

## Claims against keeper of animals for their animals action: strict liability or not?

The circumstances in which the keeper of an animal is liable for damage caused by his animal depend upon the category to which the animal belongs: animals are either dangerous or non dangerous. Section 2(1) of the Animals Act 1971 imposes upon the keeper of an animal of a 'dangerous species' strict liability for any damage caused by the animal. Non dangerous species do not have a regime of strict liability imposed upon them unless: (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. These conditions are expressed in the conjunctive rather than the alternative which means that all three conditions must be met.

### A. Type of damage

Subsection 2(2)(a) provides that the damage must be of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe. In *Mirvahedy v Henley* [2003] UKHL 16 their Lordships did not have to consider the issue of the likelihood to cause a type of damage by virtue of concessions made in that case. Lord Scott, in his dissenting judgment however, does examine that section and criticises the courts below for paying insufficient attention to the issue. He notes that 'likely' should be given its natural meaning of 'to be reasonably expected'.

Lord Nicholls gave the example of a large and heavy domestic animal such as a mature cow where section 2(2)(b) may not be satisfied. He said that: "There is a real risk that if a cow happens to stumble and fall on someone any damage suffered will be severe. This would satisfy requirement (a). But a cow's dangerousness in this regard may not fall within requirement (b). This dangerousness is due to a characteristic normally found in all cows at all times. The dangerousness results from their very size and weight. It is not due to a characteristic not normally found in cows 'except at particular times or in particular circumstances'".

Whilst this example provides an example of when subsection 2(2)(b) will not be fulfilled it will cause problems for lower courts when they come to interpret the ambit of section 2(2)(a). The problem can be exemplified by two examples. The first is a horse that is loose on the highway and a car hits it. The second is the situation where a horse shies into a car as it is passing because it is startled either by the car or something on the side of the highway.

Applying Lord Nicholls' example there would be no liability in the first scenario because although the damage was likely to be severe (fulfilling 2(2)(a)), the characteristic that caused the damage was the weight and size of the horse. This is common to all horses and would not fulfil section 2(2)(b).

In the second scenario section 2(2)(b) would appear to be satisfied because 'shying' is a characteristic that is normal to horses but only at particular times and in particular circumstances. However it is an open question whether section 2(2)(a) is satisfied. Is "shying" itself likely to cause damage or damage if caused to be severe? It is not clear that it is and suggests that expert evidence would be required for a Claimant to prove that it was.

## B. Abnormal characteristics

Section 2(2)(b) of the Animals Act has been determined by the House of Lords in *Mirvahedy v Henley* in a split decision. Section 2(2)(b) relates to 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. Lord Nicholls, giving the leading majority judgment noted that this subsection aimed to create strict liability for abnormal conduct of non dangerous species. The first limb of paragraph (b) identifies one class. The animal must have characteristics 'which are not normally found in animals of the same species'. The second limb of paragraph (b) identifies the other class of qualifying characteristics. The animal must have characteristics which are not normally found in animals of the same species 'except at particular times or in particular circumstances'.

The phraseology of section 2(2)(b) is notable for its capacity to be interpreted in diametrically opposite ways. There is no problem with the first part of section 2(2)(b)—do animals normally or are they prone to, for example, bite or kick? The problem is with the second part: does one cancel the double negative 'not normally...except' and ask whether what was done in the special circumstances was normal behaviour for the species as a general rule; or is the right approach to ask whether what was done was normal for the species in the particular circumstances even if it will be abnormal in the absence of such circumstances. In *Cummings v Granger* [1977] QB 397, the first of these approaches was adopted where Lord Denning MR said: "Those characteristics—barking and running around to guard its territory—are not normally found in Alsatian dogs except in circumstances where they are used as guard dogs. Those circumstances are 'particular circumstances' within section 2(2)(b). It was due to those circumstances that the damage was likely to be severe if an intruder did enter on its territory." This approach was followed by the majority in *Mirvahedy v Henley*. (see also *Curtis v Betts* [1990] 1 WLR 459).

However, the dissenting judgments in *Mirvahedy v Henley* favoured the rationale in *Breeden v Lampard* (21/3/1985)(unreported). In that case Lord Justice Lloyd noted: 'If liability is based on the possession of some abnormal characteristic known to the owner, then I cannot see any sense in imposing liability when the animal is behaving in a perfectly normal way for all animals of that species in those circumstances, even though it would not be normal for those animals to behave in that way in other circumstances, for example, a bitch with pups or a horse kicking out when approached too suddenly, or too closely, from behind.'

How the majority interpretation works in practice is that a bitch with her litter, a guard dog, a cow with her calf, will be covered by section 2(2): in essence normal behaviour in specific circumstances. In *Livingstone v Armstrong* (11/12/2003)(unreported) it was found that there was no negligence on the part of the cow's keeper in maintaining the fences on his farm. It was further found that the cow had in fact jumped a properly maintained fence. Evidence from the cow's keeper was that it was not normal for cows to jump over fences. There was no evidence that the cow was frightened or that it had bolted. The claim failed on the basis therefore that section 2(2)(b) had not been met because the behaviour in the particular circumstance was not normal. The problem becomes, of course, that every situation becomes a 'particular circumstance' and that animals, being animals, have behaved in a normal way. In litigation of this kind it is extremely important to identify the special circumstance in order to establish the normal behaviour of the animal.

### C. characteristics known to the keeper

Section 2(2)(c) requires that the characteristics of the animal referred to in 2(2)(b) are known to the keeper. In *Elliott v Townfoot Stables* (3/9/2003)(unreported) the judge found that a pony throwing her child rider, causing personal injury, caused a damage which was not of a kind which a pony is likely to cause, or which if caused, is likely to be severe. Damage was a mere possibility, but was not 'reasonably to be expected'. This is a surprising decision. Ponies have been known to throw riders. There was evidence that the pony was tender over her ribs and that it was likely that the rider had inadvertently put pressure on this area. It is arguable that the special circumstance of the pony being injured led to it behaving normally, for those circumstances, and therefore strict liability ought to accrue. The rationale for this decision was based solely on section 2(2)(a) without sections 2(2)(b) or 2(2)(c) having been considered because once 2(2)(a) failed it was held that it became unnecessary to do so. However, the likelihood of damage is not entirely discreet from the 'special circumstance' of the claim. The finding of fact was that the owner did not know of the ponies tender ribs. However, the section does not require knowledge of the injury or circumstance leading to the behaviour, as a negligence claim would require. Rather the keeper must have knowledge of the characteristic of the animal in 'particular circumstances'. It is arguable that if the owner had knowledge that when his pony is injured, pressure being applied to that injury will cause it to behave aggressively, then that is enough. In *Mirvahedy v Henley* where the defendant's horses had bolted as a result of receiving an entirely unknown fright. The owner knew that horses bolt when frightened.

If lower courts prefer a narrow interpretation that knowledge of the particular animal is required this could make it extremely difficult for claimants to establish liability particularly when the claimant has the burden of proof. Unless the defendant happens to mention at the scene of the accident that the animal "does this all the time" he/she is unlikely to be able to provide any evidence of the defendant's knowledge.

If general knowledge is sufficient, whilst still difficult for a claimant, where a defendant gives evidence it should be easier to establish some knowledge of the species' characteristics and where the defendant does not give evidence it would be easier for a judge to take judicial notice of the characteristic and the likelihood that it would be known to the defendant.

On a wide interpretation, those experienced, responsible animal owners who know what their animals are capable of would be in a worse position than those who were not so responsible and did not research the likely behaviour of their animal. If the narrow interpretation of subsection (c) were preferred this would limit to some degree this inequality.

### Conclusion

The Animals Act is minefield of potential interpretive errors. *Mirvahedy* was thought to be a low point for defendants but there is more potential for hope or despair in the judgment (depending on whether you are a claimant or a defendant) than appears on first sight to be the case. If lower courts adopt a narrow interpretation of section 2(2)(a) and 2(2)(c) in line with the opinion of Lord Scott then Claimants will find it exceptionally difficult, notwithstanding the difficulties that they already had, to establish liability and the gains for claimants in respect of section 2(2)(b) may be nullified. Given that the House of Lords was reluctant to rule on the policy arguments about where the risk in cases where domestic animals cause injury should lie, it may fall to Parliament to rectify the problems with the Act and provide the

clarity that is required for keepers of animals and those injured by animals to know where they stand.

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