CASE NOTES

BRISBANE v. CROSS[1]

Animals — Negligence — Highway — Rule in Searle v. Wallbank, applicability in Victoria — Whether special circumstances imposing duty of care — Breach of statutory provisions.

This matter was first heard in the Shepparton Magistrates' Court, which dismissed an action by the complainant, Brisbane. The gist of the complainant's action was that a steer, owned by the defendant, had strayed from his paddock onto Toolamba Road, Toolamba and that a collision ensued with the complainant's motorcycle. The magistrate found that the defendant knew of the steer's propensity to break through the fence and that he took insufficient precaution to see that the fence was intact. The magistrate dismissed the action, finding that the defendant owed no duty of care to the complainant. The complainant obtained an order *nisi*, which was referred by Griffith J. to the Full Court.

Squarely raised therefore, was the issue whether the notorious decision of the House of Lords in *Searle v. Wallbank*[2] must be followed and should be applied in Victoria. That decision and these facts focus sharply on the conflict which may arise between strict legalism and social policy.

In the Full Court, the Chief Justice rightfully pointed out that the decision in *Searle v. Wallbank*:

> is generally regarded as laying down two propositions, *viz.* (1) that the owner of land adjoining a highway is under no duty to users of the highway so to maintain his hedges and gates along the highway as to prevent his animals from straying on to the highway, and (2) that the owner of land adjoining a highway is not 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 on to the highway.[3]

These propositions were derived from Viscount Maugham's judgment, where he formulated them as questions[4] and then answered them appropriately.[5] Lords Uthwatt[6] and Thankerton[7] expressly concurred in the Lord Chancellor's reasoning. So the propositions were correctly accepted as the *rationes decidendi* even if the latter encompassed the former.[8]

Certainly a decision of the House of Lords has, at the least, strongly persuasive authority throughout Victoria. The weight to be afforded such a decision is influenced by two factors. The first and more direct is simply that decisions of the ultimate court of appeal in the English hierarchy should be given the utmost respect. The second relies on the fact that the common law of England, at the time when 9 Geo. IV, c. 83[9]

[1] [1978] V.R. 49. The members of the Full Court of the Victorian Supreme Court were Young C.J., McInerney and Dunn JJ.
[2] [1947] A.C. 341.
[3] [1978] V.R. 49, 51.
[4] [1947] A.C. 341, 346.
[5] *Ibid.* 351, 353.
[6] *Ibid.* 353.
[7] *Ibid.*
[8] Heuston R. F. V., *Salmond on the Law of Torts* (17th ed., 1977) 344.
[9] The statute is discussed *infra.*

was passed, was part of the common law of Victoria. Considering the latter factor, the Chief Justice asserted:

> The rule in *Searle v. Wallbank* is part of the common law of England and therefore part of the law of Victoria unless that law has been altered by statute or by the course of authority in Australia.[10]

Many cases[11] demonstrated that the rule was part of the common law of England; although it has now been abrogated there, by s. 8(1) of the Animals Act 1971 (Eng.). Its applicability in Australia was broadly defined by s. 24 of 9 Geo. IV, c. 83, short titled the Australian Courts Act 1928,[12] which provided:

> that all laws and statutes in force within the realm of England at the time of the passing of this Act . . . shall be applied in the administration of justice in the courts of New South Wales . . ., so far as the same can be applied. . . .

When Victoria was separated from New South Wales in 1851, the laws in force in New South Wales at that time applied in Victoria.[13] English laws and statutes prior to 1829, therefore, might also have been in force in Victoria. Explicit recognition of this is given by the Constitution Act 1975 (Vic.), s. 3(1). Therefore, the question arose whether the principle enunciated in *Searle v. Wallbank* had been developed prior to 1829.

Hutley J.A. in *Kelly v. Sweeney*,[14] a New South Wales Court of Appeal decision which considered the principle, stated the two lines of thought:

> Though it has been suggested that the rule is modern: *Brackenborough v. Spalding Urban District Council* . . ., *per* Lord Wright,[15] the authorities set out in *Searle v. Wallbank*[16] . . . and the reasoning of the members of the House of Lords, particularly Viscount Maugham[17] . . ., point to the rule being of ancient origin.[18]

He concluded that the rule was part of the inherited law of New South Wales.[19] As stated previously, Young C.J. reached a similar conclusion[20] on similar grounds.[21] So one must resort to the judgments of their Lordships in *Searle v. Wallbank* to discover why the rule is of ancient origin.

The only authority, relevant on this point and decided prior to 1829, was *Mason v. Keeling*.[22] Unfortunately, the case was reported in two sets of reports and with significant differences between them *e.g.* whether the case 'resulted in judgment for the defendant or a settlement'.[23] Nevertheless Lord Raymond's report contains some relevant *dicta*. Holt C.J. and Turton J. were reported as saying:

> For there is a great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs; the former the owner ought to confine, and take all reasonable caution, that they do no mischief, otherwise an action will lie against him; but otherwise of dogs, before he has notice of some mischievous quality. But in the former case if the owner puts a horse or an ox to grass in his field, which is adjoining to the highway, and the horse

[10] [1978] V.R. 49, 52.
[11] The cases best illustrating the rule are *Searle v. Wallbank, supra, Heath's Garage v. Hodges* [1916] 2 K.B. 370 and *Hughes v. Williams* [1943] K.B. 574.
[12] The short title was provided by the *Short Titles Act* 1896.
[13] 14 Vict. No. 44 (N.S.W.).
[14] [1975] 2 N.S.W.L.R. 720.
[15] [1942] A.C. 310, 321.
[16] [1947] A.C. 341.
[17] *Ibid.* 347 *et seq.*
[18] [1975] 2 N.S.W.L.R. 720, 726.
[19] *Ibid.*
[20] *Supra* n. 10.
[21] [1978] V.R. 49, 52. The Chief Justice cited Lord Du Parcq, in *Searle v. Wallbank* [1947] A.C. 341, 358, who stated that 'We are here dealing with ancient doctrines of the common law.'
[22] (1700) 1 Ld. Raym. 606; 91 E.R. 1305; 12 Mod 332, 88 E.R. 1359.
[23] [1947] A.C. 341, 358 *per* Lord Du Parcq.

> or the ox breaks the hedge, and runs into the highway, and kicks or gores some passenger, an action will not lie against the owner; otherwise if he had notice, that they had done such a thing before.[24]

The passage was quoted at length because, in *Searle v. Wallbank*, only the second sentence was cited; that apparently might not be in context. For it appears that the distinction, which the Court was highlighting, turned on knowingly keeping a dangerous animal — the *scienter* action — and not on an animal's propensity to stray onto the highway. The other pertinent *dictum*, that of Holt C.J., related only to trespass. Not mentioning the highway, he remarked:

> for if the dog breaks a neighbour's close, the owner will not be subject to an action for it. . . . But if a servant leaves open the stable door and a coach horse runs out and does mischief it is otherwise.[25]

The *ratio decidendi*, of the Modern report, is accurately summarized by the headnote:

> '[A]n action . . . for an injury done by the defendant's dog, must state that *he knew* the dog was of a mischievous nature or had done mischief before. . . .'[26]

For completeness, a possibly relevant *dictum* of Gould J. warrants inclusion: 'the law takes notice of [the] highway, and is a security for passengers.'[27] Does this passage indicate that a highway traveller has a successful cause of action? The fact, however, remains that *Mason v. Keeling*[28] is an unsatisfactorily reported decision. It is, moreover, very difficult to deduce from it a rule vaguely resembling that enunciated in *Searle v. Wallbank*. Further, it is equally difficult to fathom how that rule formed part of the common law of England in 1828.

Considering authorities subsequent to 1828, it appears that the principle gained a firm foothold as part of the common law of England at the beginning of this century. Young C.J. cited[29] a number of these authorities including *Hadwell v. Righton*,[30] *Higgins v. Searle*,[31] *Ellis v. Banyard*,[32] *Jones v. Lee*,[33] and *Heath's Garage Ltd v. Hodges*.[34] Given that this principle became part of the common law of England after 1828, is it thereby incorporated as part of the common law of New South Wales? Young C.J., quoting a learned passage of Windeyer J., stated the problem succinctly:

> There is, of course, a logical difficulty in treating a decision of an English court given at any time since 1828 as declaring the common law in Victoria, for as Windeyer J. pointed out in *Skelton v. Collins*[35] . . ., to suppose that the common law brought to this country was a body of rules waiting to be declared and applied overlooks the creative element in the work of courts. The passage may be quoted: 'Our ancestors brought the common law of England to this land. Its doctrines and principles are the inheritance of the British race, and as such they became the common law of Australia. To suppose that this was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact. It overlooks the creative element in the work of courts.'[36] . . .

[24] (1700) 1 Ld. Raym. 606, 609; 91 E.R. 1305, 1307.
[25] *Ibid.* 608; 1307.
[26] (1700) 12 Mod 332; 88 E.R. 1359.
[27] *Ibid.* 335; 1361.
[28] *Supra* n. 22.
[29] [1978] V.R. 49, 52.
[30] [1907] 2 K.B. 345.
[31] (1909) 100 L.T. 280.
[32] (1911) 106 L.T. 51.
[33] (1911) 106 L.T. 123.
[34] [1916] 2 K.B. 370.
[35] (1966) 115 C.L.R. 94, 134.
[36] [1978] V.R. 49, 52.

Windeyer J. then referred to the principle of *Donoghue v. Stevenson*[37] which, if the theory was adopted, became 'part of the law of New South Wales'[38] in 1829. His Honour then emphasized the creative element: 'Here, as it is in England, the common law is a body of principles capable of application to new situations, and in some degree of change by development.'[39] The Chief Justice appeared to skirt around this difficulty. He cited[40] the acceptance of *Donoghue v. Stevenson*[40a] as part of the law of Australia by the High Court in *Australian Knitting Mills Ltd v. Grant.*[41] However, neither example nor counter-example conclusively resolves the problem of legal theory. For example, was the decision of the House of Lords in *D.P.P. v. Smith*[42] part of the common law of Australia for the hundred and thirty-four years before the High Court rejected it in *Parker v. The Queen*?[43] It is, however, reasonable to assert that every decision, no matter how significant or trivial, whether sound or unsound, of one judge or five lords, of every English court is part of that country's common law. Australian courts have never treated all English decisions as binding and then sought to distinguish them. Often decisions of English courts subordinate to the House of Lords have been afforded respect; but that is all! Indeed, Australian courts on occasions have resolved contentious legal questions years before their English counterparts.[44] With due respect to the opinion of the Chief Justice it is a fiction, a legal myth, to regard the decision of *Searle v. Wallbank* or of *Heath's Garage Ltd v. Hodges*,[45] the first of the cases to directly decide the point,[46] as automatically forming part of the common law of Australia.

If, however, the principle did fall within s. 24 of the Australian Courts Act 1828 (Imp.), the Chief Justice correctly stated the test for the rule's applicability in New South Wales.[47] The test, laid down in *Delohery v. Permanent Trustee Co. of N.S.W.*, was:

> not whether the law is suitable or beneficial, but whether it can be applied. It is plain that a law may be applicable in the sense that it can be administered, although it may, as a matter of opinion, be considered not 'applicable', in the sense of being suitable or beneficial.[48]

Consequently, the Chief Justice reached the conclusion that:

> There seems to be no difficulty in applying the rule in Victoria and accordingly . . . the rule is part of the law of Victoria unless binding authority or statute were to compel an opposite conclusion.[49]

There was no binding authority to the contrary[50] and the statutory provisions[51] were held not to give a private right of action[52] following sound English authority.[53]

[37] [1932] A.C. 562.
[38] (1966) 115 C.L.R. 94, 134.
[39] *Ibid.* 135.
[40] [1978] V.R. 49, 52.
[40a] [1932] A.C. 562.
[41] (1933) 50 C.L.R. 387, reversed on appeal (1935) 54 C.L.R. 49.
[42] [1961] A.C. 290.
[43] (1963) 111 C.L.R. 610, disapproved on appeal on other grounds (1964) 111 C.L.R. 665.
[44] See *Masters v. Cameron* (1954) 91 C.L.R. 353 (Full High Court) and *Sorrell v. Finch* [1976] 2 W.L.R. 833 (House of Lords).
[45] [1916] 2 K.B. 370.
[46] [1947] A.C. 341, 356 *per* Lord Parker.
[47] [1978] V.R. 49, 53.
[48] (1904) 1 C.L.R. 283, 310-1.
[49] [1978] V.R. 49, 53.
[50] There are a number of persuasive authorities which are discussed *infra.*
[51] Shire of Rodney By-law 19, which is almost identical with clause 41 of the 15th Schedule of the Local Government Act 1958; Summary Offences Act 1966, s. 8(d); and Country Roads Act 1958, ss. 73(1) and (3).
[52] [1978] V.R. 49, 55-7, 61-3.
[53] *Cox v. Burbridge* (1863) 13 C.B. (N.S.) 430; 143 E.R. 171; *Heath's Garage Ltd v. Hodges* [1916] 2 K.B. 370.

Alternatively, it is arguable that the decision in *Searle v. Wallbank* should have been followed in *Brisbane v. Cross* because the former was a House of Lords decision. In its original form, the rationale was stated by the Privy Council in *Robins v. National Trust Co. Ltd.*[54] In delivering the judgment of the Board, Viscount Dunedin stated:

> (W)hen an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it.[55]

In *Piro v. W. Foster & Co. Ltd*,[56] the High Court accepted the supremacy of House of Lords decisions. Latham C.J., for example, remarked:

> This court is not technically bound by a decision of the House of Lords, but there are in my opinion convincing reasons which lead to the conclusion that this Court and other courts in Australia should as a general rule follow decisions of the House of Lords. The House of Lords is the final authority for declaring English law, and where a case involves only principles of English law which admittedly are part of the law of Australia, and there are no relevant differentiating local circumstances, the House of Lords should be regarded as finally declaring that law.[57]

Substantially similar formulations were provided by three of the other four judges, Rich,[58] McTiernan[59] and Williams JJ.[60] who sat on the case.

With the approval of the Privy Council,[61] the High Court[62] is no longer under this disability. What, however, is the position of other Australian courts? Owen J. in *Skelton v. Collins* thought the position was that:

> Where, however, there is no decision of the High Court on a question that arises in some other Australian court and a decision of the House of Lords is directly in point, the court which is called upon to decide the question will no doubt follow the decision.[63]

In *Public Transport Commission of N.S.W. v. J. Murray-More (N.S.W.) Pty Ltd*,[64] Barwick C.J. suggested that such courts should also follow English Court of Appeal decisions:

> In the first place the Supreme Court at first instance, where there is no relevant decision of this Court, should as a general rule follow the decisions of the English Court of Appeal. Further in the same circumstances the Supreme Court on appeal would be well advised as a general rule to do likewise.[65]

This *dictum* was commented upon by Bray C.J. in *Bagshaw v. Taylor*,[66] a very recent South Australian case which considered the rule in *Searle v. Wallbank*. The Chief Justice remarked: '[I] do not regard what Barwick C.J. said . . . as preventing this court from refusing in special cases to follow decisions of the Court of Appeal in England if it thinks that they are wrong, but I do not think the same is true of decisions of the House of Lords. . . .'[67] The most recent, albeit brief, discussion of these points, by the High Court, is in *Viro v. The Queen*.[68] There Gibbs J. said that:

[54] [1927] A.C. 515.
[55] *Ibid.* 519.
[56] (1943) 68 C.L.R. 313.
[57] *Ibid.* 320.
[58] *Ibid.* 325-6.
[59] *Ibid.* 335-6.
[60] *Ibid.* 340-2.
[61] *Australian Consolidated Press Ltd v. Uren* [1969] 1 A.C. 590.
[62] *Parker v. The Queen* (1963) 111 C.L.R. 610, 632.
[63] (1966) 115 C.L.R. 94, 139.
[64] (1975) 132 C.L.R. 336.
[65] *Ibid.* 341.
[66] (1978) 76 L.S.J.S. (S.A.) 475.
[67] *Ibid.* 482.
[68] (1978) 18 A.L.R. 257. The Full High Court was composed of Barwick C.J., Gibbs, Stephen, Mason, Jacobs, Murphy and Aickin JJ.

> the position of the State courts in relation to the decisions of the House of Lords and the Court of Appeal [is that though they are] not technically binding, [they] should generally speaking be followed if they are applicable and are not themselves in conflict with a decision of [the High] Court or of the Privy Council.[69]

By contrast, Murphy J. asserted correctly the relevant principle of precedent:

> that no court in Australia is bound by the decisions of the House of Lords or the courts below it in the English system. The expression 'not technically bound' is often used, but it should be clear that Australian courts are not bound by such decisions, however persuasive they may be.[70]

The foregoing authorities indicate that an Australian court, other than the High Court, should follow a House of Lords decision unless there are *e.g.* 'relevant differentiating local circumstances'[71] or 'circumstances which would render the law laid down by the House of Lords inapplicable to this country'.[72]

It further appears that such Australian courts should also afford significant weight to Court of Appeal decisions. This position was accurately adopted by Young C.J. in *Brisbane v. Cross*.[73] The question then arises of whether there are sound reasons why *Searle v. Wallbank* should not be followed in Australia.

There have been four major reported decisions,[74] delivered in Australia considering *Searle v. Wallbank*. These are *Kelly v. Sweeney*,[75] *Thomson v. Nix*,[76] *Brisbane v. Cross* and *Bagshaw v. Taylor*,[77] all 'Full Court' decisions, of New South Wales, Western Australia, Victoria and South Australia respectively. Each decision, to some extent, has examined the problem of whether there are 'relevant differentiating local circumstances'.[78] Some of the judgments have confused the distinct issues of whether the principle became part of the common law of Australia when the Australian Courts Act 1828 was passed and of whether *Searle v. Wallbank* should be applied in Australia because it was a House of Lords decision. The legislative developments after 1828 directly indicate whether the principle has been abrogated by statute; whereas the history of land settlement is relevant to indicate differentiating local circumstances. Nevertheless, the categories are obviously not completely mutually exclusive. The decisions are worth dissecting in detail to provide a comparative analysis.

In *Kelly v. Sweeney*,[79] Mahoney J.A. applied *Searle v. Wallbank* because it was a House of Lords decision, which should be followed by the New South Wales Court of Appeal.[80] Hutley J.A. thought the decision *prima facie* applicable in New South Wales as part of the inherited law of that State.[81] However, he proceeded to distinguish the decision because the facts in issue related to a high speed motorway.[82] Samuels J.A.

[69] *Ibid.* 283.
[70] *Ibid.* 319.
[71] (1943) 68 C.L.R. 313, 320.
[72] *Ibid.* 336.
[73] [1978] V.R. 49, 51-2.
[74] There is another reported decision, which has been subject to trenchant criticism: *Reyn v. Scott* (1968) 2 D.C.R. (N.S.W.) 13 *per* Cross D.C.J. The unreported decisions are: *Jones v. McIntyre* (unreported, Supreme Court of Tasmania 6 Feb. 1973 *per* Chambers J.); *Garry Willis Transport v. W.S. Lock* (unreported District Court of South Australia June 1973 *per* Senior Judge Ligertwood); and *Stevens v. Nudd* (unreported Full Court of the Supreme Court of Queensland 16 Dec. 1977 *per* Douglas, Campbell W.B. and Andrews JJ.). The first two decisions refused to follow *Searle v. Wallbank*, while the third questioned its applicability in Queensland.
[75] [1975] 2 N.S.W.L.R. 720.
[76] [1976] W.A.R. 141.
[77] (1978) 76 L.S.J.S. (S.A.) 475.
[78] (1943) 68 C.L.R. 313, 320.
[79] [1975] 2 N.S.W.L.R. 720.
[80] *Ibid.* 738-9.
[81] *Ibid.* 725.
[82] *Ibid.* 728-9.

thought both heads suggested that the decision was *prima facie* applicable.[83] He, nevertheless, declined to follow it because of three contributing factors:[84] (i) the decision has been subject to considerable judicial and academic criticism;[85] (ii) there is now a great volume of fast traffic travelling through mainly fenced country;[86] and (iii) this result would not cause a divergence between English and Australian law,[87] as the rule in *Searle v. Wallbank* has now been abrogated in England.[88] The rule has now also been abolished by the Animals Act 1977 (N.S.W.), s. 7(2)(b).

In *Thomson v. Nix*,[89] Wallace and Brinsden JJ. concurred in the judgment of Jackson C.J.[90] The Chief Justice *prima facie* accepted *Searle v. Wallbank* because it was a House of Lords decision.[91] But having traced the legislative history of the colony, he concluded:

> The history of this legislation demonstrates not only that for a long time Parliament has recognized the need for proper fencing between a farming property and a road, but also that it has required such fencing to be kept in good repair, with a penalty provided if an owner or occupier neglects to do so and a statutory right for the road authority to remedy any disrepair and charge the expense to the person in default. Again, it is not suggested that these provisions in themselves confer a private right of action. But they do show . . . that where there is a boundary fence adjoining a public road, a motorist may reasonably expect that the fence will be kept in repair and that he will not have to be prepared to cope with stock straying onto the road from adjoining farms.[92]

In the most recent decision, *Bagshaw v. Taylor*,[93] the Full Court unanimously applied *Searle v. Wallbank*. Bray C.J. found the reasoning in *Brisbane v. Cross* convincing and his analysis of the authorities led him to the same conclusion as the Victorian Full Court reached.[94] Mitchell J. thought that *Searle v. Wallbank* should be applied because it was a House of Lords decision. She remarked:

> It seems to me *a fortiori* in the case of *Searle v. Wallbank*, a decision of the House of Lords, that this court is not at liberty to refuse to follow the decision merely because it might not itself have reached a similar conclusion if the matter were *res integra* or because the decision has been criticized by text book writers and others.[95]

This latter remark perhaps states a different point of view from that offered by Samuels J.A. in *Kelly v. Sweeney*.[96] Walters J. agreed with the reasons of both Bray C.J. and Mitchell J.[97]

Finally, in *Brisbane v. Cross*, Young C.J. and McInerney J. relied primarily on the Australian Courts Act 1828[98] and, to some extent, on the status afforded a House of Lords decision[99] in order to apply *Searle v. Wallbank*. In a learned exposition, McInerney J. thoroughly considered the historical and legislative development in New South Wales prior to 1851 and in Victoria subsequently. Contrary to *Thomson v.*

[83] *Ibid.* 732.
[84] *Ibid.* 736.
[85] *Ibid.* 734.
[86] *Ibid.* 736.
[87] *Ibid.* 734-6.
[88] Animals Act 1971 (Eng.), s. 8(1).
[89] [1976] W.A.R. 141.
[90] *Ibid.* 148.
[91] *Ibid.* 143.
[92] *Ibid.* 147.
[93] (1978) 76 L.S.J.S. (S.A.) 475.
[94] *Ibid.* 476-85.
[95] *Ibid.* 488.
[96] [1975] 2 N.S.W.L.R. 720.
[97] (1978) 76 L.S.J.S. (S.A.) 475, 493.
[98] [1978] V.R. 49, 52-3, 61.
[99] *Ibid.* 51-2, 57.

Nix,[1] he concluded[2] that the development of the law in Australia was not inconsistent with the development in England. His Honour further asserted:

> The general pattern of land tenure, land settlement, control of roads and of impounding legislation in New South Wales, Victoria, *Western Australia*[3] and New Zealand[4] is, in substance, the same.[5]

The assertion is, with respect, probably well-founded. Underlying it is the notion that the decisions have conflicted for policy reasons; for as His Honour observed:

> Whether the rule in *Searle v. Wallbank* is in truth suitable to the conditions of life and traffic in rural areas[6] of Australia is a matter on which opinions may and do differ.[7]

In *Searle v. Wallbank* Lord Du Parcq supplied two rationales for the rule. Firstly, 'for centuries both the law and general sense of the community have sanctioned the depasturing of cattle on unfenced land'.[8] According to McInerney J., 'that rationale is unsustainable in' Australia.[9] Secondly, '[a]n underlying principle of the law of the highway is that all those lawfully using the highway, or land adjacent to it, must show mutual respect and forbearance'.[10] It is surprising that the 'mutuality' present in this policy did not accord with general principles of negligence being applicable to the highway. McInerney J., like some of the Law Lords,[11] fell into the trap of stating what a motorist should expect on the highway and not why he should expect it.

> In the last century in a predominantly rural colony a traveller using the highway could reasonably have been expected to accommodate his travel to the likelihood of cattle straying from lands adjoining the highway.
> Nowadays, however, the speed at which motorists travel on country roads is such as to make a collision with stock on the highway a serious matter, but (freeways apart) a prudent motorist driving along roads passing through pastoral or agricultural areas ought still to be alert to the possibility of encountering stock on the highway.[12]

On the other hand, traditional arguments criticizing the rule have been delivered in the Supreme Court of Canada:[13]

> 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 for conduct which involves foreseeable consequences of harm. I can think of no logical basis for this immunity and it can only be based 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.[14]

These last propositions are no longer as forceful nor as self-evident as they formerly had appeared to be, for the fault doctrine itself is being increasingly questioned. Who is better able to prevent accidents? Who is better able to bear the loss?

[1] [1976] W.A.R. 141.
[2] [1978] V.R. 49, 61.
[3] (Emphasis added.)
[4] A New Zealand Court of Appeal decision, *Ross v. McCarthy* [1970] N.Z.L.R. 449, followed *Searle v. Wallbank*.
[5] [1978] V.R. 49, 61.
[6] In *Gomberg v. Smith* [1963] 1 Q.B. 25, there were conflicting *dicta* whether a distinction should be drawn between roads in rural and urban areas.
[7] [1978] V.R. 49, 65.
[8] [1947] A.C. 341, 361.
[9] [1978] V.R. 49, 64.
[10] [1947] A.C. 341, 361.
[11] *Ibid.* 357, 361 *per* Lords Porter and Du Parcq.
[12] [1978] V.R. 49, 64-5.
[13] *Fleming v. Atkinson* (1959) 18 D.L.R. (2d) 81.
[14] *Ibid.* 99 *per* Judson J.

One sound attempt, which many learned judges have made to resolve the problem, was cited by McInerney J.:

> As Mahoney J.A. observed in *Kelly v. Sweeney*[15] . . ., it is not to be assumed that the balance of utility is all one way. And there is in Victoria, no less than in England, 'substantial force in the observations made in *Searle v. Wallbank* concerning the burden which would be placed upon landowners of rural property if a different principle were adopted'.[16]

Indeed, like other jurisdictions before it,[17] the Statute Law Revision Committee in Victoria is currently considering whether a different principle should be adopted. With this hindsight, it is worth considering the conclusion of McInerney J.: 'What social utility is to prevail is, it would seem, a matter for the legislature, not for the courts.'[18]

Having therefore decided that the principle in *Searle v. Wallbank* was part of the common law of Australia at some time, McInerney J. correctly determined that it had not been abrogated by legislation.[19] Also, following *Brock v. Richards*,[20] His Honour decided that neither the proximity of the defendant's land to the highway nor the proclivity of the steer towards straying constituted 'special circumstances' which would have imposed a duty of care on the defendant.[21]

Dunn J. agreed with the result and did not add any reasons.[22] The order *nisi* was, consequently, discharged with costs.[23]

JOHN M. ROGAN*

FALKO v. JAMES McEWAN & CO. PTY LTD

Breach of Contract — Aggravated Damages — Inconvenience, Mental Distress, Anxiety.

In actions for breach of contract the accepted dogma has been that aggravated damages are not awarded. In *Addis v. Gramophone Co. Ltd*[1] the House of Lords held that no 'exemplary'[2] damages could be awarded for loss of reputation or for hurt feelings or for difficulty in finding employment caused by wrongful dismissal under a contract of employment. More recently the Judicial Committee of the Privy Council in *British Guiana Credit Corporation v. Da Silva*[3] advised that damages for 'humiliation, embarrassment and loss of reputation' could not be claimed. Apparently, this was because such loss was not reasonably foreseeable as liable to result from breach of contract. Even the renowned West Indian test cricketer, Sir Learie Constantine,

15 [1975] 2 N.S.W.L.R. 720, 740.
16 [1978] V.R. 49, 65.
17 *E.g.* New South Wales, *Law Reform Commission Report* L.R.C. No. 8 (1970); The Law Reform Commission (U.K.) (1965) Law Com. No. 13; and 7th Report of the Law Reform Committee of South Australia to the Attorney-General, 'Law Relating to Animals' 1969.
18 [1978] V.R. 49, 65.
19 *Ibid.*
20 [1951] 1 K.B. 529.
21 [1978] V.R. 49, 65-6.
22 *Ibid.* 66.
23 *Ibid.*
* B.A. (Melb.).

1 [1909] A.C. 488. (see also *Perera v. Vandiyar* [1953] 1 W.L.R. 672 (C.A.).)
2 *Ibid.* 496 *per* Lord Atkinson, 497 *per* Lord Collins.
3 [1965] 1 W.L.R. 248, 259.