BRIEFING

PERSONAL INJURY

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FROM *EXODUS* TO THE ANIMALS ACT 1971: HORSES, CATTLE AND DOGS

> *If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit. … But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death.*
>
> (*Exodus* c. 21: v 28 – 29: "*Divers laws and ordinances*")

Introduction

The general principles governing the liability of animal and pet owners for personal injury caused by their charges are now largely to be found in statutory, rather than scriptural, form. The Animals Act 1971 (commencement 1 October 1971) sought to rationalise the piecemeal and archaic common law rules that had previously controlled this area of the private law. However, while the law is now, essentially, statute-based, elements of the old common law rules survive in certain key respects. For example, a variety of tortious remedies remain available to Claimants in spite of the legislative framework: trespass to the person and "*ordinary*" common law negligence survived 1971. In addition, albeit outside the scope of this presentation, the modern law of strict liability for animals belonging "*to a dangerous species*", contained in the 1971 Act, itself draws heavily upon concepts known to the law before the introduction of the legislation.

It was said that, prior to 1971, "*The law of torts has grown up historically in separate compartments and … beasts have travelled in a compartment of their own.*" (***Read v J Lyons & Co*** [1947] AC 156, 182 *per* Lord Simonds (HL(E)) A sceptical reader of recent case law may question the extent to which the 1971 Act has replaced common law chaos with legislative reason. In the first edition of his seminal "*Modern Law of Animals*" (published in 1972) Sir Peter North – anticipating the effect of the 1971 Act on the development of the law – wrote this, "*The new law of animals will be a statutory framework laid upon a common law basis. Much of it is good. One can only hope that the gloomy prognostications as to other parts will be confounded by the judicial experience in administering the Animals Act 1971.*" (p. 20). Some 30 years later, Hale LJ was able to list (compendiously) the judicial disapprobation that the Act had attracted (***Mirvahedy v Henley*** [2002] QB 769, 777A – later taken to the House of Lords): "*The Court of Appeal has more than once confessed to finding section 2(2) difficult to interpret: it has been called 'very cumbrously worded' per Lord Denning MR in Cummings v Granger [1977] QB 397 , 404, "remarkably opaque" per Ormrod LJ, at p 407, 'somewhat tortuous' per Slade LJ in Curtis v Betts [1990] 1 WLR 459 , 462, 'inept' per Nourse LJ, at p 468, 'the subject of adverse comment in this court and elsewhere' per Russell LJ in the Jaundrill case, its meaning*

'elusive' per Lloyd LJ in Breeden v Lampard (unreported) 21 March 1985; Court of Appeal (Civil Division) Transcript No 1035 of 1985 and the source of 'puzzlement' per Oliver LJ in that case. It is only slight consolation that the wording which has caused so much difficulty is different from that which was originally recommended in the Law Commission's draft." When ***Mirvahedy*** reached the House of Lords, Nicholls added the following comment (in the same vein), *"… the language of section 2(2) is itself opaque. In this instance the parliamentary draftsman's zeal for brevity has led to obscurity. Over the years section 2(2) has attracted much judicial obloquy."* A few years later Jackson LJ described subection 2(2) as *"oracular and opaque"*. A few months later, Maurice Kay LJ was even more blunt: the drafting of this provision was *"grotesque"*.

This Briefing, and the webinar which it accompanies, is largely based on the legislative provision which has attracted the judicial criticism: subsection 2(2) of the 1971 Act. We have concentrated on the recent(ish) cases and have (mostly) confined ourselves to two species: horses and dogs. We will leave it to our readers to decide whether the judicial criticism is justified.

The Animals Act 1971

> *2 Liability for damage done by dangerous animals*
>
> *(1) …*
>
> *(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 the 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 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.*

The basic principles of liability under this subsection were described by Etherton LJ (in ***Freeman v Higher Park Farm*** [2009] PIQR P103 (CA)) as follows (at p. 108):

> *"… 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."*

He went on to describe the "*straightforward*" policy of the relevant legislative provision:

> *"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, 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."*

Equine (and bovine)

Subsection 2(2)(a): foreseeability and the meaning of "likely"

There are two limbs to subsection 2(2)(a): the first alternative requiring damage of a kind which the animal was likely to cause (unless restrained); the second alternative requiring damage which (by contrast to the

first limb) is unlikely, but which "*… if caused by the animal, was likely to be severe*." Both limbs require likelihood (but, as indicated, of rather different things). For reasons that may be obvious (well, obvious to equestrians), the horse cases have tended to concentrate on the second limb and, more specifically, on the likelihood of severe injury.

Mirvahedy v Henley [2003] 1 AC 491 (SC) concerned a horse which had, with two field companions, panicked (as a result of some unknown event) and escaped from a field and onto a dual carriageway near Torquay where it collided with the Claimant's motor vehicle (causing him injuries). It was held that the field was adequately fenced and a claim in negligence was dismissed ("*On the night of the accident all three horses stampeded out of a corner of their field. They pushed over an electric wire fence and a surrounding wooden fence, and then trampled through a strip of tall bracken and vegetation. Something seems to have frightened them very badly, but nobody knows what it was. The horses fled 300 yards up a track and then for a distance of almost a mile along a minor road before reaching the busy A380 road.*"). It was conceded by the Defendants that the condition for liability contained in subsection 2(2)(a) was satisfied and, in the circumstances, the House of Lords' pronouncements on the meaning of this provision are strictly *obiter*, but (in the reference "*reasonably to be expected*") have largely been followed in subsequent cases. Lord Scott (dissenting) said this (at p. 522H), "*A mere possibility is not, in my opinion, enough. I have suggested "reasonably to be expected" as conveying the requisite meaning of 'likely' in paragraph (a). But it may be that there is no material difference between 'reasonably to be expected' and Neill LJ's 'such as might well happen'.*" As indicated, the recent preference has been to treat "*likely*" as meaning "*reasonably to be expected*."

Williams v Hawkes [2018] RTR 16 (CA) was another case involving straying livestock: this time, a Charolais steer. The steer escaped from its field after being spooked by an unknown stimulus and found its way onto the public highway where it collided with the Claimant's vehicle and caused him injury. At Trial, the Judge reached the startling conclusion that, in the course of its escape, the steer had jumped a 6 foot high fence. The Claimant's claim in negligence was dismissed. As to subsection 2(a), Davis LJ recorded that, as in ***Mirvahedy***, it was agreed between the parties that the requisite condition was satisfied, but – as a general proposition, it was necessary, "*… to consider the requirement of s.2(2)(a). Here, too, the position was agreed at trial. The damage was of such a kind [viz. likely to be "severe"]. It was of such a kind just because of the size and weight of the Charolais steer. Both the experts were agreed on that, stating that any injury such a steer might cause was likely to be severe on account of their size. The judge rightly accepted that. The position corresponds with that posited by Lord Nicholls in Mirvahedy in [46] of his speech*."

The "*reasonably to be expected*" formula expressed *obiter* in ***Mirvahedy*** has received support in more recent (horse-related and other) case law: see, for example, ***Freeman v Higher Park Farm*** [2009] PIQR P 6 (CA) (*per* Etherton LJ, para 33); ***Turnbull v Warrener*** [2012] PIQR P 16 (CA) (*per* Maurice Kay LJ, para 12); ***Lynch v Ed Walker Racing Ltd*** [2017] EWHC 2484 (QB) (*per* Langstaff J, para 16).

A particular tension evident in the case law is the degree of specificity (that is, specificity as to the accident circumstances) as to the likelihood of severe injury (and the evidence to be led to satisfy this requirement). In ***Welsh v Stokes*** [2008] 1 WLR 1224 (CA) and ***Freeman v Higher Park Farm*** [2009] PIQR P 103 (CA) it was regarded as self-evident that severe injury was reasonably to be expected when (respectively) a horse reared while being ridden on the road and when a horse bucked while following a lead in canter on a fast hack (indeed, in ***Freeman*** Etherton LJ reacted with a degree of scorn to a suggestion by Counsel that there ought to be expert evidence on this issue, "*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*". It is suggested that only a person who has never sat on a horse can so confidently assert.).

Lynch v Ed Walker Racing Ltd [2017] EWHC 2484 (QB) perhaps contains a more thoughtful approach to subsection 2(2)(a). This was a case was brought by the Claimant: a stable lad at a Newmarket racing yard. He was riding a 2 year old colt ("*WolfofWallStreet*") in a string (of nine) setting out for morning work. The lead horse in the string spooked while the horses were

walking. There was then a domino effect with the following horses also spooking (including that ridden by the Claimant). The Claimant's horse whipped round at speed, lost its footing and fell onto its nearside. The Claimant was thrown and lost consciousness. Langstaff J's judgment contains an interesting (and, in the context of the cases, rare) consideration of the level of generality/specificity required to satisfy the requirements of subsection 2(2)(a) (judgment, paras 23 – 24 and 57 - 58):

> "*I … consider that the level of particularity or, looking at it from the converse, generality, is important. It cannot be that the circumstances should be defined so particularly that, on the one hand, it is almost impossible to say that any other animal of the same species would behave in precisely the same way, because none can be shown to have faced precisely the same circumstances, and it cannot be known; nor can it be so particularly defined for the purposes of section 2(2)(b) that the circumstances themselves answer whether an injury is likely or that if it is to take place, if it is likely to be severe. Nor can it be reduced to such a level of generality as completely to divorce the question from the facts of the case. … Where precisely to place it must permit the sections of statute to have some meaning and effect as has been pointed out in the authorities. If section 2(2)(a) is to be capable of separate answer from 2(2)(b) the fact that, in the circumstances, an animal causes serious injury cannot show that any injury likely to be caused would be serious. … I think the difficulty, in this case, is that evidence relevant to the (lack of) likelihood of injury and the evidence which touched on the severity of an injury if one occurred, actually overlap. If what is put to a witness is along the lines that if there is a fall off a horse in circumstances such as these, then there might be bruising, or there might be a sprain, and the witness accepts that is so, the witness is giving a view of what is at least likely to be the generality of the injuries suffered. … The fact that normally, when a horse falls in circumstances such as these, a rider is able to step off or, if a rider falls, will suffer only minor injury such as a sprain or bruising leads to a conclusion that it is unlikely that that rider will then suffer serious harm so as to come into the category of "severe" within the statute. The answer to the question whether any injury is likely is no; and that if there is any injury, it is unlikely to be a severe one.*"

In other words, ***Lynch*** suggests that a degree of specificity as to the speed (at which the rider is thrown), the surface onto which he or she falls and the general circumstances (of the fall) are all of relevance to subsection 2(2)(a): it is not a matter of treating (nearly) every fall from a horse as necessarily justifying the conclusion that severe injury is reasonably to be expected.

Subsection 2(2)(b): characteristics and propensities

Unfortunately, subsection 2(2)(b) – like subsection 2(2)(a) – also has two limbs (something which does nothing to make it easier to construe). The proper approach to these limbs was helpfully summarised by Lord Nicholls in his speech in ***Mirvahedy***:

> "*Requirement (b) will be satisfied whenever the animal's conduct was not characteristic of the species in the particular circumstances. Requirement (b) will also be satisfied when the animal's behavior was characteristic of the species in those circumstances.*"

The use of the word "*normally*" in subsection 2(2)(b) has been held to bear a "*core meaning*" of "*conforming to type*" (see, ***Welsh v Stokes*** [2008] 1 WLR 1224 (CA) and ***Goldsmith v Patchcott*** [2012] PIQR P 167 (CA) at p. P173 *per* Jackson LJ).

In ***Goldsmith*** the evidence (as found) that bucking and rearing were a characteristic of horses in the circumstance of their being startled or alarmed justified the conclusion that the second limb of subsection 2(2)(b) were satisfied. In ***Turnbull v Warrener*** [2012] PIQR P 335 (CA) a horse ridden for the first time across open country in a bitless bridle bolted before dumping its rider onto a tarmac road. Stanley Burton LJ relied on a manual, "*The Bitless Bridle*" (cited by both parties' experts at Trial) in which it was stated that, "*exuberance on the part of a horse fitted for the first time with a bitless bridle occurs in less than 1 per cent of cases*." In the circumstances, it is not surprising that the Court concluded, "*A characteristic of an animal is something inherent in the animal. An unprecedented, one-off action of an animal is not a characteristic of that animal. It is difficult to say of action that occurs in less than 1 per cent*

of horses fitted with bitless bridles that it is characteristic of them [to bolt in open country] *at particular times or in particular circumstances."* By contrast, the unchallenged expert evidence in ***Smith v Harding*** [2013] 11 WLUK 666 that a horse which was twitched and cross-tied in order to be clipped (and which, in these particular circumstances, kicked out thereby injuring a groom when the clippers came close) was exhibiting behaviour which conformed to type in those particular circumstances: the second limb of subsection 2(2)(b) was satisfied. The same conclusion was reached in ***Bodey v Hall*** [2012] PIQR P1 (QB) where a pony pulling a trap bolted and, in doing so, tipped the groom (riding on the back) out of the trap. It was held that, "*The horse's behaviour in becoming startled by a stimulus of an unknown cause was not normal behaviour generally for animals of that species but it was a normal behaviour in the particular circumstances where there was an unknown stimulus*."

Williams v Hawkes [2018] RTR 16 (CA) provides an example of a case which turned on the requisite (causal) connection/linkage between subsections 2(2)(a) and (b): the escaped steer on the road satisfied subsection 2(2)(a) by reason of its size and weight, but subsection 2(2)(b) (second limb) required something different: "*The damage was not simply attributable to the size and weight of the cow (that satisfied s 2(2)(a) alone). The damage … was also attributable to the steer behaving in this dangerous way in the particular circumstance of it having been spooked by the various averse stimuli, as steers are wont to do in such circumstances.*" Further, "*The steer was … running on the A465 in a panic, acting under the original (but ongoing) averse stimulus which had given rise to the escape from the field in the first place and then exacerbated by subsequent averse stimuli such as the lights and noise of the cars. The linked requirements of s. 2(2)(a) and (b) were thus satisfied on the facts of this case.*"

Subsection 2(2)(c): knowledge etc.

After the linguistic and intellectual contortions required in the construction of subsections 2(2)(a) and 2(2)(b) of the Act, the knowledge test contained in section 2(2)(c) is comparatively light relief. There is relatively little case law in which this subsection has been examined. The subsection requires that the "*keeper*" of the animal in question has *either* actual *or* imputed knowledge of the propensities of the animal (as defined by the case law under subsections 2(2)(a) and (b) described above). Constructive knowledge will not suffice for the purposes of establishing liability: it is not enough that the animal's keeper *ought* to have known of the wayward habits of his charge. Knowledge of the propensities of a particular animal can be imputed to the keeper of the animal by his servants and/or agents. The Act provides that the keeper will be liable if the relevant characteristics, what we have termed the propensity, of the animal were "*at any time known*" to the person in charge of the animal as the "*keeper's servant*", or where "*another keeper*" of the animal, below the age of sixteen, knew of the animal's propensity and was a member of the keeper's household. The use of the phrase "*at any time*" would seem to refer to the time when the knowledge of the animal's propensities was acquired, rather than the time of injury: it is (and was) a key element of the old common law scienter principle that the keeper or his servant must have advance knowledge of the animal's tendency to behave in a particular way. It would seem to follow that if one servant of the keeper has knowledge of an animal's propensity and yet another servant, without such knowledge, is "*in charge*" of it at the time that it causes injury then the keeper cannot be held liable. It is clear that a wide construction will be given to the loosely drafted term "*household*" which would include, *inter alia*, family members, relatives, and any other persons who may participate to a substantial degree in the life of the collective household.

Canine

Paragraph 2(2)(a)

Whereas horses buck and cattle stray, typical injuries caused by dogs tend to be either bites or knock-overs. In cases involving a bite, the first limb of subsection 2(2), tends in practice to be satisfied by reference to the second element (likelihood of severe damage). A claimant need not spend a great deal of time convincing a court that damage from a dog bite '*was likely to be severe*', as both qualifiers in that statement have been given relatively low thresholds by the courts: '*likely*' (as above) is interpreted widely as '*might*' or '*might well*' (per Lord Justice Neill in ***Smith v Ainger*** (The Times 5 June 1990), and '*severe*', according to Lord Justice

Jackson in ***Goldsmith***, will encapsulate '*[m]ost animal related damage which someone wishes to sue about*'. Where dog-bite cases have travelled to the higher courts, the degree of time spent on the likelihood of severe damage has accordingly been minimal. Lord Denning in ***Cummings*** addresses the question in a single sentence - "*this animal was a dog of the Alsatian breed; if it did bite anyone, the damage was 'likely to be severe'*"; Lord Justice Slade in ***Curtis v Betts*** quotes Lord Denning from ***Cummings*** and echoes "*So too in the present case. Max was a dog of the bull mastiff breed. If he did bite anyone, the damage was likely to be severe*."

Although defendants might legitimately take the issue if the breed of dog in question is a '*miniature*' that the damage wasn't likely to be severe, one must still bear in mind, as per the NHS's own guidance, that animal bites that puncture the skin carry with them significant risks of infection, and a quick search of the internet reveals that even a chihuahua is capable of doing fairly nasty things to fingers and faces. As set out further below, when it comes to paragraph 2(2)(b) and the '*characteristics*' question, expert evidence is almost always going to be required, and so Claimants looking to make out the cause of action for smaller breeds might well be advised to have their expert comment on bite strength and oral bacteria for the purposes of paragraph 2(2)(a).

For '*knock-over*' cases, paragraph 2(2)(a) is considerably more likely to be a battleground of the claim. ***Smith v Ainger*** is an example of such a case. There, the defendant's Alsatian lunged at the claimant's own dog, and in doing so knocked the claimant to the ground causing him to sustain injury. The judge at first instance had distinguished between the focus of the dog's attack – the claimant's dog - and the damage which had actually occurred – personal injury to a human. In the judge's conclusion, because there was no evidence to suggest the dog was likely to attack human beings, it could not be said that it was likely the dog would have caused the damage complained of; the first part of paragraph 2(2)(a) was not met. The judge also concluded that it could not be said that it was likely that any injury caused by the dog would be severe; the second part of paragraph 2(2)(a) was not met. Accordingly the claim failed. But on appeal, Lord Justice Neill held that there was evidence of previous form of attacking other dogs and causing personal injury to humans; that it was unrealistic to distinguish between a bite and the consequences of a buffet; and that the injuries caused to the claimant did indeed constitute damage of a kind which in the circumstances existing at the time, the dog was unless restrained likely to cause. Lord Justice Neill also disagreed with the judge on the likelihood of the damage being '*severe*'. Although the injuries suffered by the claimant were '*quite minor*', he referenced the decisions in ***Cummings*** and ***Curtis*** which suggested that damage caused by a large dog such as Alsatian was likely to be severe, and although they were bite cases, he applied their conclusions to the second part of paragraph 2(2)(a).

Paragraph 2(2)(b)

Although a claimant might therefore have a relatively easy time with paragraph 2(2)(a), the second paragraph, paragraph 2(2)(b) is less straightforwardly navigated and expert evidence will almost always be required. Depending on the facts of any given case, either of the two elements relating to the dog's characteristics might be available: either the dog's characteristics which lead to the bite will be abnormal for animals of the same species (in the dog context, for '*species*' read '*breed*'); or the dog's biting behaviour could be conversely normal or the breed at particular times or in particular circumstances. The first part of the second limb is straightforward – if the defendant has an aggressive breed of dog, where normally that breed is not aggressive, then the defendant's dog will be an abnormal animal and the first part of paragraph 2(2)(b) will be met (provided of course the claimant can show their injury was 'due to' that aggressive nature). The second part of the paragraph (and particularly how it is reconciled with the first) is less clear cut.

Helpfully, although a horse case, Lord Nicholls hypothesised about the behaviours of a dog guarding its territory or a litter of pups in resolving the problem, and preferred an interpretation of the statute which said that "*Damage caused by an attack by a newly-calved cow or a dog on guard duty fits readily into the description of damage due to characteristics of a cow or a dog which are not normally found in cows or dogs except in particular circumstances.*" He expressly endorsed what he referred to as the ***Cummings*** interpretation as also applied in

Curtis) of paragraph 2(2)(b) namely that the second strand included what were essentially normal behaviours when exhibited at particular times and circumstances. In ***Cummings***, Lord Justice Ormrod had found that an Alsatian running loose in a yard, which it regarded as part of its territory, had characteristics such that in those circumstances and at that time it might cause damage – the second part of paragraph 2(2)(b) was met; in ***Curtis***, the judge at first instance concluded after hearing expert evidence on bull mastiff behaviour that bull mastiffs had a tendency to react fiercely at particular times and in particular circumstances, namely when defending the boundaries of what they regard as their own territory, which in this case included the back of a Land Rover vehicle; the Court of Appeal upheld that conclusion. In bite cases, a normally docile dog becoming aggressive when perceiving a threat to its territory, and in buffet cases, a dog running off its lead when it sees another dog, are both examples of normal characteristics in certain circumstances which have met the second part of the test in paragraph 2(2)(b).

Claimants must, however, avoid complacency in thinking that the ***Mirvahedy*** approach will mean they always get over the line on one or the other parts of paragraph 2(2)(b): e.g. either by relying on a perceived fallacy that the dog's behaviour will be abnormal or normal and the paragraph allows both. The first point is that it is a claimant's case to prove, and expert evidence on the breed's characteristics will invariably be required; without it the court will not be able to reach a conclusion on paragraph 2(2)(b) and the claim will fail. Secondly, to the extent that the claimant is attempting to show the dog's characteristic was normal in particular times and circumstances, the claimant will have to show that the characteristic was otherwise abnormal. That is easier in a bite case – in general aggression is an unusual characteristic in a dog – but harder in a buffet case. For instance, if a claimant is knocked to the ground by a Jack Russell, say, who jumps up at him, the Claimant will need to show that jumping up at people is generally unusual for Jack Russells and only occurs at particular times and in particular circumstances. Third and finally, the requirement in paragraph 2(2)(b) is that a claimant show the damage caused or the likelihood of it being severe was "*due to*" the relevant characteristic. In ***Curtis***, the Court of Appeal struggled in endorsing the conclusion of the judge at first instance as although the judge had made a finding on the evidence that bull mastiffs did have a characteristic of being aggressive when guarding their territory, the judge had not set out in black and white that the injury to the claimant in that case was due to the territorial guarding behaviour, because he did not definitely state that the territory included the rear of the Land Rover. The Court of Appeal gave the judge the benefit of the doubt in inferring that such must have been what the judge had concluded, but the judgment highlights a potential pitfall for claimants, whose burden it is to prove the bite was caused by the identified normal breed behaviour.

Paragraph 2(2)(c)

The above analysis is also highly relevant to the third limb of the subsection 2(2) test – paragraph (c) and the keeper's knowledge. As set out above, there are strict limits to what knowledge can be imputed, but in the context of dog bite cases there are two important points to note. First, the knowledge need not be of *biting* behaviour *per se*, but can be extrapolated from fierce or aggressive behaviour in general. Defendants may often seek to argue in a dog bite case that the particular dog in question had *never bitten before* and therefore the knowledge requirement was not met, but provided that the claimant has linked the injury as being due to a 'characteristic' – e.g. fierce or aggressive behaviour generally – then the knowledge need only be of that general characteristic and not of a particular manifestation of it – the bite. For instance in ***Curtis*** the conclusion of Lord Justice Neill was that because the defendants "*knew at least that the two dogs had the habit of jumping up at the school gate in the playground and growling and snarling at passers-by*" that "*the defendants must be taken to have known of [the Bull Mastiff's] relevant characteristic, namely his tendency to react fiercely when defending what he regarded as his own territory*".

The second point is that where a claimant is relying on the second part of paragraph 2(2)(b) – normal behaviour at/in particular times/circumstances – the claimant does not need to show that the keeper had knowledge of the *actual animal* in question, but can show in the alternative that the keeper had knowledge of the damage-causing behaviour in the breed in

general. For instance, if evidence shows that a keeper is an experienced Alsatian owner, and knows the guarding behaviours of the breed, a defendant would be unable to escape paragraph 2(2)(c) by saying he/she had no knowledge that the particular Alsatian would display this characteristic. The point is made simply by Dyson LJ in ***Welsh v Stokes*** (again a horse case) at §§70-71:

> "*70. It is not in dispute that subsection (2)(c) requires it to be shown that the keeper knew that the particular animal which caused the damage had the characteristics found to satisfy subsection (2)(b). The only question is how that knowledge can be proved. Miss Rodway submitted that it can only be proved by showing that the keeper knew that the particular animal had previously behaved in that way.*
>
> *71. I do not agree. I do not see why a keeper's knowledge that a horse has the characteristic of normally behaving in a certain way in particular circumstances cannot be established by showing that the keeper knows that horses as a species normally behave in that way in those circumstances.*

"Keeper"

The Act itself provides a definition of "*keeper*" at subsection 6(3) and (4) which state:

> *(3) Subject to subsection (4) of this section, a person is a keeper of an animal if-*
>
> *(a) he owns the animal or has it in his possession; or*
>
> *(b) he is the head of a household of which a member under the age of sixteen owns the animal or has it in his possession;*
>
> *and if at any time an animal ceases to be owned by or to be in the possession of a person, any person who immediately before that time was a keeper thereof by virtue of the preceding provisions of this subsection continues to be a keeper of the animal until another person becomes a keeper by virtue of those provisions.*
>
> *(4) Where an animal is taken into and kept in possession for the purpose of preventing it from causing damage or of restoring it to its owner, a person is not a keeper of it by virtue only of that possession.*

Thus, the Act provides explicitly that a person with possession of an animal can be a keeper of it *even though he does not also own it*. The Act further provides for the liability of the keeper to continue while ownership of the animal or possession of the same is being transferred from one individual to another. Indeed, it is also conceivable that two or more persons could face concurrent liability as keepers in respect of the same animal. Clearly, Plaintiffs can be faced with the dilemma of which Defendant to sue in cases where more than one person is "*keeper*" for the purposes of the Act.

Statutory defences

Subsections 5(1) and (2) of the 1971 Act provide the keeper with (among others) the following defences (often applied in the horse cases):

- *"A person is not liable under section 2 … of this Act for any damage which is due wholly to the fault of the person suffering it." (section 5(1));*
- *"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" (section 5(2)).*

There will only be rare cases in which damage is "*wholly*" due to the fault of the injured person.

The subsection 5(2) defence is not available to an employer whose animal has injured an employee in circumstances where the risk [of injury] is "*incidental*" to the employee's employment (see, section 6(5) of the Act). The Law Commission explained that the rationale of this change in the law was that the employer was the person in the best position to minimise the harmful consequences of his enterprise through the use of insurance (Law Com No 13, para 20).

It has been held that the subsection 5(2) defence is not synonymous with the common law defence of *volenti non fit injuria* and that the words of the statutory provision should instead be given their ordinary and

natural meaning (in order that a defence to a form of qualified strict liability retains its force and is not whittled away by the restrictive common law defence). There are many examples of the operation of the subsection 5(2) defence in horse cases: see, ***Jones v Baldwin*** [2010] 10 WLUK 221; ***Bodey v Hall*** [2012] PIQR P1 (QB); ***Goldsmith v Patchcott*** [2012] PIQR P11 (CA) – foresight of the possibility of some bucking will suffice for the purposes of a voluntary assumption of risk (the statutory defence) and it was not necessary for the Claimant to foresee the precise degree of energetic misbehaviour which resulted in injury; ***Turnbull v Warrener*** [2012] PIQR P16 (CA) – where the following passage in a first instance judgment was approved, "*Riding is a pursuit involving the control by a rider with the wind and the aids of rein, leg, seat and crop of a horse with its own mind and physical attributes. That relationship and activity involving two living beings cannot be precisely predicted or judged to the second or centimetre. The occurrence of an accident in such a manner as I have found is precisely the risk and type of risk which a rider undertakes.*"

Negligence and OLA

As above, liability under the 1971 Act does not displace wider liabilities at common law or under the Occupiers' Liability Act 1957.

Unlike section 2 of the 1971, the 1957 Act does not require the occupier to have the subjective knowledge that the animal was likely to pose a risk to the visitor, but rather the question is analysed objectively: was the damage reasonably foreseeable and were there reasonable steps which could have been taken to ensure the claimant's safety? In a dog bite case which takes place in a visitor/occupier context (e.g. a postman or delivery driver entering a yard guarded by a dog), a claimant will not have to meet the onerous burden of demonstrating the defendant's knowledge of the characteristics in issue, making it a somewhat easier task to prove the case. In ***Smith v Prendergast*** (The Times, 18 October 1984, CA.), for instance, the owner of a scrapyard was found liable under the OLA/in negligence for an attack by a stray Alsatian which had taken up residence in his yard three weeks earlier. The dog had not done anything in that time to indicate that it might bite (paragraph 2(2)(c) of the 1971 Act could not be met), but there was found to be a falling below the reasonable standard in failing to supervise and control the dog for a reasonable period in order to assess whether it was docile or might be aggressive.

That said, an OLA/negligence claim has its own challenges for claimants in meeting the burden of proof – particularly as regards showing unreasonable behaviour (not needed in a strict liability Animals Act case). In ***Whippey v Jones*** [2009] EWCA Civ 452, the Court of Appeal emphasised that the duty of care will generally be breached only if a reasonable person in the defendant's position would "*contemplate that injury is likely to follow*" from his acts or omissions. The judge at first instance had found that the defendant, who had taken his Great Dane to the park for exercise, and had unleashed him, was negligent when the dog had knocked the claimant down a river bank causing him to break his ankle. The 1971 Act did not apply because paragraph 2(2)(a) was not met – the injury was not likely to have been caused, and was not likely to have been severe, but the judge at first instance concluded that the defendant had been negligent because the injury was foreseeable as a "*possibility*" and the defendant had not taken reasonably prudent steps to prevent it. The Court of Appeal reversed that decision, saying that negligence in these circumstances required injury as a 'likelihood' and that 'possibility' was not enough – there must be sufficient probability of injury to lead a reasonable person in the position of the defendant to anticipate it. The defendant had (it was found) carefully checked for other adults, and the Great Dane was not inclined to be aggressive rather than intimidating. As such, the defendant had acted reasonably in unleashing him.