Animals Act 1971

Liability for animals, particularly under the Animals Act 1971 which imposes strict liability in certain circumstances, is a complex area of the law. This complexity reflects the difficulties in striking a balance between competing interests. In Mirvahedy v Henley [2003] UKHL 16 Lord Nicholls, commenting specifically on the policy underlying section 2 (2)(b) but reflecting thinking behind the Act so far as non-dangerous species are concerned, observed:

"It may be said that the loss should fall on the person who chooses to keep an animal which is known to be dangerous in some circumstances. He is aware of the risks involved, and he should bear the risks. On the other hand, it can be said that, negligence apart, everyone must take the risks associated with the ordinary characteristics of animals commonly kept in this country. These risks are part of the normal give and take of life in this country."

The terms of the Act do not make life easy for the practitioner called upon to advise on a claim involving an animal. The decision of the Court of Appeal in Freeman v Higher Park Farm [2008] EWCA Civ 1185 provides a useful reminder of some important points practitioners should bear in mind before advising.

The facts

The claimant, who had ridden regularly for many years, fell from a horse supplied by the defendant equestrian centre. The centre taught adults and children on escorted hacks from its premises. It was on one of those hacks that the claimant fell when her horse gave two or three large bucks as it began to canter.

The claimant brought proceedings claiming damages on the basis that the defendant was strictly liable for the accident under section 2 (2) of the Animals Act 1971 and for common law negligence.

Judgment

At the trial the judge held the defendant was not liable under s.2 because the requirements of that provision were not satisfied.

So far as the second part of s.2 (2)(a) was concerned the judge held that it could not reasonably be expected that the horse would buck in such a way that the claimant would fall and suffer the injury that she had. In relation to the first limb of s.2 (2)(b), the judge considered that the relevant characteristic was occasional bucking when going into a canter. He concluded that he could not find that the injury was likely because of a characteristic of bucking which was not normally found in horses other than the horse in question. In concluding that the second limb of s.2 (2)(b) was not satisfied, the judge relied on the fact that, prior to the date of the accident, the horse h never bucked in such a way as to cause the rider to fall off or suffer injury. The judge held that, in any event, the defendant was excepted from liability under s.5 (2)1 of the Act by the voluntary assumption of risk by the claimant.

Appeal

The claimant appealed, submitting that the trial judge was wrong in his analysis of section 2. The claimant also contended that while she may have assumed that she could cope with the horses bucking, that was not a voluntary assumption of the risk she might be thrown off and injured.

The Court of Appeal held that the judge had approached the second part of s.2 (2)(a) from the wrong starting point. The judge's approach to s.2 (2)(b) was also incorrect. Nevertheless, the judge had been entitled to conclude that the claimant had not established the requirements of this sub-section. That was because the provision focused on the characteristics of the species of the animal in question. The relevant characteristic, for the purposes of the first limb of s.2 (2)(b) was bucking. That first limb required the judge to consider whether bucking was not normally found in horses generally. The core meaning of normal was "conforming to type". On the evidence the judge was entitled to find that the claimant had failed to establish that bucking was not a normal characteristic of horses generally.

Turning to the second limb of s.2 (2)(b), the court held that the relevant question was whether it was normal for horses generally to buck at particular times and in particular circumstances, including when beginning to canter. It was clear that the words "at particular times or in particular circumstances" in the second limb denoted times or circumstances that could be described and predicted. In this case there was no evidence that horses generally bucked at particular times or in particular circumstances. This meant that the judge could not be faulted for concluding that the claimant had failed to discharge the burden of establishing that the second limb of s.2(2)(b) was satisfied.

The judge was held to have correctly concluded that the defendant was excluded from liability under s.5 (2) of the 1971 Act by the claimant's voluntary assumption of risk. The appeal was dismissed.

Analysis

The approach taken by the Court of Appeal is useful for helping to analyse the very difficult legal considerations that arise in cases of this kind.

The animal: section 6(2)

The first question is whether the animal responsible for the damage belongs to a dangerous species as defined by s.6 (2).

If so, the keeper will be strictly liable for damage caused in accordance with s.2 (1) and most of the complexities already referred to will not arise.

If not, the question is whether, to establish strict liability under the Act, the claimant can satisfy the court on each of the sub-sections found in s.2 (2). The key feature in this part of the Act is the need for relevant characteristics. The law becomes complex as it is necessary to consider each of the sub-sections in s.2 (2) and their relationship to each other.

The damage: section 2 (2)(a)

The damage suffered is required by this sub-section to be of a kind which the animal, unless restrained, was likely to cause or that the damage is a kind which, if caused by the animal, was likely to be severe.

Many cases are based on the second limb of the sub-section, and this decision is a reminder that for these purposes it is not necessary to prove the animal had a propensity to cause the damage. Rather, it will suffice if the "damage is of a kind" which, if caused by the animal, "was likely to be severe".

This approach in the second limb of the sub-section reflects the decision in Cummings v Granger [1977] QB 397 where it was held that if an Alsatian dog bit anyone then the damage was "likely to be severe". In Welsh v Stokes [2007] EWCA Civ 796 the court regarded it as self-evident that a rider falling from a horse who rears was at risk of injury "likely to be severe". The terms `likely' and `damage of a kind' have been interpreted broadly: see Smith v Ainger [1990].

While the first limb of the sub-section may require evidence about the propensity of the particular animal, the second limb is really a question of inference based on the nature of the animal, as to the likely severity of damage should any be caused by that animal. In each case the focus is on the animal which has caused the damage.

However, sub-section (a) cannot be considered in isolation because of the need arising from the terms of sub-section (b) for the likelihood of damage, under either limb, to be due to "characteristics". This wording of the Act confirms the linkage between the sub-sections.

The characteristics: section 2 (2)(b)

Here we find the core element for liability under s.2 (2). This decision suggests that for sub-section (b) the focus shifts from the particular animal to the species to which that animal belongs. To be fulfilled the subsection requires either:

Characteristics which deviate from the normal characteristics of other animals in the same species, even if those characteristics only manifest themselves at certain times or in certain circumstances (which might be termed permanent characteristics); or

Characteristics which are shared with other animals of the same species but are normally found in that species only at particular times or in particular circumstances (which might be termed temporary characteristics).

The decision in Mirvahedy confirmed that such temporary characteristics are covered by this sub-section.

The term `characteristic' is not defined in the Act, but it will be important that the relevant characteristics are identified so as to contrast or compare those of the animal with those of the species.

This may well require expert evidence to help establish what is `normal' for the species, in the sense of behaviour which conforms to type rather than necessarily being usual. Such evidence may also

help to prove that the relevant characteristics deviate from that norm, for the purposes of the first limb, or for the purposes of the second limb accord with that norm at the relevant time or in the circumstances prevailing when the incident occurred.

Once these have been identified the relevant characteristics are essential both to look back at sub-section (a) and forward to sub-section (c).

It is necessary to look back at sub-section (a) to establish a causal connection between the relevant characteristics and either the likelihood of damage or of any damage being severe. In other words those characteristics must be both dangerous and causative. Etherton LJ, in his judgment, explained the matter this way: "Strict liability for an animal belonging to a domesticated species will only arise if (1) the damage is caused by a dangerous characteristic (dangerous because of the likelihood that type of damage will be caused or, if caused, its likely severity), and (2) that characteristic deviates from the normal characteristics of that domesticated species, or (3) that domesticated species is itself dangerous insofar as it normally has characteristic at particular times or in particular circumstances, and the damage was in fact caused at such a time or in such circumstances".

It is also necessary to look forward to sub-section (c) for the purpose of establishing the keeper had knowledge of those characteristics.

The keeper's knowledge: section 2 (2)(c)

This sub-section requires that `those characteristics' were known to the keeper of the animal. `Keeper' is defined by s.6 (3).

Knowledge of characteristics deviating from the norm will often require factual evidence that those characteristics had been displayed in the animal before.

Where liability is based upon characteristics shared with other animals of the same species expert evidence such as that given in Welsh may be more appropriate. Where the characteristics accord with those of the species, albeit at particular times or in particular circumstances, any keeper of the animal is quite likely to have knowledge of those characteristics.

Defences: section 5

Even if the claimant can establish that the damage suffered falls within s.2 (1) or s.2 (2), the defendant may still be able to defend the claim if any of the exceptions from liability found in s.5 apply.

Section 5 (1) provides a defence if any damage was due wholly to the fault of the person suffering it. This would seem likely to require that the claimant's `fault' completely breaks the chain of causation. Otherwise the issue would seem to become one of contributory negligence with s.10 specifically providing that any damage for which a person is liable under s.2 shall be treated as due to his fault which allows for an apportionment, reflecting fault on the part of the claimant, under the Law Reform (Contributory Negligence) Act 1945.

Freeman concerns s.5 (2) which provides an exception from liability for any damage suffered by a person who has voluntarily accepted the risk of such damage. It is a reminder that this exception is not simply the common law defence of volenti. Rather, the defence depends upon the exact wording

found in the Act which raises the questions of whether the claimant had a full appreciation of the risk but nevertheless accepted exposure to it. This defence seems unlikely to arise on the facts of most cases. But here it was notable that the claimant encountered the problem which led to the injury but nevertheless made a conscious decision to continue with the ride. On the facts, there was an appreciation of the risk coupled with a decision to run that risk.

Section 6 (5) provides that a person employed by a keeper of an animal incurring a risk incidental to that employment shall not be treated as accepting the risk voluntarily. From time to time an employers' liability claim can and should be run under the Animals Act, for example Collings v Home Office [2006] 12 CL 22.

Generally, there will be a liability to trespassers under the Act, if the conditions already considered are fulfilled, but not if the animal was kept on the premises for the protection of persons or property or, if it was, that keeping it there for that purpose was reasonable.

Practice points

It is essential to understand the requirements of the Act and analyse on precisely what basis the claim is to be pursued or defended. Within that context the factual background must be carefully ascertained and appropriate evidence called. Expert evidence may be important, particularly when dealing with the requirements of s.2 (2)(b), given the need to identify the characteristics of the relevant species.

The relevant characteristics for the purposes of s.2 (2)(b) should be defined as clearly as possible, given the linkage between the sub-sections in s.2 (2), for a number of reasons:

1. The purposes of s.2 (2)(b) in order to identify whether the case concerns the first limb, where the permanent characteristics of the animal will need to deviate from the norm of the species, or the second limb, where those temporary characteristics will need to accord with those of the species at the relevant time or in the prevailing circumstances.
2. To clarify whether there is a causal connection between the characteristics and the likelihood of damage, or of it being severe, for the purposes of s.2 (2)(a); i.e. the relevant characteristics are both dangerous and causative.
3. For the purposes of proving knowledge by the keeper of those characteristics, for the purposes of s.2 (2)(c).

Finally, remember the exceptions from liability found in section 5!