Insight 212

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

In this week's edition of Insight, we report on the recent Court of Appeal decision in the case of Ford v Seymour – Williams. The Court of Appeal considered an appeal of the decision of Michael Kent QC (sitting as a Deputy High Court Judge).

The decision considers the requirements of sections 2(2)(b) and 2(2)(c) of the Animals Act 1971.

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The Animals Act 1971

The relevant provisions are set out in section 2 of the Act.

S2(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.

S2(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 the 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.

A keeper is defined in section 6(3) of the Act. The definition includes "someone who owns the animal or has it in his possession".

Ford v Seymour – Williams

Background

The appellant was an experienced horsewoman who had been employed by the respondent as a groom at the respondent's farm in Wiltshire. The horse called Tommy was a 19-year-old chestnut gelding hunter who belonged to an international polo player who lived locally. Tommy was stabled at the respondent's yard.

On 15 September 2018 the appellant was attending a meet of the Duke of Beaufort's Hounds at Badminton and was riding Tommy. Some 20 or 30 metres after trotting into a field the horse suddenly stopped, stepping back or sideways but refusing to go forward (known as "napping"). The appellant encouraged the horse using her legs, the reins and the riding crop. The horse reared up fell over backwards and landed on top of the appellant. The horse struggled on the ground for five or six minutes before dying.

The day after the incident the appellant posted a Facebook message stating that the horse had a heart attack but panicked and flipped over backwards onto her.

The appellant's injuries included multiple pelvic fractures, a fractured hip and internal bleeding and nerve damage.

The issues at trial

The respondent accepted he was the keeper of the horse for the purpose of section 2 of the Act. The following remained in issue.

1. Was the appellant acting in the course of her employment by the respondent?

2. What was the cause of the horse rearing and what were the general circumstances in which he came over onto the appellant?

3. What was the behavioural history of the horse if and in so far as it might be relevant to the horse rearing as a result of disobedience?

4. What did the appellant and the respondent know of that behavioural history?

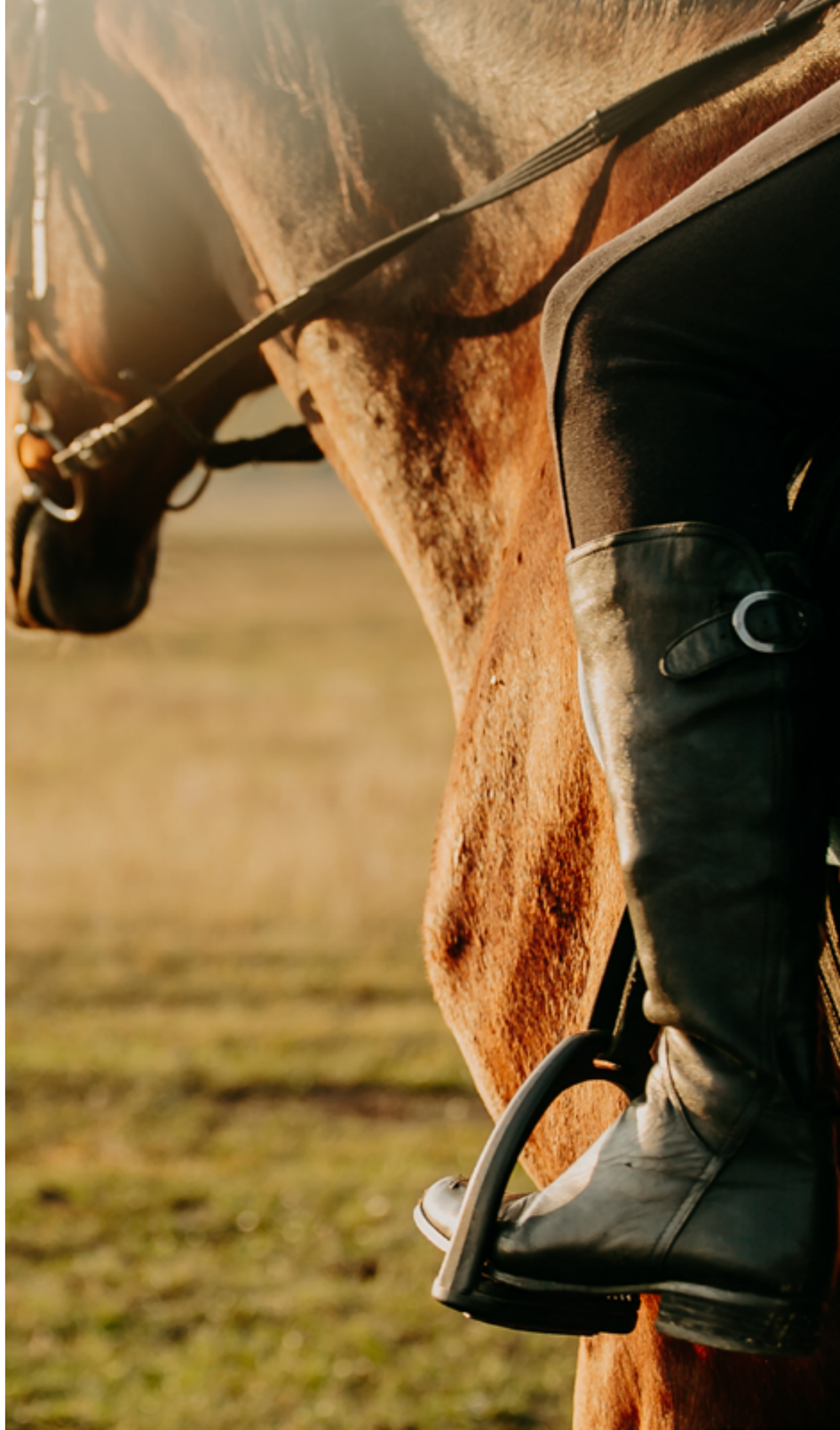
5. Having determined the cause of the horse rearing (assuming it was as a result of a cardiovascular event and not because of a pre-existing tendency to rear) would the respondent and appellant have had actual or constructive foresight of that?

6. Depending on the answers to the above what was the proper application of s 2(2) of the Animals Act?

The agreed equine evidence

The agreed equine evidence at trial included the following

"We agree that as horsemen, we are unfamiliar with catastrophic internal injury causing a horse to rear either at all or rear to the height where it falls over backwards. That is because we have not known this to be the cause of a horse rearing. In theory however as horsemen we agree napping and rearing might be caused by such incident"



"We agree rearing is a normal characteristic behaviour for all horses when in particular circumstances"

"We agree that it is within the normal range of behaviour for horses to rear when napping or if a horse suffers catastrophic internal injury, if this is what happened"

The decision of the trial judge

1. The appellant was acting in the course of her employment with the respondent at the time of the incident.

2. The rearing was the result of a cardiovascular event. There was some catastrophic internal, probably cardiovascular, failure which did not cause an immediate collapse but was preceded by sufficient pain or discomfort to cause him to stop and then rear.

3. It was irrelevant that the horse had in fact reared before and even that it had previously thrown the appellant on one such occasion.

4. It was also irrelevant that the appellant knew of one or more of such rearing events: it was not suggested the horse was "unusually prone" to rearing.

5. Whilst the veterinary experts agreed that a horse might rear as a response to catastrophic internal injury, that was not something that was common knowledge, even among experienced equestrians.

6. This meant that the strict liability provisions did not apply because the "particular circumstance" within the meaning of section 2(2)(b) which caused the horse to rear was not known to the keeper.

Accordingly, there was not the requisite knowledge under section 2(2)(c).

The judge rejected the submissions for the appellant that no particular cause of trigger for the behaviour on the occasion when the damage to a claimant is caused need to be identified, and that it was sufficient to prove that the animal of that species could behave in such a way in certain circumstances and unnecessary to show that those circumstances were in fact present at the time of the incident. The judge stated

"It is impossible to see how, if Mr Mooney's argument is right, subsection (2)(c) would provide any protection for the keeper if, on true construction, subsection 2(b) does not require a claimant to prove that any damage was due to behaviour of the animal in fact occurring in the particular times or circumstances in which the keeper knows such characteristics are normally found. It would mean that the keeper of farmed deer, for example, would be liable for an injury because he knew that at particular times (namely the rutting season) stags can be dangerous to humans, even if the claimant was injured outside the rutting season by a stag believed normally to be docile. The keeper of a bitch which has not recently had pups, but which bites the postman would be liable even though she had no propensity to behave like that. On the other hand, if the damage has to be caused in the particular times or circumstances which the keeper knows gives rise to a risk of dangerous behavioural characteristics appearing he is able to take steps at those times or in those circumstances to restrain the animal appropriately"

The judge dismissed the claim.

The grounds of appeal

1. The judge wrongly conflated sections 2(2)(b) and 2(2)(c) of the Act and misunderstood the appellant's submission that where expert evidence had identified that the relevant characteristic was one that was only displayed in particular times or circumstances it was not necessary for the purpose of section 2(2)(b) to identify exactly which time or circumstance applied. Section 2(2)(b) does not require the keeper to know anything at all. The Judge's approach "wholly empties section 2(2) of purpose".

2. The agreed expert evidence was that the horse displayed the characteristic of rearing, a characteristic not normally displayed by horses except at particular times and in particular circumstances. Thus section 2(2)(b) was made out. The judge reached conclusions in relation to section 2(2)(b) which were illogical and ones no reasonable tribunal could have reached on the agreed equine evidence.

3. The judge erred in requiring that the respondent needed to know that a horse could rear if it had a heart attack in order to satisfy section 2(2)(c). All that the respondent need to know was that the horse could rear. There was no doubt the respondent knew that horses could rear. Alternatively, if knowledge of circumstances is required, then it is sufficient knowledge that horses will rear when panicked or being disobedient. The appellant relied upon the concession by the respondent that the respondent would have been liable had the cause of the horse's rearing been disobedience. All that is required is proof and knowledge of the characteristic not the specific trigger on the day in question.

The Court of Appeal Decision

The Court of Appeal considered several recent decisions in the context of injuries caused by horses.

Mirvahedy v Henley (2003)

Horses had stampeded from a field, reached the main road, and then collided with a car causing personal injuries to the driver. The particular circumstance in which the characteristic (stampeding) arose was that something had frightened the horses, but it was not known what. It was known to the keepers that horses when severely frightened are liable to panic and it is normal for horses when sufficiently alarmed by a threat to attempt to flee from that threat. The keepers were found liable under section 2(2).

Welsh v Stokes (2007)

The claimant had been working as a trainee in the defendant's yard. At the time of the accident the claimant was riding on a road on a "sensible" horse with no history of misbehaviour. The judge found that the horse had reared up, the claimant had fallen off and the horse had fallen on top of her. Section 2(2)(b) was held to be concerned not with behaviour of which a particular animal might be capable, but rather concerned with characteristics not normally found in animals of that species except in particular circumstances. Normal meant "conforming to type"; "normally" in section 2(2)(b) did not exclude cases where the relevant characteristic was natural, though unusual. Knowledge for the purpose of section 2(2)(c) could be established by showing a keeper knew that horses as a species normally behaved in a particular way in those particular circumstances. The keeper was found liable under section 2(2).

Freeman v Higher Park Farm (2008)

The claimant fell from a horse supplied by the defendant on a hack organised by the defendant. She fell when the horse gave two or three large bucks as the horse was beginning to canter. The horse had a habit of bucking when going into canter, which was not considered to be dangerous. As to the second limb of section 2(2)(b) the court held that the clear words “at particular times or in particular circumstances” denoted times or circumstances that could be “described and predicted”. There was no evidence that horses generally bucked at particular times or in particular circumstances. Therefore, the keeper was not liable under section 2(2).

Goldsmith v Patchcott (2012)

During the course of a ride something startled the horse, who then reared up. The horse started to buck violently; the claimant tried to ride it out but did not succeed, The claimant was thrown to the ground and then struck by one of the horse’s hooves. The court found that bucking and rearing were characteristics of horses in particular circumstances, namely when startled or alarmed. The keeper was found liable under section 2(2).

Turnbull v Warrener (2012)

Following dental treatment, the horse was ridden with a bitless bridle. Whilst being ridden out by the claimant the horse suddenly veered to the right and went through a gap in the hedge. The claimant fell off, landing on a tarmac area and sustained injuries. The Court of Appeal held that the question was a refusal to respond to instructions given through the bitless bridle, and was a characteristic of horses unfamiliar with such equipment.

Lady Justice Carr went on to comment

“It can be noted that in every instance where the keeper was held liable the court identified not only the characteristic behaviour such as rearing, but also the particular time or circumstance when the characteristic manifested itself. That time or circumstance was something that could be “described and predicted”. In each case where liability was established, there was a particular event triggering a reaction which caused severe damage in circumstances where the keeper knew that such an event could lead to the reaction in question”.

Lady Justice Carr accepted that section 2(2)(b) is not about the keeper’s knowledge however stated that section 2(2)(b) identifies what needs to be known for the purpose of section 2(2)(c) and in that sense the two sub-sections need to be considered together.

Lady Justice Carr commented that the approach was correct for four principal reasons

1. The language of section 2(2)(b) is focusing on the link between the damage and the characteristic. The damage must be “due” to the characteristics of the animal.

2. The reference to (plural) “times” and “circumstances” reflects the fact that there may be multiple causes of a particular characteristic, not that it is unnecessary to

identify what the particular cause (or causes) was on the occasion in question when the damage occurred.

3. Liability under section 2(2) for an animal which does not belong to a dangerous species would otherwise be materially the same as the liability arising under section 2(1) for an animal of a dangerous species. The judgment of Lewison LJ in Turnbull v Warrener (2012) was cited with approval;

“The Law Commission did not proclaim an intention to widen the existing scope of the law to the extent that it would be necessary to catch any ordinary riding accident”

4. Section 2(2)(b) needs to be construed in the context of section 2 as a whole. Identification of the particular time or circumstance in question is necessary for an assessment of whether or not a keeper has the relevant knowledge for the purpose of section 2(2)(c).

The facts of this case demonstrate it is possible for a keeper to have knowledge of the fact that it is normal for a characteristic (rearing) to manifest itself as a result of one particular time or circumstance (here disobedience) but not another (here a catastrophic internal failure)

Lady Justice Carr also noted that if the appellant’s submissions were accepted the keeper of any horse that reared and caused damage would be liable under section 2(2). This was not what Parliament had intended.

Lady Justice Carr concluded

1. The trial judge found that the cause of the horse’s rearing was due to catastrophic internal injury (as opposed to disobedience, pain or panic). The trial judge was entitled on the evidence to reach that conclusion.

2. The agreed expert equine evidence stated that the experts had not known catastrophic internal injury to be the cause of a horse rearing though it was “in theory” possible that it might be the cause. The trial judge was entitled to reach the conclusion that the existence of what was only a theoretical possibility did not make out the necessary finding of knowledge for the purpose of section 2(2)(c).

3. The appeal was dismissed.

Commentary

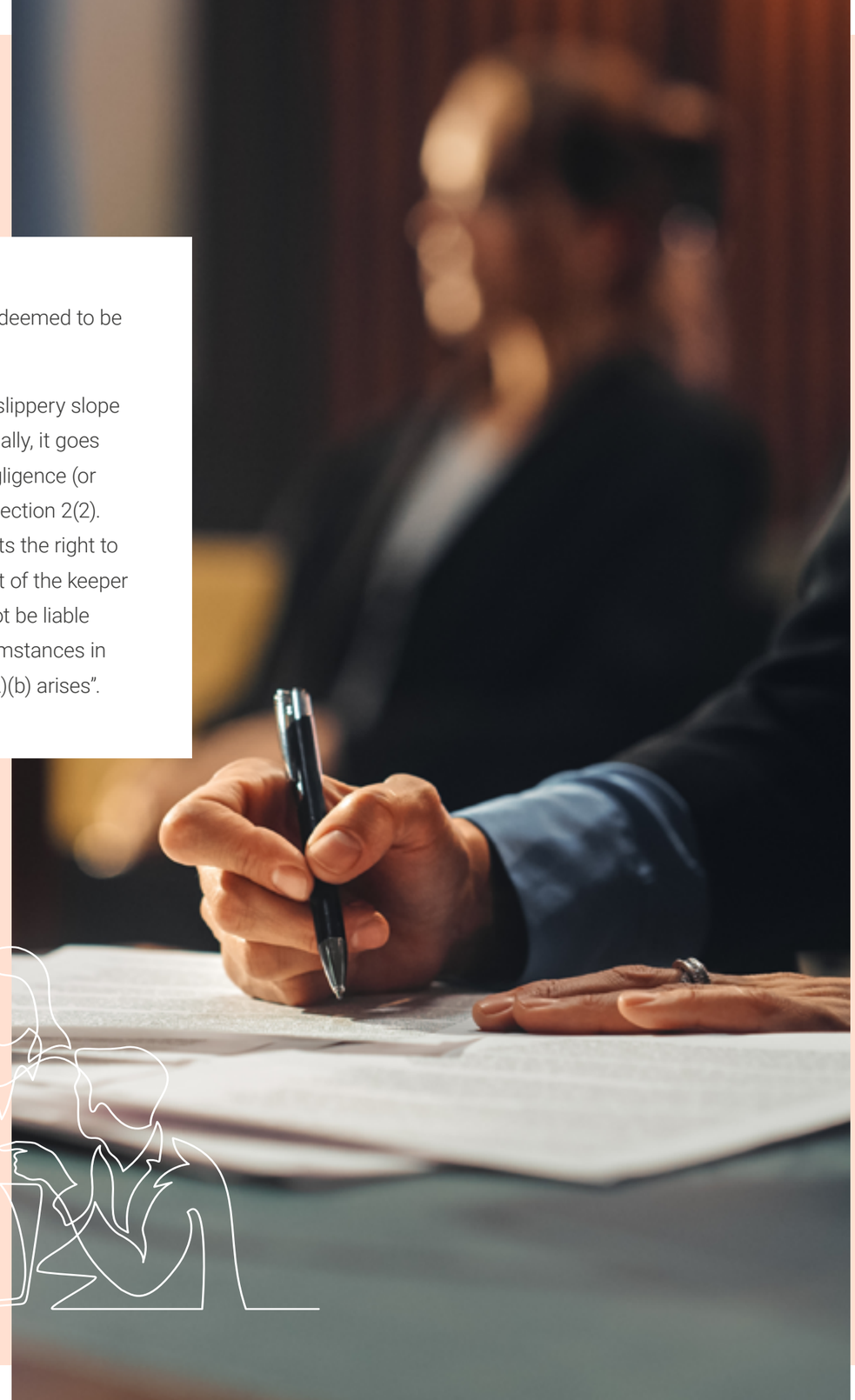
The decision affirms the existing authorities which all proceed on the basis that, in cases under the second limb of section 2(2)(b) the knowledge of the keeper for the purpose of section 2(2)(c) needs to be extended to the particular time or circumstances in which the characteristic arose.

It is important to note the following when considering claims brought under section 2 of the Animals Act 1971

- It is insufficient for a claimant to state that as damage has been caused by an animal liability attaches to the defendant under section 2(2) of the Animals Act 1971.
- The damage must be of a kind that the animal was likely to cause and if caused was likely to be severe.
- The damage must be caused by a characteristic of the animal not normally found in animals of the same species except at particular times and in particular circumstances.
- The keeper of the animal must have knowledge of the characteristic displayed by the animal at the time or circumstances in which the characteristic arose.
- A defendant is still able to allege under section 5(2) of the Act that the claimant voluntarily accepted the risk of the damage occurring.
- A claimant is still able to allege the damage was caused by the negligence of the defendant notwithstanding strict liability under section 2 of the Animals Act 1971 does not attach to the defendant.

The Court of Appeal pointed out this could not be deemed to be a ground-breaking decision;

“This outcome does not in some way represent a slippery slope that deprives the Act of its intended force. Specifically, it goes nowhere near requiring a claimant to establish negligence (or some other fault) in order to create liability under section 2(2). Rather it strikes a balance between giving claimants the right to a remedy without establishing any fault on the part of the keeper whilst at the same time ensuring the keeper will not be liable without knowledge of the particular times or circumstances in which the relevant characteristic under section 2(2)(b) arises”.



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