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# Livestock Straying on Highways: Civil Liability for Damages

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## 1. INTRODUCTION

At common law, owners' or occupiers' liability for damage caused by animals straying upon highways is governed by an old English rule, now abolished by statute in England and Wales, and in most Australian jurisdictions, but not in Queensland. This e-Research Brief describes "the rule", known colloquially as the rule in *Searle v Wallbank*, reviews its historical origins and scope, and discusses its applicability to modern social and environmental conditions. Important provisions of English and Australian Acts abrogating the rule are compared and contrasted. Civil liability for damage is discussed; criminal liability is mentioned only incidentally in the context of statutory exceptions to the common law rule. If other aspects of the law relating to stock or to animals generally are of interest, the appropriate chapters in texts such as Fleming's *Law of Torts*, Trindade and Cane's *Law of Torts in Australia* or *The Law of Torts* by Balkin and Davis can be consulted.

Readers are advised that this e-Research Brief comprises only an overview of the topic. Its treatment is not in the nature of a discussion paper.<sup>1</sup>

## 2. THE RULE IN SEARLE V WALLBANK

According to English common law (discussed and affirmed by the House of Lords to be the settled law of England in *Searle v Wallbank* [1947] AC 341; (1947) 1 All ER 12), owners or occupiers of land adjoining a highway are *prima facie*<sup>2</sup> under no legal obligation to fence or to maintain<sup>3</sup> their fences<sup>4</sup> along the highway so as to prevent their animals from straying onto the highway, *nor* are they under a duty as between themselves and users of the highway to take reasonable care to prevent any of their animals, not known to be dangerous, from straying on to the highway. The rule, as formulated, thus has *two* limbs though it is said that the second limb effectively encompasses the first.<sup>5</sup>

The justification for the rule appears to be "mainly historical",<sup>6</sup> it being the case that:

... in early times, very few roads were fenced off from the adjoining land, and it would have been a considerable imposition on the owner of cattle if he had been compelled to prevent them from straying.

In addition, it appears that road users were usually taken to have accepted the risks inherent in road travel including the possibility of the presence of straying animals.<sup>7</sup>

The historical origins of the rule, in more recent times variously described as "archaic",<sup>8</sup> "anachronistic",<sup>9</sup> and "ill adapted to modern conditions",<sup>10</sup> thus pre-date:

- the enclosure of English forests, commons and waste land;
- the growth of roads and highways;
- the advent of bicycle and motor vehicle traffic;
- the speed of modern road traffic; and
- the serious consequences which may eventuate nowadays if animals and fast moving traffic collide on the highway.<sup>11</sup>

The text of the decision in *Searle v Wallbank* is not freely available online but is reported in the English *Appeal Cases*, an official law report series. The link provided in this e-Research Brief is to a copy of the case held in the Queensland Parliamentary Library's own Online Collections.

### 2.1 THE SCOPE OF THE RULE

Two classes of animals are known to English common law – animals *mansuetae naturae* and animals *ferae naturae*.<sup>12</sup> Immunity from liability under the rule in *Searle v Wallbank* is conferred only in relation to "domestic" or "tame" (*domitae* or *mansuetae naturae*) animals. In contrast, strict liability attaches at common law to keepers of "wild" (*ferae naturae*) animals<sup>13</sup> whether or not an animal's dangerous propensities are known to its keeper. In the case of domestic animals, an owner is under a duty to take steps to prevent it from endangering users of the highway where the animal is known to be "vicious"<sup>14</sup> or "mischievous".<sup>15</sup> *Brock v Richards* [1951] 1 KB 529. A mere proclivity to stray is not, however, according to *Brock v Richards*, a propensity sufficiently peculiar to, of itself, impose liability on the owner.

It is clear that the rule applies to animals such as cattle and horses<sup>16</sup> and the e-Research Brief's focus is on liability for *livestock* straying onto highways.

The rule in *Searle v Wallbank* applies not only to what are commonly known as highways, but also to lanes,

streets, roads, bridges and thoroughfares. It is not qualified by factors such as the nature of the highway,<sup>17</sup> the extent of traffic upon it, or topographical circumstances: *Brock v Richards* [1951] KB 529.

There may, however, be statutory exceptions to the rule though opinions differ as to the extent of liability under such provisions. In *Kelly v Sweeney* [1975] 2 NSWLR 720, 728-729 Hutley JA, who was of the majority, held that section 27C(7) of the *Main Roads Act 1924* (NSW),<sup>18</sup> which prohibited persons from driving any loose sheep, cattle, horses or other animals on or along a motorway, negated, by implication, *Searle v Wallbank's* assumption that the presence of cattle on highways is a normal incident that highway users have to accept. In contrast, in the Western Australian case of *Thomson v Nix* [1976] WAR 141, 146-147, it was held that statutory obligations to prevent cattle or stock straying or to keep in repair fences and gates separating property from roads and highways did not of themselves confer a private right of action against persons in violation thereof<sup>19</sup> although such provisions clearly indicated that straying stock should not normally be expected on highways.<sup>20</sup> Persons in breach of such provisions may, of course, be liable to criminal prosecution.<sup>21</sup>

(The current legislative provisions in Western Australia and New South Wales are discussed at greater length in Section 2 of this e-Research Brief.)

The rule in *Searle v Wallbank* does not apply where an individual brings an animal onto a highway: *Deen v Davies* [1935] 2 KB 282.

## 2.2 THE STATUS OF THE RULE

The exact status of the rule in *Searle v Wallbank* has been the subject of much controversy. The rule was affirmatively held to be part of the settled law of England in *Searle v Wallbank*, a case said to have been taken to the House of Lords to “test” the obligation of owners and occupiers of land adjacent to highways to exercise reasonable care to keep their beasts from straying onto the highway.<sup>22</sup> In contrast, it was held in *Gardiner v Miller* [1967] SLT 29 that, according to the law of Scotland, although there was no absolute duty to fence or to keep gates closed, the owner or occupier of land abutting a highway was under a duty to take reasonable care to prevent his domestic animals straying upon the highway where risk of injury to users of the highway was reasonably foreseeable. In *Fleming v Atkinson* [1959] 18 DLR (2d) 81, three of seven judges of the Full Supreme Court of Canada held that the conditions on which *Searle v Wallbank* was based did not apply in Ontario where highways were created by government action and not, as in England, by dedication.

In Australia, the principle in *Searle v Wallbank* was followed in *Brisbane v Cross* [1978] VR 49 but not in *Thomson v Nix* [1976] WAR 141 nor in *Jones v McIntyre* [1973] Tas SR 1. In Queensland, in *Stevens v Nudd* [1978] QdR 96, the applicability of the rule to Queensland was questioned. His Honour Mr Justice Andrews thought *Searle v Wallbank* should either (a) not be followed in Queensland or (b) its application should be restricted to its particular circumstances. Subsequently, in [State Government Insurance Commission v Trigwell and Others](#) (1979) 142 CLR 617; [1979] 26 ALR 67; [1979] HCA 40 in a decision which casts doubts upon the correctness of various earlier Australian decisions, the High Court of Australia (Murphy J dissenting) held that the rule in *Searle v Wallbank* had been correctly decided.<sup>23</sup> Whether the law in *Searle v Wallbank* should be altered and, if so, how was said to be a matter for the legislature not the courts. Although technically the *Trigwell* case held only that the rule formed, at settlement, part of the law of South Australia, Trindade and Cane believed the decision would “...probably...be treated as a general application”.<sup>24</sup> Selected articles discussing the High Court judgement or the rule generally are listed at the end of this e-Research Brief (not all are able to be accessed electronically).

The rule in *Searle v Wallbank*, as affirmed in *State Government Insurance Commission v Trigwell*, has subsequently been applied in Queensland in *Graham v The Royal National Agricultural and Industrial Association of Queensland* (1989) 1 QdR 624.<sup>25</sup>

Most recently, in 2006, the continued applicability of *Searle v Wallbank* in Queensland was confirmed in [Smith v Williams and Ors](#) [2006] QCA 439, a decision of the Queensland Court of Appeal. In this case, Smith (the plaintiff/respondent), the driver of a loaded fuel tanker, swerved to avoid hitting cattle on the Kennedy Highway, as a result of which the tanker overturned. Smith suffered personal injury in the accident and claimed against the occupiers (the defendants/appellants) of nearby property who carried on the business of grazing cattle, alleging that they were negligent in allowing the cattle, agreed by both parties to be owned by the occupiers, to stray onto the highway. Both McMurdo P and Holmes JA concurred with the reasons given by Keane JA in his judgment (accordingly, paragraph references which follow are to Keane JA’s judgment).

The Court held that if the occupiers had knowingly moved the cattle onto the highway (eg if they had herded the cattle across the highway) the immunity conferred by the rule in *Searle v Wallbank* would arguably not apply, as such a set of circumstances would not involve *straying animals* (see eg para 16). Highly relevant to the scope of the operation of the rule are considerations relating to the extent of control exercised by the owners of animals over their movements (para 16).

In Smith’s case, the driver was not able to convince the court that either the pleadings or the facts established

that:

- the cattle had been deliberately or knowingly directed by the occupiers to the road reserve, or
- that they were actively kept and maintained there, or
- that the occupiers brought the cattle, or caused them to cross, onto the highway.

Although the driver claimed that the occupiers had “allowed” or “permitted” the cattle to be on land with direct access to the highway (a road reserve which separated the occupiers’ property from the highway) and to cross and recross the highway, the Court held instead (see para 23) that the driver’s pleadings described “... a mere failure ... to take action to prevent the cattle from moving onto the road”. As liability stemming from this type of failure is exactly what the immunity in *Searle v Wallbank* covers, the occupiers were legally entitled to this immunity (paras 11-12; 23 and 26).

### 3. LEGISLATIVE REFORMS

The rule in *Searle v Wallbank* has been the subject of much criticism from jurists, academics and law reform agencies alike.<sup>26</sup> It has been abolished in England, from whence it derived, in New Zealand, and in all the Australian states and territories except for Queensland and the Northern Territory. These legislative changes are discussed in more detail below.

#### 3.1 LAW REFORM IN THE UNITED KINGDOM

In England and Wales,<sup>27</sup> the rule was abrogated by Section 8(1) of the [Animals Act 1971](#) which provides that:

So much of the rules of the common law relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take such care as is reasonable to see that damage is not caused by animals straying on to a highway is hereby abolished.

An exception to the general rule is contained in Section 8(2) which provides that, where damage is caused by animals straying from unfenced land onto a highway, there is no breach of duty by the person who placed the animals on the unfenced land “...by reason only of placing them there” if:

- the land is either common land, or is a town or village green, or is situated in a locality where it is not customary to fence; and
- the person had a right to place the animals on the land.<sup>28</sup>

The UK reforms followed the 1967 report of the Law Commission in England (Law Commission Report No 13, *Civil Liability for Animals*)<sup>29</sup> in which it had described the case for changing the principle behind *Searle v Wallbank* as “overwhelming” (para 40). The Commissioners continued:

The expanding needs of society as a whole must from time to time require some adjustment of the rights and duties of particular interests within that society; in the present context this means that the balance between the interests of the keepers of animals and users of the highway which was struck in the remote past under very different conditions cannot be wholly maintained in the twentieth century. We recognize however that any such readjustment must take account of the economic and social importance of the keeping of animals and of the burden and practical difficulties which may be involved in ensuring that they do not cause damage on the highway; but against these considerations must be weighed the danger to life, limb and property of those who use the highway. (para 40)

Earlier still in 1953, the *Report of the Committee on the Law of Civil Liability for Damage done by Animals* (the Goddard Committee) had recommended that: "On any view we think it desirable that the rule should be modified to meet modern conditions of traffic where a road runs through enclosed country".<sup>30</sup>

It also recommended that liability should depend on negligence and that:

... an occupier should be under a duty to take reasonable care that cattle ... 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 ... which escape owing to a breach of that duty whether or not acting in accordance with their ordinary nature ...<sup>31</sup>

#### 3.2 LAW REFORM IN AUSTRALIA

Provisions clearly modelled on Section 8(1) of the UK *Animals Act* are to be found in Part VIII of the Victorian [Wrongs Act 1958](#) inserted by the *Wrongs (Animals Straying on Highways) Act 1984* (Victoria), Part IV of the [Law of Animals Act 1962](#) (Tasmania) as amended by the *Law of Animals Amendment Act 1985*, and Section 3(1) of Western Australia’s [Highways \(Liability for Straying Animals\) Act 1983](#). In New South Wales,<sup>32</sup> South Australia<sup>33</sup> and the ACT<sup>34</sup> the rule in *Searle v Wallbank* has also been abrogated by statute. In Queensland,



to date, common law principles still apply. Nor does the common law rule appear to have been abolished in the Northern Territory.<sup>35</sup>

Below, in Sections 3.2.1 and 3.2.2, two quite different approaches to the drafting of provisions designed to abrogate the rule in *Searle v Wallbank* are contrasted. Commentary on the rule's continued application in Queensland is then outlined in Section 4 of the e-Research Brief.

### 3.2.1 Western Australia

According to Clarke, the Western Australian reforms are "... in some noteworthy respects...without precedent in this area of the law".<sup>36</sup> Under the [Highways \(Liability for Straying Animals\) Act 1983](#), Western Australian courts, in determining liability in tort for negligence for damage, including personal injury and death, caused by animals straying upon a highway, may take into account matters including:

- 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.<sup>37</sup>

On the advice of the Law Reform Commission and producer associations in West Australia, an upper limit on liability of \$500,000 for any one cause of action was included in the Act.<sup>38</sup>

### 3.2.2 New South Wales

The NSW legislation, contained in Section 7 of the [Animal Acts 1977](#) (reproduced below), is also worthy of further comment (though for different reasons).

Section 7 states:

General liability for damage by an animal

(1) Liability for damage caused by an animal depends on so much of the law relating to liability as does not include the common law abrogated by subsection (2).

(2) Any common law qualification, restriction, exclusion, extension or imposition of liability that had effect immediately before the commencement of this Act and related exclusively to liability for damage caused by an animal is hereby abrogated, whether or not:

- (a) it related to the nature or propensity of an animal or any class of animal, or knowledge of any such nature or propensity, or
- (b) it applied generally or in the circumstances of escape on to a highway or in any other particular circumstances.

For the purpose of s 7, "liability" refers to "liability in damages for tort": *Animals Act*, s 6.

In *Gregory's (Properties) Pty Ltd v Muir* (1993) 17 MVR 86, the NSW provisions were described as "somewhat ungainly";<sup>39</sup> however, both parties to the case accepted that s 7 had the effect of abrogating the rule in *Searle v Wallbank* so that the question to be determined was whether the owner of property adjoining a highway was negligent in permitting an animal to stray from its property onto the highway.<sup>40</sup>

In *Brown v Toohey* (1994) 35 NSWLR 417, however, Mahoney JA (at p 423) suggested that it was not clear how the relevant NSW provisions operate to achieve the effect of abrogating the common law rule (pp 422 and 423), although His Honour was of the view (see p 423) that it was indeed "... the intention of these provisions to alter the law applied by the House of Lords in *Searle v Wallbank*. ... The terms of the report of the New South Wales Law Reform Commission LRC 8: *Civil Liability for Animals* (1970); make this clear".

While Meagher JA at p 427 described the legislation as "cast in very convoluted form" but approached it as constituting an abolition of the rule in *Searle v Wallbank*, Mahoney JA (with whom Priestley JA agreed) expressed the view that:

"The Act does not indicate what assumptions (if any) are to be made as to the liability of a landowner to fence his land" (p 424) (ie he took the view that section 7 of the *Animals Act* did not establish that there is *invariably* a duty to fence land adjacent to a highway to prevent animals from straying). However, he continued: "But it assumes that failure to fence may, *where there is a duty of care upon the landowner*, constitute a breach of that duty". (p 424) (emphasis added)



His Honour elaborated as follows:

Not every landowner has a duty to fence his land against the escape of his stock onto the highway. Notwithstanding that the escape of stock from land to highway will always involve a measure of risk, in some cases that risk is of such dimensions that it must be accepted by those who travel highways. The duty of a landowner in the centre of Australia will be different from one near Blayney. (p 424)

(The reference to [Blayney](#) is to the scene of the accident, which occurred on a road leading to that town, situated in NSW's Central Tablelands area, south west of Bathurst.)

These comments appear to echo the views expressed by the New South Wales Law Reform Commission in its 1970 Report in which it recommended that the rule in *Searle v Wallbank* be abrogated (para 20), to be replaced by principles based upon modern common law (tort) principles including, in particular, a flexible test of negligence (paras 29-33). In reaching their recommendation, they also specifically noted (para 21) that:

A fear has been expressed in some quarters that a consequence of the abrogation in New South Wales of the decision in *Searle v. Wallbank* would be the imposition upon graziers of a duty to construct or maintain fences in cases and in circumstances where this would not be warranted economically. The fear is, however, unfounded. The principles of the tort of negligence would not, if the decision in *Searle v. Wallbank* were abrogated, impose a duty to fence or a duty to maintain fencing. What the tort of negligence would do, in respect of any risk to users of a highway which the presence of straying animals may cause, is to require of the keeper of the animals that he does not behave unreasonably towards users of the highway. It is obvious that, in some circumstances, this standard of reasonableness would require of a person keeping animals on land adjoining a highway that he take some positive step to prevent them creating a situation of danger by straying onto the highway; and, no doubt, a person who is subjected to that requirement may find that the most practical method of meeting it is by attending to fencing. For example, a person who owns cattle sale yards which abut upon a busy highway and who regularly conducts sales at those yards can hardly claim that he is meeting the standard of reasonable care if he takes no steps to prevent cattle blundering into the path of the motor traffic; and one of the practical precautions which he could take is to keep the fencing in reasonable repair. But, to go to the opposite extreme, it is equally clear that in remote, infertile areas, in which the roads are infrequently used, it may well be not unreasonable for a grazier to take no step at all towards discouraging his livestock from straying onto a highway or towards warning users of the highway of their presence. Most cases lie, of course, between such extremes. In some circumstances the mere displaying of a warning notice may be sufficient to satisfy the standard of reasonableness. In others some concern for gates or for fencing may be appropriate. We do not consider, however, that in any of the ordinary circumstances of grazing there is the slightest reason to apprehend that application of the general principles of the tort of negligence would require any higher general standard as to the extent or quality of fencing than that which would pertain, in any event, for the purposes of practical animal husbandry in such conditions. The realities as to usual practices and techniques, cost, the degree of likelihood of a real risk being created, whether it is probable that any such risk will be encountered only by persons likely to be on their guard against it and able to avoid it, are all relevant in the determination of whether the standard of reasonableness has been attained.

### 3.2 LAW REFORM IN NEW ZEALAND

In New Zealand, the rule was abolished by the [Animals Law Reform Act 1989](#), Section 5, which reflects the WA provision (enacted earlier) in relation to matters that may be considered in determining liability; the NZ provision does not, however, set a maximum amount that is recoverable for a single cause of action.

### 4. THE POSITION IN QUEENSLAND

As noted previously in Section 2.2, Queensland's courts have held that *Searle v Wallbank* continues to apply in this state. However, calls for law reform in this area go back several decades.

In a [Working Paper](#) (WP 18) which dates back to September 1977, the Queensland Law Reform Commission (QLRC):

- advocated ("wholeheartedly") (p 5) that the rule in *Searle v Wallbank* be abolished;
- concluded that legal liability for animals should be left to the general law of negligence (pp 3, 6), and
- recommended the enactment of an Animals Act based on the *Animals Act 1971* of the United Kingdom (p 8 and the Draft Bill that follows the text of the Working Paper).

The Working Paper included a Draft Bill reflecting its views. Modelled on the UK Act (above), with adaptation as required to Queensland statutory laws, the Bill did, however, depart from the UK legislation in that it allowed for potentially "politically delicate"<sup>41</sup> issues surrounding fencing by providing that actions for damage caused by animals should be heard by a judge only (on this latter point, see clause 12 of the draft Bill). This deviation reflects the reasoning of the Working Party at pp 5-6 of WP 18:

It is ... essential to consider the consequences of such legislation in a State of vast dimensions, with a substantial population of grazing animals, and an immense network of roadways. We do not anticipate that judges, faced with this problem will ineluctably hold that in all circumstances, owners of properties abutting any sort of roadway, must construct fences, and ensure that such fences are at all times properly maintained. This would impose an impossible strain upon an already economically threatened industry. We are confident that in case of case decisions, courts will 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 we can see no reason why land owners should, in all circumstances, be exempt from liability particularly, as the burden may be cushioned by public risk insurance.

... the law of negligence is now sufficiently flexible to be able to cope with the problems relating to animals as they arise, in so far as they involve damage or injury to person or property, without the aid of special rules imposing strict liability, depending on the kind of animal involved. ... we find it difficult to appreciate why landowners should be automatically exempt from liability by the application of the rule of *Searle v Wallbank*.

The QLRC recommendations have not been implemented; the rule in *Searle v Wallbank* continues to attract media attention, sometimes significant, in the wake of serious collisions involving straying livestock. Selected news articles dating as far back as 1990 are listed at the end of this e-Research Brief (although older published articles are not all available electronically).

## 4.1 HANSARD MENTIONS

Calls for the rule to be overhauled have also been the subject of a number of statements in Parliament by Members of the Queensland Legislative Assembly.<sup>42</sup> In 1994 Ken Davies MLA, then the Member for Mundingburra, discussed the rule and proposed a solution:

... I acknowledge and sympathise with the arguments put forward by the United Graziers Association. Queensland is a vast State. To require all of those properties to be fenced to try to overcome the problem would place a massive burden on that section of the community. Nevertheless, although that is true for the vast rural regions of the State, I believe that the average motorist is entitled to protection on major roads in semi-urban environments such as Herveys Range Road and Mount Low Parkway in Townsville/Thuringowa.  
...

I believe that there is a commonsense solution to the problem. We really have to be able to find a commonsense solution because ... many of the persons who have been involved in accidents as passengers in a vehicle which has collided with animals have been severely disadvantaged, in that the future of any legal proceedings is clouded because of the operation of this rule. As I have said twice, I understand and sympathise with the objections of organisations such as the United Graziers Association. The costs to graziers of having to fully enclose their properties would be horrendous and would ruin many businesses. I do not believe that that is a desirable outcome.

I believe that the potential liability could be covered specifically through the motor vehicle insurance system. In the case of motor vehicle accidents where the other party to the accident cannot be found, there is the Nominal Defendant Fund. If a vehicle collides with a fixed object such as a tree, there is still a remedy available, but when the accident involves a moving object such as a horse, there are problems because of the rule in *Searle v. Wallbank*. It seems to me that a facility such as the Nominal Defendant may be the answer. I am not saying that it has to be the nominal defendant, but I believe that that type of facility is the way to go.<sup>43</sup>

Most recently, the death of a young constituent prompted the following speech by MP Steve Rodgers (then the Member for Burdekin) to State Parliament in March 2003:

I rise to draw to the attention of the House a tragic crash that claimed the life of Bradley Phillips on 22 February this year. Brad was killed when his vehicle collided with a horse on the Bruce Highway near the town of Brandon in my electorate of Burdekin. The tragedy of Brad's accident was that he was a paraplegic and a member of the Sporting Wheelies. He represented north Queensland in wheelchair basketball and was an active member of the community.

Brad was born with spina bifida, and I saw him overcome obstacles and endure hardship as he grew up and made the most of his life, obtaining a driver[']s licence and watching his favourite basketball team, the Townsville Crocs, play.

We are all held responsible and liable for making sure that our dogs and other pets are properly secured in our yards and do not stray onto the roads or cause a nuisance. I have been made aware since Bradley's accident that there is a common law dating back to 1947 which states that owners of land abutting a highway do not have any legal obligation or duty to fence their properties. This law and other similar laws need urgent review. I have sought, with the assistance of the Attorney-General and his department and other relevant government departments, to progress changes to the laws regarding livestock on roads that may assist to prevent such accidents happening.

Since the accident people in my electorate have come forward with their concerns about livestock roaming on the roads in the region and possible further accidents. I will work with the Attorney-General and look at

what can be done to address the law in this regard.

I have worked with Brad's grandfather, Syd Hilton, a blacksmith at Kalamia sugar mill in Ayr. Until his death, Syd was always looking at ways to make Brad's life more normal. It took Brad a long time to recover from his grandfather's death. They were inseparable. Brad is now resting with his grandfather, Syd. My condolences go to Brad's mother, Judy, and other family members, relatives and friends. I will be there to assist them in whatever way I can. Brad will always be remembered. May he rest in peace.<sup>44</sup>

According to the RACQ Position statement (discussed further below), following the 2003 incident referred to in Parliament and quoted above, and another accident early in the same year, then Attorney-General Hon Rod Welford MP announced that a review of the law relating to straying livestock would be undertaken;<sup>45</sup> however, to date the position remains that the rule continues to apply in Queensland and there appear to be no immediate plans to legislate on this matter.

## 4.2 PETITIONS

To date, there do not appear to have been any petitions tabled in Parliament regarding the rule in *Searle v Wallbank*, in either paper or electronic format. However, an [online petition](http://www.gopetition.com/) calling for the abolition of the rule in *Searle v Wallbank* in Queensland was published on the GoPetition website: <http://www.gopetition.com/>, an international petition hosting portal, in August 2006.

## 4.3 THE RACQ POSITION

As the basis for the RACQ's submission to the review announced by the then Attorney-General Hon R Welford MP and referred to above, the RACQ formalised its position on the respective liability and rights of motorists involved in collisions with straying livestock on roads and the owners of such livestock. In its Position Statement, last revised in March 2004 and reproduced below, the RACQ appears to favour the WA legislative approach, details of which have been discussed in Section 3.2.1 of this e-Research Brief.

### 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.

## 5. CONCLUSION

According to *Salmond on Torts*, criticisms of the rule expressed in *Searle v Wallbank* date back to 1699.<sup>46</sup> Where the rule has been abrogated by statute, ordinary principles of negligence now apply. According to Clarke, this means:

... if an accident is caused by an animal straying on to a highway, the person responsible for its control will be liable for the tort of negligence if the accident was attributable, or at least partially attributable, to a breach on his part of the duty of reasonable care imposed by the law of negligence.<sup>47</sup>

Put in context, the duty is to take reasonable care to prevent the animal causing harm by straying upon the highway, not to prevent straying.<sup>48</sup> Thus, for example, in sparsely settled areas frequented by little traffic, the duty might be adequately discharged simply by erecting signs warning the public on the highway that livestock are likely to be encountered there.<sup>49</sup>

In Queensland, in 1977, the Law Reform Commission, in its [Working Paper](#) on *Civil Liability for Animals*, recommended the legislative abolition of "...anachronisms [such] as the rule in *Searle v Wallbank*"<sup>50</sup> in favour of provisions adapted from the English *Animals Act*. The recommendation has not been acted upon. Should further consideration be given at some future date to abolishing the rule in *Searle v Wallbank* in Queensland, a variety of models from all other states now offer guidance. Ideally, any proposals for change should be predicated upon factors including consultation with competing rural and urban interests, compilation of comprehensive road traffic statistics on motor vehicle accidents involving livestock, and research into the costs of fencing and of public liability insurance.

## LINKS AND FURTHER READING

### CASES

- *Searle v Wallbank* [1947] AC 341.
- [State Government Insurance Commission v Trigwell and Others](#) (1979) 142 CLR 617; (1979) 26 ALR 67; [1979] HCA 40
- [Smith v Williams and Ors](#) [2006] QCA 439.

### ARTICLES

- Kelly, Graham, "Animals and Highways: Misinterpreted cases and ill-conceived proposals", *Australian Law Journal*, 46(3), 1972, pp 123-130.
- Atkinson, Max, "Trigwell in the High Court – Judicial Opinion v Legal Principle: A Case of Bad Law from Bad Philosophy", *Sydney Law Review*, 9(3), March 1982, pp 541-567.
- Clarke, Philip H, "Liability for Animals on the Highway: Legislative Reform in the Commonwealth", *International and Comparative Law Quarterly*, 34(4), October 1985, pp 786-804.
- Richards, Keith E, "Wandering animals - the belated burial of *Searle v Wallbank*", *Law Institute Journal*, 60(7), July 1986, pp 690-693.
- Gibbs, Harry T, "[Judicial Activism and Judicial Restraint: Where does the balance lie?](#)", Constitutional Law Conference, UNSW, 20 February 2004.
- Gray, Anthony, "[Time to abolish the rule in \*Searle v Wallbank\* for Negligence and Nuisance Claims](#)", *Deakin Law Review*, 13(2) pp 101-130, available online at:
  - [http://www.deakin.edu.au/buslaw/law/dlr/pdf\\_files/vol13-iss2/4-gray.pdf](http://www.deakin.edu.au/buslaw/law/dlr/pdf_files/vol13-iss2/4-gray.pdf), or
  - [http://eprints.usq.edu.au/4777/2/Gray\\_Deakin\\_Law\\_Review\\_v13n2\\_VoR.pdf](http://eprints.usq.edu.au/4777/2/Gray_Deakin_Law_Review_v13n2_VoR.pdf).

### MONOGRAPHS

- Luntz, Harold and Hambly, David, *Torts: Cases and Commentary*, 5<sup>th</sup> edn, Lexis Nexis Butterworths, Australia, 2003, pp 827-828 and p 422.
- Fleming, John G, *The Law of Torts*. 9<sup>th</sup> edn, LBC Information Services, 1998, Chapter 18, "Animals", pp. 395-408, especially pp 407-408.
- Balkin, RP and Davis, JLR, *Law of Torts*, 2<sup>nd</sup> edn, Butterworths, Sydney, 1996, pp 253-254.
- Trindade, Francis and Cane, Peter, *The Law of Torts in Australia*. Oxford University Press, Melbourne, 1985, Chapter 21, "Animals", pp 565-579.

### NEWSPAPER ARTICLES

- Morley, Peter, "Farmers keep bull bar – Legal protection stays for stock that wanders on road", *Courier Mail*, 2 March 2007, p 25.
- Wex, Peter, "Lobbyists weigh in on cattle law", *Cairns Post*, 28 October 2005, p 15.
- Toulson, Andy, "Emotional bid to update road law", *Townsville Bulletin*, 28 March 2003, p 5.
- Seeney, Hayley, "Push for fencing crackdown after highway death", *Townsville Bulletin*, 27 February 2003, p 4.
- Taylor, Chris, "Road to disaster – Battler mum hit by cow of a law", *Sunday Mail*, 26 January 2003.
- Green, Glenis, "Stock laws on collision course with road rules", *Courier Mail*, 23 February 1998, p 6.

- Brennan, Donna, "Cows, horses to lose their right of way", *The Weekend Independent*, April 1997, p 7.
- Abbott, Greg. "Dad Fights Unfair Law", *Sunday Sun*, 3 June 1990, p 5.
- Macpherson, James. "Bereft Parents Decry Law over Fatal-Crash Horse", *Courier Mail*, 1 September 1990, p 10.
- "Land holders Under No Legal Obligations to Motorists", *Grazier: United Graziers' Association of Queensland*, January 1990, p 11.

## ENDNOTES

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- <sup>1</sup> This is an updated and extended version of a paper first published by the Queensland Parliamentary Library as an *Information Kit* in 1992 (Information Kit No 35).
- <sup>2</sup> Latin, meaning at first appearance: *CCH Macquarie Concise Dictionary of Modern Law*, CCH Australia, 1988, p 104.
- <sup>3</sup> “[o]n principle, where there is no duty to maintain a fence at all, it cannot be a breach of duty to maintain one which is imperfect”: *Searle v Wallbank* per Lord du Parc at p 361; *Brock v Richards* [1951] 1 KB 529, 535.
- <sup>4</sup> or to keep and maintain their hedges and gates. See the headnote to *Searle v Wallbank* and p 351 of the judgment.
- <sup>5</sup> Western Australia. Law Reform Commission, [Report, Liability for Stock Straying on to the Highway](#), Project No 11 – Part 2, June 1981, at pp 1-2, Footnote 4.
- <sup>6</sup> Ireland. Law Reform Commission, Working Paper No 3, *Civil Liability for Animals*, November 1977, para 111.
- <sup>7</sup> Ireland. Law Reform Commission, Working Paper No 3, *Civil Liability for Animals*, November 1977, para 111. The quotation is from Delany, 10 NILQ (*Northern Ireland Legal Quarterly*) 140 – see Footnote 183 of the Working Paper.
- <sup>8</sup> Sir Barnett Janner, *Parliamentary Debates: House of Commons*, vol 708, column 422, 10 March 1965. Janner introduced a private member’s Bill seeking to amend the English law.
- <sup>9</sup> John G Fleming, *The Law of Torts*, 7<sup>th</sup> edn, Law Book Company, Sydney, 1987, Chapter 18, “Animals”, pp 326-338, p 338.
- <sup>10</sup> *Hughes v Williams* (1943) 1 KB 574 per Lord Greene MR at p 576. In that case, decided in 1943, four years prior to the decision in *Searle v Wallbank*, Lord Greene had said:  
  
A farmer who allows his cow to stray through a gap in his hedge onto his neighbour's land, where it consumes a few cauliflowers, is liable in damages to his neighbour, but if, through a similar gap in the hedge, it strays on the road and causes the overturning of a motor omnibus, with death or injury to 30 or 40 people, he is under no liability at all. I scarcely think that that is a satisfactory state of affairs in the twentieth century. If it should prove not to be open to the House of Lords to deal with the rule, the attention of the legislature might be directed to considering the whole position with a view to ensuring the safety of His Majesty's subjects when they are lawfully using the highway. (at p 576)
- The extract above is quoted at page 2 of the Queensland Law Reform Commission’s 1977 Working Paper 18, *Civil Liability for Animals*.
- <sup>11</sup> See, for example, Ireland. Working Paper No 3-1977, *Civil Liability for Animals*, November 1977, para 111; *State Government Insurance Commission v Trigwell* [1979] HCA 40 per Stephen J at para 2, per Mason J at para 18.
- <sup>12</sup> Herein the literal translations from the Latin are followed, though Fleming says the proper distinction is between dangerous animals and animals which are normally harmless: JG Fleming, *The Law of Torts*, 7<sup>th</sup> edn, p 331.
- <sup>13</sup> eg lions, tigers, bears, dingoes. See Fleming, 7<sup>th</sup> edn, pp 331-332; Western Australia. Law Reform Commission, [Report, Liability for Stock Straying on to the Highway](#), Project No 11 – Part 2, June 1981, p 7, Footnote 9.
- <sup>14</sup> “Vicious” means of a savage disposition, or having a propensity to attack persons: *Brock v Richards* [1951] 1 KB 529.



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<sup>15</sup> According to *Brock v Richards*, an animal, although it is not savage, may be dangerous because of its frolicsome behaviour in which case the owner, if he knows of its dangerous propensities, is under a duty to guard against them.

<sup>16</sup> See Law Reform Commission of Western Australia, Project No 11 – Part 2, [Report, Liability for Stock Straying on to the Highway](#), June 1981, p 3. However, the rule is not viewed as being limited to livestock (or “farm animals”) and has been applied, for example, to domestic dogs. See the English case of *Ellis v Johnstone* [1963] 2 QB 8; here, for the purposes of application of the rule, “domestic” (versus “wild”) animals were judicially defined to include horses, cattle & sheep, pigs & poultry, and dogs & cats; see also *Brisbane v Cross* [1978] VR 49, 63. Accordingly, case law, especially older case law, in this area may include references to both livestock such as cattle as well as references to other, domesticated, animals often kept as pets, such as dogs and cats. In relation to the latter, a range of regulatory requirements have subsequently been implemented and/or home and/or contents policyholders may be indemnified should such an animal escape and cause damage: see variously RACQ, Economic and Public Policy, [‘Liability for damage caused by livestock straying on roads’](#), *Policy Analysis* 7/05, at p 4 of 5; the comments of the Western Australian Law Reform Commission in the course of its Project No 11 – Part 2, [Report, Liability for Stock Straying on to the Highway](#), June 1981, p 33, Footnote 17; Brisbane City Council, ‘Facilities and Recreation’, ‘Animals’, ‘Keeping a Dog’, downloaded 18 February 2010; RACQ, ‘Animals on the Road Laws’, downloaded 9 July 2008.

The position in such cases is outside the scope of this e-Research Brief and is not discussed further.

<sup>17</sup> Thus the rule applies equally to both rural and urban highways.

<sup>18</sup> The *Main Roads Act 1924* has since been repealed by the *State Roads Act No 85 of 1986* (NSW).

<sup>19</sup> A similar conclusion has been reached in the English cases of *Davies v Davies* [1975] 1 QB 172, 177-178 and *Heath’s Garage Ltd v Hodges* [1916] 2 KB 370.

<sup>20</sup> In Queensland itself, legislation enacted in 2002 gave local governments the power to require landowners to construct and maintain stock-proof fencing to prevent stock entering a part of a stock route network; penalties apply for non-compliance without reasonable excuse: [Land Protection \(Pest and Stock Route Management\) Act 2002 \(Qld\)](#), Chapter 3, Part 6. The legislation also provides penalties for allowing stock to stray onto the stock route network: [Land Protection \(Pest and Stock Route Management\) Act 2002 \(Qld\)](#), Chapter 3, Part 7, Division 4, s 166. (See also [Land Protection \(Pest and Stock Route Management\) Regulation 2003](#) and Queensland Department of Environment and Resource Management (DERM), [‘Queensland Stock Route Network’](#), especially ‘What are stock routes?’) The RACQ has commented that 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; however, it should be noted that the Explanatory Notes to the legislation when introduced focus on sustainable management as the key objective underlying the provisions relating to the stock route network. The legislation does not appear to have been considered by the courts. See variously RACQ, Economic and Public Policy, [‘Liability for damage caused by livestock straying on roads’](#), *Policy Analysis* 7/05, at pp 2 & 4 of 5; Land Protection (Pest and Stock Route Management) Bill 2001, [Explanatory Notes](#) (online) or the hard copy *Queensland Explanatory Notes for Bills Passed during the Year 2002*, prepared for publication by the Office of the Queensland Parliamentary Counsel, Volume 1, pp 196-259 (see eg pp 196 & 232); DERM, [Queensland Stock Route Network Management Strategy 2009-14](#) and *Queensland Legislation Case Annotations*, May 2009 Consolidation and December 2009 Supplement, LexisNexis Butterworths, Australia.

<sup>21</sup> Law Reform Commission of Western Australia, [Report: Liability for Stock Straying on to the Highway](#), Project No 11 – Part 2, June 1981, pp 9-12.

<sup>22</sup> *Searle v Wallbank* per Lord Porter at page 355. The rule had been earlier approved in *Heath’s Garage Ltd v Hodges* [1916] 2 KB 370 but criticised in *Hughes v Williams* [1943] 1 KB 574. See the case notes in the *Australian Law Journal*, vol 32, 20 February 1959, pp 326-327.

<sup>23</sup> In His Honour Mr Justice Murphy’s view, the exception in *Searle v Wallbank*: “...permit[ted] graziers, by unreasonable behaviour, to harm road users with impunity, making them a privileged class in the judge-made law. It elevat[ed] the economic interests of graziers over the safety as well as the economic interests of road users”: *SGIC v Trigwell* [1979] 26 ALR 67, 90.

<sup>24</sup> FA Trindade and P Cane, *The Law of Torts in Australia*, Oxford University Press, Melbourne, 1985, Chapter 21, “Animals”, pp 565-579, p 577. This question has effectively been settled in all other states except Queensland by statutory abrogation of the rule, discussed further in Section 3 of the e-Research Brief.



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<sup>25</sup> In *Graham v The Royal National Agricultural and Industrial Association of Queensland* (1989) 1 QdR 624, the plaintiff's palomino quarterhorse colt, entered as a show exhibit, died from injuries it received after escaping from an enclosed yard in the Exhibition grounds onto a highway, and colliding with a vehicle driven by a Mr Oldewolbers. The plaintiff sought damages from both the Royal National Association (RNA) which ran the Exhibition (the "Ekka") (the first defendant) and Mr Oldewolbers (the second defendant), alleging negligence on the part of both.

Mr Oldewolbers, in turn claimed damages, by way of counter-claim, from the RNA, likewise alleging negligence. In its defence, the RNA sought to rely on the rule in *Searle v Wallbank*. However, the RNA was held to be liable to Mr Oldewolbers because the exception to the immunity, namely, prior knowledge of a vicious or mischievous propensity on the straying animal's part, applied. According to Connolly J, the phrase "vicious or mischievous propensity" meant that the animal was more likely than the general run of animals to escape on to the highway. Although the colt was not vicious, it was held it had a natural tendency with other animals on site to be over-active and unsettled in unfamiliar circumstances.

In Connolly J's opinion, the RNA was: "... not in the simple position of an occupier of land whose stock stray onto the highway" (p 632). Rather, the RNA:

... concentrate[d], for a short period, large numbers of livestock, many of them large animals, in a relatively small and congested area, all of them, of the nature of things, well fed and under-exercised. The colt in question was not of a vicious propensity but it obviously shared with all, or at least most of the large animals on the site during the Exhibition, a natural tendency, in these circumstances, to over-activity and to be unsettled in unfamiliar surroundings. In my opinion the phrase, "vicious or mischievous propensity" is a way of expressing a notion that the animal in question is more likely than the general run of animals, to get onto the highway as well, of course, as being more likely to cause injury or damage once there. (p 632)

Ultimately, Connolly J entered judgment upon the counterclaim for Mr Oldewolbers against the RNA, together with judgment for the plaintiff against the RNA.

<sup>26</sup> The rule in *Searle v Wallbank* has been the subject of law reform reports in numerous Commonwealth and other jurisdictions. See eg:

- United Kingdom. Goddard Committee, *Report on the Law of Civil Liability for Damage done by Animals*, Command Paper 8746, 1953; United Kingdom. The Law Commission, *Civil Liability for Animals*, 1967, Law Commission Report No 13.
- Scotland. Law Reform Committee, Twelfth Report, 1963, Command Paper 2185.
- Ireland. Law Reform Commission. [Working Paper No 3](#), *Civil Liability for Animals*, November 1977; [Report on Civil Liability for Animals](#), (LRC 2-1982), May 1982.
- New Zealand. The Torts and General Law Reform Committee, *Law Relating to Liability for Animals*, 1975.
- Queensland. *Working Paper on a Bill to Remove the Anomalies Presently Existing with Respect to Civil Liability for Animals and to Rationalize the Existing Rules of the Common Law for Damage Done by Animals*; QLRC [WP 18](#), September 1977.
- New South Wales. *Liability for Animals*, [Working Paper No 5](#), June 1969; *Civil Liability for Animals*, Law Reform Commission [Report No 8](#), June 1970.
- Victoria. Statute Law Revision Committee, *The Law Relating to Animals on Highways*, 1978.
- South Australia. *Law Relating to Animals*, Law Reform Committee Report No 7, 1969.
- Western Australia. Law Reform Commission, Project No 11 – Part 1: *Liability for Stock Straying on to the Highway*, [Working Paper](#), June 1970; [Report](#), December 1970.
- Western Australia. Law Reform Commission, Project No 11 – Part 2: *Liability for Stock Straying on to the Highway*, [Working Paper](#), August 1980; [Report](#), June 1981.
- Tasmania. *Animals Straying upon the Highway*, Law Reform Commission Report No 27, 1980.

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- <sup>27</sup> The *Animals Act 1971* (UK) was stated not to apply to Scotland and Northern Ireland: Section 13(4). However, *Searle v Wallbank* had been disapproved of in Scotland in any case in *Gardiner v Miller* [1967] SLT 29. See Ireland. Law Reform Commission. [Working Paper No. 3, Civil Liability for Animals](#), November 1977, para 117 and *State Government Insurance Commission v Trigwell* [1979] HCA 40 per Murphy J, para 8.
- <sup>28</sup> According to *Salmond on Torts*, Section 8(2) meets the needs of owners and occupiers of unfenced land “usual in the north of England”: RFV Heuston and RS Chambers, *Salmond and Heuston on the Law of Torts*, 18<sup>th</sup> edn, Sweet and Maxwell, London, 1981, pp 323-324.
- <sup>29</sup> See [State Government Insurance Commission v Trigwell](#) [1979] HCA 40 per Mason J at para 26.
- <sup>30</sup> United Kingdom. *Report of the Committee on the Law of Civil Liability for Damage done by Animals*, January 1953, p 5 quoted in [State Government Insurance Commission v Trigwell](#), [1979] HCA 40 per Murphy J, para 14.
- <sup>31</sup> United Kingdom. *Report of the Committee on the Law of Civil Liability for Damage done by Animals*, January 1953, p 5 quoted in [State Government Insurance Commission v Trigwell](#), [1979] HCA 40 per Murphy J, para 14.
- <sup>32</sup> [Animals Act 1977 \(NSW\)](#).
- <sup>33</sup> [Civil Liability Act 1936 \(SA\)](#) Part 3 (ie s 18). The provision was originally in the *Wrongs Act 1936* (SA) s 17A. The *Civil Liability Act 1936* was formerly the *Wrongs Act 1936*.
- <sup>34</sup> *Civil Law (Wrongs Act) 2002* (ACT), s 214. The provision was originally in the *Civil Liability (Animals) Act 1984* (ACT). The *Civil Liability (Animals) Act 1984* was repealed by the *Civil Law (Wrongs) Act 2002*.
- <sup>35</sup> The only statutory provisions apparently of relevance are those contained in the [Pounds Act 1930 \(NT\)](#), Section 35 of which provides that owners of cattle found straying, at large, tethered or depastured in streets or other public places within towns or townships are liable to a maximum fine of \$500. In Trigwell’s case, Mason J took the view that the same type of provisions (ie impounding legislation) in SA law had *not* had the effect of displacing the common law because they did not confer a private right of action upon a person injured by the straying cattle (para 24). His Honour drew a distinction between such legislation and legislation requiring and encouraging the fencing of properties which was relied upon by the court in the Western Australian case of *Thomson v Nix* (1976) WAR 141 to justify its conclusion that the rule in *Searle v Wallbank* was not part of the law of Western Australia (para 24).
- <sup>36</sup> PH Clarke, “Liability for Animals on the Highway: Legislative Reform in the Commonwealth”, *International and Comparative Law Quarterly*, 34(4), October 1985, pp 786-804, p 788.
- <sup>37</sup> See s 3, especially sub-section 4, read in conjunction with s 2 (the interpretation section). In the United Kingdom, the Law Commission, in its report on *Civil Liability for Animals*, had earlier recommended that negligence criteria similar to those included in s 3(4) be adopted (see para 57), but this was not done.
- <sup>38</sup> See section 3(5) and *Hansard*, Debates of the Western Australian Legislative Assembly, 27 October 1983. This limit is still in force in the Act today.
- <sup>39</sup> *Gregory’s (Properties) v Muir*, at p 88.
- <sup>40</sup> *Gregory’s (Properties) v Muir*, at p 88.
- <sup>41</sup> QLRC WP 18, p 8.
- <sup>42</sup> See Mr Hayward MLA, [Hansard, 28 August 1990](#), pp 3122-3123; Mr Davies MLA, [Hansard, 22 November 1994](#), pp 10593-10595; Mr Tanti MLA, [Hansard, 4 September 1996](#), pp 2482-2484; Mr Rodgers MP, [Hansard, 25 March 2003](#), p 777.
- <sup>43</sup> Mr Davies MLA, *Hansard*, 22 November 1994, pp 10593-10595.
- <sup>44</sup> Mr Rodgers MP, *Hansard*, 25 March 2003, p 777.

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- <sup>45</sup> RACQ, Economic and Public Policy, '[Liability for damage caused by livestock straying on roads](#)', *Policy Analysis* 7/05, at p 1 of 5.
- <sup>46</sup> RFV Heuston and RS Chambers, p 323. Tort law expert and academic, Professor John Fleming, has described the House of Lords' affirmation, in *Searle v Wallbank*, of the old English common law rule as having been made in "a singular pique of antiquarianism": JG Fleming, *The Law of Torts*, 7<sup>th</sup> edn, pp 337-338 and again in the 9<sup>th</sup> edn, LBC Information Services, 1998, p 407.
- <sup>47</sup> PH Clarke, p 790.
- <sup>48</sup> PH Clarke, p 791 and Law Reform Commission (WA) *Report on Liability for Stock Straying on to the Highway*, Project No 11 – Part 2, June 1981, p 6.
- <sup>49</sup> See for example, the comments by PH Clarke, p 791. See also the views expressed by the NSWLRC in its Report No 8 and by Mahoney JA in *Brown v Toohey*, both quoted in Section 3.2.2 of this e-Research Brief.
- <sup>50</sup> QLRC WP 18, p 1.