MIRVAHEDY – THREE YEARS ON
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Introduction

The Animals Act 1971 was intended to simplify the common law rules on strict liability for damage caused by animals. In the event, during the three decades that followed its passing into law, its most important provision – section 2(2)(b)[1], which deals with liability for damage caused by animals not belonging to a dangerous species – remained shrouded in confusion and obscurity. Two diametrically opposing interpretations of the wording of the subsection appeared to be available. The Court of Appeal offered little assistance, sometimes preferring one interpretation, sometimes the other.

Thankfully, the confusion was finally cleared up by the House of Lords in *Mirvahedy v. Henley*[2]. For the uninitiated, or for those who have forgotten, the facts of *Mirvahedy* were as follows. Mr and Mrs Henley owned three horses that they kept in a well-fenced field next to their home in Devon. One night, the three horses became spooked by something, knocked down the fence and escaped from their field. In panic, they then bolted for a distance of over a mile and reached the A380 dual carriageway on which the unfortunate Mr Mirvahedy was driving home from work. One of the horses struck Mr Mirvahedy's car, causing him serious personal injury and killing itself in the process.

It is well known that horses may bolt when spooked or panicked by something. People who own and look after horses also know that a panicked horse may continue fleeing until it is well away from the source or cause of that original panic. Thus it was accepted by both sides in the case that the behaviour of the Henleys' horses on that night was in no way abnormal for an animal of the species in those circumstances ie for a horse in a panic. These facts, concluded the House of Lords - but only by a majority of three to two – attracted strict liability under section 2(2) of the Act. The decision therefore confirmed one of the previous strands of Court of Appeal authority, that strict liability could arise under the section where damage is caused by an animal which, although not behaving at the time of the accident in a way that is normal for the species, is nevertheless normal for animals of the species in the particular circumstances.

Fears following Mirvahedy

The immediate effect of the decision was to cause a measure of concern among well-informed keepers of domesticated animals and their insurers. No longer would claims be framed first in negligence (with corresponding scope for a defence on the facts) with the Animals Act thrown in as a hopeful afterthought. If strict liability arose where a horse committed no greater sin than behaving in a horse-like manner and causing damage or injury in the process, where would the limit on compensation be drawn? The equine community was especially concerned, horses being a common source of accidents and injuries. They bite and kick people, throw them off and occasionally embark on ill-advised dalliances with traffic. Predictions were made of

an explosion in claims and multi-fold increases in third party liability insurance[3], as well as the demise of small businesses such as riding schools. Livestock farmers too were concerned about potential hikes in insurance premiums. At a time when rambling rights were being expanded, how could they guard against claims made by those exercising rights of way across fields containing cows?

Mirvahedy has undoubtedly been responsible for changes in the horse world during the last three years. Insurance premiums have risen by as much as 300% and, for riding schools, insurers are likely now to insist on much higher standards of risk management in the form of record keeping, risk assessments and compliance with local licensing regimes[4].

There appears not, however, to have been the feared explosion in claims alleging strict liability. Why is this? One reason appears to have been imaginative judicial thinking in the few cases that have reached court. Some of this thinking has caused raised eyebrows among observers. In the remainder of this paper, we examine whether there really are ways to avoid findings of strict liability under s2(2).

S2(2)(a) – the Lord Scott approach

Two cases have been reported on Lawtel where riding schools have avoided strict liability after a pupil has been injured by one of their horses. These cases are *Elliott v. Townfoot Stables* (3/9/03 Newcastle-Upon-Tyne CC, Recorder Goss QC) and *Plum v. Chorley Equestrian Centre* (5/11/04 Preston CC, Recorder Ryan). In *Elliott*, the eight year old claimant broke her arm when she fell off a pony called Jewel. Unknown to anyone, Jewel had a tender spot over the ribs. While riding Jewel on a leading rein, the claimant inadvertently touched this spot, with the result that Jewel jumped slightly and unseated the claimant. In *Plum*, the adult claimant pulled too sharply on the horse's mouth when starting to canter, causing the horse to buck and unseat her. She also broke her arm.

Both claims failed in negligence and under the Animals Act. In both, the Recorders invoked what has become known as the 'Lord Scott approach'. Lord Scott was one of the two dissenters in *Mirvahedy*, and, apart from disagreeing about the meaning of s2(2)(b), His Lordship was troubled by the defendants' concession to the effect that the damage caused by the escaped horses was 'likely to be severe'. He concluded that under paragraph (a) the word 'likely' had to be taken to mean 'to be reasonably expected' and he went on to say that[5]:

"My own impression, however, is that a loose horse on the highway does not usually result in damage to third parties, that if damage to third parties does result the damage is not usually severe, no more, perhaps, than a dent to a car, and that the cases in which serious injury or damage results are fortunately few and far between."

Following Lord Scott's logic, Recorders Goss and Ryan concluded that, notwithstanding the *actual* severity of the damage suffered in the case, damage was a mere possibility if the rider was unseated and that, if caused, it was not 'likely to be severe'.

An analysis of the validity of this approach cannot ignore the views of the other judges involved in *Mirvahedy*, both in the House of Lords and below. At first instance, the county court judge found that paragraph (a) was satisfied in that the damage was likely to be severe. In the Court of Appeal, this finding, which was not subject to appeal, was not criticised by Hale LJ who gave the only judgment. In the House of Lords, even Lord Scott's fellow dissenter, Lord Slynn, thought the concession was rightly made by the defendants and Lord Hobhouse was quite clear on the point, stating that:

"The damage to Mr Mirvahedy and his car by the panicking horse when it charged into his car and landed on its roof was and was likely to be severe…"[6]

Immediately, it can be seen that the reason for the different answers given by Lords Scott and Hobhouse under paragraph (a) is that each is asking a different question. Lord Scott asks whether the damage is likely to be severe if a horse escapes onto the road, whereas Lord Hobhouse asks the question in circumstances where a panicking horse strikes the car and lands on its roof. This distinction was at the forefront of Lord Scott's mind when he said at paragraph 100:

"It is not, in my opinion, entirely clear what is meant in paragraph (a) by "damage … of a kind…". In a case like the present, where personal injury has been caused by a collision with a bolting horse, does it mean personal injury of a kind likely to be caused by a collision with a bolting horse? Or does it mean personal injury of a kind likely to be caused by a horse unless restrained? In the former case the damage is obviously likely to be severe; in the latter case the likelihood of damage or of damage being severe is not apparent and might at least warrant some evidence."

We would respectfully suggest that the correct answer to this question in *Mirvahedy* is that paragraph (a) refers to personal injury caused by a collision with a bolting horse. This was the approach taken by Lord Hobhouse and the other members of the court who commented.

Nor, with respect, do we think that the words 'of a kind' cloud the analysis. The starting point is 'the damage' actually caused. For the purposes of paragraph (a) this damage requires classification as a *kind* of damage. That, we suggest, can only mean personal injury (or whatever) caused in the circumstances of the accident eg in a collision with a bolting horse. We say this because paragraph (a) cannot be read in isolation. The question posed by the words 'likely to be severe' can only be answered by reference to the characteristics that are being blamed for the damage in paragraph (b). Otherwise, no sensible answer can be given.

In *Mirvahedy*, as Lord Scott conceded, injuries caused by a collision with a bolting horse were likely to be severe. That, as Lord Hobhouse plainly thought, suffices to fulfil the requirements of subsection (a).

Applying this logic to *Elliott* and *Plum*, it can be seen that there may still be room for argument depending on the facts of the particular case. In *Elliott*, the Recorder disposed of the case on paragraph (a) and declined to go on to consider paragraphs (b) and (c). For the reasons we have set out above, we believe he was wrong to adopt this disjunctive approach. Nevertheless, if he had considered paragraph (a) by reference to

the characteristic relied on by the claimant under paragraph (b) – that is, a tendency to make a sudden movement if the rider inadvertently touched a sensitive spot – the same finding may well have been open to him if the evidence showed that physical injury suffered when falling from a walking horse is unlikely to be severe. On the other hand, in *Plum*, the characteristic in question was a tendency on the part of horses to buck when the rider pulled the reins too hard at a trot or canter. In those circumstances, a fall would seem to carry a greater risk or likelihood of severe injury, although the Recorder refused to find that paragraph (a) was fulfilled because of a lack of evidence before him. Miss Plum, it seems to us, was unlucky to lose on this point.

There will of course be many cases where the answer is simpler. Apart from the *Mirvahedy* example, it seems to us that, subject to the defence provided by section 5(1) [damage due wholly to fault of claimant] and section 5(2) [voluntary acceptance of risk], in most cases where a horse kicks as a result of some innate characteristic or tendency, or where a horse rears or spooks, it will be difficult to argue that the damage is not likely to be severe.

Our view, therefore, is that the Lord Scott approach may enable defendants and insurers to succeed in a limited number of cases on particular facts. It is not, however, the escape route that some may believe it to be.

A possible defence under paragraph (b) – was the animal displaying a 'characteristic' when the accident happened?

In *Livingstone v. Armstrong*[7], a driver hit a cow that had strayed from a well-fenced field some ½ mile away from the road. Remarkably, the cow had jumped a 5 foot high fence to reach the road. The claim in negligence failed and it might be thought that the defendant faced an uphill struggle to avoid the effects of *Mirvahedy*. Not so. The district judge distinguished the case from *Mirvahedy* on the basis that the horses in that case were still fleeing when the accident happened. Here, the cow was simply standing still in the middle of the road minding its own business. It was, said the judge, displaying no characteristic at all. Ingenious though it is, we doubt that this 'temporal' approach to the problem would survive the scrutiny of the Court of Appeal. If the collision in *Mirvahedy* had been between the car and a horse that was standing in the road after bolting onto the road in panic a short while before, would the decision have been different?

The statutory defences: s5[8]

There is no doubt that in certain cases the defences available under s5 will enable defendants to avoid liability. If, for example, I am in a riotous crowd standing behind a police horse and I decide to jab its rear end with a sharp object, then I will not be able to blame anyone but myself if it kicks me – s5(1)[9]. Equally, it seems to us that s5(2) could be relied upon in that case. More interesting, however, is the question of whether someone who chooses to sit on or ride a horse for recreation (as opposed to employment, which is specifically excluded by s6(5)) is thereby voluntarily accepting the risk of the damage that they suffer. The Recorder in *Plum* thought so, and this was

the second ground on which he rejected the claim in strict liability. Support for this interpretation of s5(2) is to be found in the words of the Lords Justices in *Cummings v. Granger*[10]. In the case of *Flack v Hudson*[11] however, the Court of Appeal upheld the contention that section 5(2) did not act as a defence in a case where the regular rider of a horse had direct experience of it showing fear of a farm vehicle but none the less was not held to know of the horse's specific propensity to bolt if confronted by such a vehicle.

We consider, however, that with the breadth of strict liability now afforded through the decision in *Mirvahedy* there is room for approaching section 5 with renewed vigour in cases not involving employees. If the animal is behaving normally for the circumstances and the claimant is experienced enough to know of the risk, then the defence under 5(2) ought now to be available.

Conclusions

So it would seem that there is still scope for argument as to the application of strict liability under s2(2) of the Animals Act. In particular, the right case needs to be found to test in the higher courts Lord Scott's approach to the issue of likelihood of damage. In the meantime, decisions on strict liability are likely to remain highly fact sensitive and claimants with marginal cases may be happier to settle at a discount than risk the sort of outright failure that befell the claimants in *Elliott* and *Plum*.

We are not surprised at the anecdotal evidence of the higher courts taking a sceptical approach to attempts by defendants to argue themselves out of strict liability. The correct answer to this problem may well lie in the words of Lord Hobhouse at paragraph 72 of the judgment in *Mirvahedy:*

"The statute, in this respect following the recommendation of the Law Commission, had to reflect a choice as to the division of risk between the keeper of an animal and members of the general public. Neither is blameworthy but it is the member of the public who suffers the injury or damage and it is the keeper who knows of the characteristics of the animal which make it dangerous and liable to cause such injury or damage. The element of knowledge makes the choice a coherent one but it, in any event, was a choice which it was for the legislature to make."

We understand that there are moves by various interested groups to attempt to amend the Animals Act in order to remove the perceived unfairness of the current interpretation of section 2 (2). There is at present, however, no imminent prospect of Government interesting itself in what appears to be a minority issue raised by a privileged few. Should the numbers and cost of claims rise steeply and should there be a demonstrably wider impact then this may inspire moves to lock the stable door. By then, of course, the horse will probably have bolted.

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[1] Section 2(2) reads:

> "(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 ..."

[2] [2003] 2 AC 491

[3] Where people chose to take up cover at all: one animal insurance agency estimated that in April 2003 only 12% of dog owners and 40% of horse owners had any insurance against third party risks.

[4] See a feature entitled 'Horses for Course' in Post Magazine 19th January 2006.

[5] At para 98 of the Judgment.

[6] At para 68 of the Judgment.

[7] Newcastle County Court 11th December 2003

[8] Subsections 5(1)-(3) read:

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

[9] This was the example given by Lord Scott in *Mirvahedy* – see para 115

[10] [1977] QB 397. See esp Lord Denning at p 405, Ormrod LJ at p408 and Bridge LJ at p410.

[11] [2001] QB 698