Animals Act 1971

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1. Section 2(2) of the Animals Act 1971 ("the Act") has caused countless difficulties for even the most learned of judges. Lord Denning described it as "very cumbrously worded"[1] and in the same case, Ormrod LJ found it to be "remarkably opaque"[2]. In the leading Animals Act case of Mirvahedy v Henley[3], Lord Nicholls commented:

> *Unfortunately the language of section 2(2) is itself opaque. In this instance the parliamentary draftsman's zeal for brevity has led to obscurity. Over the years section 2(2) has attracted much judicial obloquy.*[4]

Even since the House of Lords' clarification of the Act, the application of section 2(2) has continued to tie some judges in knots, leading to further appeals to the Court of Appeal.

Strict liability under the Animals Act

2. By section 1(1) of the Act, the provisions of sections 2 to 5 replace:

> *(a) the rules of the common law imposing a strict liability in tort for damage done by an animal on the ground that the animal is regarded as ferae naturae or that its vicious or mischievous propensities are known or presumed to be known;*
>
> *(b) subsections (1) and (2) of section 1 of the Dogs Act 1906 as amended by the Dogs (Amendment) Act 1928 (injury to cattle or poultry); and*
>
> *(c) the rules of the common law imposing a liability for cattle trespass*.

3. In an attempt to simplify the law, provision was made at sections 1 to 6 of the Act regarding strict liability for damage done by animals.

[1] Cummings v Grainger [1977] QB 397 at page 404
[2] Ibid at 407
[3] [2003] 2 AC 491
[4] Ibid at 504A

Keeper's Liability for damage done by dangerous animals

4. Section 2 of the Act contains provisions relating to liability for damage done by dangerous animals, as follows:

> *(1) Where any damage is caused by an animal which belongs to a dangerous species, any person who is a keeper of the animal is liable for the damage, except as otherwise provided by this Act.*
>
> *(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.*

5. All animals are placed into one or other of two categories, according to their species. Animals are categorised either as belonging to a dangerous species or not.

Keeper

6. Keeper is defined in sub-sections 6(3) and 6(4) of the Act as follows:

(3) Subject to subsection (4) of this section, a person is a keeper of an animal if—

(a) he owns the animal or has it in his possession; or

(b) he is the head of a household of which a member under the age of sixteen owns the animal or has it in his possession;
and if at any time an animal ceases to be owned by or to be in the possession of a person, any person who immediately before that time was a keeper thereof by virtue of the preceding provisions of this subsection continues to be a keeper of the animal until another person becomes a keeper thereof by virtue of those provisions.

(4) *Where an animal is taken into and kept in possession for the purpose of preventing it from causing damage or of restoring it to its owner, a person is not a keeper of it by virtue only of that possession.*

7. It is possible for more than one person to be the keeper. By way of example, in the case of Smith v Ainger[5], the Defendant *keepers* were both the owner of the dog and the owner's father, who had control of the dog at the material time while it was being led down the street.

8. In the first instance case of Doolan v E P Cornall & Sons[6], HHJ Jenkins held that a farmer who allowed a horse to graze on his land at a cost to the horse's owners of £8 per week was not a keeper of the horses. The farmer had nothing to do with the horses in his field. He did not move them between fields, or to and from stables. In the circumstances, it was found that the horse's keeper was the head of the household of the child who was using the horse at the material time.

Dangerous Species – Section 2(1)

9. *Dangerous species* is defined in s.6(2) as a species:

[5] The Times 5 June 1990
[6] 1 May 2001, unreported

(a) which is not commonly domesticated in the British Islands; and

(b) whose fully grown animals normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe.

10. Thus, section 2(1) will not generally apply to dogs or other pets, unless they are "wild dogs" or other wild animals within the meaning of section 6(2). *Commonly domesticated* animals generally include livestock and other farm animals. Animals in a zoo or circus may well meet the criteria of *dangerous species*.

Non-dangerous Species – Section 2(2)

11. Each of the 3 limbs set out at section 2(2) (a) to (c) must be considered and satisfied in turn.

a. Damage of a kind **likely to be caused** unless the animal is restrained *or* **likely to be severe** if caused by the animal;

b. Likelihood of damage is due to **characteristics** not normally found in species, or not normally found except at particular times or in particular circumstances;

c. Characteristics are **known to** the keeper, his servant, or a household member aged under 16.

(a) <u>Likelihood of damage or of severe damage</u>

Damage

12. Damage is defined in the General Interpretation section 11 of the Act to [*include*] *the death of, or injury to, any person (including any disease and any impairment of physical or mental condition)*.

13. In <u>Smith v Ainger</u> (above), the claimant was knocked over and broke a leg when the defendant's dog attacked her dog. Damage was characterized as "personal injury to a human being caused by the direct

application of force". The Court of Appeal agreed with the trial judge's view that if the personal injury was the result of an attack by a dog, it was unrealistic to distinguish between a bite and "the consequences of a buffet" (Neill LJ at 10E).

14. An obvious example of *severe* damage can be found in the case of Curtis v Betts[7]. A Bull Mastif was being led on a lead from a house to the back of a car. A child, who was friendly with the dog, approached the car. The dog bit the child. The Court of Appeal held that since the defendant's dog belonged to a breed which, if it did bite anyone, it was likely to cause severe damage, the requirement of s 2(2)(a) was satisfied.

15. The first instance decision of Hunt v Wallis[8] provides a more surprising finding of *damage likely to be severe*. Pill J found that, whilst a Border Collie was not likely to cause physical injury, any damage which the dog did cause when running into someone was likely to be severe because of the dog's size and speed. The claim failed, however, on the other two criteria of section 2(2) (see below).

Likely

16. In Smith v Ainger, Neill LJ considered the meaning of *likely* in the context of section 2(2) of the Act. He found it to mean "such as might well happen" or "where there is a material risk that it will happen" rather than probable. Thus, it would not be necessary for a Claimant to show that a dog would bite more than 50% of the people who came into contact with it in order to show that a dog was *likely* to cause damage by biting.

17. In Mirvahedy v Henley[9], Lord Scott considered *obiter* Neill LJ's construction of the word "likely".

> *I would respectfully agree with the Lord Justice's rejection of "probable" or "more probable than not" but am unable to agree that "such as might happen", a phrase consistent with no more than a possibility, can be right. A mere possibility is not, in my opinion, enough. I have suggested "reasonably*

[7] [1990] 1 WLR 459
[8] [1994] PIQR P128
[9] [2003] 2 AC 491, paragraphs 95-97

to be expected" as conveying the requisite meaning of "likely" in paragraph (a). But it may be that there is no material difference between "reasonably to be expected" and Neill LJ's "such as might well happen".

18. Lord Scott's interpretation of "likely" was adopted by Etherton LJ in Freeman v Higher Park Farm[10], and the Court of Appeal recently held that *"reasonably to be expected"* is the settled meaning of the word[11].

(b) Characteristics not normally found in the species…

19. The second part of the test at section 2(2)(b) has proven to be the most problematic of the three elements, and was the subject of the appeal to the House of Lords in Mirvahedy.

20. The Claimant suffered significant personal injuries when the car he was driving was struck by the Defendants' horse. The horse, along with two other horses, had been frightened by something or someone in their field, causing them to panic and to bolt out of the field. In doing so, they pushed over an electric wire fence and a surrounding wooden fence, and then trampled through a strip of tall bracken and vegetation. They fled 300 yards up a track and then for almost a mile along a minor road before reaching the busy A380 road on which the collision occurred.

21. At first instance, it was found that the horses had been adequately fenced, so that the Claimant's claim in negligence failed. The Animals Act claim was dismissed at first instance, but allowed on appeal. The issue for their Lordships' determination on the Defendant's appeal to the House of Lords was the apparent ambiguity of Section 2(2)(b).

22. Lord Walker of Gestingthorpe sought to summarise the defendant's construction of the sub-section as follows:

[10] [2008] EWCA Civ 1185 at paragraph 33
[11] Turnbull v Warrener [2012] EWCA Civ 412; (2012) 156(14) S.J.L.B. 31 at para.12

> *The risk is due to characteristics of the animal which (i) are abnormal in its species or (ii) are normal in the species but only at particular times or in particular circumstances (and the damage is not caused at such a time or in such circumstances)*.[12]

It was submitted that it was parliament's intention for animal owners to escape liability where an animal was simply responding in a manner which was entirely normal for its species.

23. It was held by the Court of Appeal, and by a narrow majority of the House of Lords (Lords Scott and Slynn dissenting) that section 2(2)(b) should be read as introducing a two-limbed test, summarised by Lord Walker of Gestingthorpe as follows:

> *The risk is due to characteristics of the animal which (i) are abnormal in its species* ***or*** *(ii) are normal in the species but only at particular times or in particular circumstances (and the damage is caused at such a time or in such circumstances)*.[13]

24. The first limb of the test is relatively straightforward, and the Courts have rarely had problems establishing whether the *characteristics of the animal are not normally found in animals of the same species*.

Species

25. *Species* is defined at section 11, as *including sub-species and variety*.

26. Appeal courts have subsequently approved the finding in Hunt v Wallis[14] that, where there is an identifiable breed of an animal, of long standing with acknowledged and identifiable characteristics, at least where it is a breed whose qualities are recognised as beneficial to man, the comparison should be between the animal causing the damage and that breed or sub-species. Thus, in that case a comparison was made between *Bruce* and the characteristic Border Collie, rather than with dogs generally.

[12] Ibid at 536H
[13] Ibid at 537A
[14] [1994] PIQR P128

Abnormal characteristics

27. The following cases provide useful examples of characteristics found to be abnormal for the species:-

Kite v Napp The Times 1.6.82. The claimant was bitten by a dog. The dog was known to attack people carrying bags. This was found to be a characteristic that was *not normally found in animals of the same species*.

Wallace v Newton [1982] 1 WLR 375. A groom was crushed by a horse, "Lord Justice", as it was being led into a horse box. The horse's known characteristics of *unpredictability* and *unreliability* were found to have caused the accident. The Judge found that such characteristics were not normally found in animals of the same species.

Not normally found except at particular times and in particular circumstances

28. In Mirvahedy the majority of the House of Lords held that the tendency of a horse to bolt was a characteristic not normally found in animals of the same species except in the particular times and circumstances of a horse sufficiently alarmed and panicked. Thus, it was found that the second limb of the test at section 2(2)(b) was satisfied.

29. Mirvahedy has had widespread impact on animal keepers and their insurers. There is believed to have been a significant increase in insurance premiums following the House of Lords' decision. The Country Land and Business Association (CLA) and British Horse Society (BHS) sought to have the Compensation Act 2006 amended so that owners of "normal" animals behaving "normally" are not liable for the injuries those animals cause to people. When they failed they turned their attention on to the Animals Act, and consideration has been given to the issue in parliamentary discussion of the Animals Act Amendment Bill.

30. In March 2009, DEFRA produced a document entitled *Consultation on changes to the* Animals Act 1971 *to clarify the application of strict liability to the keepers of animals.* It contained modest proposals which would breathe life into section 2(2)(b). So far no amendments have been adopted, and the provision, as

interpreted by Mirvahedy continues to concern even at the higher levels of the judiciary. In particular, Lewison LJ expressed concern that "*the Animals Act 1971 has caused a major (and unintended) expansion in the potential scope of strict liability*"[15].

Normally

31. The Court of Appeal has considered the meaning of *normally* in the post-Mirvahedy case of Welsh v Stokes[16]. The Claimant was working as a trainee on the Defendant's yard. Although there were some doubts as to her riding abilities, she was competent to ride a "sensible" horse on her own. At the time of the accident, she was riding on the road on a "sensible" 9-year-old horse with no history of misbehaviour or vice of any kind. The Claimant sustained severe head injury in the accident and had no recollection of how it occurred. The only evidence as to the circumstances of the accident was the hearsay evidence of a motorist who fled the scene after telling another motorist, who had not seen the accident, that the horse had reared up, causing the Claimant to fall. The claim succeeded at first instance. The Defendant appealed on two grounds: firstly, the trial judge's reliance on hearsay evidence for the key circumstances of the accident, and secondly the judge's application of section 2(2) of the Act.

32. In another damaging blow to defendants, Dyson LJ determined as follows:

> *It seems to me that the core meaning of "normal" is "conforming to type". If a characteristic of an animal is usual, then it will certainly be normal. The best evidence that a characteristic conforms to the type of animals of a species is that the characteristic is usually found in those animals.*
>
> *[…] It is difficult to see why Parliament should have intended to exclude from the ambit of subsection (2)(b) cases where the relevant characteristic is natural, although unusual, in the animal which has caused the damage. There is no need for such a narrow interpretation because a claim will not succeed unless the knowledge requirement in subsection (c) is also satisfied.*[17]

[15] Turnbull v Warrener (above) per Lewison LJ at para. 49; see also *ibid* per Maurice Kay LJ at para.23 and Stanley Burnton LJ at 37
[16] [2007] EWCA Civ 796
[17] Ibid at paragraphs 46-47

33. Further guidance was given by the Court of Appeal in the case of Freeman v Higher Park Farm[18] as to the meaning of characteristics normal only in particular circumstances and at particular times. An experienced rider claimed damages for personal injury sustained in the course of a hack on a horse owned by the Defendant riding stables. The horse was known to buck when going into a canter. On the particular occasion when the Claimant was riding it, it put in an unusually vicious buck, causing the Claimant to fall and sustain significant injury.

34. Counsel for the Claimant submitted that, if bucking is not considered abnormal in horses generally, it must be that it is normal only in particular circumstances and in particular times, such as when going into a canter. It was submitted that "particular" meant anything that is not continuous. Etherton LJ rejected the Claimant's interpretation, and held that: *the words "at particular times or in particular circumstances" in the second limb of s.2(2)(b) denote times or circumstances which can be described and predicted.*[19] It seems that Etherton LJ considered there to be a distinction between situations where an owner is able to try and guard against a danger (for example where a bitch has delivered a litter or cow has calved) and circumstances which are not susceptible to being guarded against. It may be that strict liability will not be imposed in the latter case.

35. It should be noted, however, that there was no expert evidence at all before the court in Freeman, and the absence of such evidence was a significant reason for the court's finding that section 2(2)(b) had not been made out. Etherton LJ commented:

> *That must, however, be a matter of evidence in every case. In the present case, there was no evidence whatever that horses generally buck at particular times or in particular circumstances.*[20]

Causation

36. There must be a causal link between the likelihood of damage and the characteristic considered to be abnormal, or normal only in particular times and circumstances. In Mirvahedy, Lord Nicholls of

[18] [2008] EWCA Civ 1185
[19] Ibid at para. 42-43
[20] Ibid para. 44

Birkenhead gave the example of *a large and heavy domestic animal such as a mature cow. There is a real risk that if a cow happens to stumble and fall on to 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.*[21]

37. Thus, in Hunt v Wallis, the surprising finding that damage caused by a Border Collie running into someone is likely to be severe did not result in a finding of liability on the part of the Defendant. The speed and size of the dog which rendered it likely to cause severe injury for the purposes of section 2(2)(a) were not *abnormal* characteristics for the purposes of section 2(2)(b). The Judge found that the Claimant had failed to establish the *necessary causal link between the characteristic in question and the damage suffered*.[22]

38. Similarly, in the case of Clark v Bowlt[23], it was held that a horse's weight might be such as to satisfy the requirement of section 2(2)(a), but it would not constitute a characteristic meeting either of the two limbs of the test at 2(2)(b), being a normal feature for mature horses generally. The Claimant was injured when a horse ridden by the Defendant along a narrow grass verge on the side of a road moved suddenly and unpredictably into the road, hitting the front nearside of the Claimant's car as he tried to pass the horse. The Defendant was found not to be liable for such an unexpected accident.

(c) Characteristics are known to the keeper

39. Section 2(2)(c) of the Act merely requires knowledge of the "characteristics", and not both characteristics and circumstances.[24] Thus in Mirvahedy, the keepers of the horses were found to be liable, notwithstanding that they had no knowledge of the frightening circumstances which caused the horses to bolt out of their field for the first time.

[21] 511A-C
[22] P140
[23] [2006] EWCA Civ 978
[24] Mirvahedy v Henley (CA) [2002] QB 769 per Hale LJ at 782G-H

40. *Actual* knowledge of the relevant characteristic must be established.[25] It is not sufficient to show that the keeper *ought* to have known of the characteristic.

41. It is not necessary, however, to establish that the keeper had actual knowledge of the characteristic in the particular animal concerned, where the keeper can be shown to know that animals of the same species will generally possess the characteristic. Thus, in Welsh v Stokes, even though the horse in question had never been known to rear, it was sufficient for the Claimant to show that the Defendant knew that horses would *normally* rear in circumstances when they did not want to go forwards but were being encouraged to do so by an inexperienced rider:

> *I do not see why a keeper's knowledge that a horse has the characteristic of normally behaving in a certain way in particular circumstances cannot be established by showing that the keeper knows that horses as a species normally behave in that way in those circumstances.*[26]

Exceptions from liability under the Animals Act

42. Section 5 of the Act provides for three relevant exceptions to strict liability under sections 2 to 4:

> *(1) A person is not liable under sections 2 to 4 of this Act for any damage which is due wholly to the fault of the person suffering it.*
>
> *(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.*
>
> *(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*

[25] Hunt v Wallis at P140.
[26] Per Dyson LJ at para. 71

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

43. Section 5(1) provides a gateway to a complete defence or to a finding of contributory negligence. An example might be where a person was teasing a dog and was bitten, or carelessly stepped on a dog, causing it to bite back.

44. As to the voluntary acceptance of risk, it has been held that the words of s.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 non fit injuria[27]. 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[28].

45. In Cummings v Granger, the Court of Appeal found that the Claimant had voluntarily accepted the risk of attack when entering a scrap yard at night knowing that there was an Alsatian patrolling the premises.

46. In Freeman v Higher Park Farm (above), it was found that the Claimant had fully accepted the risk of riding a horse which was known to buck when going into a canter, and she had willingly continued to ride into a canter after the horse's first buck.

47. Similarly, in the recent case of Goldsmith v Patchcott[29], Jackson LJ gave further guidance on how section 5 (2) of the Act operates:

> *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. It is not a prerequisite of the section 5 (2) defence that the claimant should foresee the precise degree of energy with which the animal will engage in its characteristic behaviour. Animals may act out of instinct or impulse and their precise behaviour cannot necessarily be predicted.*

[27] Cummings v Granger [1977] QB 397, 408 (Ormrod LJ)
[28] Cummings at p. 410 (Bridge LJ)
[29] [2012] EWCA Civ 183 at para.50

48. In Patchcott, the Claimant suffered severe facial injuries when she fell from a horse which had reared and bucked violently after being startled by something unknown. The claimant knew that horses could buck when startled or alarmed but had not anticipated that the horse would buck as violently as it did. Nevertheless, she was found by the Court of Appeal to have voluntarily accepted the risk.

49. Another recent example of the application of s.5(2) can be found in the case of Turnbull v Warrener [2012] EWCA Civ 412. There, the Claimant 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, but she nevertheless cantered the horse across an open field. She was unable to control the horse and suffered injury when it veered to the right through an open gap in a hedge. She was found by the Court of Appeal to have voluntarily accepted the risk which eventuated and her claim failed.

50. It seems, from the above trend in the more recent appeals to the Court of Appeal, that the potentially wide-reaching interpretation of section 2(2)(b) is tempered by the courts' willingness to apply the section 5(2) defence. See also Bodey v Hall[30], in which the Claimant was found to have voluntarily accepted the risk of injury whilst trap tilting.

51. It should be noted, however, that the defence provided by section 5(2) is not available in the case of an employee. Section 6(5) provides:

> *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*.

52. By the operation of section 5(3), a person who is not invited on to land either expressly or by implication will not be able to rely on strict liability under s.2. Whether a person is a trespasser is a question of fact. A person on lawful business has a licence to approach the front door of premises and if attacked in such circumstances, s.5(3) would provide no exception to liability.

[30] [2011] EWHC 2162 (QB); [2012] P.I.Q.R. P1

Other liability

53. The application of the Act does not preclude Claimants from bringing claims in negligence, nuisance or pursuant to the Occupiers' Liability Acts 1957 and 1984 in relation to damage caused by animals (although it is doubtful whether an occupier would be liable under the Occupiers' Liability Acts for the *activity* of keeping animals on the land). Further, it still remains to be seen whether civil liability will arise from breach of the Dangerous Dogs Act 1991. Detailed consideration of such other liability falls beyond the scope of this article, however.

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