



Guildhall Chambers Personal Injuries Team
Animal Claims Workshop Answers

John Snell and Daniel Neill

Case 1: The Rearing Horse

Mrs. Smith is an experienced horse-owner. She is 67 years of age and no longer rides, spending the majority of her time tending to her garden. Her house is located in a rural area on a lane which leads to a busy A road about 250 metres away. She owns two paddocks, the nearer of which is adjacent to her garden, and she allows Miss Jones to keep two horses in the further paddock. In the nearer paddock Mrs. Smith keeps three Shetland ponies as pets. Mrs. Smith charges Miss Jones £5 per week for the use of the paddocks which she says is for the cost of maintaining the fences. There is no written livery agreement.

On 1st June 2008, Mrs. Smith looks out of her kitchen window and sees one of Miss Smith's two horses careering around the lawn in a highly agitated state. She shouts to her husband to run and shut the driveway gate to stop the horse going up the lane towards the busy road. Meanwhile, she fetches a bucket of horse nuts and a lead rope from the yard behind the house. As she rounds the corner of the house, she sees that the horse is now standing stationary in the middle of the lawn. Mrs. Smith approaches the horse holding the bucket of nuts in her left hand and attempts to attach the lead rope to the halter which the horse is wearing. As she does so, the horse throws up its head and rears, causing a serious wrenching injury to Mrs. Smith's right shoulder.

Upon investigation later, it becomes clear that the two horses in the further paddock have jumped over a rail above a water-trough into the nearer paddock. It is not clear what has caused them to do so but there is a lot of trampled grass in the corner of the field which suggests that something has frightened them. In the nearer paddock, it seems that the horses have pushed through a gate which was secured only with baling twine and from there gained direct access to Mrs. Smith's garden. The horse which injured Mrs. Smith had no previous history of escaping and no known propensity to rear.

Questions:

Common Law

1. Does Mrs. Smith have grounds for a claim at common law against Miss Jones?

Miss Jones is not responsible for the state of the fencing and the horse had no known propensity to escape. Accordingly, she cannot be liable for negligently permitting her horse to escape from its field.



Animals Act 1971

2. Who were the keepers of the horse?

Both Mrs. Smith and Miss Jones were keepers – see section 6(3) of the Act. Miss Jones was the owner and Mrs. Smith had the horse in her possession since it was on her land.

3. If Mrs. Smith and Miss Jones were both keepers of the horse, does that fact preclude Mrs. Smith from bringing a claim against Miss Jones under the Animals Act 1971?

No. One keeper of an animal may sue another keeper of the same animal for damage caused by that animal. See Flack v. Hudson [2001] 2 WLR 982.

4. Was the likelihood of the damage or of its being severe due to characteristics of the horse which are not normally found in horses? Or, due to characteristics not normally found in horses except at particular times or in particular circumstances?

It is convenient to consider 2(2)(b) before 2(2)(a) so as to identify first what characteristic, if any, is relevant.

The horse had probably been frightened and bolted, resulting in its escape into the garden and its behaviour in the garden. Compare Mirvahedy v. Henley.

Given that the horse was standing still when Mrs. Smith approached it, was the flight characteristic still operative? Arguably not.

If not, what might explain the behaviour of the horse in rearing up? In Welsh v. Stokes [2007] EWCA Civ 796 it was held that rearing was within the parameters of normal equine behaviour and that it is something that a horse might do in particular circumstances.

It is arguable that in the particular circumstances of being loose after escaping in a panic, it would be normal (ie within the range of normal behaviour) for a horse to rear up if someone attempted to take hold of its head.

Thus, both the initial escape and the subsequent rearing behaviour were probably due to characteristics of horses falling within the second limb of 2(2)(b).

5. Was the damage of a kind which the horse, unless restrained, was likely to cause?

This question should be considered in the context of the particular characteristics under consideration. Thus, if a horse is manifesting



typical flight behaviour by galloping blindly, the question is whether a horse galloping blindly is likely to cause harm. The question is not to be addressed in general terms when the horse is simply standing in a field. See the comments of LJ Neil in Smith v. Ainger (16th May 1990) at paragraph 7.

“Likely” is to be interpreted as “such as might well happen” – see Smith v. Ainger and Mirvahedy v. Henley.

In this context therefore, the issue is whether the rearing of the horse was “likely” to cause personal injury. Mrs. Jones would probably establish that a wrenching injury in such circumstances was something which “might well happen”.

6. Was the damage of a kind which, if caused by the horse, was likely to be severe?

Arguably, if personal injury was caused by a rearing horse then such injury might well be severe. For a person riding a horse, that proposition was accepted as obvious by the court in Welsh v. Stokes.

7. Were the relevant characteristics known to the keeper?

Miss Jones is the owner of the horses and, unless she can adduce specific evidence of her ignorance, will be taken to have the ordinary knowledge of a horse-owner. Such knowledge will include knowledge that a frightened horse can bolt and that horses can rear in response to external stimuli.

The behaviour of the horse in this instance does not appear unusual and it will therefore be extremely difficult to show that Miss Jones did not know that the horse might rear in particular circumstances.

In general terms, it is difficult to defend a case on the basis of s.2(2)(c) in a case where the characteristics fall within the second limb of 2(2)(b) – if the behaviour is properly deemed “normal” then the keeper of the animal is likely to know that such behaviour is a characteristic of the animal.

8. Is there a defence under section 5(1) of the 1971 Act?

Can it properly be said that the accident was wholly due to the fault of the Mrs. Smith?

It can be argued that if she had not approached the horse, she would not have been injured, so it is entirely her fault. On the other hand, Mrs. Smith will argue that a significant cause of the accident was the behaviour of the horse over which she had no control.



9. Is there a defence under section 5(2) of the 1971 Act?

There is a powerful argument that Mrs. Smith voluntarily accepted the risk of injury by electing to approach the horse to catch it when she had seen it in a highly agitated state moments before.

Can she plead that she was in the position of a “rescuer” taking urgent action to avoid the potential danger of the horse escaping up the lane to the main road where a serious accident might have ensued?

On the facts of this case, the 5(2) defence would probably not succeed because the horse was apparently calm as she approached it.

The Courts are increasingly willing to find the section 5(2) defence established in cases where riders have suffered injury through the “normal” behaviour of horses. See, for example, Freeman v. Higher Park Farm [2008] EWCA Civ 1185.

10. Contributory negligence?

The Animals Act 1971 expressly applies the Law Reform (Contributory Negligence) Act 1945 t liability under section 2.

Arguably Mrs. Smith was negligent in holding the lead rope in such a way that the rearing of the horse wrenched her shoulder. If she had simply let the rope through her hands, presumably the injury would not have occurred.

Case 2: The Escaped Cow

Farmer Giles has a herd of dairy cows at Greenacre Farm which adjoins the M6 motorway in Cumbria. On 15th April 2007, Farmer Giles separated 20 cows from their suckler calves; he put the calves into a barn for the night and the cows into a field, one side of which adjoined the M6.

At 3.00am on 16th April 2007, Mr. Brown drove into collision with a cow standing in the slow lane of the M6. The cow was killed and Mr. Brown suffered serious personal injury. His account to the police was that the cow was standing stationary in the road, with its back to on-coming traffic, but he had not seen it until it was too late to avoid it.

Mr. Brown brought proceedings alleging negligence and strict liability under the 1971 Act. His case in negligence was based upon an inference that the fencing must have been inadequate; he adduced no photographic or other evidence about the fencing. As for the 1971 Act, his pleading simply cited *Mirvahedy v. Henley*.



The Claims Investigator's investigations reveal that some of the fencing was a bit ropey (rotten posts, some cracked rails, some middle rails missing) but there was nothing to suggest that the cow had broken through the fence. She must have jumped right over the fence which was of a common height. Expert evidence was that cows can become agitated when separated from their calves. Farmer Giles had never had a cow become so agitated that it had jumped right over a fence.

Questions:

Common Law

1. What is the standard of care at common law with respect to fencing? Does the mere fact of escape through or over the fencing demonstrate a breach of duty?

A farmer must exercise reasonable care in controlling his animals. There is no absolute duty to prevent the escape of an animal. See Wilson v. Donaldson [2004] EWCA Civ 972 in which a farmer was held liable for failing to install a self-closing mechanism on a gate regularly left open by walkers.

2. Can the Claimant succeed without calling evidence as to the state of the fence?

Insurers would plainly not disclose the Claims Investigator's report or photographs – they are privileged. If the Claimant adduced no evidence as to the state of the fencing, he should not be able to establish that the fences were inadequate. The mere fact that the animal has escaped is not proof that the fencing was inadequate. Expert evidence would show that no fencing can be made cow proof – see McKenny v. Foster [2008] EWCA Civ 173 in which a cow apparently long-jumped a cattle grid!

Animals Act 1971

3. What characteristics are potentially relevant in these circumstances?

In citing Mirvahedy the Claimant is presumably intending to say that the cow might have been frightened into escaping from the field. Such a bald assertion is a common experience defending animal claims. The Claimant would need to adduce expert evidence that bolting when frightened is a characteristic of cows and cannot simply assert that a cow has the same characteristics as a horse.



The other potentially relevant characteristic is the maternal instinct of a cow to become agitated at being separated from its suckler calf.

4. If the cow was simply standing still in the road, was it manifesting any characteristics at all?

Whatever had caused the cow to escape from the field, it is plain that when simply standing in the road it is manifesting no characteristic at all.

If that is correct, can it properly be said by the Claimant that some characteristic of the cow caused the accident at all?

5. If an animal escapes because it has been frightened and then runs into a road, for how long does the typical flight behaviour remain a causative factor for a subsequent accident?

If a frightened jumps over a fence directly into the path of a car, it is easy to see that the flight behaviour has caused the accident.

If, however, a horse escaped two weeks previously and had quietly grazed at the side of a lane before wandering onto the road, can it really be said that the accident was caused by the flight behaviour?

6. Is a cow which has escaped onto a road an animal which is likely to cause personal injury? Is any personal injury caused by such a cow likely to be severe personal injury?

A court is likely to conclude that an escaped animal "might well" cause a collision if the escape took place near a busy road. Arguably the situation is different in a rural area. Each case will turn on its own facts but this is not a point which should be conceded.

If a car is in collision with a cow then severe damage is something which "might well" happen. On the other hand, the same is probably not true for a sheep.

7. If the cow escaped by jumping clean over the fence as a result of agitation at being separated from its calf, were the relevant characteristics known to Farmer Giles?

In McKenny v. Foster [2008] EWCA Civ 173 the Court of Appeal held that knowledge was not established in a case where the farmer did not know that a cow exhibiting maternal instinct might become so agitated that she could escape over a cattle grid. Knowledge that a cow might become agitated upon being separated from her calf was not sufficient



because what rendered the cow dangerous was her “exceptional and exaggerated agitation”.

It is important to define clearly just what it is that renders the animal dangerous, then ask whether the keeper knew of that characteristic.

8. Section 5(1) Defence? Section 5(2) Defence?

Mr. Brown did not wholly cause the accident, nor did he voluntarily accept the risk of injury merely by volunteering to use the road.

9. Contributory Negligence?

Plainly there is an argument that there was contributory negligence given that he drove into collision with a stationary cow.