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SUPREME COURT OF TASMANIA

JONES v McINTYRE and ORS

Chambers J

6 February 1973

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – PERSON INJURED – ONE VEHICLE WENT ONTO INCORRECT SIDE OF ROAD TO AVOID A COW – NEGLIGENCE – STRAYING ANIMALS – WHETHER OWNER OF COW LIABLE FOR DAMAGES – *SEARLE v WALLBANK* [1947] AC 341 CONSIDERED.

The plaintiff was injured while a passenger in the defendant Jones car which collided with a car driven by the defendant McIntyre travelling in the opposite direction. The cause of the accident was McIntyre swerving to his incorrect side of the road to avoid a cow. The cow, owned by the defendant Glover, had strayed from his property adjoining the highway through a gate on to the grass verge of the road. Although it had not strayed before, it was given the opportunity to do so on this occasion because the gate had been damaged by persons apparently attending a dance nearby when Glover was absent from his property overnight.

The critical question, as His Honour saw it, was whether the defendant Glover should be held liable in negligence for failing to take any, or any adequate precautions to prevent the cow escaping from his property on to the highway. His Honour was not persuaded that the plaintiff had discharged his onus of proving negligence on the part of the defendant Glover.

HELD:

1. If the English decisions are to be followed the owner of land adjacent to a highway may be held liable in negligence in an appropriate case for damage caused by a domestic animal straying from his property on to a highway, but only if it is proved that special circumstances existed, for example, where there was knowledge on his part that the animal in question had a propensity towards causing the type of damage that was caused, or some other circumstance that the Court found was "special".

2. None of the English decisions is technically binding on any Court in Australia and there is no decision of the High Court which is in point in the present case.

3. In the light of developing trends in the law of negligence and until there is an authoritative decision by a Court whose decision is binding upon him, a judge of first instance in this country is at liberty to accept the laws of the majority of the Supreme Court of Canada in *Fleming v Atkinson* (1959) 18 DLR (2d) 81; [1959] SCR 513 as being applicable here and accordingly to hold that the ordinary rules of negligence apply to an adjoining landowner whose animals stray on to a highway.

4. Upon the assumption that, as between himself and users of the highway, a duty of care exists in an adjoining landowner to take reasonable precautions to prevent his animals from straying on to the highway, the question whether there has been a breach of that duty will depend on all the circumstances of the case. These would include the nature of the animal, any vicious or capricious propensity of that animal and the actual or constructive knowledge thereof of its owner, nature of the highway, the traffic normally using it and all other circumstances.

CHAMBERS J: ... A convenient starting point is the decision of the House of Lords in *Searle v Wallbank* [1947] AC 341; [1947] 1 All ER 12; 176 LT 104; [1947] LJR 258; 63 TLR 24. The decision has been much criticised – see for example, articles by Professor AL Goodhart in (1950) 66 LQR 456; Mr Graham Kelly in (1972) 46 ALJ 123 and Mr John Toohey in the University of Western Australia Law Review, VII No. 4, p490. Courts of England have, of course, followed and applied the decision, but often with expressions of reluctance. The Supreme Court of the Dominion of Canada has declined to follow it and it appears that the decision is not followed in Scotland. I will deal with these matters in more detail in a moment.

In *Searle v Wallbank* (*supra*) the appellant, on his bicycle, had collided at night-time with a horse which had escaped from a field where the respondent had placed it and got on to a public highway. The headnote to the case reads as follows:-

> "The owner of a field abutting on the highway is under no *prima facie* legal obligation to users of the highway so to keep and maintain his hedges and gates along the highway as to prevent his animals from straying on to it, nor is he under any duty as between himself and users of the highway to take reasonable care to prevent any of his animals, not known to be dangerous, from straying on to the highway."

The latter part of this headnote has been criticised as being inaccurate and, with respect I think it is. In his judgment, in which Lords Thankerton and Uthwatt expressed concurrence, Viscount Maugham (at p346) said that two possible questions arose:-

> "First, was the respondent, as the owner of a field or fields abutting on the highway, under a *prima facie* legal obligation to users of the highway so to keep and maintain his hedges and gates (if any) along the highway as to prevent his animals from straying on to it? Secondly, assuming there is no such general duty, was he under a duty as between himself and users of the highway to take reasonable care to prevent any of his animals (not known to be dangerous) from straying onto the highway?"

Viscount Maugham answered both these questions in the negative, but in the course of his opinion he had this to say (at p351):-

> "In the absence of any general duty to repair hedges we now come to the second question, which is based on the alleged negligence of the respondent. The established rule is that negligence must depend on failure to perform a duty of reasonable care to the class of persons of whom the plaintiff is one. In this case, the duty must be to exercise reasonable care to avoid an act or omission which would be likely, in the view of a reasonable and prudent man, to injure such a person as a cyclist or a motorist using the road beside the land of the respondent (*Donoghue v Stevenson* [1932] UKHL 100; [1932] AC 562; [1932] All ER 1; [1932] SC (HL) 31; [1932] SLT 317; (1932) 37 Com Cas 350; (1932) 48 TLR 494; (1932) 147 LT 281; [1932] Sol Jo 396; (1932) 101 LJPC 119; (1933) 4 DLR 337; 533 CA 47; [1932] SC 31; [1932] WN 139, and cases there cited). The very curious nature of the facts in that decision must not make us forget that mere possibility of accident is not enough to establish liability; otherwise the many decisions as to accidents to persons caused by domestic animals (in the absence of *scienter*) would have been differently decided."

Finally his Lordship said (at p353):-

> "The fact that the duty does not exist if the road is uninclosed by fences and yet that accidents are rare is, I think, strong to show that the respondent was not bound as a reasonable man to think that his failure to fill up a gap in his fence was likely to cause such an accident as the one which took place."

The interpretation to be placed upon the speech of Viscount Maugham was considered by the Court of Appeal in *Ellis v Johnstone* [1963] 2 QB 8; [1963] 1 All ER 286; [1962] 2 Lloyds Rep 417; [1963] 2 WLR 176. Pearson LJ dealt with it at QB p30. After setting out the two questions postulated by Lord Maugham, Pearson LJ said:-

> "The first question was one of law and answered in the negative. The second question was also answered in the negative but it was treated as a question of fact with the answer depending on foreseeability. That appears from certain passages in Lord Maugham's speech'.

Pearson LJ then set out the passages which I have already noted and concluded that part of his judgment by saying:

> "That sentence shows that the test of foreseeability was being applied, of course, on the basis of the evidence that was given and it may be in a modern case, if the evidence was substantially different (as it might well be) some different conclusion might be reached on that question of fact."

In the earlier case of *Wright v Callwood* [1950] 2 KB 515 Cohen LJ in the Court of Appeal had placed the same interpretation upon the speech of Lord Maugham. Cohen LJ said that Lord Maugham answered the second question also in favour of the defendant on the acts of that particular case (see his judgment at p525).

Reverting to *Searle v Wallbank* (*supra*) Lord Porter (at 356) expressed the opinion that there was no duty to prevent beasts *mansuetea naturae* from straying on to the highway unless

they were known to be vicious. But he concluded his judgment by saying that he would dismiss the appeal primarily because no negligence on the part of the respondent had been proved but also on the ground that on the facts established it had not been shown that he was in breach of any duty which he owed to the appellant.

The remaining judgment was delivered by Lord du Parcq who said (at p359)-

> "Counsel for the appellant submitted that, apart from any question of liability for injury caused by an animal known to his owner to be dangerous, an owner might be liable on the ground of negligence if he could be shown to have failed in his duty to take reasonable care. I agree that, subject to certain reservations, this proposition may be accepted."

His Lordship went on to express the view (at p360) that where no special circumstances exist, negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature, and even if a defendant's omission to control or secure an animal is negligent, nothing done by the animal which is contrary to its ordinary nature can be regarded, in the absence of special circumstances, as being directly caused by such negligence. He was for dismissing the appeal on the ground that on the trial judge's findings of fact negligence could not be imputed to the respondent and there was no evidence before the Court upon which a finding of negligence could have been supported.

It appears to me that all the opinions expressed in the House of Lords contemplated the possibility of liability in the respondent for negligence in allowing his animal to stray on to the highway, but all members of the House were for dismissing the appeal on the ground that in the particular circumstances there was no evidence to support a finding of negligence.

In the recent case of *Draper v Hodder* [1972] 2 QB 556; [1972] 2 All ER 210; [1972] 2 Lloyds Rep 93; [1972] 2 WLR 992 Roskill LJ in the Court of Appeal said at p228:

> "Since the present is not a highway case it is not necessary to consider in any detail the decision of the House of Lords in *Searle v Wallbank* (1947) 1 All ER 12; (1947) AC 341 to which the learned trial Judge referred in his judgment, beyond observing that in his speech Lord du Parcq clearly accepted, as he had in this court, in *Aldham v United Dairies (London) Ltd* (1939) 4 All ER 522; (1940) 1 KB 507 that the ordinary law of negligence applied to the keeper of a domestic animal although the noble Lord repeated that mere proof of a failure by a defendant to guard against the possibility that a tame animal of mild disposition will do some dangerous act contrary to ordinary nature is not of itself proof of negligence".

It will be noted that in *Searle v Wallbank* (*supra*) Lord du Parcq spoke of an adjoining landowner being liable to be held negligent for straying stock in 'special circumstances'. This concept is carried on in the later decisions. In *Wright v Callwood* (*supra*) Cohen LJ (at p527) considered when there were 'special circumstances' which might take the case out of the ordinary principle applied in *Searle v Wallbank* Asquith LJ (at p529) said:-

> "First of all it is clear that there can be special circumstances which displace the immunity of the occupier of land adjacent to a highway in respect of damage to persons on the highway by animals escaping from that land, special circumstances which impose a duty of care on him."

Denning LJ (who dissented) seems to have taken the view that the situation was governed by the ordinary rules of negligence.

In *Brock v Richards* [1951] 1 KB 529; [1951] 1 All ER 261; [1951] 1 TLR 69, the plaintiff was riding a motor cycle in the evening along a main road when a mare belonging to the defendant leapt over or through the hedge of the defendant's field bordering the highway and landed on the tank of the machine. The primary judge found for the plaintiff but an appeal was allowed by the Court of Appeal. The Court considered whether there were 'special circumstances' to render the defendant liable, as appears from the opening paragraph of the judgment of Evershed MR (at p534):

> "It follows from the judgment of the judge that he was of opinion that a special propensity to stray, and knowledge of that fact by the defendant, was a sufficient special circumstance (having regard

> to the nature of the highway adjoining the defendant's land and the extent of the traffic upon it) to take the case out of the general rule stated in *Searle v Wallbank* and to impose upon the defendant the duty of taking reasonable care to prevent the mare's indulging her propensity and leaping or otherwise escaping into the road."

The Court held that there was no such special circumstance and expressed the opinion that a special proclivity towards straying known to the owner cannot be regarded as such as a special characteristic of itself to impose liability; proof was necessary that the particular animal was liable to indulge in dangerous propensities on the highway and this to the knowledge of the owner.

In *Ellis v Johnstone* (*supra*) the Court of Appeal again made the approach of asking itself whether there were 'special circumstances' to create liability in the defendant. Members of the Court seem to have taken a more liberal attitude to this question than the Court had done in earlier cases. For example, Ormerod LJ (at p21) said that he would himself be of the opinion that there may be circumstances other than circumstances peculiar to the animal itself which could give rise to a finding of special circumstances warranting a duty on the owner of the animal. Pearson LJ began his judgment by criticising the then prevailing exposition of the law in England, as appears from this passage at p27:-

> "In this sphere the common law has not shown its usual elasticity and adaptability. It has become so rigid that it has failed to make any response at all to the changing conditions of the roads and their traffic. The rules which were appropriate to the conditions of earlier centuries have been held to be still applicable without alteration to the widely different conditions now prevailing. I think that one cause of this unfortunate lack of development in the common law has been that judicial observations on questions of fact have been treated as propositions of law with the result that the field which should have been left clear for the operation of the common sense of the jury on the facts of the particular case has been encroached upon and encumbered by legal doctrine.''

His Lordship said (at p30) that there is good authority for the existence of the liability for negligence if the evidence establishes negligence and he went on to analyse the judgments in *Searle v Wallbank* and *Brock v Richards* (*supra*).

Draper v Hodder (*supra*) was not strictly a highway case as the plaintiff had suffered damage, not upon the highway, but upon private property. However, his injuries had been caused by animals which had escaped from their owner's land and in the course of their judgments members of the Court of Appeal discussed the liability of an owner of domestic animals with respect to the escape of such animals from land adjoining a highway. After discussing *Fardon v Harcourt-Rivington* [1932] All ER 81; (1932) 146 LT 391; (1932) 48 TLR 215; *Ellis Johnstone* (*supra*) and *Searle v Wallbank* (*supra*), Davies LJ (at p215) said:-

> "These authorities leave no doubt that an owner or keeper of a tame animal may be liable in negligence for damage done by the animal, quite apart from any liability under the *scienter* rule. But what perhaps is not entirely clear in this connection is what is meant by 'special propensity' (per Pearson LJ (1963) 1 All ER 286 at p297; (1963) 2 QB 8 at p29) or 'special circumstances' per Lord du Parcq (1947) 1 All ER at 21; (1947) AC at 360). It is to be supposed that the answer to that question must depend on the particular facts of each individual case and in the present case was to that point that the evidence called on behalf of the plaintiffs was directed."

Edmund Davies LJ said the question of fact was whether, in all the circumstances known to the defendant to exist or to be likely to occur, he was negligent in allowing his dogs to escape and should be held responsible for the consequences which in fact flowed from it. This is to apply the ordinary test of negligence.

Basing himself on the judgment of Pearson LJ in *Ellis v Johnstone* (*supra*) Roskill LJ held that the defendant's main proposition was ill-founded in point of law. That proposition, as appears from p225 of the report, was that the owner or keeper of an animal of a domestic type such as cattle, sheep or a dog, is liable if the animal escapes from his control and does damage if, and only if, he has knowledge of its propensity to do the actual type of damage complained of. Roskill LJ (at p228) added:-

> "No doubt the absence of a particular propensity, or the absence of actual or constructive knowledge

> of a particular propensity in a domestic animal, will make the task of an individual plaintiff seeking to establish negligence more difficult."

The only Australian authority to which I was referred by counsel is *Hill v Clark* (1969) 2 NSWR 733; (1969) 91 WN (NSW) 550. Two members of the Court of Appeal thought it unnecessary in that case to consider whether the principle laid down in such cases as *Searle v Wallbank* had any application to owners of property in New South Wales who either failed to fence their properties or maintain such fences, or who carelessly allowed their animals to stray from their properties on to public roads. Mason JA (as he then was), however, said (*obiter*) at p741:-

> "The general rule governing liability for injury occasioned by animals is that a person is liable for injury done by his animals as a result of his failure to take reasonable care to prevent injury to others ... An important exception to this rule concerns the occupier of land adjoining a highway who fails to take reasonable steps to prevent his animals from straying on to the highway, thereby causing damage to persons using the highway. It was authoritatively established by the House of Lords in *Searle v Wallbank* that, in the absence of special circumstances, (which expression should be understood as indicating the existence of a dangerous propensity in the animal) the occupier of land adjoining the highway is under no duty of care to take reasonable steps to prevent an animal straying from his land (as for example by maintaining hedges and gates) on to the highway and thereby causing damage to a person lawfully using the highway."

His Honour went on to point out that the principle enunciated in *Searle v Wallbank* had been the subject of considerable criticism on the ground that it was founded upon ancient social conditions and was inappropriate to modern conditions.

There is a decision of the Supreme Court of Canada which is of considerable persuasive authority. In *Fleming v Atkinson* (1959) 18 DLR (2d) 81; [1959] SCR 513, a motorist on a highway was injured as a result of a collision with cows belonging to an adjoining landowner, the fences of whose property were in a poor state of repair. An appeal from a judgment against the owner of the cows was dismissed, with two of the seven members of the Court dissenting. The principal judgment of the majority was delivered by Judson J. His Honour said that the defendant's appeal raised squarely the question whether an adjoining owner owes a duty of reasonable care to users of the highway to prevent domestic animals, not known to be dangerous, from straying on to the highway. At p99 his Honour said:-

> "A rule of law has therefore been stated in *Searle v Wallbank* ... which has little or no relation to the facts or needs of the situation and which ignores any theory of responsibility to the public or conduct which involves foreseeable consequences of harm. I can think of no logical basis for this immunity and it can only be used upon a rigid determination to adhere to the rules of the past in spite of changed conditions which call for the application of rules of responsibility which have been worked out to meet modern needs. It has always been assumed that one of the virtues of the common law system is its flexibility; that it is capable of changing with the times and adapting its principles to new conditions. There has been conspicuous failure to do this in this branch of the law and the failure has not passed unnoticed ... My conclusion is that it is open to this court to apply the ordinary rules of negligence to the case of straying animals and that the principles enunciated in *Searle v Wallbank* dependent as they are upon historical reasons which have no relevancy here, and upon a refusal to recognise a duty now because there had been previously no need of one, offer no obstacle."

It is said in Fleming on *The Law or Torts* (4th ed.) at p310 that Scotland has also rejected the rule enunciated in *Searle v Wallbank* and reference is made to the case of *Gardiner v Miller* (1967) SLT 29. I have not seen the report of this case.

It is interesting to note that the flexibility of the common law and its capacity to adapt its principles to new conditions has recently, I think, been exemplified in another context by some decisions recently pronounced. I refer, for example, to *The British Railways Board v Herrington* [1972] UKHL 1; [1972] AC 877; [1972] 1 All ER 749; 1972 2 WLR 537, where Lord Pearson WLR p975 said that the long-established rule laid down in *Addie v Dumbreck* [1929] UKHL 3; [1929] AC 358; [1929] All ER 1; [1929] SLT 242; [1929] SC (HL) 51, had been rendered obsolete by changes in physical and social conditions and had become an encumbrance impeding the proper development of the law. For further examples I refer to the decisions of the High Court of Australia in *Munnings v Hydro-Electric Commission* [1971] HCA 27; (1971) 125 CLR 1; [1971] ALR 609; (1971) 25 LGRA 149; (1971) 45 ALJR 378 and *Cooper v Southern Portland Cement Ltd* [1972] HCA 28; (1972) 128 CLR 427; (1972) 46 ALJR 302. In these two cases the court held that the duty arising from

the relationship of occupier and trespasser may be displaced by a duty arising out of a special relationship which calls for a higher duty of care.

I note that in the latter case (at p307) Barwick CJ observed that the common law of Australia is not necessarily the same as the common law in the United Kingdom. My appreciation of the legal situation in this State, as I apprehend it to be, may be stated in the following propositions:—

1. If the English decisions are to be followed the owner of land adjacent to a highway may be held liable in negligence in an appropriate case for damage caused by a domestic animal straying from his property on to a highway, but only if it is proved that special circumstances existed, for example, where there was knowledge on his part that the animal in question had a propensity towards causing the type of damage that was caused, or some other circumstance that the Court finds is "special".

2. None of the English decisions is technically binding on any Court in Australia and there is no decision of the High Court which is in point in the present case.

3. In the light of developing trends in the law of negligence (I have just commented upon this), and until there is an authoritative decision by a Court whose decision is binding upon him, a judge of first instance in this country is at liberty to accept the laws of the majority of the Supreme Court of Canada in *Fleming v Atkinson* (*supra*) as being applicable here and accordingly to hold that the ordinary rules of negligence apply to an adjoining landowner whose animals stray on to a highway. I propose so to hold in this case.

4. Upon the assumption that, as between himself and users of the highway, a duty of care exists in an adjoining landowner to take reasonable precautions to prevent his animals from straying on to the highway, the question whether there has been a breach of that duty will depend on all the circumstances of the case. These would include the nature of the animal, any vicious or capricious propensity of that animal and the actual or constructive knowledge thereof of its owner, nature of the highway, the traffic normally using it and all other circumstances.
