

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mayor's and City of London County Court
His Hon. Judge Birtles**

Royal Courts of Justice
Strand, London, WC2A 2LL

30/10/2008

Before:

**LORD JUSTICE TUCKEY
LADY JUSTICE SMITH
and
LORD JUSTICE ETHERTON**

Between:

MARIAN FREEMAN	Appellant
- and -	
HIGHER PARK FARM	Respondent

**Grahame Aldous QC, Giles Mooney (instructed by Russell Jones & Walker) for the Appellant
David Westcott QC (instructed by Robertsons) for the Respondent
Hearing dates : 21st October 2008**

Lord Justice Etherton :

1. On 12 December 2004, on Chobham Common, the Appellant fell from a horse supplied by the Respondent on a hack organised by the Respondent. She fell when the horse gave two or three large bucks as it was beginning to canter. As a result she suffered a head injury, a fractured clavicle, and soft tissue injury to her left hip.
2. She brought these proceedings against the Respondent claiming damages on the ground that the Respondent was strictly liable for the accident under s.2(2) of the Animals Act 1971 ("the 1971 Act") and for common law negligence.
3. Following a trial over two days in the Mayor's and City of London Court His Honour Judge Birtles dismissed the claim on 8 February 2008 in a full and careful reserved judgment. The Appellant appeals the Judge's decision so far as it relates to liability under the 1971 Act. There is no appeal from the dismissal of the claim in negligence.

The facts

4. The Judge formed the view, for the reasons he set out in his judgment, that, where the evidence of the Appellant conflicted with that of the Respondent's witnesses, he preferred the evidence of the Respondent's witnesses. The following facts are taken from the Judge's judgment.
5. The Appellant was 50 at the date of the accident, and has been involved in riding horses since approximately 12 years of age. She owned a horse for 15 years, which died in October 2006. She rode fairly regularly.
6. The Respondent had stables at Higher Park Farm Equestrian Centre, Halebourne Lane, Chobham, Surrey. The proprietor was Mrs Kate Matthews. At the time of the trial, the Respondent had 35 horses and employed 5 full-time instructors and 17 part-time freelance instructors. It taught adults and children and escorted hacks from its premises. One of the most popular hacks was to Chobham Common. There was no evidence that this position was materially different in December 2004.
7. Prior to 20 November 2004 the Appellant had been riding at stables other than the Respondent's. She wanted to change. On that date she went with her friend, Mrs Catherine Duggan, to the Respondent's stables. She was assessed there for her riding ability. The assessment was by means of a one hour ride, which including walking, trotting, and a canter. The Appellant rode a horse called Shamrock, which was quite lively and was only hacked out by experienced riders. Miss Ella Roberts, who conducted the assessment, concluded that the Appellant was a good and experienced rider. The Appellant said that she and her friend were experienced, and were looking for an exciting ride with forward going horses.
8. The Appellant and Mrs Duggan returned on 12 December 2004 for a two and a half hour hack on Chobham Common. Mrs Matthews allocated the Appellant a horse called Patty, which was a 15.3 hands high, 7 year old chestnut mare. She had been in the Respondent's stables since the summer. Mrs Matthews said in her witness statement:

"I would describe Patty as a lively forward going horse who occasionally bucks when going to canter but not in a dangerous fashion. Any experienced confident rider had no problems with this."
9. Mrs. Matthews helped the Appellant to mount Patty, advised her that Patty might buck and was relatively inexperienced and a little green. Mrs. Matthews told her that there were other horses available, but the Appellant said that she was entirely happy to ride Patty. In cross-examination Mrs Matthews said that she told the Appellant that Patty was "a young, forward, lovely ride, can be exuberant, can give a little buck".
10. Evidence was given, on behalf of the Respondent, by Miss Avril Turner, who is a solicitor, had been riding for many years and escorted hacks for the Respondent. She escorted the hack on this occasion. She described Patty as "a chestnut mare who is quite lively. She is an exciting ride." Miss Turner had not ridden her, but she had escorted her previously. She did not regard her as a dangerous horse. Her evidence was that Patty had a habit of bucking when going into canter, but previously this had never been a cause of a problem or was dangerous.
11. In her first witness statement, Miss Turner gave the following evidence. When they reached the Common, Miss Turner asked the riders if they were ready to canter. Everybody said they were. They walked and trotted. As they were about to go into a canter, Patty put in a large buck. Miss Turner asked the Appellant if she was okay. The Appellant said that she was, and that she was not worried. Miss Turner then asked the ride to walk and trot on. She then suggested again that they attempt to go into a canter, but only after asking the Appellant specifically if she wanted to canter again and to come up beside her rather than being towards the rear of the ride. As they

were about to set off again into canter, Patty gave two or three large bucks, and the Appellant fell off. Miss Turner said the horse just seemed to be particularly excited that day.

12. In her second witness statement Miss Turner said that she chatted with the Appellant on the hack, and it was then that the Appellant indicated to her that she was experienced and very knowledgeable about horses. At no time did the Appellant say she had concerns about Patty. Miss Turner said that she specifically asked the Appellant whether she had any problems with Patty upon reaching the Common and prior to cantering, and the Appellant said she had no problems or concerns. Miss Turner said that, when Patty bucked on the first canter, she immediately stopped the ride. She asked the Appellant if she was all right, and the Appellant said she was and that she was not worried. Miss Turner said that, had the Appellant been concerned, Miss Turner would have continued the ride at walk and trot only, or possibly could have swapped her over onto one of the horses that the men were riding, as they all loved riding Patty. She said they walked on for some time, and she then made sure all the customers were ready and wishing to canter again and, specifically bearing in mind Patty had bucked on the previous canter, asked the Appellant if she wished to continue to canter again.
13. In her oral evidence in chief Miss Turner said that, following the first buck, she checked with the Appellant if she was okay. The Appellant was not nervous and she said "I'm fine", and she confirmed that she wished to continue.
14. In cross-examination, Miss Turner said that there was no need to make an assessment of the horse as the Appellant told her she was fine and she wanted to continue. She said that, had the Respondent shown any concern at all, she would have taken the ride home.
15. The Judge accepted Miss Turner's evidence, which, he said, was to some extent corroborated by Mr Andrew Swaffield. He rode about once a week and had done so for about one year. His evidence was that he regarded himself as "a novice/intermediate" rider. Once a month he would go on a hack, which would include walk, trot and canter. He said he had always found Miss Turner as an escort to be very competent and cautious. He said he had ridden Patty and that she "can be quite lively on the Common". He said that, although she had bucked with him, that had not been serious and he had not fallen off. He had not found Patty to be too strong. Indeed, he was impressed with her, and at one time was thinking of purchasing her. He said he believed Patty to be a suitable horse for someone of reasonable riding experience and competency. He said that the Appellant and Mrs Duggan appeared to him to be experts "and a cut above the usual riders who go out". He said that, following the first "big buck" of Patty, Miss Turner immediately stopped the ride, and asked the Appellant if she was okay, and whether she wanted to stop and swap horses. He said that Miss Turner was concerned, but the Appellant was quite insistent that she remain on Patty. He said that, as the horses went into a canter on the second occasion "Patty viciously bucked", and on that occasion the Appellant fell off. He repeated the substance of that evidence in his cross-examination.
16. After falling from the horse the Appellant was taken by ambulance to St Peter's Hospital in Chertsey with the injuries I have described.

The 1971 Act

17. The background to the 1971 Act was explained in some detail in the speeches in *Mirvahedy v Henley* [2003] UKHL 16. It arose out of the report of the Law Commission on Civil Liability for Animals (1967) (Law Com No. 13). It was intended to simplify the common law concerning liability for animals, which was notoriously intricate and complicated. Sections 1 to 6 of the 1971 Act made new provision regarding strict liability for damage by animals. They replace the common law: s1(1). Section 2 of the 1971 Act, with which this appeal is concerned, contains provisions relating to liability for damage done by dangerous animals. In the course of its passage through Parliament, the original wording in the Law Commission draft Bill was changed. In

particular, s.2(2), which is central to this appeal, was significantly altered. Its resulting lack of clarity has been much criticised.

18. Section 2 of the 1971 Act places all animals into one or other of two categories, according to their species. Animals either belong to a dangerous species, or they do not. Liability under s. 2 depends upon which of the two categories applies.
19. A dangerous species of animal is one which meets the two requirements in s.6(2). These are that (a) the species is not commonly domesticated in the British Islands, and (b) fully grown animals of the species 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) imposes upon the keeper of an animal of a dangerous species strict liability for any damage caused by the animal.
20. A horse like Patty does not satisfy the requirements in s.6(2) for a dangerous species because it is a domesticated animal. Liability for such an animal turns on the provisions of section 2(2), which are as follow, so far as relevant:

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

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

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

c) those characteristics were known to that keeper or were at any time known to a person who at the time had charge of the animal as that keeper’s servant ...”

21. Various points relevant to this appeal are immediately apparent from the wording of s.2(2). First, the requirements of s.2(2)(a) reflect those in s.6(2)(b) in relation to a dangerous species. It identifies a dangerous animal by reference to whether the animal in question was, unless restrained, likely to cause the “kind” of damage actually caused, or whether that “kind” of damage, if caused by the animal in question, was likely to be severe. Second, whereas s.2(2)(a) directs attention to the actual animal which has caused the damage, section 2(2)(b) requires identifying characteristics of the species of animal of which the actual animal is one.
22. Accordingly, in the case of a domesticated animal, the statutory process requires (1) identification of the kind of damage actually caused by the actual animal involved; (2) consideration of whether that kind of damage was likely to be caused by that particular animal, unless restrained, or, if caused, was likely to be severe; and (3) consideration of whether the likelihood of such damage or its severity was due to the deviation of the animal from the normal characteristics of others in the same species or to characteristics which it shared with others of the same species but are normally found in the species only at particular times or in particular circumstances. In other words, even if the animal which caused the damage was dangerous due to the likelihood of such damage or its severity, it will only give rise to strict liability under the 1971 Act if, in addition, its characteristic giving rise to that likelihood deviates from the norm of the species or if the species itself has that characteristic at, and only at, particular times and in particular circumstances.
23. Stripped of its rather complex legal framework, the policy underlying s.2(2), as clarified by case law, is straightforward. 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 that characteristic at particular times or in particular circumstances, and the damage was in fact caused at such a time or in such circumstances.

24. Section 5(2) of the 1971 Act provides exemptions from liability under s.2. It provides that a person is not liable for any damage under s.2 “suffered by a person who has voluntarily accepted the risk thereof”.

The Judge’s reasoning

25. The Judge held that the first part of s.2(2)(a) was not satisfied because there was no evidence before him either that Patty had ever bucked in the manner which she did on 12 December 2004 or that anyone had ever fallen off Patty before. He therefore found that it was not reasonably to be expected that Patty would buck in that serious way on 12 December 2004 causing the Appellant to fall off.
26. He held that the second part of s. 2(2)(a) was not satisfied because, given the history of Patty’s bucking, it could not reasonably be expected that Patty would buck in such a way that the Appellant would fall and suffer the personal injury that she did. He relied on two matters in reaching that conclusion. Prior to the hack on 12 December 2004 there had only been minor bucking by Patty. Further, the Appellant had not fallen off on the first occasion on 12 December 2004 when Patty bucked.
27. As regards s. 2(2)(b), the Judge considered that the relevant characteristic was “occasional bucking when going into a canter”. He commented that he had not heard expert evidence, and that there was little, if any, questioning of the witnesses about this particular characteristic of horses in general. He noted that, in cross-examination, Miss Turner had said: “Lots of horses buck”, and that there was no direct challenge to that assertion. He concluded that, as regards the first limb of s.2(2)(b), he could not find on a balance of probabilities, or indeed even a lower test, that injury was likely because of a characteristic of bucking which is not normally found in horses other than Patty.
28. He concluded that the second limb of s 2(2)(b) was not satisfied because there was no evidence that Patty had previously bucked in such a way as to cause the rider to fall off or suffer personal injury either generally while being ridden or while going into a canter. He said that, on his findings of fact, this was a genuine accident, and the first time that Patty had behaved in this way.
29. The Judge further held that s.2(2)(c) was not satisfied because the characteristic of bucking violently so as to be likely to throw an experienced rider was not known to either Mrs Matthews or Miss Turner, and there was no evidence that any employee or agent of the Respondent had such knowledge or could be fixed with it.
30. The Judge held that, in any event, the Respondent was excepted from liability under s.2 by s.5(2) since the Respondent voluntarily accepted the risk of carrying on with the ride and being thrown by Patty.
31. Other than in relation to the first part of s.2(2)(a), the Appellant contends that the Judge was wrong at every stage of his analysis.

The Appeal

32. In my judgment, the Judge approached the second part of s.2(2)(a) from the wrong starting point. He concentrated on the likelihood that on 12 December 2006 Patty would buck in such a way that the Appellant would fall off. That enquiry, however, is relevant to the first part of section 2(2)(a). The second part of section 2(2)(a) is concerned with the likely severity of the damage of the kind

actually suffered, should that kind of damage be caused. In the present case, the kind of damage suffered was physical injury. The relevant question, for the second part of section 2(2)(a) is whether, if Patty caused physical injury to be suffered, such damage was likely to be severe.

33. It is not in dispute that “likely” in s.2(2)(b) bears its natural meaning of “reasonably to be expected”: *Mirvahedy* at paras [95] to [97].
34. Mr Westcott submitted that it was necessary for the Appellant to adduce evidence that physical injury, if caused by Patty, was likely to be severe, but there was none other than the actual incident involving the Appellant. He said that the appropriate evidence would have been evidence of injuries throughout the country sustained by riders who fell off horses, with an analysis of the range and degree of severity of the injuries sustained. That is quite unrealistic and unnecessary. The evidence was that, if physical injury was caused by Patty, it would have been caused when she bucked when beginning to canter. There was no evidence of the likelihood of physical injury at any other time or in any other circumstances. It is obvious that, if a horse bucks on beginning to canter so that the rider falls off, it is reasonably to be expected that severe injury will result. In *Welsh v Stokes* [2007] EWCA Civ 796 at para [40] Dyson LJ, with whom the other members of the Court of Appeal agreed, regarded this as self-evident in the case of a rider falling from a horse who rears. I see no reason why the same approach should not be appropriate in the case of a rider falling from a bucking horse about to canter.
35. Turning to s.2(2)(b), the Judge’s approach to that sub-section was not, in my judgment, correct. He was, nevertheless, entitled to conclude that the Appellant had not established the requirements in s.2(2)(b). In this connection, it is important to bear in mind that, as I have said earlier, s.2(2)(b) is focused on the characteristics of the species of the animal in question. In the present case, there was no expert evidence of any kind, and the Judge observed that there was little, if any, questioning of the witnesses about the bucking of horses in general when going into a canter.
36. The relevant characteristic, for the purposes of the first limb of s.2(2)(b), was bucking. It was not bucking when going into a canter since considerations of time and circumstance are relevant elements of the second, alternative, limb of s.2(2)(b). Accordingly, the first limb of s.2(2)(b) required the Judge to consider whether bucking is not normally found in horses generally.
37. In *Welsh* Dyson LJ explained the meaning of “normally in s.2(2)(b) as follows:

“46: It seems to me that the core meaning of “normal is “conforming to type”. If a characteristic of an animal is usual, then it will certainly be normal. The best evidence that a characteristic conforms to the type of animals of a species is that the characteristic is usually found in those animals.

47: I can find nothing in the context of subsection (2)(b) to suggest that Parliament did not intend “normally” to bear this core meaning. It is difficult to see why Parliament should have intended to exclude from the ambit of subsection (2)(b) cases where the relevant characteristic is natural, although unusual, in the animal which has caused the damage. There is no need for such a narrow interpretation because a claim will not succeed unless the knowledge requirement in para (c) is also satisfied...”
38. The Judge, in reaching his conclusion that the first limb of s.2(2)(b) was not satisfied in the present case, relied on the evidence of Miss Turner that “Lots of horses buck”.
39. The Appellant says that the Judge would have reached the opposite conclusion if he had taken proper account of the evidence of Mrs Matthews, in cross-examination, that bucking in a horse is an undesirable “vice” and that she would never buy or have a horse for the riding school that bucked, and the evidence of the Appellant that in many years of attending riding schools she had never ridden a horse that had bucked.

40. In my judgment, in the light of Miss Turner's evidence and the paucity of any other evidence directly on the point, it is impossible to say that the Judge was not entitled to find that the Appellant failed to establish that bucking is not a normal characteristic of horses generally.
41. In concluding that the second limb of s.2(2)(b) was also not satisfied, the Judge relied on the fact that, prior to 12 December 2004, Patty had never bucked in such a way as to cause the rider to fall off or suffer personal injury. The relevant question for the second limb of s.2(2)(b), however, was whether it is normal for horses generally to buck at particular times and in particular circumstances, including when beginning to canter. There was simply no evidence on this point.
42. Mr Aldous submitted that, if the characteristic of bucking, including bucking when beginning to canter, is normally found in horses generally, then inevitably the second limb of s.2(2)(b) is satisfied since such a characteristic is only found at particular times or in particular circumstances. He submitted that "particular" in the context means anything that is not continuous.
43. In my judgment, that submission plainly fails. The characteristic which falls within the second limb of s.2(2)(b) must be one that is normally found in animals of the same species but only at particular times or in particular circumstances. The gloss which Mr Aldous seeks to put on the word "particular" would reduce the first limb of s.2(2)(b) to characteristics which are continuous and always present. It would eliminate from normal characteristics in the first limb of s.2(2)(b) any intermittent activity of any kind. It is clear, however, from the Law Commission report and the decided cases that this is not the correct interpretation and that the words "at particular times or in particular circumstances" in the second limb of s.2(2)(b) denote times or circumstances which can be described and predicted.
44. A typical example discussed in the Law Commission report (at para. 18(ii)) and the decided cases is the bitch which acts fiercely and bites in defence of her pups. In the summary of its proposals the Law Commission referred in its report (at para. 91(iv)) to characteristics "shared by other animals within the species, whether at a particular age, at certain times of the year or in certain conditions". In *Welsh* the evidence identified the "particular circumstances" when a horse would rear as occasions when the horse did not want to go forward and was being ridden by a person who was unable to handle the horse and give it confidence in the situation: see paras [39], [59] and [60]. In *Clark v Bowlt* [2006] EWCA Civ 978 at para. [13] Lord Phillips said that he doubted whether a propensity occasionally to move otherwise than as directed can be described as a characteristic of a horse, for the purposes of s. 2(2)(b), but, if it can, he said that the trial judge had failed to identify either the particular times or the particular circumstances when this characteristic manifested itself. In *Mirvahedy* at para. [139] Lord Walker said that it must be right to suggest that predictability (of how animals in the same species react to a particular stimulus or situation) is one of the indicia of characteristic behaviour which falls within the second limb of s. 2(2)(b). As Lord Nicholls observed in *Mirvahedy* at para. [43] "a normal but dangerous characteristic of a species will usually be identifiable by reference to particular times or particular circumstances" [my emphasis]. That must, however, be a matter of evidence in every case. In the present case, there was no evidence whatever that horses generally buck at particular times or in particular circumstances.
45. For those reasons, the Judge, in my judgment, cannot be faulted for concluding that the Appellant had not discharged the burden of establishing that the second limb of s.2(2)(b) was satisfied in the present case.
46. In these circumstances, the requirements of s. 2(2)(c) are irrelevant.
47. In any event, even if I am wrong on the application of s.2(2) in the present case, the Judge correctly concluded that the Respondent was excepted from liability under s.5(2) of the 1971 Act by the voluntary assumption of risk by the Appellant.

48. The words of s.5(2) are simple English, and must be given their ordinary meaning, and not be complicated by fine distinctions or by reference to the old common law doctrine of volenti: *Cummings v Granger* [1977] QB 397, 408 (Ormrod LJ). What must be proved in order to show that somebody has voluntarily accepted the risk is that (1) they fully appreciated the risk, and (2) they exposed themselves to it: *Cummings* at p. 410 (Bridge LJ).
49. The Judge set out his reasoning and conclusion on this issue as follows.
- “In my judgment the Claimant voluntarily accepted the risk of carrying on with the ride and being thrown from Patty for these reasons: (a) she was made aware of the possibility of Patty bucking by Mrs Mathews at the stable. I reject her evidence to the contrary; (b) when after the first big buck she was spoken to by Miss Turner she was asked by Miss Turner if she was alright and wished to continue. To each of those questions she said ‘yes’. I reject her evidence to the contrary; (c) later Miss Turner asked each rider including the Claimant whether or not they agreed to canter a second time. Each including the Claimant said yes. That was said in the full knowledge (a) of what she had been told by Mrs Mathews in the stable before setting out and (b) what had occurred a matter of minutes previously. I reject the Claimant’s evidence and that of Mrs Duggan that in some way the Claimant was forced to carry on riding after the first big buck.
50. Mr Aldous submitted that the Judge wrongly failed to direct his attention to the requirement in s.5(2) of a voluntary assumption of the risk of damage. He said that the Appellant may have made an assumption that she could cope with Patty’s bucking, but that was not a voluntary assumption that she could not cope and might be thrown off and be injured.
51. There is no substance in that criticism. The Appellant was an experienced rider, and wanted an exciting ride with a forward going horse. She was aware of Patty’s general predisposition to bucking when beginning to canter, not only from what she had been told in advance at the Respondent’s stables, but more particularly from experiencing the first buck on the ride. That was a significant buck. She was asked whether she wished to continue with the ride on Patty, and she was then asked whether she wished to attempt to canter again. She gave a positive answer to both questions. The obvious purpose of the enquiries was to ascertain whether the Appellant wished to continue with the ride and to canter again in the light of any concerns she might have that she might not be able to control and stay on Patty if Patty bucked again. The Appellant voluntarily assumed that risk and its consequences.
52. For all those reasons I would dismiss the Appeal.

Lady Justice Smith

53. I agree.

Lord Justice Tuckey

54. I also agree.