BATIVALA v. WEST

LIABILITY FOR ANIMALS

The Law Reform Committee of South Australia in its report of 1969 concerning liability for animals, regarded the law relating to animal trespass and "in particular animals trespassing on roads" as being in a most unsatisfactory state[1]. This, it felt, was due to the anachronistic decision of *Searle* v. *Wallbank*[2]. This decision of the House of Lords established that the owner of land abutting the highway was under no duty to keep hedges, fences or gates to prevent his animals straying, nor was there any duty as between the landowner and users of the highway to take reasonable care to prevent any of his animals, not known to be dangerous, from escaping onto the road. The basis of this decision was to be found in history dating from the time when land was unenclosed, highways few and traffic negligible. The House sought to apply this ancient rule to totally different modern conditions. This led to anomalous decisions, with negligent land owners escaping liability for their animals' dangerous behaviour on busy thoroughfares.

Because of such injustices, the Committee recommended that the liability of an owner of land abutting the highway should be determined in accordance with the ordinary laws of negligence[3]. As yet, the Committee's recommendations have not been followed by the Legislature, and the law in South Australia remains the Common Law. English decisions since *Searle* v. *Wallbank*[4] are thus of importance. There are two areas in which the stringency of that decision has been avoided. One is instanced by the case of *Deen* v. *Davies*[5] in which it was stated that if an owner brought his animals onto the highway himself, then he was responsible for their subsequent behaviour under the ordinary principles of negligence. A further area seems to be in the process of evolution; this is shown by the recent case of *Bativala* v. *West*[6].

In that case, the defendant, Mrs. West, carried on a riding school on fields leased by her opposite a busy urban highway. She often held gymkhanas on this land, which was separated from the road by a thick hedge. In the hedge was an open, unattended gate. On the day in question, a gymkhana was in progress. During an event called a saddle-up race, in which competitors were required to saddle their ponies against the clock and then ride to the finish line, one young girl failed to adjust her saddle properly and as a consequence fell. The loose saddle continued to slip until it was under the pony's belly, with the stirrups flapping against its sides as it ran. The pony bolted in fright and ran out through an open gate and onto the highway, where it collided with a car, causing injury to both the driver and the passenger of the vehicle. The plaintiffs, Mr. and Mrs. Bativala, sued Mrs. West in negligence, arguing that in all the circumstances in which the gymkhana was held, and realising

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1. 7th Report of the Law Reform Committee of South Australia to the Attorney General, "Law Relating to Animals" 1969, at 3.
2. [1947] 1 All E.R. 12.
3. 7th Report of the Law Reform Committee of South Australia to the Attorney General, "Law Relating to Animals" 1969, at 4.
4. [1947] 1 All E.R. 12.
5. [1935] All E.R. 9.
6. [1970] 3 All E.R. 332.

the likely ways of frightened horses, Mrs. West should have foreseen that as a reasonably likely result of holding a saddle-up race such an accident would occur, and that she would be responsible, as organizer of the gymkhana.

Bridge J., sitting alone in the Queen's Bench Division, found that if the ordinary criteria of negligence did in fact apply, Mrs. West would indeed be liable on the evidence before him. A slipping saddle was always a recognized hazard in any equestrian event, and particularly so in a saddle-up race for young competitors. Indeed, the defendant explicity recognized this by warning the competitors that the tightness of their girth straps would be checked at the end of the race. There was further evidence from expert witnesses that flapping stirrups from a loose saddle would probably cause a horse to bolt, and that if it did so, it would not be exceptional for it to run out onto the road as happened in this case. Thus Mrs. West should accept responsibility for the accident which could have easily been prevented by her by posting someone at the gate to open and shut it, if the ordinary principles of the tort of negligence were applicable. Counsel for the defendant argued that they were not. He claimed that the case fell within the exception to negligence found in the decision of *Searle* v. *Wallbank*[7]. Bridge J. acknowledged that the rule, though out-of-date, was binding on him if indeed it applied to the facts of the case before him. He referred to two limitations that had previously been expressed to the application of the rule in *Searle* v. *Wallbank*[8]. The first was the well-known limitation that once the owner of an animal took it onto a road, then the ordinary duty of care of the owner to highway users applied. The second, Bridge J. said, was to be found in a passage from the judgment of Lord Du Parcq in *Searle* v. *Wallbank*[9]. In this passage, Du Parcq said that "special circumstances" could take a case outside the rule and impose liability for negligence on the owner. Du Parcq mentioned the old case of *Mitchil* v. *Alestree*[10] as an example of a case where the ordinary principles of negligence had been applied. In that case, a horse escaped from the field where the defendant was breaking it in. He was held liable as the field was one often used by the public and therefore inapt for such a purpose. This was an early example of the application of the rules of negligence where special circumstances existed. Having regard to Du Parcq's passage and later decisions on animal liability, Bridge J. then asked himself what factors could amount to special circumstances so as to displace the rule.

Counsel for the defendants relied on passages from the judgment of Lord Evershed M.R. in the case of *Brock* v. *Richards*[11] as establishing the claim that "mere topographical circumstances such as the relative positions of the field and the highway, the amount of traffic on the highway, and the like, can never be relevant or certainly can never amount to special circumstances, for that would be to entrench on the well-established rule that there is no duty to fence"[12] and that "the sole admissible category of special circum-

7. [1947] 1 All E.R. 12.
8. *Ibid.*
9. *Ibid.*
10. [1676] 1 Vent. 295.
11. [1951] 1 All E.R. 261.
12. [1970] 1 All E.R. 332, at 339, 340.

stances [is] a known special propensity arising not from extraneous factors, but from the character of the animal itself"[13]. Such a propensity would be to behave in an unusual and dangerous way. It had already been testified in this case that the pony in bolting had reacted in a totally normal way and that it was an altogether quiet animal with no vicious or mischievous traits.

Lord Evershed M.R. did indeed appear to take a very narrow view as to what factors could amount to special circumstances. In three separate passages, he seemed to deny that a special circumstance could be created other than by a peculiarity in the character of the animal itself. In the first two instances, he denied that the topography of the place in question could ever be relevant, and in the third, he stated categorically that in order to impose liability, the special circumstance had to be constituted by vicious or mischievous characteristics in the nature of the animal itself. At first sight, this seems to be a denial of the possibility that a normal reaction by an animal to extraneous circumstances, whether topographical or not, could ever amount to special circumstances to take the case outside the rule in *Searle* v. *Wallbank*[14].

However, Bridge J. referred to the passage in the judgment of Ormerod L.J. in the case of *Ellis* v. *Johnstone*[15] which attempted to rationalize Lord Evershed M.R.'s opinion. Ormerod L.J. considered that His Lordship's comments were intended to be confined to the facts of the case before him. In that case, the fact that the horse jumped over the hedge onto a road which was at a lower level than the field was not sufficient to create liability, as the leaping was only a form of straying, and the topography of the place in those circumstances could make no difference. Ormerod L.J. further recognized that the same reasoning applied to the case he himself was judging. In that case, a dog which had been left to its own devices, ran out onto the road and caused an accident. As its running out was only a form of straying which the rule in *Searle* v. *Wallbank*[16] allowed, the topography of the surrounding area could not be enlisted to create liability. Only the proof of a dangerous propensity, other than straying, could establish liability in such a case. However, Ormerod L.J., together with Donovan and Pearson L.JJ. did recognize that circumstances other than those relating only to the character of the particular animal, could amount to special circumstances in some instances. Although they were referring particularly to the application of topographical circumstances, Bridge J. utilized their observations to establish a rule that special circumstances need not consist only of the peculiar characteristics of the animal itself and that, amongst others, topography or the manner in which an activity was carried on, could amount to such circumstances.

He was further aided by the case of *Wright* v. *Callwood*[17]. In that case, a calf being driven across the road became startled by the starting of a lorry engine, and, as a result, bolted across the road and injured a passerby. The judge held the owner of the calf liable on the ground that he must have realised that there was a lorry nearby and that this constituted a special

13. *Ibid.*
14. [1947] 1 All E.R. 12.
15. [1963] 1 All E.R. 286.
16. [1947] 1 All E.R. 12.
17. [1950] 2 K.B. 515.

circumstance. The decision was reversed in the Court of Appeal, but only on the ground that there was no evidence that the owner of the calf knew there was a lorry present. Bridge J. acknowledged that this was clear authority against the proposition that special circumstances could only be constituted by special characteristics in the animal itself, and could not arise from a normal and foreseeable reaction on the part of an animal to its surroundings.

Bridge J. decided the case in favour of the plaintiffs. His main reason for doing so can be found in the following passage: "reason and justice call out for [the rule] to be displaced by dangerous behaviour on the part of the animal, arising not only from a special propensity in the character of the animal, but also from a foreseeable reaction on the part of the animal to an incident of the activity in which the animal is engaged"[18]. This reasoning was consistent with the decision in *Wright* v. *Callwood*[19] and also accorded with the case of *Mitchil* v. *Alestree* cited by Lord Du Parcq as an example of a fact situation taking a case outside the rule in *Searle* v. *Wallbank*[20]. Bridge J. confessed that he found it hard to distinguish any difference in legal principle between the case of a horse bolting because of a mischievous propensity to do so and a horse bolting because it was enraged in a gymkhana in circumstances from which an organizer could readily foresee an accident would occur. His Honour went on to say that Lord Evershed M.R. could not have had any intention of casting doubt "on the correctness of the view implied in *Wright* v. *Callwood*, that special circumstance may be constituted by a docile animal's foreseeable reaction to extraneous circumstances"[21].

He also added that in the majority of cases in which the rule in *Searle* v. *Wallbank*[22] had been applied, the animal in question had strayed from a situation in which it had properly been left to its own devices. He recognized that in such cases, local topography could not often amount to a special circumstance. This is in fact borne out by the case of *Ellis* v. *Johnstone*[23], where, in the absence of a known propensity to behave in a dangerous way in the nature of the animal itself, topographical circumstances were found to be insufficient to create liability. Bridge J. then went on to say that "where the animal has escaped . . . from a situation in which it was under direct human control, *a fortiori* if, as in the present case, the animal was engaged in an activity which can only be carried on under a high degree of human control, totally different considerations arise"[24]. This was an additional reason for deciding the case as he did.

It thus appears that the English courts are not anxious to expand the operation of the rule in *Searle* v. *Wallbank*[25] because of its inapplicability to today's road conditions. The case of *Bativala* v. *West*[26] affords two possible methods of

18. [1970] 1 All E.R. 332, at 342.
19. [1950] 2 K.B. 515.
20. [1947] 1 All E.R. 12.
21. [1970] 1 All E.R. 332, at 342.
22. [1947] 1 All E.R. 12.
23. [1963] 1 All E.R. 286.
24. [1970] 1 All E.R. 332, at 342.
25. [1947] 1 All E.R. 12.
26. [1970] 1 All E.R. 332.

avoiding the rule and there may be others. The expansion of the scope of topographical circumstances may provide another way of escaping the full stringency of the rule.

In the area of liability for animals in negligence where the owner brings them on the road himself, certain modifications have recently evolved which may further narrow the application of the rule in *Searle* v. *Wallbank*[27]. The N.S.W. Court of Appeal's decision in *Hill* v. *Clark*[28] contains phrases which may be read as extending the "*Deen* v. *Davies*[29] exception" as it is often called. In the former case, Asprey J. made a general statement that any person who undertook operations of one kind or another on or *in the immediate vicinity of the public highway* on which others might lawfully travel, owed a duty of of care towards them. His Honour seemed to be expanding the principle of liability for animals brought onto the road by their owner to persons dealing with animals in the immediate vicinity of the road.

It is even possible that the South Australian courts will follow the lead given by the N.S.W. District Court in the case of *Reyn* v. *Scott*[30]. In that case, Cross D.C.J. refused to follow *Searle* v. *Wallbank*[31], relying on statements of the Privy Council in the decision of *Australian Consolidated Press* v. *Uren*[32]. His Honour distinguished *Searle* v. *Wallbank*[33] on the basis of the different conditions in relation to the traffic of animals which must exist between Australia and the U.K., and on the ground that conditions must have changed even since the decision of *Searle* v. *Wallbank*[34] itself. He therefore applied the general law of negligence to the situation.

Thus there is ample scope for our state courts to avoid the full stringency of the rule[35] or even to disregard it as happened in *Reyn* v. *Scott*[36]. It is probable, however, that the courts would prefer to use those methods of distinguishing formulated in *Bativala* v. *West*[37] or an extended interpretation of *Deen* v. *Davies*[38], at least until the High Court has expressed its view on the question of the applicability of the rule to Australian conditions.

*Gail Payne**

27. [1947] 1 All E.R. 12.
28. (1970) 91 W.N. (N.S.W.) 550.
29. [1935] All E.R. 9.
30. 2 N.S.W. District Court Reports 13.
31. [1947] 1 All E.R. 12.
32. (1967) 41 A.L.J.R. 66.
33. [1947] 1 All E.R. 12.
34. *Ibid.*
35. Another type of situation was also held to constitute "special circumstances" in an unreported decision of the Local Court of Port Pirie (*Smythe* v. *Welch*, 12th Dec., 1967). Grubb S.M. distinguished *Searle* v. *Wallbank* on the ground that special circumstances were created by the fact that the owner had been informed that his cattle were straying before the accident, but had done nothing about it, resulting in a collision of a heifer with the plaintiff's car. This, coupled with the fact that cattle were known to be prone normally to jump out onto the road unexpectedly created special circumstances.
36. 2 N.S.W. District Court Reports 13.
37. [1970] 1 All E.R. 332.
38. [1935] All E.R. 9.

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SAMUELS v. HALL

COUNCIL BY-LAWS — ARREST UNDER S. 75 POLICE OFFENCES ACT, 1953-1967 — OFFENSIVE OR DISORDERLY BEHAVIOUR

Samuels v. *Hall*[1] is a judgment of a majority of the Full Court (Chamberlain and Walters J.J.; Mitchell J., dissenting) dismissing an appeal against a judgment of Zelling A.J. (as he then was),[2] in which he answered certain questions put to him by a magistrate in a special case stated. In September, 1970, leave to appeal against that majority decision was refused by the High Court.

The case arose from an incident in February, 1969, when the defendant Hall, a conscientious objector, was standing on the footpath outside the G.P.O. in King William Street, handing out pamphlets which sought to encourage persons eligible for National Service not to register. A by-law had been passed by the Corporation of the City of Adelaide, prohibiting *inter alia*, the distribution of pamphlets to passers-by and bystanders. When approached by a member of the police force he refused to hand over his bundle of pamphlets and he refused to give his name and address. A police officer then arrested him. Hall went limp and had to be carried to the police van. He was charged with two offences against the Police Offences Act, 1953-67, namely:

(1) Behaving in a disorderly or offensive manner in a public place, contrary to s.7; and,

(2) Committing an offence contrary to by-law IX, s.3(19), and on being required to state his full name and address refusing to do so, contrary to s.75.

The learned magistrate stated five questions of law for the opinion of the Supreme Court (Zelling A.J.) and these provide convenient headings for the comments which follow.

1. *Whether the powers of a member of the police force under s.75 of the Police Offences Act apply to a breach of the by-law IX, 3(19).*

S.75, Police Offences Act provides:

> "75. (1) Any member of the police force, without any warrant other than this Act, at any hour of the day or night, may apprehend any person whom he finds committing or has reasonable cause to suspect of having committed, or being about to commit, any offence."

Sub-section (2) provides, *inter alia*, that,

> "Any member of the police force may require any such person to state his full name and address;".

Sub-section (3) makes it an offence for "any such person" to refuse "to comply with any such requirement". Part IX, s.163 of the Local Government

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1. [1969] S.A.S.R. 310.
2. *Samuels* v. *Hall* [1969] S.A.S.R. 296.