# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Smith v Williams & Ors* [2005] QSC 267 |
| PARTIES: | **SHAYNE QUINTON SMITH**<br>(Plaintiff)<br>v<br>**CAMPBELL PATRICK WILLIAMS**<br>(First Defendant)<br>**CAROLINE ANNE WADDELL**<br>(Second Defendant)<br>**PETER WADDELL**<br>(Third Defendant)<br>**THE STATE OF QUEENSLAND**<br>(Fourth Defendant)<br>**HERBERTON SHIRE COUNCIL**<br>(Fifth Defendant) |
| FILE NO/S: | 166 of 2005 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Cairns |
| DELIVERED ON: | 2 September 2005 |
| DELIVERED AT: | Cairns |
| HEARING DATE: | 1 August 2005 |
| JUDGE: | Jones J |
| ORDER: | **1. The application is dismissed.**<br>**2. The plaintiff has leave to amend his notice of Claim against the first, second and third defendants within 28 days.**<br>**3. The costs of and incidental to this application are reserved.** |
| CATCHWORDS: | PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – application for summary judgment – whether plaintiff has real prospect of success at trial<br><br>*Deputy Commissioner of Taxation v Salcedo* [2005] QCA 227, applied<br><br>HIGHWAYS – NEGLIGENCE AND NUISANCE – rule in Searle v Wallbank – whether facts pleaded in statement of claim can exclude the operation of the rule in Searle v Wallbank |

*Searle v Wallbank* [1947] 1 All ER 12, considered
*State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, considered
*Cunningham v. Whelan* (1918) 52 Ir LT 67, considered

COUNSEL: Mr R Morton for the applicants
Mr G Baulch SC for the respondent

SOLICITORS: McInnes Wilson for the applicants
Williams Graham Carman for the respondent

**Introduction**

[1] By this application, the first, second and third defendants seek summary judgment for themselves against the plaintiff. They submit that the rule in *Searle v Wallbank*[1] means the plaintiff has no real prospect of succeeding in his claim against them, entitling them to summary judgment pursuant to r 293 UCPR. Alternatively they submit that due to the existence of the aforementioned rule, the plaintiff's pleading discloses no reasonable cause of action and ought to be struck out pursuant to r 171 UCPR. Both submissions are grounded in essentially the same reasoning.

**Facts**

[2] At about 5.20am on 17 April 2002 the plaintiff was driving a loaded fuel tanker along the Kennedy Highway near the property occupied by the first and second defendants. As the plaintiff was driving the tanker over a crest of the hill, he noticed a number of cattle on the highway. He swerved to avoid them. The tanker overturned and burst into flames, causing the plaintiff severe injuries.[2]

[3] The pleadings raise an issue of whether the cattle were in fact owned by the first second and third defendants. But for the purposes of this application, Mr Morton of Counsel for these defendants submitted I should assume ownership of the cattle by them.[3]

[4] In April 2005 the plaintiff commenced an action in the Supreme Court, claiming damages for personal injuries and consequential loss as a result of negligence or nuisance. He claims the first, second and third defendants were negligent for allowing significant numbers of cattle to be depastured, graze, wander or remain

[1] [1947] 1 All ER 12
[2] Para 13 – 14 of Statement of Claim filed 11/04/2005
[3] Transcript p 4

upon land adjacent to the bitumen surface of the Kennedy Highway.[4] He sues the fourth and fifth defendants for the manner in which they designed, constructed, maintained, and conducted safety inspections of that section of the Kennedy Highway.[5]

**The rule in Searle v Wallbank**

[5] The rule in *Searle v Wallbank* is an ancient immunity which provides that there is no general obligation on the part of an owner or occupier of land adjoining a highway to fence the land (to keep that person's from straying onto the highway). The rule also provides that generally, that owner/occupier has no liability in negligence for injury caused by their animals which have strayed onto the highway.

[6] Although the rule came under significant attack as "anachronistic, inconsistent with principle and unsuitable to modern conditions" in *State Government Insurance Commission v Trigwell*,[6] the High Court declined to overrule it. Instead the Court stated that legislative action was the appropriate way in which to alter or abrogate the rule. Many states have since heeded that call: the rule in *Searle v Wallbank* has been abrogated by legislation in all Australian states but Queensland and the Northern Territory. Of course, the incident in this case occurred in Queensland.

[7] Mr Morton of Counsel for the defendants outlined the recent authorities on the applicability of *Searle v Wallbank*. In *Graham v The Royal National Agricultural and Industrial Association of Queensland*[7] the Court of Appeal mentioned the rule without disapproval. More recently in *Fabian v Welsh*[8], the Court of Appeal was confronted by an argument (at [8]) that *Trigwell* (and therefore *Searle v Wallbank*) "had been overtaken by the general approach of the High Court in…its tendency to bring formerly disparate principles within the unified general principle of the law of negligence". That argument found no favour with the Court, which could not disregard the explicit authority of *Trigwell* in favour of a perceived general tendency.

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[4] Para 12 Statement of Claim filed 11/04/2005
[5] Para 6-9, 11 Statement of Claim filed 11/04/2005
[6] (1979) 142 CLR 617 per Gibbs J
[7] (1989) 1 Qd.R. 624
[8] [1999] QCA 365

[8] These authorities do not provide any qualification to the rule, rather they indicate quite incontrovertibly that *Trigwell* and *Searle v Wallbank* are still good law in Queensland.

[9] There can be circumstances where the rule does not apply. In *Searle v Wallbank* Lord Porter is careful to distinguish the difference between animals that stray onto a highway, from which no liability flows, and animals that are brought onto a highway deliberately. In the latter case, reasonable care must be exercised to control them.[9] That was decided in *Deen v Davies*[10] and was also adopted in *Trigwell*. In the case of travelling stock (as defined), the *Stock Act* 1915 (Qld) provides a statutory obligation to similar effect. See section 37.

[10] Also, the rule does not apply where the defendant knew the animal in question to have vicious or mischievous propensities. Lord du Parq suggests that there may be a broader exception to the immunity: "apart from any question of liability for injury caused by an animal known to its owner to be dangerous, an owner might be liable on the ground of negligence if he could be shown to have failed in his duty to take reasonable care."[11] In *Trigwell*, the Court noted the exceptions for animals with vicious propensities. The court also noted and strongly disapproved of Lord du Parq's suggestion that there is some broader exception to the immunity.[12]

[11] Another possible exception to the rule exists. A large number of straying animals may give rise to liability for nuisance: *Cunningham v. Whelan.*[13] But this exception must be viewed in light of Mason J's comments in *Trigwell*:

> "The appellant argued that, even if a finding of negligence…were precluded…liability in nuisance could nevertheless be established. A short answer to this argument is that the rule in *Searle v Wallbank* comprehensively states the scope of liability for injury caused by straying animals, such that, if there is no liability in negligence, there can be no further basis for liability such as nuisance. To hold that there is a liability in nuisance for injury caused by straying animals…would do much to subvert the operation of the rule itself".[14]

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[9] at 356.
[10] (1935) 2 KB 282
[11] at 359
[12] Mason J's leading judgment at 636-637
[13] (1918) 52 Ir LT 67 cited by Mason J in *Trigwell* at 638
[14] At 637

[12] Mason J does not close the door completely to claims in nuisance for straying animals. He said (at p 638):-

> To constitute a nuisance, there must be an obstruction to the highway, "something which permanently or temporarily removes the whole or part of the highway from public use altogether" (Trevett v. Lee (1955) 1 All ER 406, at p 409 , per Evershed M.R.). There are certainly cases which suggest that a large number of straying animals may amount to a nuisance in this sense (Ellis v. Banyard (1911) 106 LT 51 ; Cunningham v. Whelan (1918) 52 Ir LT 67 ).

[13] He subsequently decides on the facts that such a claim was not tenable in *Trigwell* as there were only a couple of animals on the road.[15] In any event, a preliminary view of the evidence in this case indicated there were 3 animals on the trafficable surface at the time of the accident and between 20 and 30 head of cattle scattered on both sides of the road.[16] That may be enough to allow the possible *Cunningham v Whelan* exception. (In that case there were as many as 24 sheep on the highway).

[14] If the rule in *Searle v Wallbank* were applicable to the facts of this case, the plaintiff would clearly lack a cause of action for negligence. Of the only recognised exceptions to the rule, the vicious animal exception does not apply here. However it may be open to argument that the *Cunningham v Whelan* exception does apply.

[15] However the plaintiff submits the rule in *Searle v Wallbank* does not apply to the facts of this case. He pleads in para 12 of the Statement of Claim that the first, second and third defendants allowed or permitted their cattle to be depastured, to graze, to wander or to be and remain on “the land adjacent to the bitumen surface”, i.e. on the road reserve.[17] Mr Baulch of Senior Counsel for the plaintiff submitted that this situation takes the case outside the rule. In other words, this was not a situation where the cattle had wandered from the defendants’ property onto the highway – rather, the cattle had been deliberately placed on the road reserve which was not part of the defendants’ property.

[16] In my view it is debatable whether the thrust of this case is clearly identified in the pleadings having regard to paras 3 and 12 of the Statement of Claim. The

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[15] at 638
[16] Ex EJC1 to Affidavit of Emma Jane Chapman, sworn June 2005; Affidavit of John Coleman filed 25 July 2005
[17] Transcript, p 10-11

defendants' admission in paragraph 3 of the Defence clearly contemplates a reference to the same cattle.

[17] Counsel for the plaintiff submitted that paragraph 3(a) of the defence amounts to an admission that the defendants deliberately placed or maintained their cattle on the road reserve.[18] Counsel for the defendants submitted paragraph 3(a) amounted to no such admission. The difficulty lies in the wording of the pleadings: does "the land adjacent to the bitumen surface of the Kennedy Highway" refer to the road reserve, or to the defendant's property? The plaintiff suggests the former, the defendants the latter. The respondent's objection to the lack of particularity as to "significant numbers" is for present purposes answered by the evidence of John Coleman.

[18] If the first second and third defendants *deliberately placed* their cattle on the road reserve, it is likely that the rule in *Searle v Wallbank* is excluded. The rule provides an immunity in relation to animals which stray from a farmer's property onto the highway; not those which are deliberately brought outside the farmer's property. The point at issue would then give rise to factual considerations and even perhaps a consideration of whether cattle – which may have once been straying cattle – came to be something else if they were deliberately maintained as grazing cattle in the place to which they strayed.

[19] In applications for summary judgment pursuant to r 292-293, the Court must apply the clear and unambiguous words found in those rules: *Deputy Commissioner of Taxation v Salcedo.*[19] This means, in the light of present authority:-

> Summary judgment will not be obtained as a matter of course and the judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at a trial; if that is established then the matter must go to trial.

[20] For the reasons expressed above, it cannot be said that the rule in *Searle v Wallbank* will inevitably determine the plaintiff's claim such that he therefore has no real prospect of succeeding on the part of his claim to which this application relates.

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[18] Transcript, p 13
[19] [2005] QCA 227 at [17] per Williams JA

Difficulty however does arise because the pleadings are somewhat ambiguous and lacking in particularity. In my view, this is best resolved by giving the plaintiff leave to replead.

**Orders**

[21] I therefore make the following orders:

1.) The application is dismissed.
2.) The plaintiff has leave to amend his notice of Claim against the first, second and third defendants within 28 days.
3.) The costs of and incidental to this application are reserved.