Personal injury

Horsing around

David Regan takes the reins of the debate surrounding liability for horse-related injuries

IN BRIEF

- Strict liability is imposed on the keeper of a domesticated animal which causes injury by the Animals Act 1971.
- In order to restrict the extension of this liability, in two recent cases the Court of Appeal has found that the rider of a horse has consented to the risk of injury from it.

The Animals Act 1971 (AA 1971) imposes strict liability on the keeper of a domesticated animal which causes injury. Since the House of Lords clarified its interpretation in 2003, the scope of the strict liability imposed has grown (see *Mirvahedy v Henley* [2003] UKHL 16, [2003] 2 All ER 401). Subsequent decisions of the Court of Appeal have tended to express a desire to limit this extension, but with very mixed effect. However, in two recent decisions the Court of Appeal has found that the rider of a horse has consented to the risk of injury from it, extending the defence of consent so that it poses a much greater bar to a claim succeeding, *Turnbull v Warrener* [2012] EWCA Civ 412, [2012] All ER (D) 51 (Apr); *Goldsmith v Patchcott* [2012] EWCA Civ 183, [2012] All ER (D) 179 (Feb). It may also have a wider application in cases involving injury arising from dangerous sports.

Oracular Act

AA 1971 is not an easy statute. Its language had been described most kindly by Jackson LJ as "oracular". Its interpretation has been much disputed. The Act is clearly not intended to impose strict liability on keepers of domesticated animals in all circumstances, for it does so unambiguously for non-domesticated animals. Domesticated animals are of course a wider group than merely "domestic" animals, and include horses and other farm animals. Liability turns on the claimant establishing that the damage meets a statutory severity test and arose from a characteristic of the animal of which the keeper knew but which was either abnormal to the species or only exhibited at "particular times or in circumstances".

Historically, claimants have found little difficulty in establishing the first limb of the test, namely that "the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe". The Court of Appeal has followed the dissenting judgment of Lord Scott in *Mirvahedy* that the likelihood of the damage does not have to tip the balance of probabilities, but merely be damage "such as might happen". The Court of Appeal has observed that imposing such a low bar will eliminate only a small number of cases, *Goldsmith*.

Proving the likelihood of injury (or of severe injury) is still not entirely straightforward. There has always been a contrast in the treatment of the two most common subject animals, dogs and horses. A dog bite has consistently been held to amount to severe damage. It is enough that it occurs and the claimant does not have to establish its likelihood. Damage caused by a horse has been considerably more problematic. In circumstances where a horse refused to slow from a fast canter, with the rider losing control and falling, the Court of Appeal divided 2:1 in doubting that injury was likely or, if it occurred, likely to be severe (see *Turnbull*).

The concept of injury

Can this be right? The difficulty probably arises in the concept of injury. The bite victim is clearly injured (*quaere* whether always severely). The horse rider frequently returns to the saddle a little battered and bruised. Is she injured? She may say not. But if so, does the hardihood of the general riding population really render the rider, injured when unable to control her horse at speed, unable to prove that some injury is likely or that injury, if it occurs, is likely to be severe? To this extent, *Turnbull* and *Goldsmith* have different ratios and one suspects it is the latter which will prove to be followed.

> **"The Court of Appeal has found that the rider of a horse has consented to the risk of injury from it, extending the defence of consent"**

Until recently, jurisprudence has tended to focus on the second limb of the test, s 2(2)(b), which affords two alternative means of establishing

liability: the characteristic causing the damage must either be abnormal to the species (or breed) or, if normal to the species, "only so found at particular times or in particular circumstances", (see *Mirvahedy*). The meaning of the first alternative—a characteristic abnormal to the species—is clear, although it is unlikely by definition to apply very frequently.

The extent of the wider alternative basis of liability has been the subject of much judicial debate. Almost any characteristic could be said to be exhibited at some particular time or circumstance. While the Court of Appeal has consistently sought to prevent the extension of this interpretation to lead to an inevitable finding of liability, s 2.2(b) has proved a poor control mechanism. The court initially sought to do so by imposing a requirement that the "times and circumstances" in which the characteristic is manifested must be linked to the means by which s 2(2)(a) was discharged (see *Clark v Bowlt* [2006] EWCA Civ 978, [2006] All ER (D) 295 (Jun). Thus, a horse which caused damage by moving unpredictably into the path of a car discharged the first limb of the test because of its weight. Yet the horse's weight was normal to it at all times—the dieting horse has not yet been litigated—and could not discharge the second limb of the test.

Biting back

While this sufficed on the facts in *Clark*, linking the first and second limbs of the test is itself a poorly defined requirement: the interplay of factors present at all times (the dog's sharp teeth) and those present in particular circumstances (its inclination to bite) being capable of being distinguished in almost any action and conceptually little different from the horse being at all times heavy and on occasions moving unpredictably so that that heaviness causes damage. It has assisted the Court where the evidence has permitted it to reach findings about the motivation of the actions of a cow separated from her calf but found to be overreacting in a way which was abnormal but which could not have been foreseen, *McKenny v Foster* [2008] EWCA Civ 173, [2008] All ER (D) 73 (Mar). Not all courts will be willing to indulge such psychoanalysis.

A second means of control has been for the court to doubt whether the behaviour manifested amounts to a characteristic at all. The difficulty remains that "characteristic" is a difficult word to circumscribe. A horse's inclination "to move otherwise than directed" was doubted to be a characteristic (see *Clark*). So too, by the majority of the court, was the horse's refusal to accept instructions given via a novel bridle, even though the risk that it might do so was one which it was held the claimant appreciated (see *Turnbull*). It is difficult for the court to limit the scope of what amounts to a characteristic, without giving rise to considerable inconsistency in the case law.

Described & predicted

A more effective means of constraining the application of s 2(2)(b) is that the "times and circumstances" in which the characteristic is manifested must be capable in advance of being "described and predicted," (*Freeman v Higher Court Farm* [2008] EWCA Civ 1185, [2008] All ER (D) 310 (Oct). Yet, even this only excludes the entirely unpredictable accident. More and more frequently, claimants have been able to persuade the court that damage occurring in defined circumstances arose as a result of a characteristic being exhibited, the epitome being the normally quite horse rearing at crossroads when urged forwards by an inexperienced rider, *Welsh v Stokes* [2007] EWCA Civ 796, [2008] 1 All ER 921.

To be liable, the keeper must have knowledge of the characteristic. Strictly, actual knowledge is not required, as knowledge that the characteristic is one exhibited by the species, even if not previously exhibited by the animal, is sufficient (see *Welsh*). In the absence of helpful veterinary records ("damaged teeth biting tradesman") or other evidence of the animal's earlier behaviour, knowledge was previously difficult to establish. Allowing it to be proven by knowledge of how the species can behave amounted to a significant extension of liability, which was in itself in tension with the view expressed by Sedley LJ, that the section was not intended to render keepers of domesticated animals routinely liable for the damage that they cause (see *Clark*).

Achilles heel

Recently, this Achilles heel of the defendant has been turned to its advantage by engaging one of the statutory defences, consent to the risk of injury. The defence of consent in the statute provided by s 5(2) is not strictly one bound by the rules of *volenti* (see *Cummings v Grainger* [1977] QB 397, [1977] 1 All ER 104). While it has previously operated to defeat the claim of a rider who was warned that the horse might buck, experienced bucking, was asked if she wished to continue, accepted and then fell when the horse bucked, this is perhaps not surprising (see *Freeman*).

To make out the defence, the defendant must establish that the claimant fully appreciated the risk and exposed themselves to it. In cases of tortious *volenti*, the requirement of knowledge of the risk tends to be strictly applied. Not so now for AA 1971. The Court of Appeal has effectively found that if knowledge of how the species in general reacts is enough to make out the keeper's knowledge of the characteristic of the particular animal and so to engage strict liability, such knowledge is also enough to form the basis of informed consent to the risk of injury on the part of the claimant (see *Turnbull*). A claimant who demonstrates that the keeper knew that the ordinarily placid horse had the characteristic that it might refuse to stop on command, when wearing for the first time a bridle designed to work without a bit, was herself found to have consented to the risk that this would occur, because as an ordinarily experienced horsewoman she knew of the risk. Similarly, where a normally placid horse was startled by an unknown cause and bucked, the strict liability provisions of the statute were made out because the keeper as an ordinary horsewoman knew of the risk that it might do so in such

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circumstances. However, the rider, who had the same knowledge, was held to have consented to such a risk of injury. As Jackson LJ held: "If the claimant, knowing of the risk which subsequently eventuates, proceeds to engage with the animal, his or her claim under the Act will be defeated."

No effective control

Unable effectively to control the extension of the limits of strict liability because of the wide and imprecise wording of the statute, the court has developed the defence of consent. It is unlikely to be available against the keeper who had actual knowledge that the animal had a characteristic abnormal to the species, unless the claimant also had such knowledge. It is also unlikely to operate where the claimant is a novice and does not have the knowledge of an ordinary rider or handler. It is also no bar to the claim of an employee, against whom the defence cannot apply, s 6(5). Yet, in the most fertile field for the extension of liability, that of damage arising from a characteristic normal to the species but only exhibited at particular times or in particular circumstances, the defence may well remain effective.

By developing the defence of consent in this way the court has made a conceptual leap. For some years it has been willing either to avoid the imposition of a duty of care in cases where, however serious the damage to which they gave rise, the risk was plain and obvious: whether this arose from jumping at height between climbing walls (see *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646, [2008] All ER (D) 150 (Jun)), or diving into the shallow waters of a lake (see *Rhind v Astbury Water Park* [2003] EWHC 1029, [2003] All ER (D) 217 (May)). What it has been far less willing to do is extend the defence of consent in such cases.

Those who ride horses are coming to be fixed with a policy-based liability which derives from cases of sporting injury, rather than the jurisprudence of liability for animals. Yet those who ride are in a more vulnerable position. The rugby player is held to consent to the ordinary risks of the game, but able to recover where the rules are not properly applied, even if there is always an inherent risk of injury. The rider riding the horse of another cannot economically insure herself against the consequences of a serious injury; the owner quite simply can insure herself against the risks of liability. If *Turnbull* is followed, the extent of the defence of consent may leave many without a remedy. NLJ

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