



THE ANIMALS ACT 1971 PLACES A DISPROPORTIONATE BURDEN ON THE KEEPERS OF ANIMALS AND IS IN NEED OF REFORM

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Abstract

The purpose of this paper is to determine whether the Animals Act 1971 places a disproportionate burden on the keepers of animals and whether it is in need of reform. The law prior to the Act will be considered in order to identify the problems that led to the current law. An analysis of the application of the Act and the case law follows to identify any problems with the current law. This paper will also focus specifically on damage caused by horse riding accidents due to the fact that it is a high risk sport and injuries will arise. Finally the attempts to reform the Act will be discussed in order to come to a conclusion as to whether reform continues to be necessary.

Keywords: Animals Act 1971, liability of animal keepers and owners, horses

Introduction

The Scienter Principle

Humans have used and domesticated animals for thousands of years, and as such the law on civil liability for animals has been in existence for many centuries. Under the old common law rules, the scienter action gave individuals a remedy if they had been injured by an animal. Due to the meaning of 'scienter' being to 'know', the rule required the knowledge of the defendant for there to be liability. The scienter action distinguished between two types of animals; animals *ferae naturae* and animals *mansuetae naturae*. The former referred to wild animals and the latter to tame animals. If an animal *ferae naturae* caused injury or damage, the keeper would be found strictly liable for that injury or damage, whereas the keeper of an animal *mansuetae naturae* would only be found liable if they knew of the animal's tendency to act in a vicious way.

One of the main problems which arose under the scienter action was this classification of animals into either *ferae naturae* or *mansuetae naturae* as 'the decision was made with

regard to the species and not to the particular animal, and that danger to mankind was the sole criterion of 'wildness'.¹ In *Behrens v Bertram Mills Circus Ltd*² a circus elephant caused injury to the plaintiff when it was running in panic due to being frightened by a dog. It was held that the elephant in question was an animal *ferae naturae* and therefore the defendants were strictly liable. However, it can be seen that Devlin J was critical of the rules contained under the scienter action as he stated:

the particular rigidity in the scienter action which is involved in this case - there are many others which are not - is the rule that requires the harmfulness of the offending animal to be judged not by reference to its particular training and habits, but by reference to the general habits of the species to which it belongs. The law ignores the world of difference between the wild elephant in the jungle and the trained elephant in the circus. The elephant Bullu is in fact no more dangerous than a cow; she reacted in the same way as a cow would do to the irritation of a small dog; if perhaps her bulk made her capable of doing more damage, her higher training enabled her to be more swiftly checked. But I am compelled to assess the defendants' liability in this case in just the same way as I would assess it if they had loosed a wild elephant into the funfair.³

Devlin J was compelled to include Bullu the elephant within the category of animals *ferae naturae* due to the earlier Court of Appeal decision in *Filburn v People's Palace and Aquarium Co. Ltd*⁴ where it was held that elephants as a species are animals *ferae naturae*. Devlin J stated, quoting Lord Goddard CJ in *Wormald v Cole*⁵, 'this is a branch of the law which has been settled by authority rather than by reason.' He re-emphasised the fact that whether Bullu was an animal *ferae naturae* or *mansuetae naturae* was a question of law not fact and for that reason *Filburn* was followed and confirmed that 'the case must be regarded as an authority for the legal proposition that all elephants are dangerous.'⁶

Another problem with scienter concerned the requisite knowledge of the keeper of an animal *mansuetae ferae* and whether 'there was liability for damage inflicted other than by an 'attack', or for injuries caused by a natural propensity of the animal.'⁷ In *Fitzgerald v E.D & A.D Cooke Bourne (Farms) Limited*⁸ the claimant was injured by the defendant's filly whilst walking along the public right of way through the field in which the filly was kept. The claimant sought damages for the personal injury she suffered under both the scienter action and negligence. Under scienter it was held that the injury incurred by the claimant was due to a result of the filly's natural propensity to be playful and was not caused as a result of a

¹ North, P., *Civil Liability for Animals*, First Edition, (2012), p.3.

² *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1.

³ *Behrens v Bertram Mills Circus Ltd* [1957] per Devlin J at pp.14 and 15.

⁴ *Filburn v People's Palace and Aquarium Co. Ltd* (1890) 25 QBD 258.

⁵ *Wormald v Cole* [1954] 1 Q.B. 614, at p.621.

⁶ *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1 at p.15.

⁷ North, *Civil Liability for Animals*, p.3.

⁸ *Fitzgerald v E.D & A.D Cooke Bourne (Farms) Limited* [1964] 1 QB 249.

vicious propensity therefore the claim failed. The decision was also based on policy factors, namely the rights of landowners against the rights of the public, as illustrated by a statement made by Willmer LJ:

If we came to a different conclusion, the consequences of our decision would, I apprehend, be very far-reaching. For if this filly were to be held to be a dangerous animal, having regard to the way in which it was behaving on this particular occasion, it would really mean that no owner of horses of this class could ever safely leave an unbroken and playful colt or filly loose in any place to which the public have access. That seems to me to be a very arresting thought, but it would, I think, be the inevitable consequence of our holding that the circumstances here justified the finding that this filly was a dangerous animal to the knowledge of the defendants.⁹

These difficulties concerning the overall scope of scienter were subject to increasing criticism and consequently resulted in the review of this area of the law with the intention for major reform.

The Law Commission Report on Civil Liability for Animals

The Law Commission produced its report on Civil Liability for Animals in 1967 and although it confirmed that the 'law relating to dangerous animals was 'intricate and complicated''¹⁰, there was an eagerness to retain the distinction between dangerous and non-dangerous animals. The Commission justified this proposal by stating:¹¹

we see a great deal of common sense in the broad distinction which the law makes between dangerous and non-dangerous animals. It does not seem unreasonable that the keeper of a dangerous animal should bear the special risk which is created by keeping it; moreover, it is a risk against which he can more conveniently insure than can the potential victim.

The Commission proposed to abolish the scienter action suggesting that it be replaced by a statutory regime imposing strict liability for animals of a dangerous and non-dangerous species. The Commission felt that strict liability should attach to keepers of both dangerous and non-dangerous animals and justified this on the basis that:

as far as the potential defendant is concerned, he is equally the creator of a special risk if he knowingly keeps, for example, a savage Alsatian as if he keeps a tiger. As far as the potential plaintiff is concerned, an animal belonging to an ordinarily harmless species, which is known to its keeper to be dangerous is in the nature of a trap - a 'wolf in sheep's clothing'.¹²

But the Commission still wished to retain the crucial principle of knowledge when concerning any dangerous characteristics of animals of a non-dangerous species. It was believed that

⁹ *Fitzgerald v E.D & A.D Cooke Bourne (Farms) Limited* [1964] 1 QB 249 per Willmer LJ at p.261.

¹⁰ *Ibid* para.14.

¹¹ Law Commission, *Report on Civil Liability for Animals*, (1967, Law Commission No 13).

¹² *Ibid* para.17.

this would 'free the present law from many of its technicalities'¹³ as the defendant would not have to have knowledge of a vicious propensity, it would only be necessary to have knowledge of dangerous characteristics. The Commission approved of the defences that existed under the common law, primarily the defence of the plaintiff's own negligence which resulted in their injury, and also the defences of voluntary acceptance of risk and contributory negligence.

Many of the suggestions made by the Law Commission were eventually implemented into the Animals Act 1971, but the distinction of animals as dangerous or non-dangerous, now contained in section 2 has been described as an 'artificial distinction divorced from reality'¹⁴ and as will be seen from the case law, the interpretation and application of section 2 has caused the judiciary a further multitude of problems.

1 Analysis of the application of the Animals Act 1971

The purpose of the Act

The Animals Act came into force on the 1st October 1971. Section 1 abolishes the common law scienter action but section 2 retains the distinction between dangerous and non-dangerous animals. Under section 2(1) a keeper will be strictly liable for any damage caused by a dangerous animal. A dangerous species is defined in section 6(2) as a species;

'(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.'

Section 2(1) was clarified by Lord Nicholls in *Mirvahedy v Henley*

If you choose to keep a dangerous animal not commonly domesticated in this country, you are liable for damage done by the animal. It matters not that you take every precaution to prevent the animal escaping. You may not realise that the animal is dangerous. Liability is independent of fault. Liability is independent of knowledge of the animal's dangerous characteristics.¹⁵

Section 2(1) does not generate contention as it is logical. It is effectively a statutory version of the common law scienter principle concerning animals *ferae naturae* as, 'where an animal had been classified as *ferae naturae* at common law it will be regarded as belonging to a dangerous species under the Act.'¹⁶ Section 2(1) applies absolutely to all dangerous animals

¹³ Ibid para.18.

¹⁴ Samuels, A., 'The Animals Act 1971', (1971) 34 *Modern Law Review* 550 at p.550.

¹⁵ *Mirvahedy v Henley* per Lord Nicholls at para.13.

¹⁶ Rogers, W.V.H., *Winfield and Jolowicz on Tort*, Eighteenth Edition, (2010), p.803.

by reference to its species and does not take into account the characteristics of a particular animal, which can result in harsh decisions as seen in *Behrens*.

However it can be argued that:

the justification for applying a fixed rule to all animals of one species, however tame, might be that: a wild animal may become tame and kind. Its nature may sleep for a time, but it may also wake up, and, if the animal has lost its fear of mankind, it is undoubtedly more dangerous.¹⁷

Section 2(2) will primarily be focused on due to the fact that it has received significant criticism from the judiciary and academics. The basis of section 2(2) is that the keeper of a non-dangerous animal which causes damage will only be found strictly liable if three requirements are satisfied.

Section 2(2)(a)

The first requirement is that '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'. This section is formed of two parts; the first being that the animal, unless restrained, was likely to cause damage and secondly, if damage was caused it was likely to be severe. Either criteria can be met for section 2(2)(a) to be satisfied.

Under the first part it is clear that an animal is likely to cause damage if it has previously acted in a way that has caused damage. In *Kite v Napp*¹⁸ it was held that section 2(2)(a) had been met when a dog attacked a woman carrying a bag as the dog had previously attacked people carrying bags. One unlikely animal which was held to be likely to cause damage was a cockerel in *Kane v McKenna*¹⁹ which had attacked a child causing severe injuries. The cockerel was likely to cause damage as it had previously attacked and killed a goat. Generally the first part of section 2(2)(a) does not cause difficulty in its application.

The same can be said for the second part of the section as it is common knowledge that if, for example, a Rottweiler bites a person it is likely that there will be severe damage as a result, due to the sheer size and power of the animal. The section is based on the foreseeability of damage. In *Hunt v Wallis* a Collie dog knocked into the claimant causing her to suffer injury, it was held that it was not likely that the dog would cause such damage but 'if damage is caused by a potentially fast moving and comparatively large dog it is likely, in the

¹⁷ North, *Civil Liability for Animals*, p.33.

¹⁸ *Kite v Napp* (1982) Unreported, 26 May.

¹⁹ *Kane v McKenna* (1991) 1 BNIL 105.

sense of there being a material risk, that it will be severe.²⁰ Therefore section 2(2)(a) was satisfied.

Section 2(2)(b)

Section 2(2)(b) requires there to be a causal link between the supposed abnormal characteristics of the animal and the damage that has occurred. Undoubtedly the wording used in this section has caused controversy, having been described as ‘very cumbrously worded’²¹, ‘remarkably opaque’²² and ‘tortuous’²³. As with section 2(2)(a), there are two limbs: the first limb is that ‘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’. It seems that this part of section 2(2)(b) has not caused many problems, as can be demonstrated by *Hunt v Wallis* where the particular dog’s excitable nature was held to be a characteristic shared by all Collies therefore the keeper was not liable.

The main issues arise when considering the second limb which concerns characteristics that are ‘not normally so found except at particular times or in particular circumstances’. The meaning of ‘particular times’ and ‘particular circumstances’ was considered by the Court of Appeal in *Cummings v Granger*. This case concerned an Alsatian dog which had been used by the defendant as a guard dog to protect his scrapyard from intruders. The claimant who was aware of the presence of the dog entered the yard and was attacked by the dog resulting in her suffering severe injuries. The dog would run around the yard barking for the purpose of defending its territory and it was held that ‘those characteristics are not normally found in Alsatian dogs except in circumstances where they are used as guard dogs’²⁴, therefore section 2(2)(b) was satisfied.

This interpretation of section 2(2)(b) ‘might be described as the literal meaning approach’²⁵.and was used in *Curtis v Betts* which applied *Cummings*. The claimant was attacked by Max a Bull Mastiff dog when he approached the dog as he was being walked from the defendants’ house to their Land Rover. It was held that section 2(2)(b) had been satisfied as:

the dog had characteristics not normally found in bull mastiffs except at particular times or in particular circumstances, namely, the tendency to react fiercely when defending what he regarded as his own territory; that the judge had found that the

²⁰ *Hunt v Wallis* [1994] PIQR 128 per Pill J at p.139

²¹ *Cummings v Granger* [1977] QB 397 per Lord Denning at p.404.

²² *Ibid.* per Lord Ormrod at p.407.

²³ *Mirvahedy v Henley* [2003] UKHL 16 per Lord Nicholls at para.31.

²⁴ *Cummings v Granger* [1977] QB 397 per Lord Denning at p.404.

²⁵ North, *Civil Liability for Animals*, p.51.

dog regarded his territory as including the rear of the Land Rover and, accordingly, the likelihood of severe damage had been shown to be due to the dog's territorial characteristics.²⁶

It has been stated that the second limb of section 2(2)(b) is the provision most commonly used where injuries caused by dogs are concerned as:

'aggressive, territorial defence, hostility to uniform (postmen, gas inspectors and even, the fast disappearing milkmen), and jumping up at the door at a delivery could all be such 'temporary abnormal characteristics'.'²⁷

However, it can be argued that both of these cases show that keepers can be found liable for injuries caused by their animals acting in a completely natural way, that being a dog's tendency to react in an aggressive way when it feels its territory is being infringed upon. In *Gloster v Chief Constable of Greater Manchester Police*²⁸ a contrasting approach was taken when interpreting and applying section 2(2)(b). Here a purposive approach was adopted in order to examine the intentions of Parliament when drafting the section as 'Parliament cannot have intended to hold the keeper liable for normal behaviour by his animal.'²⁹ The case concerned a police dog which bit the claimant police officer during the pursuit of a suspected criminal. Section 2(2)(b) was not satisfied as the dog's-

ability to respond to training was the relevant characteristic.. Jack acted as he was trained to act and in a way characteristic of the subspecies. Section 2(2) was not intended to cover German shepherd dogs acting in accordance with their character.'³⁰

This decision is therefore more lenient and takes into account the natural behaviour of the animal. This is further highlighted by a statement made by Pill LJ that 'the section is not concerned with animals behaving in a perfectly normal way for animals of the species or subspecies.'³¹ Consequently it was left to the House of Lords to resolve the conflict between these two methods of interpreting section 2(2)(b), in the now leading case on the Animals Act, *Mirvahedy v Henley*. The claimant, Mr Mirvahedy, was driving at night on a dual carriageway when a horse collided with his car resulting in him suffering severe personal injury. The horses' appearance on the dual carriageway was due to the horses being panicked by something in their field and as a result of their panicked state they bolted through the fencing surrounding the field, ending up on the road.

²⁶ *Curtis v Betts* [1990] 1 WLR 459 at pp. 459-460.

²⁷ McFarlane, A., 'Dogs and Animals Act claims', (2001) 3 *Journal of Personal Injury Law* 253 at p.255.

²⁸ *Gloster v Chief Constable of Greater Manchester Police* [2000] P.I.Q.R. P114.

²⁹ North, *Civil Liability for Animals*, p.51.

³⁰ *Gloster v Chief Constable of Greater Manchester Police* [2000] P.I.Q.R. P114 per Pill LJ at p.120.

³¹ *Ibid*, at p. 118.

The main issue in the case was whether section 2(2)(b) had been satisfied. The House of Lords held by a majority of 3:2 that although bolting when scared is not a characteristic found generally in horses, it is a characteristic that is found in horses in certain circumstances and as this characteristic was the cause of the injuries to the claimant, the owners of the horses were found strictly liable. Therefore the House of Lords applied the reasoning used in *Cummings* and *Curtis* rather than the reasoning in *Gloster*. Lord Nicholls stated that:

the fact that an animal's behaviour, although not normal behaviour generally for animals of that species, was nevertheless normal behaviour for the species in the particular circumstances does not take the case outside section 2(2)(b).³²

Therefore keepers are being held liable for injuries caused by the natural behaviour of their animal which, it can be argued, places a disproportionate burden upon them.

Section 2(2)(c)

The final requirement which must be satisfied for a keeper to be found strictly liable is under section 2(2)(c) which states that the characteristics which caused the damage must be 'known to that keeper'. In *McKenny v Foster*³³ the claimant was driving when she collided with a cow, resulting in the death of the passenger and Ms McKenny suffering injuries. The cow had become extremely agitated due to her calf being weaned and as a result of this extreme urgency to get back to her calf the cow climbed a six-bar gate and jumped a cattle grid, ending up on the road. The claim failed as it was held that the extreme agitation of the cow was completely abnormal and as such the defendants had no knowledge of that characteristic, therefore section 2(2)(c) was not satisfied.

Section 5 defences

Section 2(2) is subject to certain defences contained in section 5 of the Act. If any of the defences are applicable the defendant will be wholly excluded from liability. Under section 5(1) 'a person is not liable for any damage which is due wholly to the fault of the person suffering it.' In *Dhesi v Chief Constable of the West Midlands Police*³⁴ the claimant was bitten by a police dog after refusing to come out of a hiding place. It was held that the injuries the claimant suffered were wholly due to his own fault, as Stuart-Smith LJ stated: 'a suspect who ignores clear warnings to come out or a dog will be sent to find him has only himself to

³² *Mirvahedy v Henley* [2003] UKHL 16 per Lord Nicholls at para.47.

³³ *McKenny v Foster* [2008] EWCA Civ 173.

³⁴ *Dhesi v Chief Constable of the West Midlands Police* [2000] WL 491455.

blame if he suffers injury as a result.³⁵ The defence was also successfully raised in *Nelms v Chief Constable of Avon and Somerset Police*³⁶ 'where the claimant kicked the dog.'³⁷

Section 5(2) states '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.' There is an exception to this defence courtesy of section 6(5) which states, '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.' In *Cummings v Granger* the defence applied because the claimant knew of the presence of the dog in the scrap yard, and further, there was a sign on the gates to the yard stating 'beware of the dog' but despite all of this the claimant continued to enter the yard and therefore voluntarily accepted the risk.

The final defence under section 5(3) states, '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 purpose was not unreasonable.'

This defence also applied in *Cummings* as the claimant had entered the scrapyards as a trespasser and it was held that the defendant had not been unreasonable in keeping the dog at the yard to guard against trespassers, as Lord Denning stated:

the only reasonable way of protecting the place was to have a guard dog. True it was a fierce dog. But why not? A gentle dog would be no good. The thieves would soon make friends with him. It seems to me that it was very reasonable - or, at any rate, not unreasonable - for the defendant to keep this dog there.³⁸

The facts of this case occurred before the Guard Dog Act 1975 came into force, which states that a guard dog must be under the control of a handler at all times. Therefore if a similar case occurred today, the defence would most likely fail. In conclusion, it can be argued that section 2(2)(b) of the Animals Act appears to place a disproportionate burden on keepers as it finds them liable for damage caused by their animals acting in a completely natural way. However, section 2(2)(c) and the section 5 defences provide much needed protection for keepers.

³⁵ Ibid per Stuart-Smith LJ at para. 39

³⁶ *Nelms v Chief Constable of Avon and Somerset Police* February 9, 1993, CA.

³⁷ Rogers, W.V.H., *Winfield and Jolowicz on Tort*, (Eighteenth Edition, 2010), p.810.

³⁸ *Cummings v Granger* [1977] QB 397 per Lord Denning at p.405

2 Horses and the Animals Act 1971

'In the late 1970s there were approximately half a million horses in the United Kingdom'³⁹, the current horse population in the UK is estimated at 988,000⁴⁰. Due to this and the increasing numbers of people taking up riding it is clear that there will also be an increase in horse-related accidents. Despite all the precautions and safety measures being taken it is inevitable that accidents will occur and it can be argued that in such situations 'this is simply the unhappy outcome of the rider taking part in an inherently risky activity.'⁴¹

Case law prior to *Mirvahedy*

In *Breeden v Lampard*⁴² the claimant suffered a broken leg after her horse approached another horse from behind too quickly, resulting in the horse kicking out and injuring the claimant. It was held that kicking is a normal characteristic of all horses as Lloyd LJ stated:

If liability is based on the possession of some abnormal characteristic known to the owner, then I cannot see any sense in imposing liability when the animal is behaving in a perfectly normal way for all animals of that species in those circumstances, even though it would not be normal for those animals to behave in that way in other circumstances, for example, a bitch with pups or a horse kicking out when approached too suddenly, or too closely, from behind.

This statement suggested that there was only one limb to section 2(2)(b) and therefore the decision 'severely restricted the application of s.2(2) to circumstances where the animal was 'abnormal'.⁴³ Clearly the outcome of this case was more favourable to keepers as animals' natural behaviour was being considered. A horse's propensity to gallop or being difficult to stop could also not constitute a characteristic so as to satisfy section 2(2)(b) as seen in *Fox v Kohn*⁴⁴.

*Flack v Hudson*⁴⁵ illustrates the nature of an abnormal characteristic. Mrs Flack was riding along a road when a tractor started towards her, upon seeing the tractor the horse became extremely agitated and bolted down the road. Mrs Flack fell off and died as a result of her injuries. It was clear that this horse's behaviour was abnormal under section 2(2)(b), not all horses will bolt when within the vicinity of a tractor, but if a horse does become frightened in such a situation, its natural reaction will be to bolt. Therefore although Sebastian's reaction

³⁹ Deakin, S., et al., *Markesinis and Deakin's Tort Law*, (Seventh Edition, 2013), p.524.

⁴⁰ British Equestrian Trade Association (BETA), National Equestrian Survey 2011, <http://www.beta-uk.org/pages/industry-information/market-information.php> 1 March 2015

⁴¹ Compton, B., and Hand, J., 'The Animals Act 1971 – the statutory defences to strict liability', (2012) 1 *Journal of Personal Injury Law* 18 at p.18.

⁴² *Breeden v Lampard* [1985] WL 542478.

⁴³ McNally, M., 'The Animals Act – The end of strict liability?', (2009) *Agricultural Law Association Bulletin* 8 at p.8.

⁴⁴ *Fox v Kohn* (1995) CA, unreported, 2 November.

⁴⁵ *Flack v Hudson* [2001] QB 698.

of fleeing was perfectly natural the fact that the catalyst of his fear is not commonly shared by all horses meant it was held to be abnormal.

The majority of these cases: *Breeden* and *Fox v Kohn* highlight that keepers should not be held liable for damage caused by their horses acting in a completely natural way, and from this it can be argued that the Animals Act does not place a disproportionate burden on keepers. However, in *Flack v Hudson* it was clear that the horse had a particular abnormality. Due to all the conflicting case law regarding section 2(2)(b) and the vast differences in judicial opinion, it was a matter for the House of Lords in *Mirvahedy v Henley* to determine the correct interpretation and application of the section.

Mirvahedy v Henley

In *Mirvahedy v Henley*, the House of Lords held by a majority of 3:2 that under section 2(2)(b) the keeper of a non-dangerous animal will be found strictly liable if that animal causes damage by behaving in a way which is not normal for the species as a whole but is normal for the species at certain times or in certain circumstances. Therefore a horse bolting due to being frightened by something unknown, is considered to be acting normally in the circumstances as all horses will act in that way when sufficiently scared and therefore such behaviour is within the ambit of the second limb of section 2(2)(b). The House of Lords also reaffirmed the fact that there are two limbs to section 2(2)(b) that could give rise to liability.

It can be argued that the decision in *Mirvahedy* means that keepers are being held liable for damage caused by their animals acting in a natural way. The case was decided on a very slim majority therefore it is necessary to consider their Lordships' opinions, particularly those of Lord Scott and Lord Slynn who were dissenting. Lord Nicholls gave the leading judgment for the majority and considered the two conflicting decisions of *Cummings* and *Breeden*. Lord Nicholls approved of the literal interpretation applied by the Court of Appeal in *Cummings* and *Curtis*, his reasoning being that:

'the horses escaped because they were terrified. They were still not behaving ordinarily when they careered over the main road, crashing into vehicles rather than the other way about. Hale LJ concluded that it was precisely because they were behaving in this unusual way caused by their panic that the road accident took place. That conclusion, on the evidence, seems to me irrefutable and to be fatal to the case of Dr and Mrs Henley. I would dismiss this appeal.'⁴⁶

⁴⁶ *Mirvahedy v Henley* per Lord Nicholls at para.48.

Lord Hobhouse and Lord Walker both agreed with Lord Nicholls that *Cummings* was the correct approach but Lord Walker went further by also using a purposive approach to the interpretation of the section when he asked:

did Parliament contemplate that the generality of animals in a domesticated species might in some circumstances show dangerous behavioural characteristics so as to be liable to be treated, in those circumstances, as dangerous?⁴⁷

Lord Walker answered this question in the affirmative when he stated:

I consider that the claimant's proposed construction of the second limb of section 2(2)(b) is more natural as a matter of language, and that it is not inconsistent with Parliament's general intention to impose strict liability only for animals known to present special dangers.⁴⁸

This statement suggests that 'this broad interpretation does not make liability automatic'⁴⁹ but it can also be argued that in most cases where an animal is acting naturally and causes damage as a result, such as a horse fleeing due to being scared, this will constitute such a 'special danger' and therefore the keeper will be found liable. Lord Scott and Lord Slynn who were dissenting both took a purposive approach. Lord Slynn stated:

the object of the provisions as I see it is to exclude strict liability not only for behaviour which is normal in normal circumstances but also for behaviour which is normal in particular (i.e. abnormal) circumstances, even if such behaviour would be abnormal in normal circumstances.⁵⁰

Lord Slynn was of the opinion that strict liability should only arise where an animal is acting abnormally. It can be argued that this should be the current law, as section 2(2) of the Animals Act was not intended to enable strict liability to arise absolutely. Lord Scott preferred the *Breeden* and *Gloster* interpretation and was critical of the literal approaches taken in *Cummings* and *Curtis* as he stated to interpret section 2(2)(b) in such a way would mean that 'strict liability would be imposed for any damage caused by an animal when responding to any external stimulus in a manner entirely normal for its species.'⁵¹ Therefore Lord Scott also re-emphasised the fact that strict liability should be based on abnormality alone.

The overall decision in *Mirvahedy* resulted in huge ramifications for the equine industry. Helen Niebuhr an equine law specialist stated:

not only were people made more aware of their ability to claim for damages in the event of injury or damage, but also the knock-on effect on the insurance industry

⁴⁷ Ibid per Lord Walker at para.155.

⁴⁸ *Mirvahedy v Henley* per Lord Walker at para.156.

⁴⁹ Mildred, M., 'Road traffic accidents - horses - abnormal characteristics', (2003) *Journal of Personal Injury Law* 65 at p.67.

⁵⁰ *Mirvahedy v Henley* per Lord Slynn at para.57.

⁵¹ Ibid per Lord Scott at para. 114

meant that horse owners and keepers were taking advice on reducing their risk of being responsible for damage.⁵²

Following the decision, insurance premiums had 'risen by as much as 300%'⁵³ and 'according to the Association of British Riding Schools, 650 riding schools had shut down'⁵⁴ in the four years following the House of Lords' decision.

Case law after *Mirvahedy*

It is necessary to examine the case law following *Mirvahedy* in order to determine whether the decision has placed a disproportionate burden on keepers of horses. In *Elliott v Townfoot Stables*⁵⁵ the eight year old claimant suffered a broken arm after falling from a bucking pony. Section 2(2)(a) had not been satisfied as the pony was not likely to cause damage and nor was the damage likely to be severe. The pony was a riding school pony therefore it was presumed to be safe for the purposes of young children and as such the injury was not reasonably expected.

In *Clark v Bowl*⁵⁶ the claimant was about to pass two horses being ridden when the defendant's horse Chance moved into the road hitting the claimant's car causing him personal injuries. At first instance the judge held that an inclination to move otherwise than as directed was a characteristic which satisfied section 2(2)(b) and found the defendant liable. The Court of Appeal held that the judge had erred when applying *Mirvahedy*, the judge held that section 2(2)(a) was satisfied due to the fact that Chance's weight was likely to cause severe damage, therefore that characteristic should have been considered under section 2(2)(b). However, the section would not have been satisfied as a horse's weight is a permanent characteristic of the species. If weight was held to be a characteristic not normally found in horses, this would 'effectively extend the scope of s.2(2) to characteristics that were common to the non-dangerous species involved – the reverse of the situation intended by the Act.'⁵⁷ This case 'has narrowed the interpretation of section 2 by highlighting the requirement for a homogenous reading of subsections (a) and (b).'⁵⁸ The Court of Appeal allowed the appeal on the basis that the inclination to move otherwise than as directed could not be held to be a characteristic under section 2(2)(b). Sedley LJ stated that:

⁵² Trevelyan, L., 'The rise in equine law', (2008) *Law Society Gazette*, <http://www.lawgazette.co.uk/analysis/the-rise-in-equine-law/47464.article> 14 March 2015

⁵³ Rodway QC, S., and Todd, J., 'Mirvahedy – Three Years On', 39 Essex Street, 25 May 2006, http://www.39essex.com/docs/articles/JTO_SR_Mirvahedy_May_2006.pdf 10 November 2014

⁵⁴ Pollock, I., 'Gloom lifts for riding schools', *BBC News*, 19 April 2007, <http://news.bbc.co.uk/1/hi/business/6563235.stm> 14 March 2015.

⁵⁵ *Elliott v Townfoot Stables* [2004] CLY 169.

⁵⁶ *Clark v Bowl* [2006] EWCA Civ 978.

⁵⁷ Deal, K., 'Horsing around', (2007) 151 *Solicitors Journal* 490 at p.491.

⁵⁸ Barker, D., 'Animals: Where Should the Loss Lie?', (2006) *EMIS Property Service* 9 at p.10.

section 2(2) is not intended to render the keepers of domesticated animals routinely liable for damage which results from characteristics common to the species. It requires something particular, and there was nothing of the specified kind to render the keeper liable here.⁵⁹

*Welsh v Stokes*⁶⁰ concerned a 17 year old employee of the defendants, who suffered injuries after a horse reared up and fell on top of her. The Court of Appeal upheld the trial judge's decision that all three conditions in section 2 had been satisfied. Section 2(2)(a) was not in dispute, any damage caused by falling off of a rearing horse was likely to be severe. The defendant argued that the trial judge had incorrectly applied sections 2(2)(b) and 2(2)(c). Under section 2(2)(b) the judge held that the characteristic of rearing was normal for the horse in certain circumstances as horses as a species will rear in certain circumstances. Dyson LJ stated 'the relevant question was not whether Ivor tended to rear generally, but whether he had the characteristic of rearing in the particular circumstances.'⁶¹ Therefore the judge had correctly applied section 2(2)(b). The defendants argued that the issue with section 2(2)(c) was that the judge had failed to identify whether they had the requisite knowledge that Ivor had the characteristic of rearing in certain circumstances, rather than horses generally. The Court of Appeal held that if a defendant has knowledge that the general species can act in such a way in certain circumstances, then that knowledge will suffice to satisfy section 2(2)(c), therefore the defendant's appeal was dismissed.

*Freeman v Higher Park Farm*⁶² concerns what is arguably the most blatant voluntary acceptance of risk of all the cases concerning section 5(2) and demonstrates exactly why the defence is such a necessary inclusion to the Animals Act. The claimant organised a hack at a riding centre and was told before the ride that her horse had a tendency to buck when going into a canter but she stated that she was okay with that. The horse gave a small buck on commencing a canter and the claimant confirmed she was okay to continue and canter again. The second time the horse gave two to three large bucks resulting in the claimant falling off and suffering injuries. The Court of Appeal held that section 2(2)(a) had been satisfied, falling from a bucking horse is likely to cause severe injury. However under section 2(2)(b) it was held under the first limb that bucking cannot be considered a characteristic not normally found in horses and further there was no evidence that bucking is a normal characteristic for horses but only at particular times or in particular circumstances. Therefore the second limb was not satisfied which resulted in consideration of section 2(2)(c) being wholly unnecessary. The Court of Appeal confirmed that the judge was correct in holding

⁵⁹ *Clark v Bowlit* [2006] EWCA Civ 978 per Sedley LJ at para.24.

⁶⁰ *Welsh v Stokes* [2007] EWCA Civ 796.

⁶¹ *Welsh v Stokes* per Dyson LJ at para.60.

⁶² *Freeman v Higher Park Farm* [2008] EWCA Civ 1185.

that the section 5(2) defence applied. The claimant was asked at least twice if she wanted to continue and canter again and each time she said yes even though it was highly likely that Patty would buck again. As Etherton LJ stated 'the appellant voluntarily assumed that risk and its consequences.'⁶³

This case reiterates the fact that keepers should not be held liable for characteristics which are natural for horses generally and also that those who decide to engage in horse riding should accept any consequences that may flow from being involved in such a risky activity. In *Jones v Baldwin*⁶⁴ the claimant suffered personal injuries after he was kicked by the defendant's horse when he rode too closely to it from behind. The three requirements in section 2 were satisfied but it was clear that the defendant had a defence under section 5(1), as it was the claimant's own actions which had resulted in him suffering injuries.

In *Bodey v Hall*⁶⁵ the claimant was acting as a groom for her friend who was driving her horse in a trap. The horse spooked and bolted resulting in the trap tipping up and the claimant suffering injuries. Section 2(2)(a) was satisfied as such an occurrence is likely to result in severe injury. Section 2(2)(b) was also satisfied as the relevant characteristic was the horse bolting due to being spooked by something unknown and as is known from *Mirvahedy*, this is a characteristic common to all horses in certain circumstances. Section 2(2)(c) was also satisfied as the defendant was an experienced horsewoman and therefore she knew that horses as a species have the characteristic of fleeing when scared. However the High Court held that the section 5(2) defence of voluntary acceptance of risk applied as the claimant was also an experienced horsewoman and therefore she was aware of the risks that came with driving horses.

In *Goldsmith v Patchcott*⁶⁶ the claimant was out riding a horse named Red when he spooked at something and started bucking. The claimant fell off and Red kicked her in the face. At first instance the judge found that the criteria under section 2 were satisfied however, he also held that the defendant could use the defence of voluntary acceptance of risk. The Court of Appeal held that the judge had been correct in holding that all three requirements in section 2 had been satisfied. The second limb of section 2(2)(b) had been satisfied as bucking is a characteristic shared by all horses in certain circumstances, namely when they are spooked by something. The Court of Appeal also upheld the trial judge's decision that section 5(2)

⁶³ *Freeman v Higher Park Farm* per Etherton LJ at para.51.

⁶⁴ *Jones v Baldwin* [2010] (Unreported) Cardiff County Court, 12 October.

⁶⁵ *Bodey v Hall* [2011] EWHC 2162 QB.

⁶⁶ *Goldsmith v Patchcott* [2012] EWCA Civ 183.

applied. The claimant argued that although she accepted the risk that Red could buck, she did not accept the risk of him bucking as violently as he did. Jackson LJ stated, 'the fact that Red bucked more violently than anticipated cannot take this case outside s.5(2), so as to defeat the defendant's defence.'⁶⁷ It can be seen that:

this broad approach to s.5(2) therefore reduces significantly the concern of defendant insurers that a claimant will be liable for the normal behaviour of his animal.⁶⁸

In *Turnbull v Warrener* the claimant was riding the defendant's horse Gem who had been fitted with a bitless bridle for the first time. Both women confirmed after a few minutes of walking Gem around in an enclosed arena that he would be fine being ridden in the bridle. The claimant took Gem into a field and proceeded to canter, the horse became difficult to control and swerved going through a gap in the hedge resulting in the claimant falling off. The trial judge held that none of the conditions under section 2(2) had been satisfied and even if they had been, the defendant would have had the section 5(1) defence of the damage being due wholly to the fault of the person suffering it. The claimant appealed as a result of this whilst the defendant argued that the section 5(2) defence of voluntary acceptance of risk also applied.

The Court of Appeal held that the judge had applied section 2(2) incorrectly. Section 2(2)(a) was likely to have been satisfied due to the fact that riding is a high risk sport. The judge had also asked himself the wrong question when considering section 2(2)(b), whether it was normal for horses to ignore instructions in such circumstances. Maurice Kay LJ stated that this consideration was 'too simplistic'⁶⁹ and that as the judge had held that the claimant could not stop the horse because of the bitless bridle, he should have instead asked whether it was normal for horses not to respond to instructions in circumstances where they are wearing a bitless bridle which they are unaccustomed to. This question would therefore have most likely led to the second limb of section 2(2)(b) being satisfied. It was also clear to the Court of Appeal that section 2(2)(c) would have been satisfied due to the fact that the two women were experienced horsewomen.

The Court of Appeal held that the section 5(1) defence was not applicable as Maurice Kay LJ stated, 'to find that Ms Turnbull was 'wholly' at fault cannot coexist with the finding that Mrs Warrener was not negligent.'⁷⁰ However it was decided that section 5(2) afforded a

⁶⁷ Ibid per Jackson LJ at para.59.

⁶⁸ Harris, 'Horse play', p.4.

⁶⁹ *Turnbull v Warrener* per Maurice Kay LJ at para.21.

⁷⁰ Ibid at para.29.

defence to the defendant as the claimant knew that a horse may ignore a rider's instructions when it is not accustomed to something, particularly a bitless bridle, hence why they first tried Gem in the bridle in an enclosed area. Maurice Kay LJ further stated that:

if Mrs Warrener's knowledge for the purpose of s.2(2)(c) is established, it is difficult to see how knowledge as an element of voluntariness on the part of Ms Turnbull for the purpose of s.5(2) can be denied.⁷¹

It can be seen from the case law following *Mirvahedy*, that the majority of keepers were afforded defences, mostly under section 5(2), this suggests that the Animals Act 1971 does not place a disproportionate burden on the keepers of animals. It is clear that the courts have taken the view that those who choose to participate in such a risky activity should accept the consequences of those risks.

3 The Animals Act 1971 and the Need for Reform

The House of Lords decision in *Mirvahedy* led to increasing calls for reform of the Animals Act 1971. The decision was partly a social policy decision. Their Lordships considered that there must be a balance between those who decide to keep animals and society as a whole. The main question for their Lordships was who should the burden be placed upon? Lord Nicholls stated:

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.⁷²

The majority held that the loss should fall on the keepers of animals which cause damage and this decision was the main catalyst for the calls for reform.

The most significant proposal put forward to reform the existing law was the Animals Act 1971 (Amendment) Bill 2008 which was introduced by Stephen Crabb MP. Mr Crabb's intention for the Bill was to:

restore the careful balance that the Act tried to achieve between the rights of members of the public and the rights of keepers of animals regarding the circumstances in which keepers are liable for damage caused by animals.⁷³

The Bill proposed to remove the section 2(2)(b) wording 'characteristics of the animal which are not normally found in animals of the same species' and 'except at particular times or in

⁷¹ *Turnbull v Warrener* per Maurice Kay LJ at para.34.

⁷² *Mirvahedy v Henley* per Lord Nicholls at para.6.

⁷³ HC Deb Vol. 473 Col. 514 14 March 2008.

particular circumstances', thereby removing the main substance of section 2(2)(b). The Bill sought to replace section 2(2)(b) with 'the damage was due to an unusual or conditional characteristic of the animal.' An unusual characteristic was defined as a characteristic that 'is not shared by animals of that species generally.' A conditional characteristic was defined as a characteristic that 'is shared by animals of that species generally, but only in particular circumstances.' This new wording would limit the effect of strict liability, as if the characteristic of the animal is a conditional one, the keeper will not be liable if they can show that there 'was no particular reason to expect that those circumstances would arise at that time.' However it is clear that the Bill did not aim to remove strict liability absolutely as:

there might still be scope for an owner of an animal to be held strictly liable for damage caused by their animal but the Bill aims to limit the number of situations where strict liability would apply.⁷⁴

The Bill received support from the Department for Environment, Food and Rural Affairs, who gave advice on the drafting of the Bill. However there was not enough support to get the Bill past the second reading stage due to there not being a sufficient number of MPs present to vote.

In 2009 DEFRA produced a consultation document with the purpose of furthering the attempts for reform. Their proposals for reform continued to be based on the Animals Act Amendment Bill 2008 using the same wording proposed in the Bill of unusual or conditional characteristics to replace section 2(2)(b). DEFRA claimed that the changes were necessary in order to protect keepers from unnecessary litigation.

Many of the organisations consulted agreed that reform was necessary. There has even been judicial approval, Maurice Kay LJ speaking of the DEFRA consultation stated that the proposed reforms, 'would breathe life into s.2(2)(b).'⁷⁵ However, there was significant opposition to the wording suggested to replace section 2(2)(b). One of the criticisms of the proposed wording is 'that the wording seems to repeat the errors of the past by asking if the keeper had a 'particular reason' for expecting the circumstances to arise'⁷⁶. Consequently, the Government took no further action and it can be said that reform of the Act has been put on the back burner, but, is reform still necessary?

⁷⁴ Fairbairn, C., and Smith, L., *Animals Act 1971 (Amendment) Bill [Bill 18 of 2007-08]*, Commons Library Research Paper RP08/25, 12 March 2008.

⁷⁵ *Turnbull v Warrener* per Maurice Kay LJ at para.24.

⁷⁶ Arvind, TT., and Steele, J., *Tort Law and the Legislature*, (2013) p 232.

It can be argued that it is not due to the fact that the Act adequately protects keepers from strict liability as demonstrated by the case law following *Mirvahedy*, where in the majority of the cases, the section 5(2) defence of voluntary acceptance of risk arose. It can be seen that 'there now appears to be serious hurdles for claimants bringing claims where both parties' knowledge of the animal's dangerous characteristics is identical.'⁷⁷ It has been further argued that DEFRA's proposals to clarify the law and benefit keepers of animals 'have already been achieved by the outcome of the post-Mirvahedy cases'⁷⁸ and as such it is apparent that 'no consensus will be achieved in the forthcoming consultation.'⁷⁹

Conclusion

The main issue discussed in this paper was whether the Animals Act places a disproportionate burden on the keepers of animals. It can be said that it does not. The decision in *Mirvahedy* did appear to place a harsher burden on keepers of animals and it also seemed to indicate that in future cases it would be harder for a defendant to avoid liability. However, the widespread fear that emanated from the House of Lords' decision, that all keepers would face crushing liability has not occurred. Nearly all of the decisions discussed that came after *Mirvahedy* absolved the defendant from liability as the section 5(2) defence of voluntary acceptance of risk was held to apply. These cases, most notably: *Bodey*, *Goldsmith* and *Turnbull* therefore show that keepers are not going to automatically be found liable.

The majority of recent cases concern horse riding accidents and the most recent Court of Appeal decision in *Turnbull* affirms the current position that keepers should not be found liable when the claimant clearly accepted the risk of injury, as Lewison LJ stated:

An individual who chooses to ride horses for pleasure no doubt derives enjoyment from being able to control a powerful beast. But inherent in that activity is the risk that on occasions the horse will not respond to its rider's instructions, or will respond in a way that the rider did not intend. That is one of the risks inherent in riding horses.⁸⁰

To conclude, it can be seen that the Animals Act 1971 is no longer in need of reform, the recent case law shows that the Act is currently adequately protecting and upholding the rights of keepers.

⁷⁷ Harris, R., 'Personal injury: Nuclear fallout', (2012) 162 *New Law Journal* 606 at p.607.

⁷⁸ McNally, M., and Mooney, G., 'Defra's consultation on reforming section 2(2) of the Animals Act is unnecessary', (2012) *Solicitors Journal* 13 at p.13.

⁷⁹ *Ibid.*

⁸⁰ *Turnbull v Warrener* per Lewison LJ at para.56.