SUPREME COURT OF QUEENSLAND

CITATION:	*Hutton v RLX Operating Company Pty Ltd & Ors* [2016] QSC 248
PARTIES:	**SHAUN HUTTON** (Plaintiff/First Respondent) **v** **RLX OPERATING COMPANY PTY LTD (ABN 90 129 963 935)** (First Defendant/Applicant) **ROCKHAMPTON PERFORMANCE HORSE INC (ABN 25 486 898 870)** (Second Defendant/Second Respondent) **TRACEY MUSCAT** (Third Defendant)
FILE NO/S:	S 46/16
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	31 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2016
JUDGE:	McMeekin J
ORDERS:	**1. Judgment for the first defendant on that part of the plaintiff's claim alleging a breach of a statutory duty by the first defendant;** **2. That paragraphs 2h, 6a and 6g of the Amended Statement of Claim so far as they relate to the first defendant be struck out;** **3. That the plaintiff have leave to re-plead;** **4. That the plaintiff file and serve any amended Statement of Claim on which he seeks to rely on or before 4pm on 14 November 2016;**

5. **That the parties have liberty to apply on the giving of three days' notice to the other;**

6. **That the plaintiff pay the first defendant's costs of the application on the standard basis.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the defendant applies for summary judgment or in the alternative to strike out paragraphs in the plaintiff's Statement of Claim – where the plaintiff's vehicle collided with six horses which had strayed from a saleyards complex - where the plaintiff suffered personal injuries – where the first defendant was the sublessee of the saleyards complex – where the plaintiff claims the first defendant with knowledge of the presence of animals on the land brought there by another is under a duty at common law to take reasonable care to prevent harm to passers-by from those animals escaping – where the plaintiff claims the first defendant was under a statutory duty to fence in animals that others brought onto its land – whether the plaintiff has no real prospects of success – whether paragraphs of the statement of claim disclose no reasonable cause of action or have the tendency to prejudice or delay the fair trial of the proceeding

Uniform Civil Procedure Rules 1999 (Qld), r 149, r 154, 157, r 171, r 292, r 293, r 443, r 444

Local Government Act 2009 (Qld), s 9, s 28, s 60

Agar v Hyde (2000) 201 CLR 552
Australian Iron & Steel Ltd v Ryan (1957) 97 CLR 89
Australian National Railways Commission v Scott's Transport Industries Pty Ltd (1985) 2 MVR 417
Bennett v Chemical Construction (GB) Ltd [1971] 1 WLR 1571
Commonwealth Dairy Produce Equalisation Committee Ltd v Hansen [1944] St R Qd 95
Deen v Davies (1935) 2 KB 282
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232
Electrical and General Contract Corporation v Thomson-Houston Electric Co [1893] 10 TLR 103
Fabian v Welsh [1999] QCA 365
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125
Graham v The Royal National Agricultural and Industrial Association of Queensland [1989] 1 Qd R 624
Heil v Suncoast Fitness [2000] 2 Qd R 23
Henderson v Dalrymple Bay Coal Terminal [2005] QCA 355
O'Brien v TF Woollam & Son Pty Ltd [2002] 1 Qd R 622
O'Connor v S P Bray Ltd (1937) 56 CLR 464

Percy v Central Control Financial Services Pty Ltd [2002] 1 Qd R 630
Schellenberg v Tunnel Holdings Pty Ltd (2000) 200 CLR 121
Schiliro v Peppercorn Childcare Centres Pty Ltd [2001] 1 Qd R 518
Searle v Wallbank (1947) AC 341
Smith v Williams [2006] Aust Torts Reports 81-863
Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397
State Government Insurance Commission v Trigwell (1979) 142 CLR 617
Theseus Exploration NL v Foyster (1972) 126 CLR 507
Townsend v BBC Hardware [2003] QCA 572
Wilkinson v BP Australia Pty Ltd [2008] QSC 171

COUNSEL: G Crow QC for the plaintiff

B Health (solr) for the first defendant

R Morton for the second defendant

No appearance by the third defendant

SOLICITORS: Carter Newell for the applicant

Maurice Blackburn for the respondent

Meridian Lawyers for the second respondent

[1] **McMeekin J:** At about 4am on 11 November 2013, Mr Hutton, the plaintiff, suffered serious physical injuries when he drove into and struck a small group of horses that had escaped from the Gracemere Saleyards Complex ("the saleyards") onto the Capricorn Highway. The horses belonged to the third defendant and she had brought them to the saleyards a few days before for the purposes of a camp drafting and quarter horse event organised by the second defendant. The first defendant (RLX Operating Company Pty Ltd) was the sublessee of the saleyards at the relevant time.

[2] Mr Hutton claims damages for the personal injuries suffered. The first defendant applies for summary judgement pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) or in the alternative to strike out certain paragraphs of the Amended Statement of Claim pursuant to r 171 UCPR.

[3] A preliminary point was taken that the latter application, at least as argued, came within the purview of rr 443 and 444 UCPR and that the necessary letter had not been written as r 444 required. I am satisfied that there was no requirement to write such a letter. Rule 443 does not apply - this is not an application made for further and better particulars of the opposite party's pleading under rule 161, nor under Chapter 10 Parts 1 or 2 UCPR, nor is it an application relating to a failure to comply with an order or direction of the court.

The Pleading

[4] Relevantly in paragraph 2 (various matters are pleaded which apparently concern the second and third defendants and which I do not mention) the following is alleged (and I here summarise the effect):

(a) the first defendant was the lessee[1] and operator of the saleyards;
(b) the saleyards is the largest saleyard complex in Australia. It consists of 80 selling pens, 40 receiver yards, a camp drafting area, an undercover stock selling facility, and an undercover camp drafting area of stated dimensions, with the capacity to concentrate more than 1,000 head of livestock in a small area;
(c) The saleyards are located directly beside the Capricorn Highway, a road known to carry heavy traffic;
(d) The speed limit on the highway was 80kph;
(e) The first defendant knew or ought to have known that if livestock were to wander from the saleyards they were likely to traverse upon the highway and a risk of a high speed collision was "likely" and persons may be killed or suffer injury.

[5] Paragraph 2 h of the pleading asserts (and here I quote verbatim):

> "h. The First and Second Defendants knew or ought to have known that the Second Defendant in organising and/or operating (as the term is used in *Subordinate Local Law No. 1.12 (Operation of Temporary Entertainment Events)* 2011) the Rocky Super Series, the Second Defendant was organising for several hundred camp drafting and quarter horses to be present at the confined area of the Gracemere Saleyards Complex as aforesaid and that such horses would be housed or placed at the said complex together with a further 170 horses being offered for auction on 11 November 2013, such that both the First and Second Defendant were responsible for and did in fact concentrate for a short period large numbers of performance horses in a relatively small and congested area in circumstances where the horses were brought to the saleyards area for competition or sale, such that the horses were well fed and under exercised, such that the horses had a natural tendency in the circumstances to over activity and were understood by the First and Second Defendants to be unsettled in unfamiliar surroundings such that the horses at the complex were more likely than general horses to attempt to get out of the complex and onto the highway and cause injury to users of the Capricorn Highway once there."

[6] Reference is then made to various laws having been made by the Rockhampton Regional Council pursuant to s 28 of the *Local Government Act* 2009 (Qld). Those laws, so far as they seem to apply to the first defendant, are *Local Law No 2 (Animal Management)* 2011, *Subordinate Local Law No 2 (Animal Management)* 2011, and *Local Law No 1 (Administration)* 2011. No reference is made to the terms of those laws or why they apply to the first defendant.

[7] Paragraph 2A then pleads:

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[1] Inaccurately – it is now common ground that the first defendant is the sub-lessee.

"In the circumstance pleaded above the First Defendant owed duties of care to the Plaintiff to:-

a. take reasonable care to avoid a foreseeable risk of injury to users of the Capricorn Highway, including its use by the Plaintiff, as a result of animals that might escape the Gracemere Saleyards Complex; and
b. take reasonable steps to ensure that the gates to the Gracemere Saleyards Complex were closed and secure at all times except when immediately being opened or closed to prevent animals escaping the Gracemere Saleyards Complex; and
c. take reasonable steps to ensure that instructions and/or directions were given to third parties using the Gracemere Saleyards Complex, such as the Second Defendant, that the gates to the Gracemere Saleyards Complex were to be closed and secure at all times except when being immediately opened or closed to prevent animals escaping the Gracemere Saleyards Complex; and
d. ensure, according to Rockhampton Regional Council *Local Law No. 2 (Animal Management) 2011* and to Rockhampton Regional Council *Subordinate Local Law No. 2 (Animal Management) 2011* that:-
    i. all enclosures, being either temporary or permanent, at the Gracemere Saleyards Complex were suitably fenced and that the said enclosures are maintained so as to effectively enclose animals being kept at all times and to prevent those animals from wandering or escaping; and
    ii. the enclosures, referred to in paragraph 2A.d.i. above, were suitably fenced to effectively enclose animals from escaping over, under of through the fence; and
        1. being constructed of materials which were of sufficient strength to prevent animals from escaping over, under of through the fence; and
        2. being of a height which was sufficient to prevent animals jumping or climbing over the fence; and
        3. for which all attached gates were kept closed and latched except when in immediate use by a person entering or leaving the enclosure."

[8] What particular "circumstance pleaded above" is relied on is not apparent from the pleading. Many of the matters "pleaded above" have nothing to do with the first defendant. In the course of submissions reliance was placed on the matters I have outlined in paragraphs [4] and [5].

[9] At paragraph 3 the fact of the collision with the horses is pleaded. At paragraph 5 the fact of the plaintiff sustaining injuries as a result of the collision is pleaded.

[10] The area from which the horses escaped and the means by which they escaped is not identified in the pleading – these facts may not be known to the plaintiff. He was a motorist driving past the saleyards when injured. The closest the pleading comes to these issues is at paragraph 4:

> "The group of six horses had wandered or escaped from the Gracemere Saleyards Complex because of the Third Defendant's failure, and/or the

First and Second Defendants' failures and/or their servants or agents of the First, Second or Third Defendants failures to properly house or secure the said horses, and/or to properly close the gate to the saleyards complex."

[11] The pleading of breach of duty is at paragraphs 6 and 6A which provide:

"6. The aforesaid incident and injuries were caused by the negligence of the First and Second Defendant, their servants or agents in:-

a. Failure to adequately secure the six horses involved in the incident on the Gracemere Saleyards complex which adjoins the Capricorn Highway ("the property")
b. Failure to adequately maintain fencing and yards on the complex (including latches etc on the gates to yards) to ensure they were in working order;
c. Vicarious liability for an employee of the First and Second Defendants in failing to properly and securely shut a gate on the property which allowed the six horses to escape;
d. Failure to catch the six horses following their escape within a reasonable time-frame;
e. Failure to have a secondary fence or catchment for the six horses should they escape their primary yard to prevent them from accessing the Capricorn Highway;
f. Failure to provide yards or fencing at the property which would not be liable to fail from horses pushing against it which is a common habit of horses;
g. Otherwise the failure to prevent the six horses from getting loose on the highway and posing an obvious hazard to motorists such as the injured Plaintiff.

6A. Further, the aforesaid incident and injuries were caused by the breaches by the First and/or Second Defendants of their statutory duties as described in paragraphs 2A and 2B for failing to ensure that a suitably fenced enclosure existed so as to reduce the risk of animals escaping from the Gracemere Saleyards Complex."

[12] It is common ground that the first defendant was not the owner of the animals that escaped, did not bring onto its land the animals that escaped and was not the organiser of the event being conducted on the land. That event (involving camp drafting and quarter horse events and referred to in the pleading above as the "Rocky Super Series") was conducted with its permission, which it seems, by the terms of its sub-lease, it was under some obligation to give.

[13] Mr Hutton's case against the first defendant therefore depends on one of the following propositions being accepted.

(a) That a lessee of land, with knowledge of the presence of animals on the land brought there by another, is under a duty at common law to take reasonable care to prevent harm to passers-by from those animals escaping from the land; or

(b) That the first defendant was under a statutory duty to fence in animals that others brought onto its land imposed by *Local Law No. 2 (Animal Management)* 2011 and *Subordinate Local Law No. 2 (Animal Management)* 2011, a breach of that duty entitling a party injured thereby to damages;

The submissions

[14] The first defendant argues that neither proposition is correct in law. It argues that the first amounts to the proposition that by reason of the mere occupancy of land the occupier is responsible for straying stock, a proposition that runs counter to the decision of the High Court in *State Government Insurance Commission v Trigwell*[2] in which it was held that the rule in *Searle v Wallbank*[3] applied in Australia. That the immunity identified in *Trigwell* applies in Queensland is well established: see *Fabian v Welsh*;[4] *Smith v Williams*[5].

[15] The second argument depends on the propositions that local laws made by the local council in fact apply to the first defendant, that those local laws overturn the principle established in *Trigwell* and further that those laws provide a private right of action should they be breached. The first defendant says none of these can be maintained.

[16] Senior counsel for the plaintiff asserts, accurately in my view, that the fundamental issue for determination concerns the control that the first defendant exercised or should have exercised over the saleyards. There is a debate between the defendants as to that control - the second defendant has issued contribution proceedings against the first defendant. If the person in control of the stock failed to exercise reasonable care in fencing the horses in then, absent any immunity, that person is potentially liable to the plaintiff.

[17] As to the immunity enjoyed by land owners from suit for damage caused by straying stock the plaintiff argues that the facts pleaded serve to distinguish the case from the facts in *Trigwell* citing *Graham v The Royal National Agricultural and Industrial Association of Queensland*[6]. Those relevant facts appear in paragraph 2h quoted above.

[18] According to the pleading there was a concentration of horses at the sale yard complex on the night in question. The plaintiff asserts that this concentration was brought about in a "relatively small and congested area"; that the horses were "well fed and under exercised, such that the horses had a natural tendency in the circumstances to over activity"; and that they were, and were known by the first defendant to be, "unsettled in unfamiliar surroundings such that the horses at the

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[2] (1979) 142 CLR 617.
[3] (1947) AC 341.
[4] [1999] QCA 365.
[5] [2006] Aust Torts Rep 81-863.
[6] [1989] 1 Qd R 624

complex were more likely than general horses to attempt to get out of the complex and onto the highway". A similar concatenation of facts satisfied Connolly J in *Graham* that the immunity found to exist in *Trigwell* did not apply to the defendant there.

[19] The plaintiff asserts that the local laws by their terms do apply and whether they have the effect contended for is a complex issue not to be determined in a summary way.

The principles applicable to summary judgment

[20] Rule 293 UCPR provides:

> **Summary judgment for defendant**
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> (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
>
> (2) If the court is satisfied—
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> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
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> (b) there is no need for a trial of the claim or the part of the claim;
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> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate.

[21] In *Deputy Commissioner of Taxation v Salcedo*[7], after a review of authorities, the Court of Appeal considered the approach that should be adopted to summary judgment applications brought pursuant to rules 292 and 293 UCPR. It was held that the more stringent test laid down by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)*[8] "that the case of the plaintiff is so clearly untenable that it cannot possibly succeed" is not to be applied. Rather "the court must consider whether there exists a real, as opposed to a fanciful, prospect of success. If there is no real prospect that a party will be successful in all or part of a claim, and there is no need for a trial, then ordinarily the other party is entitled to judgment": [9] I bear in mind the cautionary statement of McMurdo P in that case:

> "Nothing in the UCPR, however, detracts from the well established general principle that issues raised in proceedings will be determined summarily only in the clearest of cases. Gaudron, McHugh, Gummow and Hayne JJ said in *Agar v. Hyde*, (2000) 201 C.L.R. 552, 575–576 [57] recently cited with approval by Gleeson C.J., McHugh and Gummow JJ. in *Rich v. CGU Insurance Ltd* (2005) 79 A.L.J.R. 856, 859 [18]-[19]:

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[7] [2005] 2 Qd R 232.
[8] (1964) 112 CLR 125, 130.
[9] *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 per Atkinson J at [47]. See also McMurdo P at [2] and Williams JA at [17].

> "… Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[10]

The case in negligence

[22] In my view the plaintiff's case is not so untenable that it could be said that it has no real prospect of success.

[23] The plaintiff contends that the facts pleaded, if established, have been held in *Graham* to be sufficient to distinguish *Trigwell's Case*. *Graham* concerned, inter alia, a claim by a motorist for damages for personal injury caused by a horse that bolted from an exercise yard adjacent to the road. The horse was in the care of a servant or agent of the show society – the RNA. That servant had, as part of his duties, brought the horse to the exercise yard from which it escaped. In *Graham* Connolly J said of the principle laid down in *Searle v Wallbank*:

> "In *State Government Insurance Commission v. Trigwell* (1979) 142 C.L.R. 617, the continued operation of this principle, which I have stated rather baldly, was affirmed. The judgment of Mason J., as he then was, in Trigwell, discusses the qualification of the rule which recognised that liability might arise where the defendant had prior knowledge of some vicious propensity in the animal which injured the plaintiff. At 637 his Honour observed that the reference to "special circumstances" as an exception to the immunity acknowledged by the rule in *Searle v. Wallbank* relates to knowledge by the owner of a vicious or mischievous propensity in the animal which strays onto the highway and causes injury. … It seems to me however that the R.N.A. is not in the simple position of an occupier of land whose stock stray onto the highway. It concentrates, for a short period, large numbers of livestock, many of them large animals, in a relatively small and congested area, all of them, of the nature of things, well fed and under-exercised. The colt in question was not of a vicious propensity but it obviously shared with all, or at least most of the large animals on the site during the Exhibition, a natural tendency, in these circumstances, to over-activity and to be unsettled in unfamiliar surroundings. In my opinion the phrase, "vicious or mischievous propensity" is a way of expressing a notion that the animal in question is more likely than the general run of animals, to get onto the highway as

[10] Ibid [3].

> well, of course, as being more likely to cause injury or damage once there."[11]

[24] On that ground Connolly J distinguished *Trigwell* and held that the immunity was not available to the RNA.

[25] Essential then to the plaintiff's argument is that Connolly J correctly expressed the law – that the immunity is excluded where "the animal in question is more likely than the general run of animals, to get onto the highway" not because of some known vicious or mischievous propensity that would cause it to stray but rather because, common to all of its kind, the conditions in which it finds itself causes it to be more excitable. As Connolly J put it - "a natural tendency, in these circumstances, to over-activity and to be unsettled in unfamiliar surroundings" a tendency "obviously shared with all, or at least most of the large animals on the site".

[26] Any decision of Connolly J of course demands respect but I note that his Honour did not attempt any close analysis of the decisions on the exception to the rule and with the greatest of respect I entertain considerable doubts that his Honour correctly stated the exception to the rule.

[27] It is quite evident that in stating the mischievous propensity exception to the rule the judgements delivered in *Trigwell* required that there be knowledge of a propensity in the individual animal to behave in a way not common to all of its kind. So Barwick CJ said:

> "I also agree with my brother Mason in thinking that if the view of Lord du Parcq in *Searle v Wallbank* was that there may be exceptional circumstances beyond the known and relevant propensity of the straying animal in which negligence in the land-owner may be found, it is not an acceptable view and ought not to be acted upon."[12]

[28] Gibbs J was to the same effect:

> "The 'special circumstances' to which Lord du Parcq refers in *Searle v Wallbank* [1947] AC at 360, must, I agree, be limited to circumstances in which a particular animal has, to the knowledge of the defendant, a special vicious or mischievous propensity against which there is a duty to guard; a mere proclivity towards straying is not enough: *Brock v Richards* [1951] 1 KB at 535–7."[13]

[29] Mason J, with whom each of the judges, save Murphy J, agreed on the application of the principle, said:

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[11] *Graham v The Royal National Agricultural and Industrial Association of Queensland* [1989] 1 Qd R 624, 632.
[12] *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 623.
[13] Ibid 628.

> "The reference to 'special circumstances' as an exception to the immunity acknowledged by the rule in *Searle v Wallbank* relates to knowledge by the owner of a vicious or mischievous propensity in the animal which strays on to the highway and causes injury. In this connection I express my agreement with the observations of Evershed MR in *Brock v Richards*. I doubt whether topographical peculiarities can amount to "special circumstances": cf *Ellis v Johnstone* [1963] 2 QB 8; [1963] 1 All ER 286."[14]

[30] Connolly J's finding that the colt in question in *Graham* was not of a mischievous disposition would seem to me to take the case out of the recognised exception to the rule. The "special vicious or mischievous propensity" concept is also to be found in the related area of the liability of an owner for the harm caused by a domesticated animal – one in the category of *mansuetae naturae*. There an owner may be held strictly liable for any harm caused by an animal if the owner had prior knowledge of such a propensity.[15] It has never been doubted in that context that it is knowledge pertaining to the individual beast that is essential. Thus the typical behaviors of the animal in question is to be ignored.[16] Connolly J's exception – that a docile animal placed in a situation that is likely to make it more prone to react - has in fact been expressly rejected as exposing a keeper of an animal to liability. So in *Sycamore v Ley*[17]it was held that a dog that had exhibited fierceness when tied up in its master's car was insufficient "for it was no evidence that it was different from other dogs". That the exception should be so extended seems to me to be not based in authority and not otherwise justified.

[31] However the fact is that *Graham* has stood as authority for the proposition that the plaintiff advances for over a quarter of a century. No case was cited in which that proposition has been doubted or over-ruled. The first defendant did not dispute the continuing authority of *Graham* but rather seeks to distinguish the facts here from those in *Graham*. So I have heard no argument on the point. In those circumstances I am disinclined to rule on a summary judgment application that the argument is untenable and cannot succeed.

[32] The distinguishing feature that the first defendant contends for is that in *Graham* the RNA brought the horse to the location from where it escaped whereas here the first defendant did not. It is true that there is no pleading that the first defendant brought the horses that escaped to the precise yard from which they escaped. However it is alleged in paragraph 2h (along with much else) that the first and second defendant "did in fact concentrate for a short period a large numbers of performance horses in a relatively small and congested area." That it seems to me is sufficient to arguably come within Connolly J's exception – that the gathering by the occupier in one congested place of a large group of horses that, to quote the pleading, "were well

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[14] Ibid 637.
[15] 20 *Halsbury's Laws of Australia* para 20-505.
[16] [1916] 2 KB 370, 383.
[17] (1932) 147 LT 342.

fed and under exercised, such that the horses had a natural tendency in the circumstances to over activity and were understood by the First and Second Defendants to be unsettled in unfamiliar surroundings such that the horses at the complex were more likely than general horses to attempt to get out of the complex and onto the highway."

[33] The issue then is whether it is sufficiently pleaded to show a case in negligence. The first defendant was critical of the pleading and I can understand why. However the general thrust of the case is clear enough.

[34] The plaintiff has pleaded that the first defendant was the lessee and "operator" of the saleyards. That latter assertion is in issue. The question of the extent of the control being exercised by the first defendant, or that ought to have been exercised, at the relevant time is plainly a triable issue.

[35] The pleading of negligence is contradictory – the allegations include both a failure to secure a gate, failing to provide fences that were capable of keeping horses enclosed, and failing to maintain the fences. Each of these is quite a distinct case. The plaintiff is entitled to do that provided the plea is in the alternative (see r 154 UCPR). That does not appear from the pleading.

[36] I assume that the plaintiff does not know why the horses escaped.

[37] While it was not said in submissions it seems to me that a plaintiff who is ignorant of the causes of an accident – here, how it is that the horses came to be on the highway - can call in aid the doctrine of *res ipsa loquitur*. That is, that in the normal course of things, absent negligence by whomever had the duty to exercise reasonable care, horses kept in the saleyards should not escape onto the highway. It has been held that there is no necessity to plead the doctrine: *Bennett v Chemical Construction (GB) Ltd*.[18] Zelling J pointed out in *Australian National Railways Commission v Scott's Transport Industries Pty Ltd*[19] that the application of the doctrine was "simply a method of launching the case of a plaintiff who says that the circumstances of the accident themselves raise a sufficient presumption of negligence because what has happened is what does not normally happen when the act complained of is being carried on with normal care and skill…. It merely enables a plaintiff to launch his case and avoid applications for nonsuit…." It is at least arguable that in the normal course of things a herd of six horses should not escape from the saleyards and get on to the highway. As to the principles that apply see *Schellenberg v Tunnel Holdings Pty Ltd.*[20]

[38] The first defendant cited *Smith v Williams*[21], a decision of the Court of Appeal on a summary judgment application, as supporting its argument but the facts pleaded are

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[18] [1971] 1 WLR 1571.
[19] (1985) 2 MVR 417, 420.
[20] (2000) 200 CLR 121, [20]-[25] per Gleeson CJ and McHugh J.
[21] [2006] Aust Torts Reports 81-863.

very different. There the plaintiff sought to argue that a plea that the defendant "allowed or permitted" cattle to be on the highway brought the case within the claimed exception referred to in *Deen v Davies*[22] – that if one brings animals onto the highway then no immunity applies as it only applies to *straying* animals. The ambiguity in the phrase "allowed or permitted" was the plaintiff's undoing there. Here the pleading in paragraph 2h suffices to bring the case within the exception for which *Graham* is authority.

The breach of statutory duty case

[39] The statutory duty case is more complex. That very complexity is a reason for not dismissing the case summarily: *Electrical and General Contract Corporation v Thomson-Houston Electric Co*;[23] *Theseus Exploration NL v Foyster*;[24] and *Commonwealth Dairy Produce Equalisation Committee Ltd v Hansen*.[25]

[40] There are three areas of dispute. The first is that the first defendant contends that the legislation simply does not apply to it according to its terms. It submits that there is no pleading that shows that the legislation does apply to it. That is correct.

[41] Obligations expressed in mandatory terms are imposed on certain persons by some provisions of the *Local Law No. 2 (Animal Management)* 2011. That is a law passed by the Rockhampton Regional Council. Which provision is relied on by the plaintiff does not clearly emerge from the pleading. Section 12 imposes obligations on "the owner" or on the "responsible person". Section 14 imposes an obligation on a "person who keeps an animal". Each of those terms are defined, albeit the word "keep" is defined only in the subordinate local law not the local law. The submissions of the plaintiff concentrated on the word "keep" and the obligation imposed by s 14 (as to which see below).

[42] *Subordinate Local Law No. 2 (Animal Management) 2011* is expressed to have been made under *Local Law No. 2*. It provides a definition of "keep" with respect to an animal as follows:-

> **keep** (an animal) –
> (a) includes board, breed and train; and
> (b) in the absence of evidence to the contrary, a person is presumed to keep an animal on land if the person –
> (i) feeds and cares for the animal on the land; and
> (ii) the animal is observed by an authorised person on the land on more than one occasion during a month.

[43] The Statement of Claim does not identify which of those alternatives applies to the first defendant.

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[22] (1935) 2 KB 282.
[23] [1893] 10 TLR 103.
[24] (1972) 126 CLR 507.
[25] [1944] St R Qd 95.

[44] The plaintiff argues that the definition in the subordinate law does not apply to the local law and if that is not right that the definition is merely inclusionary, leaving the point to be determined as a matter of fact. Further the plaintiff points to the word "board" in paragraph (a) above as being sufficiently wide to encompass the temporary accommodating of the horses at the saleyards. The plaintiff contended that it was a triable issue whether or not the first defendant "kept" the animals in the relevant sense. That may well be right but at present there is no express pleading that s 14 applies or that the first defendant comes within the term or the factual basis for why that is contended to be so.

[45] As will appear from the legislative provisions other potential qualifying conditions include whether the first defendant is a "responsible person" for an animal, the "occupier" of land where the animal is located, or the person having "management or control" of the saleyards. The first defendant says that none apply to it but those are questions of fact for a trial.

[46] The second area of dispute is that the first defendant says that the legislation does not abrogate the common law immunity. In my view if the legislation does provide a private right of action (which is the third area of dispute) then this is a question that must be left to trial. On its face the legislation is broad enough.

[47] I will set out the plaintiff's argument.

[48] By s 9 of the *Local Government Act* 2009 (Qld) ("LGA") local governments are given power "to do anything that is necessary or convenient for the good rule and local government of its local government area" provided that a local government "can only do something that the State can validly do".

[49] Section 28 of the LGA gives local governments power to "make and enforce any local law that is necessary or convenient for the good rule and local government of its local government area".

[50] Section 60 of the LGA provides that a local government "has control of all roads in its local government area" which includes a power to "make a local law to regulate the use of roads, including … by imposing obligations on the owner of land that adjoins a road (including an obligation to fence the land to prevent animals going on the road, for example)".

[51] Section 8 of the *Local Law No. 2 (Animal Management)* 2011 provides that the local government "may, by subordinate local law, specify minimum standards for the keeping of animals or a particular species all breed of animal" and that the "person who keeps an animal must ensure that the relevant minimum standards prescribed by a subordinate local law are complied with".

[52] Section 13 of *Subordinate Local Law No. 2 (Animal Management) 2011* provides that Schedule 8 contains the requirements for proper enclosures for particular

species. Schedule 8 sets out requirements for all animals and also provides specifically for the enclosure of horses.

[53] The Schedule provides the following requirements for a proper enclosure for all animals:-

(1) A proper enclosure is an area of the land on which the animal is kept, appropriately sized so as to be capable of effectively and comfortably housing the animal.

(2) The area must be suitably fenced –

(a) appropriate to the species and breed of the animal to be enclosed; and

(b) so as to effectively enclose the animal on the land on which it is kept at all times.

(3) For the purposes of this item 1 **suitably fenced** means enclosed by a fence –

(a) constructed of materials which are of sufficient strength to prevent the animal from escaping over, under or through the fence; and

(b) of a height which is sufficient to prevent the animal jumping or climbing over the fence; and

(c) where the animal has the ability to dig - which includes a barrier installed directly below the fence to prevent the animal from digging its way out; and

(d) where the animal has the ability to climb - designed and constructed in such a way as to prevent the animal from climbing over the fence; and

(e) of which all gates are kept closed and latched except when in immediate use by a person entering or leaving the land on which the animal is kept.

[54] The Schedule provides the following requirements for a proper enclosure for horses:-

A proper enclosure for the keeping of a horse must, in addition to the requirements specified in item 1 –

(a) effectively enclose the horse so that the horse can not reach over or through the fence to adjoining land or any public place; and

(b) where the animal is a stallion - the enclosure must be constructed with an additional or second suitable and adequate fence or enclosure that is provided at the land on which the stallion is kept to a standard approved by an authorised person.

[55] Part 3 of the *Local Law No. 2 (Animal Management)* 2011 deals with the control of animals. Section 12 provides, so far as relevant:

Control of animals in public places

(1) **The owner or responsible person** for an animal must ensure that the animal is not in a public place—

(a) unless the animal is under the effective control of someone; and

…
Maximum penalty for subsection (1)—20 penalty units.

…

(3) An animal is under the ***effective control*** of someone only if—

(a) a person who is physically able to control the animal—
(i) is holding it by an appropriate leash, halter or rein; or
(ii) has appropriately tethered it to an object fixed to a place from which the object can not be moved by the animal and is continuously supervising the animal; or
(iii) has corralled it in a temporary enclosure adequate to contain the animal and is continuously supervising the animal; or

…

[56] Section 14 provides:-

Duty to provide proper enclosure and prevent animal from wandering

(1) **A person who keeps an animal** must maintain a proper enclosure to prevent the animal from wandering or escaping from the person's land.

(2) The local government may, by subordinate local law, prescribe requirements for a proper enclosure for an animal or species or breed of animal.

(3) **The owner of the animal** must ensure that it is not wandering at large.

(4) It is a defence to a prosecution for an offence against subsection (3) for the defendant to prove that –

(a) the defendant maintained a proper enclosure for the animal and could not, by the exercise of reasonable diligence, have prevented the escape of the animal; or

(b) the animal was wandering at large in circumstances authorised by the conditions of an approval granted under a local law.[26]

[57] The plaintiff's argument is that parliament determined that rather than pass a blanket law for the whole of Queensland it left it to individual councils to abrogate the immunity if they saw fit. That seems extraordinary and I deal with the relevant issues below. At this point I merely observe that given the width of the terms of s 60 of the LGA the proposition is not unarguable.

[58] The third area of dispute is whether the statute provides a private right of action for its breach. That point has not been the subject of judicial determination previously in relation to this legislation. Whether legislation confers a private right of action has proved a vexed question. The differing points of view expressed in relation to workplace health and safety legislation are testament to that: *Schiliro v Peppercorn Childcare Centres Pty Ltd*[27]; *O'Brien v TF Woollam & Son Pty Ltd;*[28] *Percy v*

[26] My emphasis.
[27] [2001] 1 Qd R 518.
[28] [2002] 1 Qd R 622.

Central Control Financial Services Pty Ltd;[29] *Townsend v BBC Hardware*[30]*; Heil v Suncoast Fitness;*[31] *Henderson v Dalrymple Bay Coal Terminal;*[32] *Wilkinson v BP Australia Pty Ltd*[33].

[59] The general principles underlying the issue here were explained by Dixon J in *O'Connor v S P Bray Ltd*[34]:

> "The received doctrine is that when a statute prescribes in the interests of the safety of members of the public or a class of them a course of conduct and does no more than penalise a breach of its provisions, the question whether a private right of action also arises must be determined as a question of construction. The difficulty is that in such a case the legislature has in fact expressed no intention upon the subject, and an interpretation of the statute, according to the ordinary canons of construction, will rarely yield a necessary implication positively giving a civil remedy. **In the absence of a contrary legislative intention, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognised by the general principles of the common law.** I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or scope of the legislation of which it forms part a contrary intention appears." (my emphasis)

[60] The views of Kitto J in *Australian Iron & Steel Ltd v Ryan*[35] are often quoted and are also of assistance:

> "… an implication that private rights are created does not necessarily, or even generally, depend upon discerning in the words used a manifestation of an actual intention on the part of the draftsman to create such rights. It depends, of course, on 'a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted': per Lord Simonds in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407."

[61] Monetary penalties are provided in section 14 of *Local Law No. 2* 2011 for breaches of the obligations to maintain a proper enclosure and to ensure that animals are not wandering at large. That is, the provisions are penal. That, of itself, is not a disqualifying feature: see Kitto J's discussion in *Sovar v Henry Lane Pty Ltd*[36] and Glass & McHugh, *The Liability of Employers in Damages for Personal Injury*, Law

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[29] [2002] 1 Qd R 630.
[30] [2003] QCA 572.
[31] [2000] 2 Qd R 23.
[32] [2005] QCA 355.
[33] [2008] QSC 171 [20]-[26].
[34] (1937) 56 CLR 464, 477-478.
[35] (1957) 97 CLR 89, 98.
[36] (1967) 116 CLR 397, 405-406.

Book Company Ltd, 1996 at 126 cited in *Schiliro v Peppercorn Childcare Centres Pty Ltd* [37]

[62] The terms of the legislation are mandatory and seem to impose a strict liability – if an animal escapes then it follows that it was not properly enclosed or supervised as the case might be. So far as an owner is concerned the liability imposed under s 14(3) is subject to the defence provided for in s 14(4)(a). That defence does not reflect the common law position – the onus is reversed and it is the defendant who must prove that the enclosure was appropriate and that due diligence was exercised.

[63] There are three significant points. The first is that the pre-condition that Dixon J spoke of in *O'Connor* is not present. These laws do not protect an interest recognised by the general principles of the common law. That is, the person upon whom the plaintiff says the duty is laid is not, under the general law of negligence, bound to exercise due care. There is an immunity provided by the common law.

[64] Allied to that and against the argument is that the provisions impose strict liability. There may be an argument whether that is so given the defence in s 14(4)(a) but I cannot see any such argument regarding s 12 or under s 14(1) for those who "keep" an animal. Far from imposing a duty to exercise reasonable care the provisions require obedience and proof of escape, perhaps absent intervention by a third party, would appear to expose the landholder to proceedings for breach and hence, on the plaintiff's argument, damages at the suit of anyone who suffers harm as a result of that breach.

[65] The second point, and again against the plaintiff's proposition, is the very width of the provision. The duty is necessarily owed not to a defined class of persons but the world at large – anyone using the highway adjoining the saleyards. Where that is so it is a factor against, and strongly against, the notion that the legislation affords a private right of action: *Heil v Suncoast Fitness.*[38]

[66] Nor is the duty confined to doing a particular act – the duty is to ensure an animal is enclosed, or not at large, or not in a public place unless controlled. While more precise than merely asserting the animal is to be kept safely there is very little in the way of direction as to what will amount to compliance with the law. In *Schiliro* it was said that views differed as to whether "generality of expression or lack of indication of precisely what is required or prohibited is an influential factor in deciding whether a statutory provision gives rise to a civil cause of action, such a factor is sometimes adverted to as a relevant consideration."[39]

[67] The third point, and again against the plaintiff's proposition, is that neither the nature of the provision or the scope of the legislation of which it forms a part provide much support for the argument. It is one thing for a local council to pass a

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[37] [2001] 1 Qd R 518 [19].
[38] [2000] 2 Qd R 23 [10].
[39] *Schiliro v Peppercorn Childcare Centres Pty Ltd* [2001] 1 Qd R 518 [20].

local law that enables it to exercise some control over landholders and their keeping of animals by way of the imposition of a modest fine. It is quite another to take away an immunity from suit for damages caused by wandering animals thereby exposing landholders to potentially crushing awards of damages.

[68] If the plaintiff's argument is correct then it has the effect of there potentially being a patchwork of rights and immunities across the State and even across an individual property. Thus a landowner's property might straddle council boundaries so that at one place the owner has immunity but in another not as no similar local law had been passed. Hence liability might turn on where the gap in the fences happened to be. That is a very peculiar position to be in.

[69] That this significant change to the common law involving the sweeping away of an immunity that has been enjoyed by landholders in this State since its inception appears in a local law is quite extraordinary. One would expect such a legislative change to be the subject of considerable debate and if intended that the relevant Minister would announce publicly so sweeping a change.

[70] Senior counsel for the plaintiff argued that this was in the nature of a test case on the question of the effect of these legislative changes. The question for me is whether I have a "high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way".[40]

[71] Despite the complexity of the issues I cannot see that there is any real prospect of success on this aspect of the claim. I propose to give judgment for the first defendant on that part of the plaintiff's claim that alleges a breach of a statutory duty by the first defendant.

Rule 171

[72] The first defendant seeks in the alternative to strike out paragraphs 2(d), 2(h), 2(A)(d) and 6(a)[41] of the Amended Statement of claim pursuant to r 171 UCPR on the grounds that "no material facts have been pleaded in substantiation of the propositions sought to be advanced and so those paragraphs disclose no reasonable cause of action." In case I am wrong in my views on the statutory duty case I will deal with the paragraphs relevant to that case under this heading as well.

[73] Rule 171 provides:

> **Striking out pleadings**
> (1) This rule applies if a pleading or part of a pleading—
> (a) discloses no reasonable cause of action or defence; or
> (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
> (c) is unnecessary or scandalous; or
> (d) is frivolous or vexatious; or

[40] *Agar v Hyde* (2000) 201 CLR 552, 575–576 [57].
[41] I here quote the first defendant's style of numbering which is not the same as the pleading.

(e) is otherwise an abuse of the process of the court.

(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.

(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading.

[74] I do not accept that no cause of action is shown in respect of the case in negligence, although I consider that in some respects the pleading is embarrassing or has a tendency to delay the fair trial of the proceeding. Taken as a whole the pleading discloses sufficient facts to show a reasonable cause of action.

[75] I will deal with each of the paragraphs mentioned.[42]

[76] Paragraph 2d alleges that the first defendant "knew or ought to have known" that if livestock were to wander from the saleyards they were likely to traverse upon the highway and a risk of a high speed collision was "likely" and persons may be killed or suffer injury.

[77] The only complaint can be that the plaintiff has failed to plead why it is that the first defendant "ought to have known" the matters alleged. The facts pleaded are obvious enough and the controlling minds of the first defendant would need to be remarkably obtuse not to have realised that horses loose on a highway might result in motorists suffering serious injury. I decline to strike the paragraph out.

[78] I have set out paragraph 2h above.[43] Again there is a pleading of what the first defendant "ought to have known" without any statement of the factual basis for that claim. I think that there are in the order of eight separate facts pleaded that it is said the first defendant knew or ought to have known. These include:

i. That the second defendant was organising for several hundred camp drafting and quarter horses to be present at the confined area of the Gracemere Saleyards Complex;
ii. that such horses would be housed with a further 170 horses being offered for auction on 11 November 2013;
iii. that both the First and Second Defendant were "responsible" for the concentration of a large numbers of horses in a relatively small and congested area;
iv. that the concentration was of "performance horses";
v. that the horses were well fed and under exercised;
vi. that the horses had a natural tendency in the circumstances to over activity;
vii. that the horses were understood by the First and Second Defendants to be unsettled in unfamiliar surroundings;

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[42] I will adopt the plaintiff's style of numbering.
[43] See [5]

viii. that the horses at the complex were more likely than general horses to attempt to get out of the complex and onto the highway and cause injury to users of the Capricorn Highway once there.

[79] Any pleading asserting numerous facts, alleged against differing defendants, and asserting what one defendant knew or ought to have known about those facts and about the other defendant's position is almost certain to create confusion. It does here.

[80] In my view the first defendant is entitled to know why it is that it "ought to have known" at least several of those facts. I do not think it is for the defendant to attempt by a request for particulars to eke out a determination of the case made against it as the plaintiff argued could have been done. Rule 157 UCPR requires that "a party must include in a pleading particulars necessary to —

(a) define the issues for, and prevent surprise at, the trial; and
(b) enable the opposite party to plead…"

The Amended Statement of Claim does not do that.

[81] In my view the paragraph should be struck out.

[82] Paragraph 2A.d. is set out above[44] – it pleads the breach of statutory duty case but without reference to which section of the local law or subordinate law is relied on or how it is that that the provision applies to the first defendant. It is essential for those matters to be plainly identified to enable the real issues to be agitated.

[83] In my view paragraph 2A.d. should be struck out.

[84] Paragraph 6a is set out above[45] - failing to adequately secure the six horses involved in the incident. The complaint here is that the pleading does not state what it is that reasonable care required of the first defendant to avoid causing harm to the plaintiff. While no reference was made to it the same complaint can be made about paragraph 6g. The mischief that such pleadings create is that at trial a plaintiff can argue that effectively anything and everything is "on the table". The pleading offends r 157 UCPR.

[85] As it stands the plea in paragraphs 6a and 6g is no more than a claim for strict lability - that as the horses managed to get loose the first defendant is liable. The plaintiff by his counsel expressly disclaimed advancing such a case. That being so in my view the paragraphs should be struck out so far as they affect the first defendant. The paragraph also affects the second defendant who however makes no complaint. It may be that the parties have arrived at some accommodation and so there is no concern. In any case the second defendant has its remedies.

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[44] See [7]
[45] See [11]

[86] For the sake of completeness I add the following. I have assumed that the first defendants' complaint related to paragraph 6a (as the written submission states) and not to paragraph 6A. There is a problem with the latter. Paragraph 6A pleads a breach of the statutory duties "as described in paragraphs 2A and 2B for failing to ensure that a suitably fenced enclosure existed so as to reduce the risk of animals escaping from the Gracemere Saleyards Complex." There is a difficulty in that the legislation does not, so far as I can see, impose any duty to "reduce the risk of animals escaping". Rather the duty under s 14(a) (the only provision the plaintiff contended for during the hearing before me) is to "maintain a proper enclosure to prevent the animal from wandering or escaping from the person's land". This highlights the problem and the unfairness of failing to identify with precision the section of the legislative instrument that is relied on and to identify what precisely the obligation is that it imposes. As pleaded the plaintiff asserts a breach of a duty that nowhere appears in any legislative instrument referred to. The pleading is embarrassing.

[87] In my view paragraph 6A should be struck out.

[88] There is no good reason why the plaintiff should not have leave to re-plead in respect of the negligence case. As previously held it is not apparent that the case the plaintiff seeks to make out is unarguable.

Orders

[89] The orders will be:

(a) Judgment for the first defendant on that part of the plaintiff's claim alleging a breach of statutory duty by the first defendant;
(b) That paragraphs 2h, 6a and 6g of the Amended Statement of Claim so far as they relate to the first defendant be struck out;
(c) That the plaintiff have leave to re-plead;
(d) That the plaintiff file and serve any amended Statement of Claim on which he seeks to rely on or before 4pm on 14 November 2016;
(e) That the parties have liberty to apply on the giving of three days' notice to the other;
(f) That the plaintiff pay the first defendant's costs of the application on the standard basis.