

**IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MIDDLESBROUGH COUNTY COURT
(MR RECORDER BULLOCK)**

Royal Courts of Justice
Strand
London, WC2

9 July 2004

Before:

**LORD JUSTICE POTTER
LORD JUSTICE RIX
MR JUSTICE MUNBY**

ALEC NORRIS WILSON

Appellant

-v-

PETER DONALDSON

Respondent

**MR BEN BROWNE QC AND MR MARK GRENYER (instructed by Messrs Langleys) appeared on
behalf of the Appellant**

**MR MICHAEL REDFERN QC AND MR JEREMY GREENFIELD (instructed by Messrs Fletchers)
appeared on behalf of the Respondent**

LORD JUSTICE POTTER:

Introduction

1. This is an appeal by the defendant ("Mr Wilson"), who is a farmer, from the decision of Mr Recorder Bullock sitting in the Middlesbrough County Court on 16 October 2003, when he found Mr Wilson liable to the claimant in respect of injuries suffered in a road accident on the evening of 26 October 2000 as a result of cattle belonging to Mr Wilson having strayed onto the B1257 road near Middlesbrough.

The facts

2. The cattle had been installed in a field ("the upper field") on Mr Wilson's farm, Mounthouse Farm, which did not abut the B1257. It was separated from it by a lower field belonging to a farm called Home Farm. Mr Wilson's farm is well maintained. The upper field was separated from the lower

field by secure post and wire fencing, access being gained by a wide five-bar gate of familiar pattern, hanging by hinges from a solid wooden post and able to be opened and afterwards pushed shut against another post at its free end. The method of securing the gate was by means of a hook and chain, one end of the chain being attached to the post. Its free end, with the hook attached, was able to be threaded round the leading edge of the gate when shut and secured by the hook to a metal eye on the gate post. A heavily used public footpath runs through and along one side of the upper field, through the gate and downhill through the lower field to the road.

3. Home Farm is in a neglected state. Its farm house is unoccupied. It has not been farmed for some five or six years. Its gates are dilapidated and left open, and are largely incapable of being shut. All this was known to Mr Wilson and his son, who were familiar with the fields and tracks.
4. At the trial it was common ground that the only way that the cattle could have gone down onto the B1257 was by leaving the upper field through its gate, left open by walkers, and going downhill into Home Farm and thence along an unfenced track onto the B1257.
5. The evidence of Mr Wilson at trial was that he had never experienced his cattle trespassing onto the road before in the 36 years he had farmed at Mounthouse Farm. When, six or seven years earlier, the old gate separating the two fields required replacement, he had, as was the practice of farmers in the area, simply requested the National Park Authority to renew the gate, which was done without charge. The nature of the gate was not discussed with the National Park Authority and he made no requirements in relation to it, or how it should be secured. The public footpath was regularly used by walkers who passed through the gate. There was no alternative or additional means of access such as a kissing-gate or stile nearby which would enable the gate to be locked by a padlock or made secure by other means. If opened, it had to be returned to its position and fastened manually, ie it was not hung or sprung so as to be self-closing. There was no warning or reminder to walkers in the form of a "Please Shut the Gate" notice on or adjacent to the gate.
6. In these circumstances the judge found that there was a foreseeable risk that his gate would at some time be left open by a careless walker, enabling the cattle to leave his field and make their way to the road. The judge's finding at paragraph 9 of his judgment was as follows:

"It seems to me, on any analysis, the passing of this footpath through this gate in the upper field clearly has with it a foreseeable risk that the gate will at some time not be shut by walkers and, following from that, it is clearly a foreseeable risk that the cattle, having left the upper field, will inevitably go back down to Home Farm and there is clearly an unfenced situation at Home Farm which is known to the defendant. It was certainly known to the defendant's son who had driven up the track and through Home Farm farmyard that very day of the accident and I do find, I have to find, that Mr Alec Wilson would also be aware of the dilapidated conditions at Home Farm and the fact that there was nothing and no barrier between the lower field and the exit onto the main road. Put another way, it is entirely foreseeable, (1) that this gate could be left open, (2) having been left open, the cattle would finish up on the highway and, that being the case, there is a foreseeable risk that the exact sort of injury that took place and the exact accident that took place would happen and that is in fact what did happen."

7. The judge encapsulated the allegations of negligence as three-fold. First, that Mr Wilson had failed at any time before the claimant's accident to make any adequate risk assessment to ensure that the danger caused by inadequate fencing would be remedied before the claimant's accident. Second, that he failed to fit the upper gate with a self-closing mechanism when he knew or ought to have known that the lower field was not adequately fenced off from the road. Third, that he caused or

permitted the upper gate to be secured solely by means of a hook and chain when he knew or ought to have known that the gate might be left open, thereby allowing cattle into the lower field.

8. In relation to the assessment of risk, the judge said this at paragraph 13 of his judgment:

" ... it may be a feature of this case that makes it somewhat different to other farm situations, that of course the farmers do not live anywhere near this particular field. It is not a field that is under their constant supervision. It is not a field that leads into a farmyard that is occupied at all. It is a fairly remote field that is not subject to anything other than specific visits and in my view all this militates to the situation that more should have been done with this gate than was done. Simply putting the onus or leaving it all to the National Park Authority was not sufficient because I do not think that they in turn gave sufficient thought to this. There is a known risk. There is a foreseeable risk. There is an actual event that arises from everything that is foreseeable and other things could have been done, in my view, as regards to this gate."

9. As to the failure to fit the gate with a self-closing mechanism and the simple reliance upon a hook and chain, the judge said this at paragraph 14 of his judgment:

"First of all I have said there are no warning signs. There was no attempt to impress upon walkers the necessity of this particular gate being closed. A stile could have been used. Further down the footpath there is a stile leading onto the main road. So it is not an unusual feature of this area. It could have been a stile rather than this particular gate. There has been talk of self-closing gates. They could have been installed with very little cost - somewhere between £30 and £40. And I agree with the claimant's submission that you cannot say, well, in the course of time these self-closing gates would not work properly. That is an issue of maintenance. It is not an issue of principle as to whether or not they should be installed. There is a catalogue of gates at the back of the trial bundle. There are kissing-gates where cattle cannot get through which would be a possibility and the plan also shows in the area, an actual cattle grid itself which of course is an absolute bar to cattle. There are lots of things that could have been considered here and lots more could have been done. In my view the defendant was negligent and the claimant succeeds on liability in this matter."

10. The passages of the judgment quoted demonstrate that the findings of the judge as to foreseeability were clear and particular to the case. Permission to appeal was initially refused by Pill LJ, who observed:

"The Recorder rightly considered the facts and the circumstances of the particular case. He was entitled to conclude that, in the particular circumstances, the defendant was negligent."

11. Upon oral application, permission to appeal was granted, somewhat reluctantly, the court being persuaded by Mr Grenyer, for Mr Wilson, that the judgment might have wide ramifications for farmers up and down the land, the implication being that, in any case where it is foreseeable to a farmer that an animal of his may get out onto the road, he must have a fail-safe system, ie some sort of automatic closure system upon any farm gate through which access to the road may be gained.
12. Mr Browne QC, who now leads Mr Grenyer on this appeal, argues essentially that, on the facts of this case, the judge imposed a standard of foreseeability and/or a duty of care which was a counsel of perfection rather than one based on reasonable foresight. He relies upon the fact that Mr Wilson had farmed the land for 36 years and had never encountered problems involving his cattle straying from the field before. The former gate, which had a similar closing mechanism, had been replaced by the National Parks Authority in 1998 without warning or query. The defendant and his son had

both checked that the cattle were in the field on the day in question, the second check being carried out between 5.30 and 6.00pm when all was in order. The apparent action of walkers in leaving the gate open between that time and the time of the accident was an unprecedented occurrence, not reasonably foreseeable by Mr Wilson.

13. Mr Browne makes the following additional points on the state of the evidence. He submits that, (1) there was no evidence to show that walkers who followed footpaths such as that upon the defendant's farm habitually, or even occasionally, leave gates open; (2) there was no expert or other evidence to show that farmers with footpaths crossing their land usually take precautions other than the installation of a gate with a visible and properly maintained securing device such as the hook-and-eye method used in this case; (3) there was no evidence to show that the National Park Authority recommended to the defendant that any additional precautions should be taken; (4) in the light of the history and distance of the gate from the road it was inappropriate for the Recorder to infer from the evidence that a reasonably careful farmer would have taken additional precautions. In relation to the additional or alternative measures considered by the judge, Mr Browne submits as follows:

14. (i) In relation to a "Please Close the Gate" sign, in the light of the general currency of the Country Code and the level of knowledge of the modern hiker, such a sign is unnecessary. Alternatively, it is unlikely to alter the behaviour of a careless walker.

15. (ii) In relation to stiles, on the evidence, a stile is not a favoured solution in the North York National Park, whose Guide provides in respect of the provision and maintenance of gates and stiles:

"Gates and Stiles are the owner or occupier's responsibility, but the National Park Authority's Area Ranger can assist by providing materials and installing furniture. Access for the less able is increasingly important, so we aim to improve the quality of the public path network by removing barriers wherever possible. Replacing a stile with a gate will make it easier for a growing number of people with knee or hip problems to enjoy a walk."

Mr Browne also submits that, even had a stile been provided, it was wrong to infer that a walker would have used it as opposed to the gate.

16. (iii) So far as the installation of a self-closing gate was concerned, Mr Browne relies on the assertion by Mr Wilson in evidence, uncontradicted by any other witness, that self-closing gates, upon moving to the closed position, often do not secure themselves without manual fastening, so that livestock are able to shove them open.

17. (iv) So far as the installation of a kissing-gate was concerned, Mr Browne complains that no costings were produced for the installation of such a gate and that, in any event, it was wrong to infer that a walker would use a kissing-gate as opposed to the ordinary field gate which would have been alongside.

18. (v) Finally, so far as the installation of a cattle grid was concerned, he complains that, again, no costings were produced and there was no evidence to show that cattle grids are habitually installed between ordinary fields. Mr Browne submits that there was no evidence upon which the Recorder was entitled to conclude that the installation of the cattle grid was appropriate or that it would have avoided the escape of the cattle.

19. In response to the points made by Mr Browne, Mr Michael Redfern QC, for the claimant, points out in his skeleton argument that the absence of cattle straying onto the road in 36 years of farming cannot in principle be decisive as to liability in a case where, on the contemporary facts, foreseeability is clearly made out, as the judge found it to be. The circumstances current at the time of the accident and known to Mr Wilson, were those of dilapidation in the state of the gates on Home Farm, a situation which to the knowledge of Mr Wilson had come about in comparatively recent times, so that Mr Wilson's gate was one which constituted the last line of defence, as it were, between Mr Wilson's cattle and the road. If his gate was left open, then there was nothing to prevent the cattle straying onto the road.
20. As to the points made by Mr Browne at paragraph 14 above, (1) having heard evidence that the gate was heavily used by walkers, it was scarcely necessary for the Recorder to have evidence as to their proclivities to conclude that, at some stage, the gate was likely to be left open.
21. (2) In the face of the obvious danger if cattle were to escape onto the road, it was not necessary for the claimant to call expert evidence that farmers with footpaths crossing their land usually take precautions additional to those of the defendant; rather was it for the defendant to produce expert evidence of general practice justifying the absence of additional precautions.
22. (3) It was never established that Mr Wilson asked, let alone relied on, the National Park Authority for advice as to the appropriate method of securing his gate, or that he ever received any such advice. Further, the passage already quoted from the North York Moors National Park Advice on Rights of Way made clear that the provision and maintenance of gates and stiles are the owner's or occupier's responsibility, the authority assisting by providing materials and installing furniture on request.
23. As to the question of additional or alternative measures (see paragraphs 15-19 above), Mr Redfern submits as follows:
24. (i) It is simply unrealistic to assume that all users of rights of way are experienced hikers with a sound knowledge of the Country Code. Further, it was never established that the walker or walkers guilty of leaving the gate open on the occasion in question were aware of the fact that cattle were grazing in the upper field; nor that they were aware that the cattle could stray straight onto the road beyond the lower field.
25. (ii) It was not suggested by Mr Wilson that it was not feasible for him to have kept the gate locked, with access for walkers being provided by way of an adjoining stile.
26. (iii) The Recorder obviously had in mind the evidence as to the possible difficulties in relying on a self-closing gate. However, he was entitled to hold that their successful operation was a question of maintenance.
27. (iv) The position in relation to a kissing-gate was the same as that in relation to a stile. Although no prices were adduced in evidence, the Recorder was right to suggest, without being prescriptive, that there were various alternatives, of which the use of a kissing-gate in conjunction with a locked main gate was a clear possibility. Furthermore, it appears that the National Parks Authority were willing without charge to provide appropriate forms of gate along the rights of way if requested to do so.

28. (v) Finally, it was the evidence of the claimant that his own access to the field on its far side from the gate was via a cattle grid.
29. All these points were available to be made, and indeed were made, before the Recorder. It is plain that he was satisfied that there was a variety of alternatives, not limited to a self-closing gate (such as the installation of a kissing-gate or stile beside the stock gate), whereby the dangers of the escape of the cattle through the carelessness of a walker could have been avoided by the simple expedient of a lock and chain securing the stock gate while cattle were grazed in that field, which means beside the gate for a walker to continue along the right of way.
30. In those circumstances, I find it impossible to fault the reasoning of the judge or the conclusion to which it led. Essentially, Mr Browne has argued that the sum of the judge's reasons has led to an unjust and unrealistic result. He complains that, nationwide, it will lead to an undue burden placed upon farmers to take safety precautions on land well away from the road against the possible but unlikely carelessness of walkers. I do not agree. I say that for two particular reasons.
31. First, every case depends upon its own facts. So far as proximity to the road is concerned, it is true that Mr Wilson's land was separated from the road by another farm. In the ordinary way, that might have been expected to have its own proper system of gates and fencing to prevent livestock wandering on to the road. Had that been so, the position would have been wholly different. However, to Mr Wilson's knowledge, that was not the case. It was established by the evidence that Mr Wilson and his son were well aware of the lack of repair in the gates and fences of Home Farm, and it is apparent from the photographs before us that the view from the gate on Mr Wilson's upper field, down across Home Farm to the road, made clear the ease with which cattle, straying through the gate from Mr Wilson's land, could make their way to the road. As Mr Wilson and his son conceded in cross-examination, from the point of view of escaping cattle, the situation was essentially the same as their having a gate immediately next to the road, ie that of a farmer whose cattle were in a field adjacent to the road and able to stray directly onto it if the stock gate was not secured. The case therefore falls to be considered on that basis. It further falls to be considered on the basis that the Wilsons had to make provision appropriate to a situation where a heavily used right of way passed through their field, users of which would be obliged to open and shut the stock gate unless an alternative kissing-gate or stile was provided.
32. Despite those factors, the plain fact was that, in the absence of previous incident, the Wilsons had never focused their minds upon the danger. When, some years earlier, they had asked the National Park Authority to replace the previous gate, they made no fresh assessment of the position. It was not incumbent upon the Park Authority to give them advice as to whether to adopt a different or additional method of access for walkers in order to avoid the danger of cattle escape. Indeed, there is no evidence whether the Authority considered the position in relation to gates and fencing on Home Farm which may well have been an adequate repair at the time that the Authority were concerning themselves with the replacement gate. Nor does there appear reason to doubt that, if the position had been pointed out to the Parks Authority, it would not have provided alternative means of access and exit from the field, such as a kissing-gate or stile beside the gate so enabling it to be kept locked.
33. The second reason is this. It is not in dispute that a burden rests upon farmers who graze cattle in a field next to a road to take all reasonable precautions to prevent their escape so as to constitute a danger to road users. The ancient common law immunity in respect of animals straying onto a public highway (see *Searle v Wallbank* [1947] AC 341) has long been abolished: see the Animals Act 1971 s.8. The ordinary principles of the law of negligence apply to such a situation: see *Halsbury's Laws of England* (4th ed) Re-issue Vol 2(1) para 626.

34. In my view, in the case of a farmer whose land abuts a road is crossed by a heavily used right of way, the duty of care of the farmer extends to guarding against the carelessness of persons lawfully on his land, who may either be unaware of the Country Code, or through malice or oversight may leave open a gate situated across that right of way. Indeed, in this case the Wilsons were essentially in that position as they knew, but a walker would not have known. There is no reason to suppose that the danger of leaving the gate open on the occasion in question would have been apparent to a hiker who was unaware of the topography or the state of disrepair of Home Farm and hence that cows might go straight to the road if the gate was left open.
35. In this position, it seems to me that Mr Browne's criticisms as to the absence of any expert evidence called on behalf of the claimant as to the practice of other farmers or the expense of alternative precautions is misplaced. Upon the facts of this case, such evidence appears to me, as it appeared to the judge, to have been unnecessary. Liability was established on the basis of a common-sense consideration of the facts combined with the various admissions made by Mr Wilson and his son. If it was to be effectively contested on the basis of accepted farming practice, it was for the defendant to call expert evidence to that effect.
36. Finally, I would add that I do not regard it as a matter of great difficulty or an undue financial burden upon a farmer, upon whose farm a stock gate forms the sole barrier between his cattle and the road, to provide in respect of a busy right of way upon his land, alternative means of access, proof against cattle, but adequate to enable users of the right of way to pass, so enabling a stock gate to be secured, against the risk that a user of the right of way will leave it open, thus permitting cattle to stray untended onto the road.
37. In those circumstances, I would dismiss this appeal.
38. LORD JUSTICE RIX: I agree. In one sense this case illustrates an exercise in judgment concerning such well-known considerations as quantification of risk, of consequences of the risk materialising and of the cost of protecting against that risk materialising. In that context, for the reasons given by my Lord, Potter LJ, I can see no very good reason to differ from the judgment pronounced by the judge below in his well argued judgment.
39. However, there was also a broader approach. On the one hand, the defendant is in business as a farmer, having therefore to exercise his mind about the risks inherent in his business and the means of protecting against such risks, whether such protection is to himself, the set-up of his farm or to third parties. On the other hand, the claimant was simply driving down the public highway when he was confronted at night by the defendant's herd.
40. In a well balanced issue, where does policy and reason point? On which side should the risk of liability or of mere bad luck without legal remedy fall? On the facts of this case, I can see force in the answer that such considerations point to the liability of the farmer. Both sets of considerations in this case therefore point in the same direction.
41. For these reasons, as well as those of my Lord, I would dismiss this appeal.
42. MR JUSTICE MUNBY: I agree that this appeal should be dismissed for the reasons given by my Lord, Potter LJ. For my own part, I prefer to express no view on the additional matter raised by my Lord, Rix LJ.

Order: appeal refused.