LIABILITY FOR STRAYING STOCK

In Western Australia in 1965 there were 127 road accidents involving motor vehicles and straying stock. Of these 16 occurred within the metropolitan area, 111 without. In each case someone was injured or property was damaged in excess of $50. Statistics are not available to show the exact location of each accident or the time of day at which it occurred. Over the last five years these accidents have been on the increase, and there is nothing to suggest that the pattern will not continue.[1] This presents a problem not only for those concerned with road safety and insurance but for lawyers as well, because a consideration of the law operating in this area can hardly lead to complacency.

The theme of this paper is liability for straying stock, and with a few digressions it is so limited. It does not attempt a general coverage of liability for animals.[2] It resists the temptation to explore such questions as whether an African grass monkey, twelve inches in height, is *ferae naturae* or *mansuetae naturae*,[3] whether liability exists when a person suffers a heart attack on seeing an escaped tiger on the top of his bed,[4] or whether a claim exists by a pedestrian whose eye is injured by a splinter of glass ejected from a stationary car by a dog jumping about.[5]

---

1 The following table is based on the Road Traffic Accident Statistics prepared by the Commonwealth Bureau of Census and Statistics. Rather surprisingly none of these accidents involved a fatality.

			Metropolitan		Country	
Year	Metro.	Country	Killed	Injured	Killed	Injured
1961	7	87	—	1	—	13
1962	10	90	—	1	—	10
1963	12	103	—	5	—	10
1964	21	90	—	1	—	6
1965	16	111	—	1	—	11

2 See generally WILLIAMS, LIABILITY FOR ANIMALS; FLEMING, LAW OF TORTS, ch. 16 (3rd ed.).

3 Brook v. Cook, (1961) 105 Sol. Jo. 684.

4 Behrens v. Mills Circus, [1957] 2 Q.B. 1, 17.

5 Fardon v. Harcourt-Rivington, (1932) 146 L.T. 301.

It is stock (which in this context I take to mean horses, cattle and sheep) with which this paper is concerned, and basically in two situations only. If stock stray they do so on to someone else's land or on to a road. If in so doing they cause damage to persons or to property, questions of liability must be answered. The answers are to be found mainly in the common law, although Western Australia has some relevant statute law.

The common law of England began to develop in what was primarily an agricultural community, and the law relating to liability for straying stock reflects this. Twentieth century Australia differs from thirteenth century England in at least two respects. The first is the presence of fences and the second is the presence of motor vehicles. A law which was satisfactory for a community lacking either is not necessarily satisfactory for a community possessing both.

Liability for animals in the broad sense may fall under one of three heads:

(a) *scienter,* i.e. liability for dangerous animals;
(b) cattle trespass;
(c) liability for negligence.

SCIENTER

It is of course true that a particular horse, cow or sheep may have a dangerous disposition, for example, a propensity to bite, kick or butt.[6] In that event, on proof of *scienter* (that is knowledge of the disposition) the owner is subject to strict liability for damage done. This, however, is unusual in the case of stock and will not be considered further.

CATTLE TRESPASS

By the fourteenth century it was well established that if stock strayed into neighbouring land their owner was held strictly liable for damage. At first liability existed only for damage caused to the surface of the land and to crops. Later it was extended to injury to the plaintiff's stock, whether directly by attack or indirectly by infection or misbreeding. Later again it was extended to injury to the plaintiff himself.[7]

---

[6] In UPFIELD, THE WILL OF THE TRIBE (Pan Books Ltd. 1965), one of the characters is a ram which has been trained to butt on a signal from a small child.

[7] Wormald v. Cole, [1954] 1 Q.B. 614.

Professor Fleming regards it as 'still an open question whether liability extends beyond damage that is natural to the species of the trespassing animal.'[8] If, for instance, a trespassing horse collides with the occupier in the dark, that is "natural"; if, however, it savages the occupier, that is not "natural" and may require proof of *scienter*.

The Goddard Committee reporting to the Lord Chancellor of Great Britain in 1952 took rather a different view of the law, limiting the action for cattle trespass to damage done to land and crops but excluding damage for personal injuries except on proof of *scienter*.[9] *Wormald v. Cole*[10] was decided subsequently, however, and the action for cattle trespass now embraces injury to the person as well as damage to property.

The principle has unreal refinements. If stock are lawfully on a road and stray into adjoining land, a claim for damages depends on negligence. If stock stray from land across a road into adjoining land, the action for cattle trespass applies. If stock stray on to the road and cause damage there, the action for cattle trespass has no application nor may an action for negligence. More of this hereafter.

There exists in this area some uncertainty as to the type of damage recoverable, and, as will be suggested, this state of the law constitutes an artificial hazard to users of the road. The Goddard Committee was clearly minded to recommend the abolition of the action for cattle trespass, leaving liability to be determined according to the ordinary rules of negligence. Finally it decided to leave well alone. This conclusion was reached, no doubt, on the view which the Committee took of the existing law.

Although liability for cattle trespass is strict, it admits of some limitations. Default on the part of the plaintiff, the act of the third party, for instance in leaving a gate open, and an act of God, as where a storm damages fences, are probably available as defences.

There is one further aspect to be considered, namely the existence of fencing legislation. Under the Cattle Trespass Fencing and Impounding Act 1882-1952 (W.A.), a curious miscellany, certain limitations were imposed on the right to recover damages where a trespass had occurred on land not enclosed by a "sufficient fence". But in *Kratochvil v. Dall*[11] Wolff J. (as he then was) held that these limita-

8 FLEMING, op. cit., n. 2., at 322.

9 Report of the Committee on the Law of Civil Liability for Damage done by Animals (H.M.S.O., London, 1953).

10 [1954] 1 Q.B. 614.

11 (1955) 57 W.A.R. 55.

tions only applied to a claim for damages under the Act and did not affect the right of a plaintiff to sue at law.

This Act was repealed, in part, by the Local Government Act 1960 (W.A.) and, as to the balance, by the Dividing Fences Act 1961 (W.A.). The Local Government Act contains a series of provisions dealing with cattle trespass and impounding. "Cattle" is defined by reference to various animals including all those normally regarded as constituting stock.

If stock are found trespassing on land the owner or occupier of the land may claim damages for trespass according to a scale set out in the Act.[12] The scale prescribes varying rates depending on the animals concerned and the nature of the land, for instance, whether it is enclosed or unenclosed. As well, the owner or occupier may impound the stock and in addition to damages for trespass may claim poundage.[13] "Damages" in this context are arbitrarily determined by the scale, and have no relation to loss actually suffered. Probably with a view to removing the uncertainty which surrounded the Cattle Trespass and Impounding Act, at least before *Kratochvil v. Dall,*[14] section 485 of the Local Government Act makes clear that the provisions of the Act just mentioned 'do not affect the right of the owner of the land from suing in a court of competent jurisdiction . . . for any other damages in respect of trespass by cattle on the land.'

The law in this area seems to be functioning reasonably satisfactorily.

NEGLIGENCE

In *Donoghue v. Stevenson,* Lord Atkin said: 'The rule that you are to love your neighbour becomes in law you must not injure your neighbour.'[15] If the occasion had been appropriate he might have added 'nor must your stock', for, with one notable exception, owners have a duty to ensure that their stock do not cause damage due to want of care on their part. This obligation is independent of any liability which may exist under the rules relating to cattle trespass or scienter.

Thus when a farmer was taking a young unbroken colt along a road on a dark night and it suddenly ran across the road into a cyclist, judgment for damages was given against the farmer.[16] Like-

12 s. 463.
13 s. 460.
14 (1955) 57 W.A.R. 55.
15 [1932] A.C. 562, 580.
16 Turner v. Coates, [1917] 1 K.B. 670.

wise, when a cow, being driven along a road after dark without warning to users of the road, moved from the verge into a car, the farmer was held liable.[17] Again, when a farmer rode his horse to town and tethered it insecurely, with the result that it got free and collided with a woman walking on crutches along the street, damages were awarded against the farmer.[18]

The problems in these cases were essentially the same as in any action for negligence. Was there a duty of care? Was it breached? Did damage result? But in one area the ordinary principles of negligence, which usually are capable of adaption to meet new situations, have fossilized into a rigid rule of law.

SACRED COWS?

In several decisions the English courts have held

(a) that the owner of land adjoining a road is under no legal obligation to users of the road to keep his fences so that animals do not stray on to the highway; and

(b) that he is under no obligation as between himself and users of the road to take reasonable care to prevent animals, not known to be dangerous, from straying on to the road.

Bearing in mind that, if stock are brought on to a road and through negligence cause damage, the owner will be liable, bearing in mind also that, if stock do in fact stray on to the road and thence on to someone else's land, causing damage, the action for cattle trespass is available, it may be asked—how did this strange immunity come about?

Although the principles invoked by the English courts are ancient, the cases themselves are quite modern. In *Heath's Garage Limited v. Hodges*[19] the Court of Appeal held that there was no duty on the owner or occupier of land adjoining a road to fence it so as to prevent sheep from straying on to the road and causing damage. In this case there was a collision, in daylight, between sheep and a car. The court seems to have accepted this as so well established at common law that it was really beyond argument. In an extraordinary appeal to the past Neville J. said that 'the experience of centuries has shown that the presence of domestic animals upon the highway is not inconsistent with the reasonable safety of the public using the road.'[20]

---

17 Griffith v. Turner, [1955] N.Z.L.R. 1035.
18 Deen v. Davies, [1935] 2 K.B. 282.
19 [1916] 2 K.B. 370.
20 Id. at 382.

His Lordship was not entirely unmindful of the advent of the horseless carriage, but he concluded that 'those who use them now take the roads as they find them and themselves put up with such risks as the speed of their cars occasion not only to themselves but to others.'[21] The principle was accepted by the House of Lords in *Brackenborough v. Spalding Urban District Council*,[22] although it should be emphasized that this case turned on a somewhat different fact situation, and it was not necessary for that court to examine the principle in any detail. Lord Wright commented that 'this rule, so far as I know, is modern.'[23]

In *Hughes v. Williams*[24] the Court of Appeal had to consider a claim by a plaintiff who had been driving his car along a road at night and collided with two horses which had passed through an open gate from a yard on the defendant's land on to the road. Liability was refused because the Court of Appeal regarded itself as bound by what Lord Greene stated to be 'a rule of law which I dislike, but which has been stated or assumed to exist in several pronouncements of this court.'[25] His Lordship considered that the rule was ill adapted to modern conditions and appealed to the House of Lords or to the Legislature to remedy the position.

The opportunity came in 1947, but Lord Greene's *cri de coeur* was unanswered. In *Searle v. Wallbank*[26] the House of Lords was called on to determine an appeal by a miner who, riding his bicycle at night with restricted lighting due to blackout regulations, collided with a horse which had escaped from a nearby field. In reaching its decision the Court had before it the earlier criticisms which had been made of the rule, but nevertheless concluded that it was still good law.

Viscount Maugham referred to the history of highways in England, the slow and gradual process over the centuries whereby land was enclosed and the piecemeal manner in which many highways were laid out, often on unenclosed land, to show that English law recognises no obligation on the owner of land vis-a-vis road users to fence his land. His Lordship went on to say that, before the advent of fast traffic on made-up roads, no duty to road users to prevent animals straying on the highway could have existed. That, together with the

21 Ibid.
22 [1942] A.C. 310.
23 Id. at 321.
24 [1943] 1 K.B. 574.
25 Id. at 575.
26 [1947] A.C. 341.

difficulty of formulating a rule that would meet all situations, led him to conclude that no such obligation exists even now. Likewise (although this is a gross oversimplification of their judgments) the other members of the Court relied largely on the fact that no such duty existed in earlier times.

The fallacy of this, as Professor Goodhart has pointed out,[27] is that 'what began as a conclusion of fact, i.e., that there was no danger in letting domestic animals stray on the highway, has in time become a rule of law, i.e., that there is no duty to keep domestic animals from straying there. As long as the conclusion of fact and the rule of law were not in conflict,' he added, 'this shift from the one to the other passed unnoticed.' With modern traffic conditions the fallacy of the move has been exposed.

Leaving aside the question of binding authority,[28] it would be open to an Australian court to recognise this and to apply to such a situation the ordinary rules of negligence. This would mean determining in an individual case whether, having regard to such factors as the situation of his land, the extent to which the locality was built up, the volume and type of traffic using the road, an owner of land was under an obligation to take care that his stock did not stray on to the road. The result may well be that such an obligation would be found to exist on the owner of the land in an outer suburban area, or in farming land close to a town, but that it may be found not to exist in the case of an owner of a station property in the Northwest.

The objection may be raised that uncertainty will be introduced into the law. There are two answers to this. The first is that uncertainty is not too high a price to pay; the other is that the uncertainty will be no greater than in many other areas to which negligence is applied. To quote Professor Goodhart again: 'This would, of course, leave certain intermediate cases along the dividing line, but this is inevitable because there can be no clear division between negligence and non-negligence in law because there is no such division in fact.'[29]

At this stage it is appropriate to refer to two statutory provisions. The first is Regulation 1702 of the Road Traffic Code 1965 (W.A.) which makes it an offence for the owner of an animal to allow it to

(a) stray on to or along a road;
(b) be unattended on a road; or
(c) obstruct any portion of a road.

---

27 (1950) 66 L.Q.R. 456.
28 See Skelton v. Collins, (1965-66) 39 A.L.J.R. 480.
29 (1950) 66 L.Q.R. 456, 459.

It is a defence that the owner 'took all reasonable precaution to prevent the animal from straying on to or along, being unattended on, or obstructing any portion of, the road.' Again, by section 484 of the Local Government Act 1960, if the owner of cattle permits them to stray or be at large in a street or other public place he commits an offence. Although it may not be possible to argue that these sections in themselves create any civil remedy, they could be relied on in an action for negligence as evidence of the standard of care which the community demands.

It would also be open to an Australian court to distinguish *Searle v. Wallbank*[30] as did some of the judges of the Canadian Supreme Court in *Fleming v. Atkinson.*[31] Judson J., with whom Fauteux and Abbott JJ. concurred, considered that in the English case there were two reasons implicit in the rejection of the duty to prevent stock from straying on to the road. The first was based upon the history of highways in England which came into being largely as a result of dedication of land by adjoining owners who gave to the public no more than a right of passage which had to be exercised subject to the risk of straying animals. The second was that already mentioned, namely the fact situation existing until the advent of fast moving traffic. Judson J. dealt with the second consideration as did Professor Goodhart. He dealt with the first by pointing out that in Ontario (the province involved in the appeal) the public right of passage on highways was never subject to the risk of straying animals for the historical reasons given in *Searle v. Wallbank.* For the most part the highways of Ontario did not come into being as a result of dedication. The same can be said of Western Australia for, generally speaking, roads have been created pursuant to statute, for instance under the Main Roads Act 1930-1961 or the Local Government Act 1960-1964. It is apparent from the provisions of the Road Traffic Code and Local Government Act previously referred to that the Legislature shows no particular tenderness to stock on the highway nor has it accorded them any rights superior to those of other users of the road.

It was Lord Atkin again, in another case and in another context,[32] who said: 'When these ghosts of the past stand in the path of justice clanging their medieval chains the proper course for the judge is to

30 [1947] A.C. 341.
31 (1959) 81 D.L.R. 2d 81, 97-98.
32 United Australia Ltd. v. Barclays Bank Ltd., [1941] A.C. 1, 29.

pass through them undeterred.' The immunity conferred on the owner of stock which stray on to the highway and cause damage is such a ghost. The legislature or an appropriate court, if and when the occasion presents itself, should see that it is decently but effectively exorcised.

JOHN TOOHEY*

* *Solicitor and Barrister of the Supreme Court of Western Australia.*