

HIGHWAYS (LIABILITY FOR STRAYING ANIMALS) AMENDMENT BILL 2016

Second Reading

Resumed from 25 August.

MR J.R. QUIGLEY (Butler) [2.45 pm]: This rather short bill comes before the chamber by way of an amendment to the Highways (Liability for Straying Animals) Act 1983. That act, introduced by the Labor government back in 1983, sought to, and did, set aside the common law position that had hitherto prevailed that there was no liability to be held against the owner of stock that had wandered onto a highway and had, by reason of their wandering on the highway, caused a motor vehicle accident. There was no action in tort against the owner of the animal that had strayed onto the highway. In introducing the bill back in 1983, it was said that there would be a cap of \$500 000, which back in 1983—33 years ago—was obviously a very, very significant sum. That was set by statute as a cap. Over that time, by reason of inflation, that figure has, of course, diminished in value to plaintiffs. The Highways (Liability for Straying Animals) Act capped the damages at \$500 000, even though to fully compensate a plaintiff might in fact cost more than \$500 000. It was adjudged at the time that that sum was reasonable in view of the insurance burden that it would cast upon pastoralists, farmers and landowners upon whose land stock was contained, and that to have an uncapped amount would mean that farmers, and to a lesser extent pastoralists—I will come to pastoralists in a moment—would be looking at insurance bills that would be prohibitive to them. Now with the effluxion of time—as I said, 33 years has passed since the inception of the legislation—it is high time that this cap was raised. The government intends to do that with the Highways (Liability for Straying Animals) Amendment Bill by way of providing statutory authority for the government to proclaim regulations.

The opposition supports the bill; it supported it in the other place where the bill was introduced and it supports it here. The regulations will regulate the cap and therefore it will be unnecessary to come back before this chamber and this Parliament to bring on further amendments to the legislation to increase the cap from time to time because the government will be able to promulgate regulations to increase the cap.

There has of course been the Highways (Liability for Straying Animals) Act since 1983 and only in recent times Parliament passed the Motor Vehicle (Catastrophic Injuries) Bill, which was debated in this chamber at length. When a driver or a passenger in a vehicle has a collision involving an injury that is caused by straying stock and that injury is classified as a catastrophic injury, the commission takes it over as a catastrophic injury and fully funds the plaintiff in terms of maintaining and looking after the plaintiff during his or her lifetime. That legislation followed the tragic case of Warrick Proudlove, which has been widely reported both in the courts and the media. Warrick Proudlove was a passenger in a vehicle that was being driven south on Albany Highway. When the driver saw straying stock on the road, which he said at the last moment he swerved to miss, the vehicle collided with a tree inflicting catastrophic injuries upon his passenger Warrick Proudlove. Tragically for Warrick Proudlove and his family, the catastrophic injuries legislation does not cover Mr Proudlove's situation. Therefore, it fell to Mr Proudlove to prove negligence on the part of the driver. The driver defended himself on the basis that he was not negligent because he had taken last minute action to avoid straying stock. The judge also found that the owner of the straying stock was not liable because the accident was not caused by the straying stock; rather, it was caused by the evasive action of the driver of the vehicle. I am quite limited and circumspect in what I say, because the case has been taken on appeal from Judge Keen's judgement that no-one was at fault to the Court of Appeal, which heard the case in June. I understand that the Court of Appeal was constituted by a quorum, including the Chief Justice, and that judgement has not been handed down. That matter is before the court and therefore I do not want to comment on Judge Keen's reasoning or my views on Judge Keen's reasoning because his reasoning has been adequately critiqued before the Court of Appeal by senior counsel and will shortly be the subject of judgment by the Court of Appeal.

The second tragedy for the Proudloves is this: if the Court of Appeal finds that the collision that the vehicle was involved in—it ultimately hit a tree and did not hit the stock—was caused by the evasive action of avoiding the stock on the road, the court could find the owner of the stock liable. If that is the case, the second tragedy for the Proudloves is that damages is capped at \$500 000. They would get two bitter pills from this Parliament. The first is that the injuries legislation is not retrospective and will therefore not provide an award or grant of damages to Warrick for his carers, so he misses out there. With the passage of this legislation, there will be no further relief for Mr Proudlove if he is successful in the Court of Appeal, because this legislation will not be retrospective and any increase to the cap by a promulgated regulation will not apply to Mr Warrick Proudlove's situation.

The situation of stock straying onto a road was treated at common law as a circumstance that would not give rise to an action in tort if the highway user struck the stock and was injured. That position at common law was substituted by the Highways (Liability for Straying Animals) Act 1983, which set aside the previous rules relating to straying stock. I add that it did not set them aside entirely, because it included a provision that the court was to have regard for the usage of the highway and the proximity of the highway.

Section 3(4) of the act states —

In determining according to the law of Western Australia relating to liability in tort for negligence whether or not a person is liable for damage caused by animals straying on to a particular highway, a court may consider, among other matters —

- (a) the general nature of the locality in which the relevant part of that highway is situated (in this subsection called *the locality*);

In Mr Proudlove’s case, it was a highway running through agricultural farmland to a major regional city.

Mr W.J. Johnston: I have a story.

Mr J.R. QUIGLEY: I hope that the member tells it.

Under this legislation, the court could have regard to the fact that that highway runs through farmland, all of which is fenced, to contain stock and to exclude trespassers to a lesser extent. I will not try to prescriptively delineate the pastoral areas that would not be covered by the legislation. There are areas north of Carnarvon where it is normal for pastoralists to have open grazing, although they have some fences. I have worked on stations in that area of the country—Mardathuna, Hill Springs and briefly on Brick House. As you would know, Mr Acting Speaker (Mr I.M. Britza), often the roads are what are commonly referred to as cattle grids. Road users have a reasonable expectation that stock in that area will be traversing that road, hence the legislation states that a court will have regard to, among other matters, the general nature of the locality in which the relevant part of that highway is situated. I am sure that the member for Albany, if he is so minded, could get to his feet and talk about that area with a bit more specificity. The last thing we expect to find is stock on roads near agricultural land with paddocks and fences. They should be properly contained on the farmland.

I am aware of another case in which four or five horses, I recall, went onto a road and were struck by a truck near Narrogin. Once again, that was agricultural land on which the public have an expectation that stock would be contained on the property.

The other matter that the court will have regard to is “the nature and amount of traffic using that highway” because it is discretionary for pastoralists or farmers to fence or not to fence. It is not a situation of dividing fences and a compulsion to fence. The court can also have regard to the nature and amount of traffic using that highway. The court might say that North West Coastal Highway is a major highway and a major transport route for carriage companies to take mining equipment up north et cetera. It can take that into account as opposed to, for example, a more remote road between Nullagine and Marble Bar, a lesser used road on which there might not be that much traffic so the farmer or pastoralist would not have to go to the expense of making sure their stock do not wander onto that road.

Section 3(4)(c) of the act states —

The extent to which users of that highway would expect to encounter animals on that highway and could be expected to guard against the risk associated with their presence;

That is exactly the defence run by the driver in that case. The last thing he expected to encounter on Albany Highway was stock, certainly not a large animal like a horse. A sheep might have wriggled through a wire fence or something but the last thing we expect to encounter on the road is a horse.

Ms M.M. Quirk: Baa-rbed wire!

Mr J.R. QUIGLEY: I admire the member for having that wit this late into the session.

Mr P.B. Watson: She’s not working hard enough if she’s got that wit.

Mr J.R. QUIGLEY: It is amazing that she has that wit left in her at this time on a Thursday afternoon.

Section 3(4)(d) of the act states —

the common practice in the locality in relation to —

- (i) fencing and the taking of other measures to prevent animals from straying on to highways in that locality; and
- (ii) the taking of measures to warn users of that highway of the likely presence of animals thereon;

Common local practice on Albany Highway is that all adjoining paddocks are fenced. Finally, section 3(4)(e) states —

the cost of fencing, or of the taking of measures, referred to in paragraph (d) or of both, as the case requires.

As I have mentioned, it is difficult to fence in pastoral areas when the roads that run through those areas can be 10 or 12 miles long. In fact, I think the road down to Hill Springs on Mardathuna station was about 15 miles long. The last thing we would expect is for a pastoralist to fence 15 miles of pastoral country.

We support the legislation but we want the government to tell us about this legislation's interaction with catastrophic injury cases and the catastrophic injury legislation that has already passed and its intention. We know that catastrophic injury could be sustained in cases involving straying stock, which would exceed the cap that will be regulated in this piece of legislation. We look forward to hearing from the minister during consideration in detail about the interaction of that piece of legislation with the new cap.

In reviewing the Proudlove case, I think one of the tragedies was the dispute itself. I am not referring to the case; I am referring only to the press reports in which the Insurance Commission of WA was criticised for the stance it took in defending this because it was not the driver, Burridge, who defended, because there are rights of subrogation in the insurance policy—it was ICWA. ICWA sought to deflect public criticism of it by saying that prior to trial it offered \$5 million, I think, to the Proudloves in an effort to try to deflect the voluble public criticism.

I note from those press reports that Mr Brian Bradley, of the very well regarded firm of Bradley Bayly Legal, said that at no stage did the Insurance Commission of WA make a formal offer of any money.

Mr W.J. Johnston: Is Brian Bradley the former head of DOSHWA?

Mr J.R. QUIGLEY: No.

Mr W.J. Johnston: He is a different one. It's funny that there're two people with the same name in the same industry.

Mr J.R. QUIGLEY: That is right. Brian Bradley is a practitioner from Albany, who moved his practice to Perth with Mr Bayly, a very successful racehorse owner and personal injuries lawyer.

Anyway, Mr Bradley was emphatic in saying that at no stage at all did ICWA offer the Proudloves any money. However, going into court, they tried to sound out from the solicitors for the plaintiff whether they would be amenable to a settlement; in other words, they were trying to pull out a suggested sum from the Proudloves. They never offered anything to the Proudloves, and Mr Bradley was quite clear about that.

We all in this state recognise the tragedy that befell Mr Proudlove. Judge Keen found no liability under the Highways (Liability for Straying Animals) Act because that was not the cause of the accident or the cause of the collision with the tree. He also found that the driver was not negligent because he had taken reasonable evasive action and that the poor hapless passenger sitting in the vehicle who has had his life destroyed and his family life's destroy pretty well, because they are the prime carers for their much-beloved son, get nothing, subject of course to the final judgement of the Court of Appeal. There are two things there, and I hope that it goes one way. There are two possible outcomes in that case. The Court of Appeal could find that the causation of the injury was the stock on the road. It is said that there is no justice at law. If we want justice, we must wait until we get to the pearly gates to get justice. At law, people get outcomes that they try to approximate to justice—they are not justice; they are outcomes. Of the two outcomes in this case, I know which one I am rooting for. The first one is that the stock owner will be found liable under the Highways (Liability for Straying Animals) Act, in which case the damages will be capped at \$500 000, or, in the alternative, the court could find that Judge Keen erred in saying that the driver was not negligent and find that the driver did not keep a proper lookout, the driver was negligent—the driver was then negligent in the action that he took and it was the driver's negligence that caused the collision with the tree and that was the causative effect of the catastrophic injury. He then will have uncapped damages, and it will be damages at large. That is the one, of course, that we all hope that the Court of Appeal gets to. However, as I said, I want to be a bit circumspect here and not urge a particular outcome because that is in the hands of the judges as they write their decisions.

It is on those quirks that a person's situation could be saved—as far as someone who is as catastrophically injured as Mr Proudlove has been can be saved—by compensation. If it is found that the driver is negligent, at least there will be uncapped damages. But if it is found that the horse on the road caused the accident, it will come back to the legislation that this bill we are dealing with amends. The third alternative is that Judge Keen's judgement will stand and Proudlove will get nothing.

In cutting to the chase of this bill, we support it because situations will not arise all the time in which a person can sue a driver. In the collision in which Mr Proudlove was so catastrophically injured, the driver, Mr Burridge, was not injured or did not suffer any real injury. It is usually drivers on lone country trips who sustain injury; therefore, they have to sue the landowner. Mr Proudlove could sue the stockholder and, in the alternative, the driver. We hope that he succeeds against the driver and that damages at large are awarded, and it is not limited only under this act.

For those reasons, the opposition supports lifting the \$500 000 cap. It thinks that lifting it by way of regulation so that it can be amended from time to time without the necessity to come back to this Parliament is appropriate.

However, the opposition is also mindful that these will be capped damages. When people are found to be negligent by allowing their stock to wander onto the road, they are not liable for damages at large. If they were, the farmer in this case would be liable for perhaps \$15 million damages, and no farmer could afford the insurance of that sort of risk. Whereas, for uncapped damages at large for motor vehicle collisions, all of us bear a bit of the burden in the premium we pay; the burden is shared across the whole community.

We support the bill and we want to hear from the minister

Mr R.F. Johnson: Are you charging by the hour?

Mr J.R. QUIGLEY: No.

Mr R.F. Johnson: You have said a lot today.

Mr J.R. QUIGLEY: I only wish I were, member. The member has raised that again.

Mr R.F. Johnson: I say that in jest.

Mr J.R. QUIGLEY: I know the member does. I am speaking in accordance with the time allotted in this chamber.

That is the position of the opposition. We look forward to hearing about this bill's interaction with the catastrophic injuries legislation. May it please the chamber.

MRS L.M. HARVEY (Scarborough — Minister for Police) [3.17 pm] — in reply: I thank those opposite for their support of the Highways (Liability for Straying Animals) Amendment Bill 2016 and the member for Butler for his contribution on behalf of the opposition. This legislation will provide some currency in lifting the cap on the limit on a payout available under this legislation since it was introduced in 1983. Obviously, the economic environment has changed since then. The bill will lift the cap and allow for the inclusion of a regulation so that the cap can be lifted with consumer price index increases et cetera through an easier mechanism—that is, by way of regulation rather than adjusting the legislation every time we need to adjust the cap.

It is a simple bill and I appreciate the opposition's cooperation in expediting its passage.

Question put and passed.

Bill read a second time.

Leave denied to proceed forthwith to third reading.

Consideration in Detail

Clause 1 put and passed.

Clause 2: Commencement —

Mrs M.H. ROBERTS: I realise that this is fairly much a standard clause, but I refer to paragraph (b) in which the rest of the act will come into operation on a day fixed by proclamation and different days may be fixed for different provisions. Is it likely that it will be necessary to split the bill and declare some provisions come into place on different days from others?

Mrs L.M. HARVEY: I am advised that that is unlikely. This clause will allow for the regulations to be prescribed and to have that part of the act fixed by proclamation on a different date.

Clause put and passed.

Clauses 3 and 4 put and passed.

Clause 5: Sections 4 and 5 inserted —

Mr J.R. QUIGLEY: I want to ask the minister about the interplay between the Highways (Liability for Straying Animals) Amendment Bill and the catastrophic injuries legislation that passed this chamber quite recently and that I referred to in my contribution to the second reading debate. Clause 5 inserts new section 4, which provides in subsection (1) —

The damages awarded in respect of any one cause of action in tort for negligence arising out of damage caused by animals straying on to a highway must not exceed the maximum damages amount prescribed by the regulations for the financial year in which the damages are assessed.

I will speak hypothetically at the moment, because we do not know what the regulations will set as the new cap. Let us say that the new cap is \$500 000. We know it will be more than that, because it is \$500 000 at the moment. When the injury has been sustained by reason of straying stock, does proposed section 4(1) limit the amount of damages to the new capped amount even if the injury sustained was catastrophic in nature?

Mrs L.M. HARVEY: I am advised, firstly, that the new cap will be \$4 million, and that will be prescribed in the regulations and can be adjusted further down the track. Secondly, the person who is injured in this way basically needs to choose whether to sue the owner of the straying stock and use this legislation for a damages claim or

apply for the catastrophic injuries support scheme. They cannot double-dip and claim under both. They would need to make an assessment with their legal counsel, I guess. If they have collided with straying stock, under this scheme they are confined to a claim to a maximum cap of \$4 million.

Mr J.R. QUIGLEY: Is that the case even if the nature of the injury is catastrophic or can they still apply for support under the catastrophic injuries legislation?

Mrs L.M. HARVEY: Under the Motor Vehicle (Catastrophic Injuries) Act 2006, a person is not eligible to be a participant in the catastrophic injuries support scheme in respect of a motor vehicle injury if the person has been awarded damages pursuant to a final judgement by a court or a binding settlement in respect of future treatment, care and support needs of the person injured. If they have been awarded damages under the Highways (Liability for Straying Animals) Act, they cannot also claim under the catastrophic injuries support scheme.

Mr J.R. QUIGLEY: What is the situation when there are two prospective defendants, as there was in the case of Mr Proudlove? One prospective defendant was the driver, Mr Buckeridge, for negligently controlling the vehicle, and the other being the stock owner, who allowed the stock to wander on to the highway. A further variation to that question is: what happens when there is contributing negligence and the driver is found to be 50 per cent liable and the stock owner found to be 50 per cent liable? How does that interplay with the catastrophic injuries legislation?

Mrs L.M. HARVEY: I am advised that even if one or more people are involved, it is covered under clause 5 of this legislation. Proposed new section 4(1) reads —

The damages awarded in respect of any one cause of action in tort for negligence arising out of damage caused by animals straying on to a highway must not exceed the maximum damages amount ...

My adviser says there can be only one claim.

Mr J.R. QUIGLEY: In pleading the cause of action, the plaintiff would be ill-advised not to put down as defendants each defendant who could prospectively be liable—that is, the stock owner and the driver. It is the one cause of action, but there are two different bases within that cause of action to find negligence on behalf of either one—that is, negligent control of the vehicle or allowing the stock to stray. When there is an apportionment of liability between the owner of the stock and the driver of the vehicle, what is the interplay in terms of the cap?

Mrs L.M. HARVEY: My adviser said this is not a scenario that has ever occurred. The advice she has given me is that there can only be one cause of action in tort for negligence, and that under this scheme the claim would be limited to \$4 million. With respect to contributory negligence, I believe the bill is silent on that, unless my adviser can advise otherwise.

Mr J.R. QUIGLEY: Although I do not have the pleadings in front of me, I thought that was the situation in the Proudlove case. His Honour found there was straying stock on the road and then he found that was not causative. He then had to assess whether the driver was negligent. It is not a situation that has never occurred; there were those two issues. If there had been a finding for the plaintiff, I am wondering what the interplay would have been between the cap and a finding that the driver was partly negligent and the stock owner was partly negligent.

Mrs L.M. HARVEY: Member, I am not familiar with that case but I believe the member said the court found that the owner of the straying stock was not negligent in that case; it was the driver of the vehicle.

Mr J.R. Quigley: No-one was found to be negligent.

Mrs L.M. HARVEY: No-one was found to be negligent, so there is no claim. I do not know that we could necessarily use that as a precedent because the court has not made a judgement in that situation. We have not catered for that scenario with this amending legislation. The amending legislation deals with the existing regime, which limits the cap to \$4 million for a claim under this particular scheme.

Clause put and passed.

Title put and passed.

Leave granted to proceed forthwith to third reading.

Third Reading

MRS L.M. HARVEY (Scarborough — Minister for Police) [3.32 pm]: I move —

That the bill be now read a third time.

MR J.R. QUIGLEY (Butler) [3.32 pm]: In summing up, I think the consideration in detail stage has been worthwhile if for no other reason than the government has come out and told us what the regulated sum will be. I did not ask the question in relation to clause 5 because it had already been answered. The regulated sum will be \$4 million. In the case of injuries that are not catastrophic, to the opposition that appears to be an appropriate

Extract from *Hansard*

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Mr John Quigley; Mrs Liza Harvey; Mrs Michelle Roberts

sum for 2016, having regard to the 33 years that have passed between the promulgation of the original act and this amendment bill. The Labor Party supports the legislation and commends it to the chamber.

MRS L.M. HARVEY (Scarborough — Minister for Police) [3.33 pm] — in reply: I thank members for their contribution and for the interrogation during the consideration in detail stage of the bill. I commend the legislation to the house.

Question put and passed.

Bill read a third time and passed.