

NINESTJOHNSTREET
PERSONAL INJURY

ANIMALS ACT 1971
‘A Trot Through the Essentials’

Victoria Rigby
Lockdown Lectures 2020

Common Law position before the Act

Strict liability for keepers if:

- The animal is classified by law as wild (*ferae naturae)* or
- The animal, being tame (*mansuetae naturae)* has a propensity that can be described as 'vicious mischievous or fierce' which is known to the keeper

Law Commission Report on Civil Liability for Animals 1967

"It is widely recognized that this branch of law is in an unsatisfactory state…."

Consulted a large number of public and private organizations, representing those who keep animals either for business or pleasure

When should keepers of animals be liable?

- Whether savage Alsatian/or wild tiger – keeper creates a special risk either way

- Wolf in sheep's clothing - If keeper knows his Labrador can be dangerous i.e. is in the nature of a trap the same strict liability applies

NORMAL OR ABNORMAL?

- “It would seem that the act of the animal must be in the nature of an “attack” and does not therefore include behaviour which, although it may cause damage, is merely frolicsome.

- Further, it may now be that the propensity of the animal must be contrary to the nature of the species to which it belongs.”

Characteristics – or mental gymnastics?

The keeper should know of characteristics which are dangerous in that they either make it likely to inflict damage of the kind which in fact results or make it likely that any damage of that kind which it may cause will be severe

The fact that a particular animal shares dangerous characteristics with other animals within the species, either at a particular age, or at certain times of the year or in special conditions, should not preclude liability where the keeper knows about those characteristics at the time of injury

Defences

C by reason of his negligence was wholly responsible

C voluntarily assumed the risk of injury or damage arising from the dangerous animal (does not apply to employees who work with the animal in question)

Partial defence of contributory negligence

The Animals Act 1971

- Purpose = to simplify!!/replace old common law rules
- Section 2: provisions regarding liability for damage done by dangerous animals
- Section 5: defences
- Section 6: definitions
- Section 10: contributory negligence

Section 2

(2)Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if—

(a)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; and

(b)the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and

(c)those characteristics were known to that keeper or were at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen.

Key ingredients in Animals Act claim

- (a) likelihood of damage (severe)
- (b) propensity/characteristic
- (c) knowledge

- All three hurdles must be satisfied
- Both (a) and (b) are two limbed
- (a) and (b) must be causally related i.e. the damage sustained must be caused by the characteristic in question
- (c) actual or imputed

Case Law Update

4 most recent reported decisions:

- Maciris Estacio v Mark Honigsbaum 2017 WL 05177254
- Williams v Hawkes 2017 EWCA Civ 1846
- Katie Smith v Alan Harding Manchester CC [2013]
- Lynch v Ed Walker Racing Ltd [2017] EWHC 2484

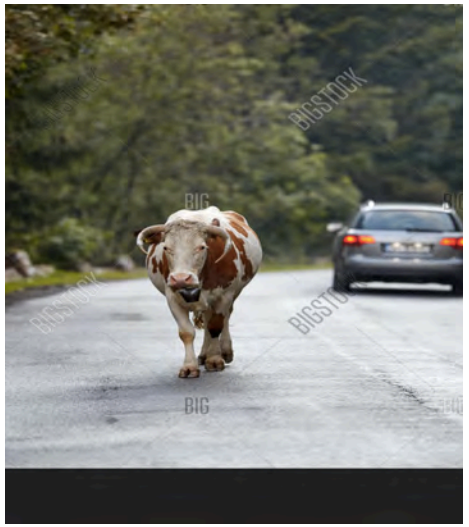
Maciris Estacio v Mark Honigsbaum 2017 WL 05177254

- Not a counsel of perfection to expect a dog handler to restrain a dog
- C walked into the confined/defensible space of the dog
- *"Natural thing for a dog to do when a dog finds itself with restricted space...caused by a person unknown to the dog. It is in the character traits of dogs that they do that"* (i.e. to bite)

Estacio cont.

- D had never noticed dog act in this way before – Welsh v Stokes 2007 EWCA Civ 796 states that this is immaterial
- Tapp v Trustees of the Blue Cross Society 2013 – biting satisfies 2(2)(a); J found dog not restrained and that the dog, in these circs might bite and that it would be severe, puncture the skin
- Dogs can bite in particular circumstances e.g. when threatened or in a constrained space (2)(b)
- Knowledge – 'I cannot be liable because the dog only did it once' does not apply. Provided keeper aware of general characteristic to bite in certain circumstances, s2(2) satisfied. D not required to have more particular knowledge of that animal

Williams v Hawkes 2017 EWCA Civ 1846



Characteristic and circumstance. Experts agreed:

"At specific times or under specific circumstances such as when they are frightened, cattle in general can behave unpredictably and with great force and hence dangerously towards those around them..."

1st instance Judge found that this characteristic was causative of the accident

- D tried to argue on appeal that claim should have failed on issue of causation. 3 pronged attack:

  - Car collided with steer rather than other way round (unlike Mirvahedy v Henley 2003 UKHL 16)
  - J relied upon the wrong characteristic
  - Jaundrill v Gillet [1996] applied

- 1st instance Judge considered under 2(2)(a) that damage was of such a kind not simply because of the size and weight of the steer but also because the steer behaved in this dangerous way in the particular circumstances of it being spooked
- Causal link between damage at (a) and characteristic at (b) was there

Katie Smith v Allan Harding 26/11/13

<u>Issue in the case:</u>

Whether D liable to C under the Animals Act 1971 for injury caused when D's horse kicked C?

Outcome:

S lost. Held whilst 2(2)(a) & (b) satisfied, 2(2)(c) not satisfied as H had never experienced the horse kicking out when about to be clipped before.

Defences at 5(1) entirely S's fault & 5(2) applied.

HJ Allan QC found that S was not an employee (test not met) therefore s6(5) did not apply.

Points of note:

- C had written expert evidence, D did not
- C's expert evidence accepted re characteristic/package of behaviour in response to a fright
- If you have any of these elements in a horse case 2(2)(b) likely to be met

Lynch v Ed Walker Racing Ltd 2017 WL 02610547

- Two limbs of 2(2)(a) asks two different questions:

I. whether injury is reasonably to be expected when someone falls off a horse that whips around?

II. however unlikely it is that an injury would occur, how likely it is that such an injury would be severe?

- Each limb to be considered in context of characteristics relied upon under (b)
- Must be looked at prospectively not retrospectively

Outcome Lynch

Appeal failed. J entitled to find that injury not likely/or likely to be severe based on the evidence before her

Appropriate level of generality?

Qn is **"whether a horse in, broadly these circumstances, if spooked, would reasonably be expected to be a source of injury to anyone and, in particular to the rider"**

Evidence needed for s2(2)(a)?

- Etherton J in Freeman v Higher Park Farm 2008 EWCA Civ 1185 - evidence of injuries sustained by riders throughout the country "unrealistic and unnecessary"

- Lewison LJ in Turnbull v Warrener stated that even though Etherton suggested it need not be called this did not mean it was inadmissible

- 1st instance J had expert evidence but stated she did not find it particularly helpful. She found (on basis of witness evidence) most unlikely injury would result when horse whips around

How does the caselaw assist in approach to cases?

- Case by case basis.
- Broadly – dog bites hard to defend (unless C has provoked)
- Dog knocking into cases – easier to defend as D must have knowledge
- Horse riding accidents often unsuccessful for C due to s5(2)
- Horse cases where horse not being ridden – very fact specific
- Harder to defend if C is an employee
- Animals escaping on highway – hard to defend

Do I require evidence?

- Issue of fact or law?
- Characteristics – general? Or specific? Horse suitable? Dog generally misbehaves?
- Likelihood of injury?
- Is the animal likely to behave for the expert?

Case Studies

Horse Purchase case

FACTS

- Horse purchase case – buyer beware!
- Advert for sale of horse ‘No Novices’
- Phone conversation pre- purchase trial
- C trials horse. During trial horse canters off down school and C comes off. Claims injury has devastated her life

Issues:

Factual:

- Who should be preferred as to conversation?
- Meaning of 'no novices'
- Cause of fall?

Legal:

- Whether D fell below expected standard of care towards C and whether C had voluntarily assumed the risk of injury by choosing to get on the horse? (s5(2) – both came down to the conversation had pre-trial for purchase

Outcome

- Advert only precursor to conversation
- C was experienced knowledgeable
- Back operation - yet no back protector/air jacket?
- Horse had no particular vices
- D's evidence preferred re conversation
- D not negligent 5(2) applied
- Not necessary therefore to go into detail on 2(2)

Dog knocking over case A v H

- Two dog walkers in a park – D recognizes C's dog which is well known in the area as being very over-excitable – Weimaraner
- Dogs meet and start to chase. D's dog accidentally runs into C knocking her over and breaking her leg
- C sues D under Animals Act and in negligence

Outcome

- J determined that D's dog was friendly not boisterous with no evidence that he ran into objects or people when at play 2(2)(a) & (b)
- S2(2)(c) characteristic 'colliding with people' not known to D or dog owning community generally.
- 5(2) applied
- Dismissed expert evidence – strayed beyond remit.
- C an unreliable witness
- D not negligent – would have found contrib at 65%
- Claim failed

Thanks for listening

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15/06/20

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The Animals Act 1971
"A Trot Through the Essentials"

Elizabeth Murray
15 June 2020

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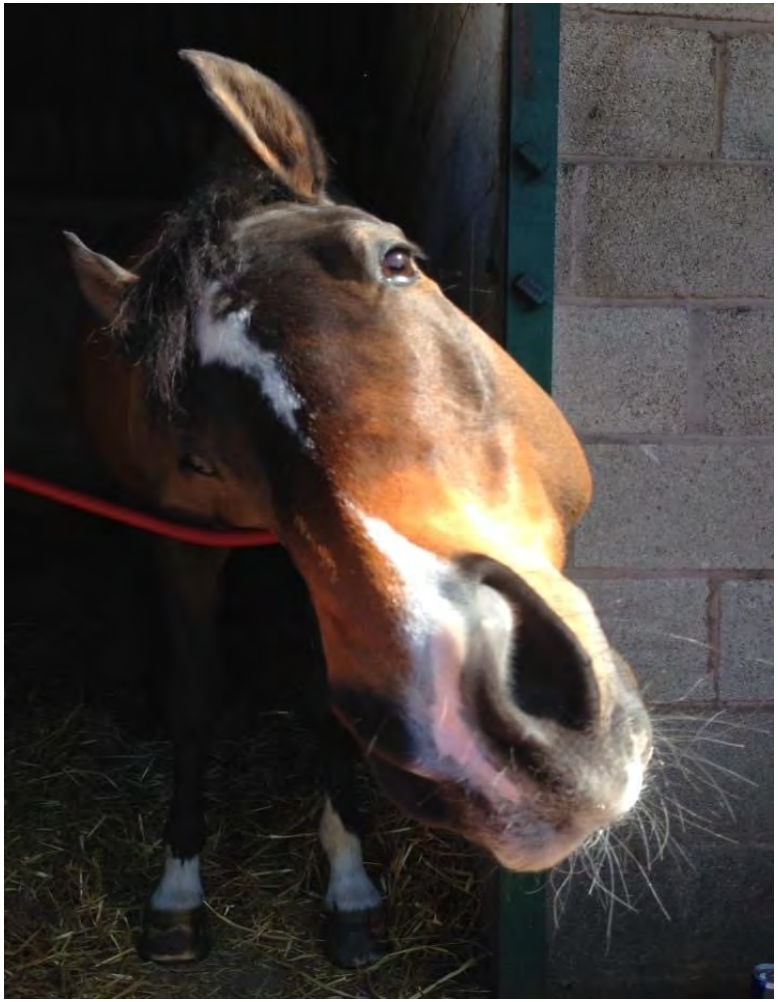
What Shall We Talk About Then?

- Defences to strict liability under section 2
- Other Defences
- Alternative causes of action



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What Do I Do Now?

- The Act does offer some protection to the keepers of animals and their insurers
- S5 AA 1971 – Exceptions from liability under section 2
- Cummings v Grainger [1977] QB 397, Ormrod LJ:

"That brings us to section 5, which is the important section providing for defences. It is important, I think, to remember that this is not a negligence action; this is not a fault liability situation; this is a strict liability situation, which is quite different. Therefore, the defences which are made available to the defendant by the statute are very important and ought not to be whittled away. To be fair to him and to be fair to the plaintiff, each of them must have their full statutory rights."

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What Are the Defences?

s5(1) - A person is not liable under section 2 (to 4A) of this Act for any damage which is due wholly to the fault of the person suffering it

s5(2) – A person is not liable under section 2 of this Act for any damage suffered by a person who has voluntarily accepted the risk thereof

s5(3) – A person is not liable under section 2 of this Act for any damage caused by an animal kept on any premises or structure to a person trespassing there, if it is proved either –

(a) that the animal was not kept there for the protection of persons or property; or

(b) (if the animal was kept there for the protection of persons or property) that keeping it there for that purpose was not unreasonable

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Should I Plead it?

- YES
  - No harm in pleading without prejudice to your primary position
  - The burden of proof

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It Was Your Fault

- Section 5(1)

"A person is not liable under sections 2 to 4A of this Act for any damage which is due wholly to the fault of the person suffering it"

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The Dog Did It

- Cummings v Grainger – again!

- Preskey v Sutcliffe (18 February 2013, Leeds County Court, unreported)

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Cummings v Grainger

- The defendant was the occupier of a breaker's yard in the East End of London
- At night the yard was locked up and an untrained Alsatian dog was turned loose to deter intruders
- One night an associate of the defendant, who had access with a key, unlocked the side gate and entered the yard with the claimant
- The dog attacked the claimant causing her serious injury and she brought a claim for damages

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Lord Denning

- AT TRIAL:

The claimant established strict liability under s2(2) but subject to a deduction of 50% contributory negligence as she had entered the yard knowing that there was a dog there

- ON APPEAL

At page 404 - *"The bite was not wholly due to the fault of the plaintiff but only partly so"* – and therefore the keeper of the dog could not avail himself of the defence under s5(1)

But it is unclear who else, apart from the keeper, could be to blame.

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Lord Denning Went On.....

At page 405:

"Alternatively there is another defence provided by section 5(2). It says that a person is not liable 'for any damage suffered by a person who has voluntarily accepted the risk thereof.' This seems to me to warrant a reference back to the common law. This very defence was considered in 1820 in Ilott v Wilkes....It was a case about a spring gun which went off and injured a trespasser, but Bayley J. put this very case at p.313:

".....if a trespasser enters into the yard of another, over the entrance of which notice is given, that there is a furious dog loose, and that it is dangerous for any person to enter in without one of the servants or the owner. If the wrong-doer, having read the notice, and knowing, therefore, that he is likely to be injured, in the absence of the owner enters the yard, and is worried by the dog .....it is clear that the party could not maintain any action for the injury sustained by the dog, because the answer would be, as in this case, that he could not have a remedy for an injury which he had voluntarily incurred."

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SO IS THERE AN OVERLAP?

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Preskey v Sutcliffe

- The defendants were keepers of a boxer dog, Frankie. They managed The Barnleigh Public House. After hours the defendants asked if those present minded Frankie being let loose into the bar area
- A takeaway delivery arrived. Frankie headed towards the open front door
- Found on the balance of probabilities that the claimant was restraining the dog by straddling her and holding her back with his arms around her chest, and that he did not let go when told to by the keeper
- Found that the injury was caused by a bite
- Section 2 was satisfied
- Claim failed due to both section 5(1) and section 5(2)

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Preskey v Sutcliffe

At para 30:

"Mr Preskey's claim fails by reason of both defences. He agreed in evidence that he knew dogs can bite in certain circumstances and that dogs get territorial and protect their own interests. In my judgment, by restraining Frankie as he did he voluntarily accepted the risk that she might feel threatened or the need to protect her own interests (to get away from Mr Preskey or, as he would have it, to follow Mrs Sutcliffe and/or go to the food source) and he fully exposed himself to the risk by his own actions in restraining Frankie. Nobody in the case suggested he was acting out of malice towards the dog and neither do I, but in my judgment his actions were the sole cause of this incident. It follows that the section 5(1) defence is also made out."

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Hold Your Horses

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Turnbull v Warrener

- [2012] EWCA Civ 412

- The claimant fell whilst cantering the defendant's horse in open countryside when it suddenly bolted
- The horse was being ridden in a bitless bridle for the first time and it was accepted that this was the cause of the claimant losing control
- Both the claimant and defendant were experienced horsewomen

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- AT TRIAL

It was not negligent to allow the claimant to ride the horse in a bitless bridle without first cantering in an enclosed area

S2(2) was not established

The defendant could have relied upon s5(1) on the basis it was wholly due to the claimant's fault in cantering the horse without testing first

- ON APPEAL

The conclusions of the trial judge on s2(2) were flawed *("Having disagreed with the judge about almost everything relating to statutory liability for the reasons I have given I have come to the same ultimate conclusion.")*

The defendant could not rely upon s5(1) but why?

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Maurice Kay LJ at para 29:

"There is an obvious difficulty with the judge's finding that the damage was 'wholly due to Ms Turnbull's fault in cantering off on Gem as she did using a bitless bridle before testing him adequately with that piece of equipment in closed and/or open conditions.'

Ms Turnbull and Mrs Warrener were horsewomen as between whom there was no material distinction to be drawn in relation to their respective riding experiences and ability. On the judge's finding it was not negligent of Mrs Warrener to permit Ms Turnbull to proceed to canter at the point when she did.....

.....To find that Mrs Turnbull was wholly at fault cannot co-exist with the finding that Mrs Warrener was not negligent.....Either both or neither were at fault in the statutory sense."

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You Ran The Risk……

- Section 5(2)

"A person is not liable under section 2 of this Act for any damage suffered by a person who has voluntarily accepted the risk thereof."

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Turnbull v Warrener

- Section 5(2) could be relied upon
- As per Etherton LJ in Freeman: *"The words of section 5(2) are simple English and must be given their ordinary meaning and not be complicated by fine distinctions or by reference to the old common law doctrine of volenti.....what must be proved in order to show that somebody has voluntarily accepted the risk is that (1) they fully appreciated the risk and (2) they exposed themselves to it."*
- Therefore consider the knowledge of each party and the consequent effect on defences under s5(1) and s5(2)
- In this case the level of equestrian knowledge held by the claimant was such that the Court of Appeal concluded that a defence could be made out under s5(2)

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At para 32 - *"In the present case Ms Turnbull knew that a horse, just fitted with a bitless bridle for the first time, bore an increased risk of not being responsive to a rider's instructions. That was the whole point of the initially cautious approach in the enclosed area. She also knew that when she took Gem into the open in order to canter, he had not yet cantered when fitted with a bitless bridle. In these circumstances it is plain that she had voluntarily accepted the risk which eventuated……..*

At para 34 - *"There is a further point which underwrites the section 5(2) defence in the present case. It arises from the equivalence of knowledge and experience as between the parties. If Mrs Warrener's knowledge for the purpose of section 2(2)(c) is established it is difficult to see how knowledge as an element of voluntariness on the part of Ms Turnbull for the purpose of section 5(2) can be denied."*

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So It Cuts Both Ways

- Actual knowledge of the risk of injury is required
- Claimant does not need to have known the precise behaviour
- How has the case been put under the second limb of s2(2)(b) *"– ……..due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances."*
- In satisfying s2(2)(c) knowledge on the part of the keeper has to be established – are they experienced with that animal?
- But if the claimant has a similar level of experience then if the defendant knew what could happen……so could the claimant

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I Did Tell You.....

- Cummings v Grainger – AGAIN!

"The plaintiff certainly knew the animal was there. She worked next door. She knew all about it. She must have seen this huge notice on the door "Beware of the Dog." Nevertheless she went in."

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- BUT……section 6(5) expressly excludes employees:

"Where a person employed as a servant by a keeper of an animal incurs a risk incidental to his employment he shall not be treated as accepting it voluntarily."

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The Trespasser

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Section 5(3):

A person is not liable under section 2 of this Act for any damage caused by an animal kept on any premises or structure to a person trespassing there, if it is proved either:

(a) that the animal was not kept there for the protection of persons or property;

OR

(b) (if the animal was kept there for the protection of persons or property) that keeping it there for that purpose was not unreasonable.

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- Do not forget the basics!

- What is a trespasser? Go back to established principles:

"A trespasser is a person who has neither right nor permission to enter on premises, who "goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to. It must, of course, be remembered that not every trespasser is a miscreant." – Clerk and Lindsell on Torts, 22nd edition

- What constitutes premises or structure? Have a look at the Occupiers' Liability Acts

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(A) THE ANIMAL WAS NOT KEPT THERE FOR THE PROTECTION OF PERSONS OR PROPERTY

- Most animals will fall within this remit

(B) ……BUT IF IT WAS, WAS THAT REASONABLE?

- You guessed it……..Cummings v Grainger.

- Uncertainty remains in this area

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Other Defences

- Contributory Negligence
- Bodey v Hall [2011] EWHC 2162

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Bodey v Hall

- The claimant sustained an injury whilst travelling as a groom in a pony and trap driven by the defendant on a country lane
- The horse, Pepper, became startled shortly after the defendant turned off a country lane and shot forwards rapidly with the effect of tipping the trap and both occupants were thrown onto the ground.
- The claimant suffered a severe head injury and it was specifically pleaded that due to the nature of her brain injury she was unable to recall the accident itself

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Bodey v Hall

- Found as a fact that the claimant was an experienced horsewoman; that she was familiar with the unpredictable nature of horses; that the natural reaction is to move forwards or sideways away from a perceived threat or stimulus; that she fully appreciated that there was a risk of the trap tilting; that she took an informed decision not to wear a hat
- The case fell squarely within the remit of s2(2)
- But given the findings above the defence was made out under s5(2)
- But in the event he was wrong he was not satisfied that the failure to wear a hat contributed. Photographs suggested there was no consistent practice in hat wearing for carriage driving
- Distinguish from horseback riding and the increasing practice of wearing riding hats whilst carrying out yard duties

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Alternative Causes of Action

- Negligence
- Occupiers' Liability
- Trespass to the Person

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Negligence

HORSES:

- Harris v Miller [2016] EWHC 2438

The claimant was 14 years old and fell from a thoroughbred horse sustaining paraplegic life changing injuries

Found as a fact that the defendant had limited knowledge of the claimant's riding experience; the claimant was encouraged to ride first because of her greater experience and the defendant wanted to see how the horse handled in open conditions; the claimant did express a degree of insecurity and received more encouragement from the defendant; once in the field the claimant began to trot and opened up the gap between her and the rest of the group; the claimant lost control when it started to canter; the horse was a strong and wilful thoroughbred and difficult to control

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Negligence

Para 149 – *"It is necessary to focus on the defendant's knowledge, actual or constructive, of both horse and rider when considering whether or not in permitting the claimant to ride Polly she was in breach of the duty of care to her as a young person for whom she was responsible."*

Para 151 – *"It seems to me that the defendant made a serious error of judgment in acquiring an unsuitable horse at the early stages of her riding hobby. She had undertaken insufficient enquiry and had failed to seek appropriate advice as to the type of horse she was after....By positively encouraging (the claimant) to ride the horse, and condoning, if not specifically instructing a trot in an open field for the first time, she was exposing the Claimant to a risk of injury from a horse which could not be controlled in other than the most benign of conditions."*

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Negligence

Para 152 – *"….It was reasonably foreseeable that the horse would be strong and difficult to control and in certain conditions likely to unseat a rider who was not used to managing a horse bred to race and trained to gallop. Whilst the consequence of serious injury may not have been foreseen that is immaterial. It was foreseeable that a loss of control of such a horse would unseat the rider leading to injury of some sort."*

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Negligence

DOGS:

- Whippey v Jones [2009] EWCA Civ 452

Hector was an adult Great Dane weighing 12.5 stone.

The appellant let him off the lead in a park once he was satisfied there were few people around.

Hector appeared from behind a bush whilst the respondent was running past and knocked his right shoulder, causing him to loose his balance and fall down the slope to the river and break his ankle.

Found that the judge had applied the wrong test for negligence

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Negligence

Para 16 – *"Before holding that a person's standard of care has fallen below the objective standard expected and so finding that he acted negligently the court must be satisfied that a reasonable person in the position of the defendant would contemplate that injury is likely to follow from his acts or omissions. Nor is the remote possibility of injury enough; there must be sufficient probability of injury….."*

It had been found as a fact that Hector had no tendency to jump at people, at most he would stop and bark from 5ft away. There was no reason why the defendant would have anticipated that if let off the lead physical harm would result

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WE DID IT!

If you have any questions, or would like copies of the cases referred to, please contact me on

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