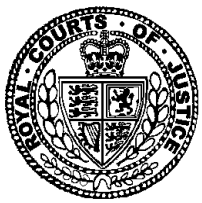

Neutral Citation Number: [2021] EWCA Civ 1848

Case No: B3/2021/0506

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MICHAEL KENT QC (sitting as a Deputy High Court Judge)

[2021] EWHC 312 (QB)
Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 08/12/2021

Before :

LADY JUSTICE MACUR

LADY JUSTICE CARR

and

LORD JUSTICE WILLIAM DAVIS

- -

Between :

LISA JANE FORD — **Claiman / Appellan**

- and –

JONATHAN TIPPET SEYMOUR-WILLIAMS — **Defendan / Respond**

- -

- -

Giles Mooney QC and Ms Laura Hibberd (instructed by **Royds Withy King LLP**) for the **Appellant**

William Norris QC and Ms Georgina Crawford (instructed by **Kennedys Law LLP**) for the **Respondent**

Hearing date : 30 November 2021

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Approved Judgment

Lady Justice Carr :

Introduction

1.
This appeal raises questions as to the scope of the strict liability obligation that arises under s. 2 of the Animals Act 1971 ("s. 2") ("the Act"). It arises out of a claim by the Appellant for personal injury damages and consequential losses following an incident on 15 September 2018 when the horse that she was riding ("the horse") reared and fell on top of her. The Appellant suffered severe injuries. She sued the Respondent on the basis that, as keeper of the horse, he was strictly liable to her under s. 2(2) of the Act (and s. 2(2) alone); no allegations of fault-based liability were made.

2.
S. 2(2) provides:

"Liability for damage done by dangerous animals

…(2) Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if-

a)
The damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and

b)
The likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and

c)
Those characteristics were known to the keeper or were at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen."

3.
Following a three-day trial on liability, Michael Kent QC (sitting as a Deputy High Court Judge) ("the Judge") dismissed the claim on the basis that the Respondent did not have sufficient (actual or constructive) knowledge for the purpose of s. 2(2)(c).

4.
The specific (overlapping) issues of law raised on appeal are, when dealing with characteristics not normally found in animals of the same species except at particular times or in particular circumstances (for the purpose of the second limb in s. 2(2)(b)):

i)
Whether identification of the "particular times" or "particular circumstances" when the relevant characteristic arises is necessary for the purpose of s. 2(2)(b);

ii)
Whether knowledge for the purpose of s. 2(2)(c) requires knowledge of those "particular times" or "particular circumstances".

5.

The Appellant contends that the Judge was wrong to find that identification of the “particular times” or “particular circumstances” is necessary, as is knowledge thereof. She also challenges the Judge’s approach to and/or findings on the facts.

The facts

6.
The Appellant, now 43 years old, was an experienced horsewoman who had been employed by the Respondent as a groom at his yard at Farleaze Farm, Malmesbury, Wiltshire, since September 2017. The horse, called Tommy, was a 16.1hh chestnut gelding hunter and approximately 19 years old. He belonged to an international polo player who lived locally and became stabled at the Respondent’s yard as one of the horses under the Appellant’s management. The Respondent was also an experienced horseman, keeping hunters and polo ponies amongst a number of other horses.

7.
In the early morning of 15 September 2018, the Appellant was attending a pre-season autumn meet of the Duke of Beaufort’s Hounds at Badminton and riding the horse. Some 20 or 30 metres after trotting into a field, the horse suddenly stopped, stepping back or sideways but refusing to go forwards (known as “napping”); the Appellant encouraged him to proceed with her legs, through the reins as well as with a light slap on the shoulder with a riding crop but the horse reared up, fell over backwards and landed on top of her. He struggled on the ground for some five or six minutes before dying.

8.
Mr Richard Iddon, a very experienced horseman who witnessed the incident, immediately thought that the horse was suffering a heart attack. The day after the incident the Appellant posted a Facebook message stating that the horse had a heart attack but panicked and flipped over backwards onto her.

9.
The Appellant’s injuries included multiple pelvic fractures, a fractured left acetabulum, internal bleeding and nerve damage.

The issues at trial

10.
By the conclusion of the trial, the Respondent had accepted that he was a keeper of the horse for the purpose of s. 2. The following issues remained live:

i)
First, was the Appellant acting in the course of her employment by the Defendant? (If not, s. 2 liability would not have arisen because the exception in s. 5(2) of the Act would have been engaged);

ii)
Secondly, what was the cause of the horse rearing and what were the general circumstances in which he came over onto the Appellant? (The competing arguments, based on opposing veterinary expert opinion, were a) rearing through disobedience or b) rearing because of a cardiovascular event);

iii)
Thirdly, what was the behavioural history of the horse if and in so far as it might have been relevant to the horse rearing as a result of disobedience?

iv)
Fourthly, what did the Appellant and Respondent know of that behavioural history? (It was common ground that, in context, the Respondent would have been fixed with any knowledge of the Appellant);

v)
Fifthly, having determined the cause and circumstances of the horse rearing (assuming it was a result of a cardiovascular event and not because of a pre-existing tendency to rear) would the Respondent and Appellant have had actual or constructive foresight of that?

vi)
Sixthly, depending on the answers to the above, what was the proper application of s. 2(2)?

11.
Both the Appellant and the Respondent gave evidence at trial, as did Mr Iddon. There was also equine and veterinary expert evidence on both sides. The agreed equine expert evidence at trial included the following:

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

13. We agree rearing is normal characteristic behaviour for all horses when in particular circumstances…

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

The Judgment

12.
The Judge found, in overview, as follows:

i)
The Appellant was acting in the course of her employment with the Respondent at the time of the incident;

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

iii)
It was therefore irrelevant that the horse had in fact reared before and even that it had previously thrown the rider (the Appellant) on one such occasion;

iv)
It was also irrelevant that the Appellant knew of one or more such rearing events; it was not suggested that the horse was “unusually prone” to rearing;

v)

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

vi)
This meant that the strict liability provisions of s. 2(2) did not apply because the 'particular circumstance' within the meaning of s. 2(2)(b) which caused the horse to rear was not known to the keeper. Accordingly, there was not the requisite knowledge under s. 2(2)(c).

13.
It is the last two of these findings that are the focus of this appeal. In their regard the Judge considered the competing arguments on s. 2(2) and the relevant authorities commencing with Mirvahedy v Henley [2003] UKHL 16; [2003] 2 AC 491 ("Mirvahedy") and followed by subsequent cases, chronologically: Welsh v Stokes [2007] EWCA Civ 1185; [2008] 1 WLR 1224 ("Welsh"); Freeman v Higher Park Farm [2008] EWCA Civ 1185; [2009] PIQR 96 ("Freeman"); Goldsmith v Patchcott [2012] EWCA Civ 183; [2012] PIQR P11 ("Goldsmith"); and Turnbull v Warrener [2012] EWCA Civ 412 ("Turnbull").

14.
The Judge rejected the submissions for the Appellant i) that no particular cause of trigger for the behaviour on the occasion when the damage to a claimant is caused need be identified and ii) that it was sufficient to prove that the animal of that species could behave in such a way in certain circumstances and unnecessary to show that those circumstances were in fact present at the time of the incident. At [58] he stated:

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

15.
In the Judge's view, the House of Lords in Mirvahedy did not read section 2(2)(b) as broadly as was being suggested for the Appellant. The cases where section s. 2(2)(b) was satisfied were distinguishable. In Welsh, Goldsmith and Turnbull "what had been identified as the particular circumstances were present at the time of the accident." In Freeman the statement of Etherton LJ (as he then was) at [43] that the second limb of s. 2(2)(b) required the particular times or circumstances to be capable of being "described and predicted" was of general application. (In his draft judgment the Judge had stated incorrectly that Jackson LJ in Goldsmith had not referred, in connection with s. 2(2)(b), to Etherton LJ's observations in Freeman. This error was drawn to his attention by the Appellant's counsel and corrected. The Judge indicated that the error did not affect the outcome of his

decision “because it remains the case that the “particular circumstances” in Goldsmith in which the keeper knew the characteristic of rearing may normally be found were in fact present at the time”.)

16.
At [75] the Judge stated:

“Applying to this case the principles which in my judgment emerge from these authorities it seems to me that it would not have been enough for the Claimant simply to prove that the horse reared and that that is something that horses do from time to time, for example whether they are startled or in pain or are simply being disobedient. If therefore, on the Claimant’s primary case as to what in fact happened, Tommy napped and reared because he was being “disobedient”, using that expression not in an anthropomorphic sense but merely to mean a failure to do what the rider is commanding or expecting the horse to do, that does not satisfy the tests in the second limb of section 2(2)(b). That would amount to a “characteristic” giving rise to a risk of damage but it would not involve identifying the particular circumstances in which such behaviour is normally found or that such circumstances were present on this occasion.”

17.
However, as he then stated, his finding was that the horse’s behaviour was more than simply disobedience for some unknown reason: the horse was “probably reacting to a catastrophic internal injury”.

18.
As to the Respondent’s knowledge, the Judge referred (at [76]) to the equine experts’ agreed statement that they had not known catastrophic internal injury to be the cause of rearing and went on:

“Therefore, although the veterinary experts acknowledged that a horse might rear in response to a catastrophic injury, the agreement of the equestrian expert shows that this was not common knowledge even among experienced equestrians and it was not suggested that the Defendant himself had some special knowledge of this phenomenon.”

The parties’ respective positions

The Appellant’s position in summary

19.
For the Appellant it is said that, in the light of the agreed expert evidence and the Respondent’s admitted knowledge, the Judge was bound to find that the requirements of s. 2(2) were satisfied.

20.
First, it is said that the Judge wrongly conflated ss. 2(2)(b) and (c) of the Act. At [56] of the Judgment he misunderstood the Appellant’s submission, which was not that it was unnecessary to prove that any particular time or circumstance existed when the characteristic was displayed, but rather that, where expert evidence had identified that the relevant characteristic was one that was only displayed in particular times or circumstances, it was not necessary for the purpose of s. 2(2)(b) to identify exactly which time or circumstance applied. S. 2(2)(b) does not require the keeper to know anything at all. The Judge’s approach “wholly empties s. 2(2) of purpose”.

21.

Secondly, it is said that the Judge wrongly distinguished the findings in relation to s. 2(2)(b) in Mirvahedy; Welsh; Goldsmith and Turnbull. His distinction that in those cases what had been identified as the particular circumstances were present at the time of the accident is a distinction without a difference. The agreed expert evidence was that the horse displayed the characteristic of rearing, a characteristic not normally displayed by horses except at particular times and in particular circumstances. Thus s. 2(2)(b) was made out. The Judge reached conclusions in relation to s. 2(2)(b) which were illogical and ones which no reasonable tribunal could have reached on the agreed equine expert evidence.

22.
Thirdly, it is said that the Judge erred in requiring that the Respondent needed to know that the horse could rear if he had a heart attack in order to satisfy s. 2(2)(c). This was to set the bar too high. All that the Respondent need to know was that the horse could rear, rearing being the only characteristic in issue. There was no doubt that the Respondent knew that horses could rear. Alternatively, if knowledge of circumstances is required, then it is sufficient knowledge that horses will rear when panicking or being disobedient.

23.
Mr Mooney QC for the Appellant emphasised in his oral submissions that the characteristics for the purpose of s. 2(2)(b) are properly described as “conditional” characteristics. The Judge in [75] of the judgment made crucial errors in misunderstanding what was required under that subsection. He points to the concession made by the Respondent (both here and below) that the Respondent would have been liable had the cause of the horse’s rearing been disobedience. All that is required is proof (and knowledge) of the conditional characteristic, not the specific trigger on the day in question. The courts adopt a “claimant-friendly” approach under s. 2(2); s. 2(2)(b) is particularly easy to make out (see [43] of Mirvahedy).

24.
In any event it is said that the Judge was wrong to find that the Respondent did not know that horses might rear when suffering a heart attack. He failed to consider the Respondent’s evidence as to his knowledge, relying solely on the expert evidence which he then also misconstrued. In reaching his findings on causation he had accepted that it was common knowledge that horses might rear when suffering an internal injury.

The Respondent’s position in summary

25.
For the Respondent it is said that the real and only question for appeal is whether the Judge was correct to find that the cause of the rear, namely a cardiovascular event, was relevant to section s. 2. The Judge was right; otherwise s. 2(2)(c) would be deprived of any real meaning and s. 2(2) would be effectively on the same footing as s. 2(1). The Respondent accepts that, if the horse had reared out of disobedience (in the sense of wilful misbehaviour), he would (on the basis of the Judge’s other findings) have been liable. However, the cause here was an incipient cardiovascular event. On the facts, the Judge found that horsemen would have no reason to foresee a rear as a result of a cardiovascular event. This was a proper finding which he was entitled to make and with which this court should not interfere.

Discussion and analysis

26.

The purpose of the Act was to simplify the common law, which has been described as “notoriously intricate and complicated” (see Lord Nicholls in Mirvhahedy at [8]). Thus, s. 1 of the Act states that ss. 2 to 5 of the Act replaced (amongst other things) the rules of common law imposing strict liability in tort for damage done by an animal on the ground that the animal is regarded as ferae naturae or that its vicious or mischievous propensities are known or presumed to be known.

27.
S. 2 provides in full (partly repeated for ease of reference):

“Liability for damage done by dangerous animals

(1)
Where any damage is caused by an animal which belongs to a dangerous species, any person who is a keeper of the animal is liable for the damage, except as otherwise provided by this Act.

(2)
Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if-

a)
The damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and

b)
The likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and

c)
Those characteristics were known to the keeper or were at any time known to a person who at that time had charge of the animal as that keeper’s servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen.”

28.
A “keeper” is defined in s. 6(3); the definition includes “someone who owns the animal or has it in his possession”. S. 5 sets out the exceptions from liability under ss. 2 to 4A of the Act. By s. 5(2), a person is not liable under s. 2 for any damage suffered by a person who has voluntarily accepted the risk thereof. By s. 6(5), a person employed as a servant by a keeper of an animal who incurs a risk incidental to his employment shall not be treated as accepting it voluntarily.

29.
S. 2(1) thus imposes strict liability on the keeper of an animal of a dangerous species. S. 2(2) deals with damage caused by animals which do not belong to a dangerous species.

30.
The rationale under s. 2(2) was to impose strict liability on the keeper of an animal not of a dangerous species if damage resulted from dangerous characteristics known to the keeper (see [17] of the Law Commission Report on Civil Liability for Animals (1967) (Law Comm No 13):

“…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" – which would seem to justify the same strictness of liability as applies to an obviously dangerous animal."

31.
The Law Commission's draft of s. 2(2) included the requirements in (a) and (c) but not (b). However, following criticism that the ambit of the liability would then be cast too widely, the Bill was amended to include (b). As Lord Nicholls identified in Mirvahedy at [39], s. 2 would otherwise have given rise to strict liability for "even quite normal behaviour on the part of an animal".

32.
Liability under s. 2(2) is established only if all three limbs are made out. In this case it was common ground that the requirements of s. 2(2)(a) were satisfied and the first limb of s. 2(2)(b) were not. The question is whether or not the requirements of the second limb of s. 2(2)(b) and then s. 2(2)(c) were met. Ultimately, as set out below, what really matters is whether or not knowledge for the purpose of s. 2(2)(c) was established.

33.
But the logical starting point is s. 2(2)(b), a subsection that has been described variously as "opaque", "tortuous" and "oracular" (as recorded by Maurice Kay LJ in Turnbull at [17]). Nevertheless, a clear line of authorities (in the context of injuries caused by horses in particular) has emerged. They establish, amongst other things, that rearing or bucking can be a characteristic for the purpose of the s. 2(2)(b) and that, for the purpose of s. 2(2)(c), the keeper need only have knowledge of the characteristic in the relevant species, rather than in the individual animal in question.

34.
Given the submissions for the Appellant on this appeal, a brief examination of the facts in each of these cases is illuminating:

i)
Mirvahedy: horses stampeded from a field where they were kept and reached the main road where one collided with a car causing personal injuries to the driver. The particular circumstance in which the characteristic (stampeding) was displayed was fear - something had frightened the horses very badly, although nobody knew what it was. It was known to the keepers that horses when severely frightened are liable mindlessly to panic and it is normal for horses when sufficiently alarmed by a threat to attempt to flee from that threat. The keepers were found liable under s. 2(2);

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

iii)

Freeman: the claimant fell from a horse supplied by the defendant on a hack organised by the defendant. She fell when the horse gave two or three large bucks as the horse was beginning to canter. The horse had a habit of bucking when going into canter, which was not considered to be dangerous. As to the second limb of s. 2(2)(b), the court held that the clear words “at particular times or in particular circumstances” denoted times or circumstances that could be “described and predicted” (see [43]). There was no evidence that horses generally bucked at particular times or in particular circumstances. Therefore, the keeper was not liable under s. 2(2);

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

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

35.
It can be noted that in every instance where the keeper was held liable the court identified not only the characteristic behaviour such as rearing, but also the particular time or circumstance when the characteristic manifested itself. That time or circumstance was something that could be “described and predicted”. In each case where liability was established, there was a particular event triggering a reaction which caused severe damage in circumstances where the keeper knew that such an event could lead to the reaction in question.

36.
As set out above, the (primary) position taken for the Appellant is that, where expert evidence has identified that a horse will only rear in certain given times or circumstances, it is not necessary for the purpose of s. 2(2)(b) to identify the time or circumstance that was actually engaged; by definition, one of the times or circumstances must have arisen.

37.
It is correct that s. 2(2)(b) is not about the keeper’s knowledge. However, s. 2(2)(b) identifies what needs to be known for purpose of s. 2(2)(c) and in that sense the two sub-sections need to be considered together. It is also right to say that, as identified in [43] of Mirvahedy, a normal but dangerous characteristic of a species will usually be identifiable by reference to particular times or particular circumstances. However, that does not empty s. 2(2)(b) of all content (see [46]).

38.
As set out above, however, the authorities demonstrate that it is necessary to identify not only the characteristic but also the particular time or circumstance in which it arose. This is an approach not confined to cases involving horses (see for example Williams v Hawkes [2018] EWCA Civ 1846, a case where a Charolais steer caused a serious accident on a dual carriageway. Liability was established where the steer was “spooked” by something, causing it to jump over a fence and stampede into the road).

39.
That is the correct approach as a matter of construction and principle, for a number of reasons:

i)
First, as the Judge commented, as a matter of language s. 2(2)(b) is focusing on the link between the damage and the characteristic. The damage must be “due” to the characteristics of the animal;

ii)
Secondly, the reference to (plural) “times” and “circumstances” reflects the fact that there may be multiple causes of a particular characteristic, not that it is unnecessary to identify what the particular cause (or causes) was on the occasion in question when the damage occurred;

iii)
Thirdly, liability under s. 2(2) for an animal which does not belong to a dangerous species would otherwise be materially the same as the liability arising under s. 2(1) for an animal of a dangerous species. As Lewison LJ identified in Turnbull at [47]:

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

iv)
Fourthly and fundamentally, s. 2(2)(b) needs to be construed in the context of s. 2 as a whole. Identification of the particular time or circumstance in question is necessary for an assessment of whether or not a keeper has the relevant knowledge for the purpose of s. 2(2)(c). As the facts of this case themselves demonstrate, it is possible for a keeper to have knowledge of the fact that it is normal for a characteristic (here rearing) to manifest itself as a result of one particular time or circumstance (here disobedience) but not another (here a catastrophic internal failure).

40.
The Judge did not inappropriately conflate s. 2(b) and (c). At [58] of the judgment he was simply explaining why identification of particular time and circumstances was necessary. His reference to s. 2(2)(c) reflects the fact that the Appellant’s construction would deny a keeper of any real protection. Certain passages in [75] are difficult to follow. However, in circumstances where this was not a case of disobedience, any confusion as to whether or not such a case would meet the requirement of s. 2(2) does not affect the ultimate result.

41.
In short, I reject the Appellant’s submission that the circumstance of the rearing was irrelevant for the purpose of s. 2(2)(b) on the basis that, whichever circumstance applied, the rearing was within the boundaries of normal equine behaviour. Rather, it was necessary to establish and identify the particular circumstance that gave rise to the characteristic of rearing. This case is unusual, in that there were competing arguments as to the relevant particular time or circumstance; but that does not affect the approach in principle.

42.
Adopting this approach, on the facts, the conditions in s. 2(2)(b) were met - because the evidence established that the likelihood of the damage (identified in s. 2(2)(a)) was due to characteristics (namely rearing) not normally found in horses except at particular times or in particular circumstances (including catastrophic internal injury). On a fair reading, this is what the Judge held (at [76]):

"…the horse was probably reacting to a catastrophic internal injury. While that may be described as a "particular circumstance" …"

43.
For the same reasons, and by the same logic, the knowledge required under s. 2(2)(c) for a keeper to be liable under the second limb of s. 2(2)(b) extends to knowledge of the "particular" time or circumstance giving rise to the characteristic in question. It was (rightly) accepted for the Appellant that the scope of knowledge required for s. 2(2)(c) would have to reflect the scope of findings necessary for the purpose of s. 2(2)(b). Again, this is consistent with the authorities which all proceed on the basis that, in cases under the second limb of s. 2(2)(b), the knowledge of the keeper for the purpose of s. 2(2)(c) needed to extend to the particular time or circumstance in which the characteristic arose.

44.
Mr Mooney submitted that this analysis cannot be correct: it would mean that the greater the discovery of a claimant as to the nature of the circumstances triggering the characteristic, the more difficult it would be to establish liability. The answer to that, however, is that each case falls to be decided on its own facts, and the evidence available. The importance of that is demonstrated by the result in Freeman where the claim under the second limb of s. 2(2)(b) failed because "there was no evidence whatever that horses generally buck at particular times or in particular circumstances". If there is evidence, as here, of a particular circumstance giving rise to the relevant characteristic, then knowledge of that characteristic (in the sense described above) must be established.

45.
By contrast, the effect of the Appellant's submissions, if correct, would be striking. As Mr Mooney fairly accepted, the keeper of any horse that reared and caused damage would be liable under s. 2(2). He pointed to the fact that many keepers would be able to take advantage of the volenti defence under s. 5(2) of the Act; but the consequence remains startling.

46.
I turn then to the Judge's finding of knowledge on the facts, an issue with which the Judge dealt only very briefly. It was common ground that the Appellant's knowledge fell to be imputed to the Respondent, as her employer at the time.

47.
As set out above, the Judge referred to the agreed equine expert evidence; both experts stated that they had not known catastrophic internal injury to be the cause of a horse rearing, though it was "in theory" possible that it might be the cause. The Judge was entitled to reach the conclusion that the existence of what was only a theoretical possibility did not make out the necessary finding of knowledge.

48.
I have some sympathy for the Appellant's criticism of the Judge's failure to address expressly the factual (as opposed to expert) evidence on knowledge. However, that evidence included the Respondent's oral evidence that he had no professional experience of a horse rearing when in pain, and it was not put to him that he knew that a horse could rear when suffering a catastrophic injury such as a heart attack. Further, in her first statement the Appellant stated:

“I would be surprised if it was a heart attack because my experience is that when that happens a horse would typically collapse. At least I have not seen or heard of a horse rearing because of a heart attack.”

And in her second statement:

“…it seems obvious to me that what he was doing was napping, for whatever reason. To me, riding him, the rear was connected with this napping behaviour and, it just didn’t feel like it was connected with something different like a new and sudden shock of pain.”

49.
Looking at the evidence in the round, there is no proper basis for appellate interference with what was a finding of fact made by the Judge which he was entitled to make, not only by reference to the expert evidence upon which he relied but also the witness evidence of, amongst others, the Respondent and the Appellant themselves.

The Appellant’s alternative contentions

50.
As set out above, at the oral hearing the Appellant advanced various further or alternative contentions arising out of a suggested interpretation of the Judge’s findings on causation, namely;

i)
That the Judge in fact found that the cause of the rearing was disobedience, such as to fall within the concession made for the Respondent; alternatively

ii)
That the Judge in fact found that the cause of the rearing was panic, alternatively pain.

On any of these scenarios, the evidence is said to have established the necessary knowledge on the part of the Respondent.

51.
As for disobedience, the Appellant relied on the Judge’s description of the accident at [21] of the judgment, where the Judge described the horse as stopping, stepping back or sideways but not going forward, despite encouragement from the Appellant – literal disobedience. But it is abundantly clear that the Judge did not find that the horse reared out of disobedience, literal or wilful. He expressly rejected that submission. Having referred to the two possible causes, namely disobedience and internal injury, he stated at [46] of the judgment:

“…In my view the more probable reason was that Tommy suffered some catastrophic internal, probably cardiovascular, failure which did not cause an immediate collapse but was preceded by sufficient pain or discomfort to cause him to stop and then rear. I am supported in this by both veterinary experts who accept this as a plausible explanation as well as by the reaction of witnesses at the scene who have had experience of horses which died of heart failure…”

and later at [76] of the judgment:

“However, I have found that this was more than simply disobedience for some unknown reason: the horse was probably reacting to a catastrophic internal injury.”;

and at [77]:

“…the veterinary experts acknowledged that a horse might rear in response to a catastrophic internal injury…”

52.
As for panic or pain, reliance is placed on [29] and [31] of the judgment; however, in these paragraphs the Judge was simply summarising the parties’ respective contentions on causation (and by reference to the Appellants’ characterisation and not that of the Respondent). His clear findings that the circumstance giving rise to the rearing was a catastrophic internal injury are to be found elsewhere, in particular again at [46], [71], [76] and [77].

53.
It is therefore entirely unrealistic to suggest that the Judge found anything other than that the cause of the horse’s rearing (or more accurately the relevant circumstance for s. 2(2) purposes), was a catastrophic internal injury (as opposed to disobedience, panic or pain). To put it another way, disobedience, panic or pain were at most reactions to the trigger event, namely the internal catastrophe. I do not in these circumstances propose to address further the submissions for the Appellant that are contingent on a finding that the relevant circumstance was either disobedience, panic or pain.

Conclusion

54.
For these reasons, I would dismiss the appeal.

55.
This outcome does not in some way represent a slippery slope that deprives the Act of its intended force. Specifically, it goes nowhere near requiring a claimant to establish negligence (or some other fault) in order to create liability under s. 2(2). Rather, it strikes a balance between giving claimants the right to a remedy without establishing any fault on the part of the keeper whilst at the same time ensuring that the keeper will not be liable without knowledge of the particular times or circumstances in which the relevant characteristic under s. 2(2)(b) arises.

Lord Justice William Davis :

56.
I agree.

Lady Justice Macur :

57.
I also agree.