ANIMALS, HIGHWAYS AND LAW REFORM

STATE GOVERNMENT INSURANCE COMMISSION v. *TRIGWELL*

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INTRODUCTION

The rule in *Searle* v. *Wallbank*[1] ('The Rule') has been the subject of considerable controversy in Australia for many years. There has been, for example, widespread disagreement as to whether the Rule in fact operates in Australia[2] and on the assumption that it does, disagreement as to the existence and scope of the exceptions to it.[3] Unfortunately, except in New South Wales where the Rule was abrogated in 1977,[4] these disagreements have tended to distract attention from what is ultimately the more important question, namely, should the Rule be abrogated, modified or retained as part of the law in its present form? In this context therefore the decision of the High Court in *State Government Insurance Commission* v. *Trigwell*[5] is to be welcomed as it may put an end[6] to these disagreements sufficiently to allow the final and proper determination of this issue.

THE EFFECT OF THE RULE IN SEARLE v. WALLBANK

A person responsible for the control of an animal is subject to a

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1 [1947] A.C. 341.

2 In Reyn v. Scott [1968] D.C.R. (N.S.W.) 13, Jones v. McIntyre [1973] Tas. S.R. 1, Garry Willis Transport v. W. S. Lock and Sons [District Court of South Australia 1973, unreported], Thomson v. Nix [1976] W.A.R. 141 it was held that the Rule did not apply in New South Wales, Tasmania, South Australia, and Western Australia respectively. However, in Brisbane v. Cross [1978] V.R. 49, and Bagshaw v. Taylor (1978) 18 S.A.S.R. 564 the Full Court of the Supreme Courts of Victoria and South Australia respectively held that the Rule did apply in those States. In Kelly v. Sweeney [1975] 2 N.S.W.L.R. 720 the New South Wales Court of Appeal divided on the issue.

3 Contrast the opinions of Hutley J. A. in Kelly v. Sweeney [1975] 2 N.S.W.L.R. 720 and McInerney J. in Brisbane v. Cross [1978] V.R. 49 concerning whether the location of the land from which the animal strayed could affect the operation of the Rule.

4 Animals Act 1977, s.7. This Act adopted the recommendations of the New South Wales Law Reform Commission in its report, *Civil Liability for Animals* (1970) L.R.C. 8.

5 (1979) 26 A.L.R. 67.

6 It should be noted that in so far as the High Court is still not the only tribunal able to finally declare the common law for Australia, its ability to put an end to common law disagreements is not absolute.

number of obligations[7] imposing strict liability and to a general obligation to exercise that control with reasonable care.[8] The effect of the Rule is to create an exception to the latter obligation by providing that the occupier of land adjoining a highway[9] owes no duty to the users thereof to fence the land or in other ways take reasonable care to prevent the animal straying on to the highway. The Rule is invariably expressed in terms that would restrict its operation to the occupiers of land adjoining a highway and it is generally thought of as benefiting only farmers and graziers. However, it is clearly established[10] that the Rule is not limited in either of these ways and although in practice its significance in urban areas has been reduced by the Dog Act[11] 1976-1977, nevertheless it applies to all persons in control of an animal, regardless of the location of their land. Consequently, subject to a number of exceptions, anyone who suffers personal injury or damage because of the presence on the highway of a straying animal has no remedy against the person from whose control it strayed.

STATE GOVERNMENT INSURANCE COMMISSION v. *TRIGWELL*

(a) The facts

In this case the plaintiffs, members of the Trigwell family, were injured when the motor vehicle in which they were travelling along a main highway was struck by a motor vehicle being driven in the opposite direction by a Ms Rook. Ms Rook was killed in the accident. Immediately prior to the accident Ms Rook collided with two sheep which had strayed on to the highway from adjoining land occupied by the second defendants; the Kerins. But for the presence of these sheep on the highway the accident would not have occurred.

The Trigwells sued the State Government Insurance Commission (SGIC), as Ms Rook's compulsory third party insurer, and the Kerins. Against the SGIC it was alleged that Ms Rook had been guilty of negli-

7 To prevent 'cattle' trespassing, to keep a dangerous animal under control and to keep the animal in a manner that does not unreasonably interfere with another person's occupation of land.

8 Fardon v. Harcourt-Rivington [1932] All E.R. Rep. 81; Draper v. Hodder [1972] 2 All E.R. 210; Thomson v. Nix [1976] W.A.R. 141.

9 'Highway' in this context means any road, street or place open to the public for passage.

10 See, for example, Hall v. Wightman [1926] N.I. 92; Brock v. Richards [1951] 1 All E.R. 261 at 264.

11 Although at common law dogs are within the Rule, s.46(2) of the Dog Act 1976 (W.A.) in effect abrogates it as far as they are concerned.

gent driving; against the Kerins it was alleged that they had been negligent in allowing the sheep to stray on to the highway or alternatively, that the presence of the sheep on the highway constituted a nuisance for which they were responsible. Both the SGIC and the Kerins resisted these claims. The SGIC also issued a third party notice against the Kerins seeking a contribution from them in the event of its being held liable to the Trigwells.

In the Supreme Court of South Australia King J. decided that Ms Rook had been guilty of negligent driving and that therefore the Trigwells were entitled to recover damages from the SGIC. The claims in nuisance and negligence against the Kerins, however, were dismissed. According to King J. the Kerins were not liable in nuisance because the presence of two sheep on the highway could not constitute a public nuisance, and they were not liable in negligence because, as a result of the Rule, they owed no duty to the Trigwells to take reasonable care to prevent the sheep straying on to the highway. For these reasons the Kerins were also not liable to contribute to the damages awarded against the SGIC.

From this decision the SGIC appealed, and the Trigwells cross-appealed, to the High Court. The SGIC argued that the finding of negligence against Ms Rook was wrong and both the SGIC and the Trigwells challenged the decision that the Kerins were not liable in negligence.

(b) The decisions of the High Court

A majority in the High Court dismissed both the appeal by the SGIC against the decision in favour of the Trigwells, and the appeal by the SGIC and the cross-appeal by the Trigwells against the decision in favour of the Kerins. Although certain aspects of the trial judge's reasoning were criticised, four justices[12] agreed with his Honour's conclusion that the accident was caused by Ms Rook's negligent driving, thereby disposing of the SGIC's appeal against the Trigwells. A differently constituted majority[13] decided that the Kerins were protected by the Rule and that therefore the appeal by the SGIC and cross-appeal by the Trigwells against them should also be dismissed.

The importance of the case lies in the reasoning behind the latter decision. For convenience, this will be analysed in a manner corre-

12 Gibbs, Stephen, Mason and Murphy JJ.; Barwick C.J. and Aickin J. dissented on this issue.

13 Barwick C.J., Gibbs, Stephen, Mason and Aickin JJ.; Murphy J. dissented on this issue.

sponding to the several discrete issues discussed by both the majority[14] and Murphy J.

(c) The issues

(i) Was the Rule part of the law of South Australia?

It is a well established[15] common law[16] principle that to the extent they are reasonably capable of application, the common law and statute law of England become on settlement part of the law of any British settled colony and remain so until abrogated by statute. As the rule in *Searle* v. *Wallbank* is a development of the English common law and not indigenous to South Australia, the first issue to be determined in *Trigwell* was whether this principle operated to introduce it into the law of that State. The justices forming the majority had little difficulty in deciding that it did.[17] However, there appears to have been a difference of opinion between them as to why this happened which, although not important in *Trigwell,* could have a significant bearing on the outcome of other cases.

According to the view apparently adopted by Mason J.,[18] a particular common law rule will only be introduced into the law of a colony if it was part of the English common law at the time the colony was settled. Therefore in the present case his Honour decided that the Rule became part of the law of the colony of South Australia only because he first concluded that it formed part of the law of England in 1836.[19] On this

14 Mason J. gave the leading judgment for the majority concerning the effect and operation of Searle v. Wallbank. The other members of the majority discussed particular issues at some length.

15 See Cooper v. Stuart (1889) 14 App. Cas. 286 at 291; Duggan v. Mirror Newspapers (1978) 22 A.L.R. 339 and Roberts-Wray *Commonwealth and Colonial Law* (1966), 539-541.

16 The Australian Courts Act 1828, s.24, puts this rule into a statutory form for New South Wales, Victoria, Queensland, Tasmania, Northern Territory and the Australian Capital Territory. Although as far as the English statutes are concerned the rule is put into a statutory form in Western Australia and South Australia by s.43 of the Interpretation Act 1918-1975 and s.48 of the Acts Interpretation Act 1915-1975 respectively, the common law rule still governs the reception of English common law in those states.

17 Murphy J. appears to have accepted for the purpose of argument that the Rule became part of the law of the colony of South Australia on settlement. However, his Honour was of the view that this was irrelevant to the question of whether it has remained so. The answer to this question, according to his Honour, depends upon whether the Rule is suitable to present conditions in South Australia, which he concluded it is not; see (1979) 26 A.L.R. 67 at 93.

18 (1979) 26 A.L.R. 67 at 78-79.

19 The date of settlement for South Australia was taken to be the 28 December 1836. In Western Australia it is 1 June 1829; this is also the date specified in s.43 of the Interpretation Act 1918 for the reception of the statute law of the United Kingdom. In the other Australian jurisdictions it is the date the Australian Courts Act was passed.

view it follows that a principle such as that in *Donoghue* v. *Stevenson*,[20] which had not been developed when the Australian colonies were settled, will become part of the law of the various States and Territories only if the courts having the power to declare the law in those jurisdictions elected to adopt it. Support for this conclusion can be found in the reasoning of the Full Court of the Supreme Court of Western Australia in *Thomson* v. *Nix*.[21] In that case, the Full Court having assumed that the Rule was not part of the common law introduced into the colony on settlement,[22] chose not to follow the decision in *Searle* v. *Wallbank* because differentiating local conditions in Western Australia made the decision inapplicable within the State.

According to the view adopted by Gibbs J.[23] on the other hand, a common law rule will form part of the received law of a colony, irrespective of whether it had been formulated at the date of settlement, as long as it can be seen as a development of the common law which existed at that date. In other words, the English colonists took with them not only the common law as it had developed at the time of colonisation but also the common law as it was to become, and will become in the future. On this view, the Rule forms part of Australian law regardless of whether it was part of the common law when the various colonies were settled because it is a development of common law principles that were in existence at that time. Gibbs J. therefore did not have to find, as did Mason J.[24] that the Rule was of ancient origin.

It is submitted that the former view is preferable for a number of reasons. First, it enables Australian courts to choose logically whether or not to adopt the developments in the common law that have taken place in England since settlement, and which will occur in the future,[25] rather than he obliged to accept them.[26] If the view of Gibbs J. is adopted on the other hand, this choice would not be possible as the common law in Australia would change automatically each time it changed in England[27] unless the decision effecting that change was found to be

20 [1932] A.C. 562.

21 [1976] W.A.R. 141.

22 In Trigwell, Mason J. after having considered this issue, reached the opposite conclusion in relation to South Australia.

23 (1979) 26 A.L.R. 67 at 71-73.

24 See (1979) 26 A.L.R. 67 at 77.

25 On this view, the reason Australian courts almost invariably adopt the developments in the law that occur in England is that they usually elect to do so because of the high regard with which English superior courts are held.

26 According to Murphy J., this is the position not only in relation to common law principles developed since settlement, but also in relation to those developed before then; see (1979) 26 A.L.R. 67 at 93.

27 See on this point Brisbane v. Cross [1978] V.R. 49 at 52.

wrong. Secondly, it is consistent with the rules governing the reception of statute law according to which statutes passed after the date of settlement do not become part of the law of a colony unless expressly made applicable to it. Thirdly, the alternative would render absurd the rule[28] that a principle of law only becomes part of the law of a colony if it is capable of application in the colony at the date of settlement. In conjunction with this rule, the effect of the view of Gibbs J. would be that a common law principle developed by Courts in England in the late twentieth century to deal with a contemporary problem would form part of the law in Australia only if it would have been capable of application in the various Australian colonies in the early nineteenth century.

(ii) What exceptions are there to the Rule?

The Rule does not apply to animals brought on to the highway[29] or to dangerous animals.[30] Consequently, anyone who brings an animal on to a highway must take reasonable care to prevent it causing injury or damage to other users thereof[31] and the rules governing liability for dangerous animals apply when a person is injured on a highway. by such an animal.[32] Both these exceptions were accepted by the majority in *SGIC* v. *Trigwell.*[33]

In addition, in *Searle* v. *Wallbank*[34] itself Lord du Parcq suggested that the Rule would not apply if there were 'special circumstances'. Initially special circumstances were limited to the characteristics of an animal which made it unusually dangerous such as a dog's habit of rushing out on to a narrow highway[35] and a horse's peculiar liking for leaping over hedges on to a highway.[36] Gradually, no doubt because of the unpopularity of the Rule, special circumstances came to embrace such things as the topography of the locality in which the straying animal had been kept and the amount and speed of the traffic using the highway.[37] In this way the unsuitability of the Rule to the conditions and needs of modern urban communities was minimised.

This development, however, was firmly rejected in *Trigwell.* Accord-

28 For a description of the operation of this rule see SGIC v. Trigwell (1979) 26 A.L.R. 67 at 71 and 79.

29 Dean v. Davies [1935] All E.R. Rep. 9; Gomberg v. Smith [1962] 1 All E.R. 725.

30 Searle v. Wallbank [1947] A.C. 341 at 335-356, 358.

31 Griffith v. Turner [1955] N.Z.L.R. 1035.

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

33 (1979) 26 A.L.R. 67 at 81.

34 [1947] A.C. 341.

35 Ellis v. Johnstone [1963] 1 All E.R. 286 at 295.

36 Brock v. Richards [1951] 1 All E.R. 261.

37 Gomberg v. Smith [1962] 1 All E.R. 725, 729-730; Ellis v. Johnstone [1963] 1 All E.R. 286 at 292, 294 & 297; Fleming v. Atkinson (1959) 18 D.L.R. 81 at 82.

ing to the majority[38] the 'special circumstances' exception relates only to some known vicious or mischievous propensity of the particular animal and therefore the topographical peculiarities of a particular location, for example, will not lead to the imposition of a duty to take reasonable care to prevent an animal straying on to the highway. The majority were apparently content to see the Rule apply in the same manner in the city and in the remote outback, and equally in respect of land adjacent to infrequently used country back-roads and land adjacent to busy city freeways.[39] It is submitted that the singular virtue of this conclusion is that it serves to highlight how unsuitable the Rule is to modern conditions.

(iii) Does the Rule apply to nuisance?

The Rule is often described as an exception to the law of negligence and this has given rise to suggestions that it will not provide an answer or defence to a claim based on nuisance. On this basis it was argued in the present case that presence of the Kerin's sheep on the highway amounted to a public nuisance for which the Kerins were responsible.

This argument was rejected by Mason J.[40] on two grounds. First, because the Rule '. . . comprehensively states the scope of liability for injury caused by *straying* animals, such that, if there is no liability in negligence, there can be no further basis for liability such as nuisance.'[41] And secondly, because according to his Honour something will amount to a nuisance only if it permanently or temporarily obstructs the highway so as to remove all or part of it from public use altogether which, on the facts of the present case, the Kerin's two sheep had not.

It is submitted that whilst the first proposition is unexceptional, being logically consistent with the rationale behind the Rule the second is, at the very least, not beyond dispute. The reason for this is that in other contexts, it has been decided that a public nuisance can be constituted by the presence on the highway of something which makes it unreasonably dangerous for traffic. Thus, for example, the presence of fat on a footpath[42] and a vehicle parked on the highway for a long period of time,[43] have both been held to be a public nuisance. By analogy, it

38 (1979) 26 A.L.R. 67 at 70, 74 and 81.

39 Compare in this respect the decision of Hutley J.A. in Kelly v. Sweeney [1975] 2 N.S.W.L.R. 720.

40 Stephen, Murphy and Aickin JJ. agreed with Mason J.; Barwick C.J. and Gibbs J. do not refer to the matter.

41 (1979) 26 A.L.R. 67 at 81.

42 Dollman v. Hillman [1941] 1 All E.R. 355.

43 Dymond v. Pearce [1972] 1 All E.R. 1142.

would appear to be arguable that the presence of an animal on the highway could also be a public nuisance, even though it did not remove any part thereof from public use, if nonetheless it made passage unreasonably dangerous.

(iv) Should the Rule be abrogated of judicial decision?

The final issue of note dividing the High Court was whether, assuming the existence of an agreement that the Rule was unsuited to modern times, the court should abrogate it by judicial decision. For reasons which have been the subject of considerable criticism,[44] the majority decided that it would not be proper to do so.

Although the majority agreed that the Rule should not be abrogated, the members thereof expressed differing opinions as to whether it would ever be appropriate for the High Court to change a settled common law rule or principle. Thus, on one reading of the judgments at least, the case reveals three different approaches to this more general question.

What may be described as the most conservative or the most democratic position, depending upon one's attitude to judicial as opposed to parliamentary law making, was taken by Barwick C.J.[45] In the present case, the Chief Justice[46] adopted the views he had expressed earlier in *Duggan* v. *Mirror Newspapers,*[47] namely, that the role of the High Court is to '. . . decide what the common law always has been (and to) extend the principles of the common law to cover situations not previously encountered or not yet the subject of binding precedent.'[48] Where, however, the common law '. . . has been declared by a court of high authority (the High Court) if it agrees that the declaration was correct when made, cannot alter the common law because the court may think that changes in the society make or tend to make that declaration of the common law inappropriate to the times;'[49] effecting this kind of change is a matter for the legislature. It is interesting to note that in this line of reasoning, whilst firmly denying that the court can change an established common law rule or principle, his Honour simultaneously provided the court with a device for doing so by acknowledging that it can overrule or depart from decisions that are not 'correct'.

Mason J.[50] agreed that the Rule should not be abrogated by the High

44 See, for example, Blackshield, 'The High Court: Change and Decay' (1980) 5 *Legal Service Bulletin* 107.

45 Gibbs, Stephen J.J. appear to have agreed, see (1979) 26 A.L.R. 67 at 73 and 74.

46 SGIC v. Trigwell (1979) 26 A.L.R. 67 at 70.

47 (1978) 22 A.L.R. 439.

48 Id. at 441.

49 SGIC v. Trigwell (1979) 26 A.L.R. 67 at 70.

50 Id. at 78. Aickin J. appears to have been more in agreement with Mason J. on this issue than with Barwick C.J.

Court. However, in an opinion that can be regarded as occupying the middle ground, his Honour said that in a 'simple or clear case' the court can and should change the common law when social or economic changes have rendered a particular rule unsuitable to modern circumstances. However, even in relation to such cases his Honour spoke in terms of varying, modifying and moulding rather than simple abrogation.

Finally, Murphy J.,[51] who alone in the present case thought that the Rule should be abrogated, fervently adopted an approach to judicial law making that was, in certain important respects, diametrically opposed to that of Barwick C.J. According to his Honour the courts have a responsibility to adapt the law to social conditions and it is 'the nadir of the judicial process' for them to leave the abrogation of an 'unjust' rule to the legislature. Although it appears to be an unfashionable[52] point of view, it is submitted that the approach of Barwick C.J. is to be preferred, for a number of reasons, to that of Murphy J. First, Murphy J. fails to distinguish between, on the one hand, judicial creativity in previously unregulated areas of activity and on the other, the alteration of previously well established rules. Thus it is a noticeable feature of his Honour's judgment that all the authorities quoted in support of the proposition that the Rule should be abrogated clearly relate to the former kind of judicial law making rather than to the latter. This distinction is, however, important because whilst it can be readily accepted, as did Barwick C.J., that the court must develop the common law to meet new and unprecedented situations, different considerations apply when an area of law is settled and persons in the community have regulated their affairs in accordance with it. To change the law in these circumstances, retrospectively as far as the parties to a particular case are concerned, may be as unfair to one of those parties as the rule of law in issue is perceived to be.

Secondly, whilst presumably everyone would agree with Murphy. J. that 'unjust' rules should be abrogated, whether a particular common law rule is unjust will almost invariably be an issue that is capable of a subjective determination only. Taking the case under consideration as an example, it can be anticipated that many farmers and graziers will regard the Rule as perfectly fair and consistent with Australian rural conditions. Even if this view is disregarded on the ground of personal interest, it is by no means clear that simple abrogation of the Rule in the manner suggested by Murphy J. is the most satisfactory manner of reforming the law. In this respect it is worth noting that the reforms that

51 Id. at 91-93.
52 Supra note 44.

have occurred in this area of the law in the United Kingdom[53] and New South Wales[54] have not been by the simple abrogation of the Rule, and simple abrogation has not been recommended by any law reform agency.[55]

Thirdly, if judges engage in the kinds of law reform advocated by Murphy J. they would be effecting changes in the law without the benefit of public participation, and in a manner which contrasts sharply with the procedures adopted by most Australian law reform agencies and by the parliaments. Although the institutionalised law reform process rarely produces rapid changes in the law, it can do so if required.[56] It also provides consumers of the law, and experts in particular fields, with an opportunity to participate in the development of the law which, as well as being a virtue in itself in a democratic society, will often provide valuable information and expertise to the bodies recommending law reform and to parliament. This in turn makes more likely the passage into law of effective, coherent and acceptable reforms. In contrast, as Mason J. pointed out in *Trigwell,*[57] judicial techniques and procedures are not adapted to this kind of law reform activity.

The position adopted by Barwick C.J. is often glibly and pejoratively described as conservative. It should not be forgotten, however, that whilst the House of Lords gave the common law *Donoghue* v. *Stevenson*[58] their Lordships also gave it *Shaw* v. *D.P.P.*[59] and that although old Herbert Bundy[60] no doubt thought Lord Denning to be liberal and progressive, Miss Ward[61] almost certainly would not agree.

CONCLUSION

Although the matter is not entirely beyond doubt it is submitted that

53 Although s.8(1) of the Animals Act 1971 abrogates the Rule, s. 8(2) imposes certain qualifications on the operation of the ordinary rules of negligence.

54 The Animals Act 1977 abolished *all* the special rules relating to animals.

55 The Law Commission (1967), the Western Australian Law Reform Committee (1970) and the Queensland Law Reform Commission (1977) all recommended that abrogation of the Rule be accompanied by statutory directions to the trial judge concerning the issue of negligence. The New South Wales Law Reform Commission (1970) recommended the abrogation of all the special rules relating to animals. The New Zealand Torts and General Law Reform Committee (1975) and the South Australia Law Reform Committee (1969) recommended that abrogation be accompanied by changes in the burden of proof. The Victorian Statute Law Revision Committee (1978) recommended the retention of the Rule in a modified form.

56 For example, the Trade Disputes Act 1965 (U.K.).

57 (1979) 26 A.L.R. 67 at 78.

58 [1932] A.C. 562.

59 [1961] 2 All E.R. 446.

60 Lloyds Bank v. Bundy [1974] 3 All E.R. 757.

61 Ward v. Bradford Corporation (1972) 70 L.G.R. 27.

there are strong reasons for regarding *SGIC* v. *Trigwell* as having established that, until abrogated by statute, the Rule will continue to apply in all Australian jurisdictions. With this matter resolved it is hoped that the Parliaments which have not yet done so, will soon respond to the many calls for reform made by courts and by various law reform agencies.

Although the current predominate judicial view is that the courts should not actively reform the law, as distinct from extending it to cover new situations, tardiness on the part of Parliaments to do so, or to indicate their attitude to proposals for reform, may produce changes in this attitude. If this were to occur, the process of law reform would then have moved from an arena in which the public have an opportunity to participate and over which they have ultimate control, into one about which they know little and to which they have no right of access.