand and the Law Reform Committee of South Australia fall into this category.³⁵

4.39 There are two distinctive features about these recommendations –

- (i) the proposal to shift the burden of proof on to the people responsible for the control of animals so that, in the event of a *prima facie* case being established against them, they would be able to avoid liability only by proving that the accident was not the result of that control being exercised negligently;
- (ii) the proposal that liability for accidents caused by animals straying on to the highway be determined by the law of negligence only, so that liability could not arise under either of the special rules described in paragraphs 2.1 and 2.2 above or under the law of nuisance.

4.40 In relation to the first proposal the Commission acknowledges that a claimant may face difficulties when trying to prove that an animal's presence on the highway was the result of the negligence of the person responsible for it. However, these difficulties are not unique to claims of this nature and in the Commission's opinion there is no justification for making a special rule in relation to them. In any case, in relation to accidents occurring in certain localities at least, the doctrine of *res ipsa loquitur* may assist claimants. According to this doctrine, an inference of negligence may be drawn from the circumstances of the accident itself where a jury would be entitled to think that such an accident was not likely to occur without there having been a failure to take reasonable care on the part of the defendant.³⁶

4.41 The Commission is therefore tentatively of the opinion that, if the Rule is abrogated, abrogation should not be accompanied by any change in the burden of proof.

³⁵ See paragraphs 4.5 and 4.10 above.

³⁶ *Government Insurance Office of N.S.W. v Fredrichberg* (1968) 118 CLR 403.

4.42 The Commission sees merit in the second proposal. However, it notes that if implemented the proposal would lead to certain anomalies³⁷ unless the special rules were entirely replaced by the law of negligence, as indeed both Committees recommended.³⁸ The Commission is therefore tentatively of the opinion that unless the whole law relating to animals is reformed, this proposal should not be adopted.

³⁷ It would mean, for example, that if a person was injured by a dangerous animal whilst on private property the owner of the animal would be strictly liable but that if the injury was inflicted whilst the person was on the highway, the owner would be liable only if negligence was established.

³⁸ Law Reform Committee of South Australia, *Law Relating to Animals* (1969) paragraphs 1, 2 and 3; Torts and General Law Reform Committee of New Zealand, *Law Relating to Liability for Animals* pages 16-18, 34-36 and 52. The New South Wales *Animals Act 1977* abolished the special rule, but retained the law of nuisance. The proposal under consideration in the text, however, would make the law of nuisance also inapplicable to animals straying on to the highway.

CHAPTER 5 DISCUSSION

5.1 A number of matters now arise for discussion. Although these are distinct and it is helpful to examine them separately, there is an overlap between them which should not be overlooked. In particular, an evaluation of the arguments in favour of retaining the Rule in its present form necessitates, for that purpose, a view being taken of the law which might replace it.

1. SHOULD THE RULE BE ABROGATED?

(a) Arguments for retaining the Rule

(i) Abrogation would impose an unfair cost burden upon those responsible for the control of animals

5.2 If the Rule were simply abrogated¹ the scope of the existing duty of care² applicable to persons responsible for the control of animals would expand.³ The view has been expressed that this expansion of the duty of care would inevitably impose upon such persons new and additional expense in the following forms –

- (1) the cost of obtaining indemnity insurance⁴ ("public liability insurance") in respect of liability for breach of the duty;
- (2) the cost of taking measures to fulfil the duty;
- (3) the payment of damages in circumstances in which, at present, there would be no breach of duty;

¹ Alternatives to simple abrogation include, for example, replacing the Rule with strict liability for any injury or damage caused to users of the highway. This would place a greater burden on persons responsible for the control of animals than would simple abrogation.

² See paragraph 2.11 above.

³ If the Rule is simply abrogated liability for the tort of nuisance will also arise in relation to animals straying on to the highway. This issue is discussed in paragraphs 5.27 to 5.29 below. Also, existing forms of liability, such as for dangerous animals, would remain.

⁴ Under such an insurance policy the insurer is obliged to indemnify the person insured in the event of a successful claim being made against that person. The policy usually provides that if the claim is disputed by the insurer, the insurer will arrange the conduct of the defence and will be responsible for legal costs.

- (4) a combination of these.

5.3 The principal argument advanced to the Commission in favour of retaining the Rule is that, if it is retained, such expense will be avoided.

5.4 The Commission has carefully considered this argument, especially in relation to farmers and graziers. It is also sympathetic to the view that because of the importance of farming and grazing to Western Australia, an additional financial burden should not be imposed upon those engaged in this industry. However, the Commission is tentatively of the opinion that abrogation in the manner described in paragraph 5.2 will not in fact impose a significant financial burden on anyone and may not increase: at all the costs of many farmers and graziers currently employing sound farming and grazing practices.

Each of the suggested forms of additional expense will now be considered.

(1) The cost of insurance

5.5 Even if the Rule is retained, public liability insurance would still be an important consideration for farmers and graziers because –

- (a) the metes and bounds of the Rule are so uncertain that it cannot be relied upon for protection against liability;⁵ and
- (b) they are already under a number of civil duties in relation to their animals⁶ and property management⁷ which, if broken, could have serious financial consequences for them.

5.6 Consequently the cost of such insurance cannot properly be regarded as a cost that would only be incurred if the Rule was abrogated. Many farmers and graziers already have public liability insurance and are therefore substantially unaffected by the Rule. As far as they

⁵ See paragraphs 2.25 and 2.26 above.

⁶ See paragraphs 2.1 to 2.6, 2.11, 2.21 and 2.27 above.

⁷ For example, the occupier of land upon which a hazard to another person has arisen is under a duty to take what, in the particular circumstances, are reasonable steps to remove or reduce the hazard: *Goldman v Hargrave* [1966] 2 All ER 989.

are concerned the real beneficiary is their insurer who, in some cases, is currently able successfully to resist liability on their behalf only by reliance on the Rule.

5.7 In any case, the Commission has been informed by the Western Australian Regional Director of the Insurance Council of Australia that public liability insurance cover is available to farmers and graziers on relatively inexpensive terms. The following premiums, which are presumably tax deductible, were quoted as examples –

Amount of cover	Cost per annum
\$100,000	\$65.00
\$200,000	\$85.00
\$500,000	\$245.00

5.8 The Commission was also informed that abrogation of the Rule would not automatically lead to an increase in current premium rates, although these would be reviewed by insurers in the light of their subsequent claims experience. In this respect it should be noted that between 1976 and 1979 when the legal position was understood to be that the Rule no longer applied in Western Australia, premiums were not increased as a result and likewise in New South Wales, premiums have not increased as a result of the abrogation of the Rule in 1977.

5.9 The position is the same for many householders because of the widespread practice of including public liability insurance in home contents or home and contents insurance policies. If a householder with such a policy is held liable to pay damages in respect of injury or damage caused by an animal kept on the house property, that liability would be covered by the policy.

(2) The cost of precautionary measures

5.10 The only duty imposed by the law of negligence in relation to potentially harmful acts or omissions, is a duty to take reasonable care in the circumstances to avoid foreseeable injury.⁸ It does not impose an absolute obligation to ensure that injury does not occur.

⁸ *Donoghue (or M'Alister) v Stevenson* [1932] AC 562 esp. 580.

Precisely what this involves in a particular situation is determined by the circumstances of the case⁹ having regard, for example, to the social utility of the dangerous activity, the gravity of the risk of injury to the persons to whom the duty of care is owed, the cost of taking precautions to reduce or eliminate that risk and the common practice of others engaged in the same or similar activity.

5.11 Therefore, despite the terms in which the Rule is traditionally formulated¹⁰ its simple abrogation would not automatically impose upon persons responsible for the control of animals a duty to fence their land or in other ways to prevent the animals straying on to the highway.¹¹ Whether in a particular locality fulfilment of the duty to take reasonable care would require, for example, the erection and maintenance of fences to keep animals off the road or merely the erection of signs warning users of the highway of the presence of straying animals would be determined having regard to such factors as –

- (a) the amount and nature of the traffic using the highway;
- (b) fencing costs; in particular whether, having regard to the amount of fencing needed, it would be generally uneconomical for farmers or graziers to fence in their stock;
- (c) the cost and effectiveness of taking other measures to keep animals off the highway or to warn of their likely presence thereon;
- (d) common practice in the locality in relation to animal control and management;
- (e) the extent to which persons using the highway would expect to encounter straying animals.

5.12 Consequently, the Commission is of the view that simple abrogation of the Rule will, in practice, require no financial outlay by farmers and graziers additional to that already

⁹ *Thomson v Nix* [1976] WAR 141, 147.

¹⁰ See paragraph 2.12 above

¹¹ *Wark v Steel* 1946 SLT (Sh. Ct. Rep.) 17; *Gardiner v Miller* 1967 SLT 29; *Kelly v Sweeney* [1975] 2 NSWLR 720, 737-738.

required by sound farm or station management.¹² In some more closely settled areas, additional expenditure may be required to raise the standard of fencing to comply with these requirements and, at the same time, discharge the duty to take reasonable care.

(3) The payment of damages

5.13 In so far as it would remove a possible line of defence, abrogation of the Rule will certainly, in theory at least, increase the risk of persons responsible for the control of animals being held liable to pay compensatory damages for accidents caused by their animals straying on to the highway. However, if public liability insurance is obtained, the burden of this risk will in effect be shifted to the insurer. Although the insurer may require certain precautions to be taken against the risk materialising, there is no reason why these would be uneconomical.¹³

(ii) Straying may occur because fences are damaged or gates are left open by third parties

5.14 As emphasised above,¹⁴ if the Rule is simply abrogated people responsible for the control of animals will only be liable for injury or damage caused by their animals straying on to the highway if they have not taken reasonable care to prevent that injury or damage occurring. In a locality in which reasonable care requires the erection and maintenance of gates and fences, this duty will be fulfilled by the erection of fences and gates and the taking of reasonable steps to keep these in good repair. Consequently, subject to the exceptions mentioned below, if gates are left open or fences broken through no fault of the person responsible for the control of the animals restrained by them, and as a result animals that would otherwise have been kept off the highway stray thereon, that person will not be in breach of duty and therefore will not be liable in negligence if they cause injury or damage to users of the highway.¹⁵

¹² The New South Wales Law Reform Commission expressed a similar opinion in its report – *Civil Liability for Animals* (1970) LRC 8 paragraph 21.

¹³ See paragraphs 5.10 and 5.11 above.

¹⁴ Paragraphs 5.10 to 5.12 and see also *Crosby v Curry* (1969) 7 DLR (3d) 188.

¹⁵ *Wark v Steel*, 1946 SLT (Sh. Ct. Rep.) 17, 22; *Wolfe v Dayton* (1975) 55 DLR (3d) 552. Similarly in *McCafferty v Van Praet* (1973) 35 DLR (3d) 323 the owner of horses that escaped from a fenced corral over a snowbank caused by snow drifting against a fence was found not to have been negligent because this event was not reasonably foreseeable.

5.15 The only situations in which liability could arise after an animal's escape on to the highway has been facilitated by the act of a third party are: (a) when such an act was reasonably foreseeable by the person responsible for the control of the animal, and steps that could reasonably in the circumstances have been taken to guard against it were not taken; and (b) if, once it was discovered that the animal had strayed on to the highway, reasonable steps were not taken to remove it and place it back under restriction.

(b) Arguments in favour of abrogating the Rule

(i) Where the person responsible for the control of an animal has exercised that control negligently (a) it would enable the recovery of compensatory damages by anyone who suffers personal injury or property damage because of the presence of the animal on the highway and (b) where death has resulted, it would enable the recovery of compensatory damages under the Fatal Accidents Act 1959- 1973

5.16 Although in exceptional cases¹⁶ damages for personal injury and property damage are now recoverable, in general, because of the existence of the Rule, this is not possible. As a result, unless they are adequately insured privately, people who are injured¹⁷ or whose property¹⁸ is damaged must personally bear the loss they suffer, even in cases where the accident was in no way attributable to fault on their part.

5.17 The position is the same when the accident results in death. The *Fatal Accidents Act 1959-1973*,¹⁹ only permits damages to be recovered in respect of a person's accidental death if that person would have been able to recover damages for personal injury from the person responsible for the accident, had death not ensued. Consequently, in cases where the Rule operates, the dependants of a person killed in an accident caused by an animal straying on to the highway are unable to recover damages from the person responsible for the control of the animal, however careless that person may have been, because the deceased could not have done so.

5.18 In both these situations severe, and in some cases devastating, financial hardship may be caused to accident victims and their dependants. Abrogation of the Rule would, by allowing the recovery of damages in such cases, alleviate this hardship and place the burden

¹⁶ See paragraphs 2.21 to 2.25 above.

¹⁷ See for example, *Searle v Wallbank* [1947] 1 All ER 12 and *Ross v McCarthy* [1970] NZLR 449.

¹⁸ See for example, *Brisbane v Cross* [1978] VR 49 and *Bagshaw v Taylor* (1978) 18 SASR 564.

¹⁹ Section 4.

of each accident on the person responsible for it and through that person's insurer, on the community as a whole.

(ii) It should reduce the number of accidents attributable to presence of the highway of straying animals

5.19 The Commission acknowledges that the financial hardship described in paragraphs 5.16 to 5.18 above could be averted or minimised, even if the Rule is retained in its present form, by users of the highways themselves obtaining private accident insurance. However, the Commission is tentatively of the opinion that this would not be the most satisfactory solution to the problem because, whilst it would relieve the financial burden imposed upon individuals by the occurrence of accidents caused by the presence on highways of straying animals, it would do nothing to reduce the likelihood of such accidents occurring.²⁰

5.20 If the Rule is retained, the persons responsible for the control of animals would have little²¹ incentive to adopt measures to guard against their straying animals causing accidents on the highway, even though they are in the best position to do so, because generally they cannot be held liable in law for such accidents. If the Rule was abrogated, however, the incentive to take such measures would be increased considerably as this would be the only way in which liability for negligence could be avoided. To the Commission it seems reasonable to assume that an increase in the incentive to take measures to avoid accidents would lead to an increase in the number of such measures being taken and that this in turn would reduce the likelihood of accidents of the kind in question occurring. If this did happen, abrogating the Rule would in practice be less costly in both financial²² and human terms²³ to the community as a whole than retaining it and encouraging users of the highways to obtain private accident insurance.

²⁰ The Commission is also of the opinion that it would be unfair to require motorists to insure as they are less able than the persons responsible for the control of animals to reduce the risk insured against.

²¹ As there are exceptions to the Rule and because of uncertainty concerning these, there will be some incentive to take care. A feeling of moral responsibility may also act as an incentive.

²² The fewer accidents there are the fewer claims for compensation there will be. This will keep insurance premiums at lower levels.

²³ Although the Rule has been evaluated so far in financial terms only, it should not be overlooked that accidents also cause death and personal injury which cannot be viewed in this manner alone. In the Commission's opinion, as one solution to the problem, as against the other, offers the prospect of reducing the loss of life and the infliction of personal injury, then this by itself is a powerful reason for adopting it.

(iii) It would make the law more certain

5.21 The existence of the Rule makes the law uncertain in a number of respects.²⁴ These uncertainties would disappear if the Rule was abrogated.

(iv) It would bring civil and criminal liability more into line

5.22 The *Local Government Act 1960-1979*²⁵ and the *Road Traffic Code 1975*²⁶ make it an offence to permit cattle and animals respectively to stray on to a highway. If the Rule was abrogated, in more²⁷ situations than at present, people injured as a result of the commission of these offences would be able to obtain compensatory damages.

2. WHAT FORM SHOULD ABROGATION TAKE?

5.23 The Commission has identified in paragraphs 4.25 to 4.42 above the five principal ways in which the Rule could be modified or abrogated. Of these the Commission, as did its predecessor, tentatively favours the approach described as "abrogation of the Rule coupled with negligence criteria".²⁸ The advantages the Commission sees this approach having over the others considered, and the effect of implementing it, are set out below.

(a) The advantages of abrogation of the Rule coupled with negligence criteria

5.24 (i) It would remove the defects in the law, described in paragraphs 5.16 to 5.22 above, advanced as reasons for abrogating the Rule.

(ii) It could be implemented easily.

(iii) By specifying some of the considerations to be taken into account by the courts when determining liability in particular cases, it would ensure that regard is paid to the different means by which animals are controlled and managed in

²⁴ See paragraph 2.25 above.

²⁵ See paragraph 2.7 above.

²⁶ See paragraph 2.8 above.

²⁷ For the reasons set out in paragraphs 5.10 and 5.11 above liability for the tort of negligence would not arise in all cases in which the offences were committed.

²⁸ See paragraphs 4.28 to 4.31 above. Paragraph 4.30 gives examples of the kind of matters that could be specified as criteria.

various parts of Western Australia and to the competing: interests of users of the highways and the keepers of animals.

(b) The effect of abrogation of the Rule coupled with negligence criteria

5.25 (i) A person who suffers personal injury or property damage because of the presence on the highway of a straying animal would be able to claim damages from the person responsible for the control of the animal if it could be established that that person had been negligent. The precise nature of this liability is described in paragraphs 5.10, 5.11, 5.14 and 5.15 above.

5.26 (ii) A person who suffers personal injury or property damage because of the presence on the highway of a straying animal would also be able to claim damages from the person responsible for the control of the animal if it could be established that its presence on the highway amounted to a public nuisance.

5.27 Although the matter is not free from doubt²⁹ it appears that a straying animal could constitute a public nuisance on a highway if the animal's presence on the highway unreasonably prevents or hinders the movement along it of members of the public³⁰ or if the animal's presence creates a source of danger upon the highway, unreasonable in the circumstances.³¹ In both situations, claimants would also have to establish that they suffered particular damage in the sense of damage over and above that suffered by other users of the highway.

5.28 There is reason to believe, however, that where a straying animal has caused an accident on the highway, liability for public nuisance will only arise in cases where the tort of negligence has also been committed.³² As a result, the existence of a duty to avoid causing a

²⁹ Mason J. in *SGIC v Trigwell* (1979) 26 ALR 67, 81, appears to suggest that liability for nuisance can arise only in the first of the two situations described in the text.

³⁰ *Ellis v Banyard* [1911-1913] All ER Rep. 303; *SGIC v Trigwell* (1979) 26 ALR 67.

³¹ Due no doubt to the existence of the Rule there appears to be no direct authority for this proposition; however, it would seem to follow by analogy from the authorities dealing with other dangers on the highway such as *Dollman v Hillman* [1941] 1 All ER 355 (the presence of fat on the footpath) and *Dymond v Pearce* [1972] 1 All ER 1142 (parking a large vehicle on the highway for many hours).

³² See Newark, *The Boundaries of Nuisance* (1949) 65 LQR 480; *Winfield and Jolowicz on Tort*, 11th ed. 389-390; *Dymond v Pearce* [1972] 1 All ER 1142, 1147; cf. *Dymond v Pearce* [1972] 1 All ER 1142, 1147 and 1152.

public nuisance will not, in practice, impose any obligation on the people responsible for the control of animals additional to that imposed independently by the law of negligence.

5.29 (iii) It would permit, in appropriate cases, claims to be made under the *Fatal Accidents Act 1959-1973*.

5.30 (iv) It would leave unaffected the rules of law described in paragraphs 2.1 to 2.10.

5.31 (v) The law relating to contributory negligence set out in the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* would apply to reduce the damages recoverable by a person injured or whose property was damaged by an animal straying on to the highway when that person contributed in some way to the accident causing the injury or damage.

CHAPTER 6

ISSUES UPON WHICH COMMENT IS INVITED

6.1 The Commission would welcome comment, with reasons wherever possible, on any of the issues arising out of its terms of reference and in particular on –

- (a) Whether the Rule should be –
 - (i) retained in its present form,
 - (ii) modified, or
 - (iii) abrogated.

(paragraphs 5.2 to 5.22)

- (b) If it is thought that the Rule should be modified, in what respects should this be done?

(paragraphs 4.12 to 4.16 and 4.34 to 4.37)

- (c) If it is thought that the Rule should abrogated,
 - (i) should it be abrogated without negligence criteria being specified?

(paragraphs 4.25 to 4.27,5.10 and 5.11)

 - (ii) should abrogation be coupled with specified negligence criteria and if so, what should those criteria be?

(paragraphs 4.28 to 4.31 and 5.11)

 - (iii) should the person injured because of an animal straying on the highway be required to prove that the person responsible for the control of that animal was negligent or should the latter be required to prove that he was not?

(paragraphs 4.38 to 4.42)