LIABILITY OF ANIMAL OWNERS/KEEPERS

1. Animals on the highway

Let's take a fairly common scenario whereby an innocent motorist is travelling at a reasonable speed, at night, when he is suddenly confronted by a horse which collides with his vehicle causing damage to his vehicle and inevitably these days there is a suggestion of whiplash, post traumatic stress disorder etc on the part of the driver and his passengers.

The horse was on a DIY livery and had escaped from livery yard premises.

Is there a liability on the part of the owner or keeper of that animal? If so who is liable?

If we are acting for the insurers of the owner or keeper of the horse, then we need to consider whether the owner/keeper has been **negligent** and/or attracts strict liability under the **Animals Act**.

First we need to consider has there been any negligence. The owner/keeper of the horse has a general duty of care to keep the horse properly fenced or secured from gaining access to the highway. If the boundary fencing/hedging is inadequate and the horse has escaped through that then negligence will attach, a claim will be for settlement on best terms. There won't be any arguments of contributory negligence if the driver was driving carefully; it is extremely difficult to pick up a dark non reflective animal in headlights.

Who is liable under these circumstances?

The owner has contracted with the livery yard and there is an implied condition in that fencing and the fields will be adequate. Whilst the owner should check that the facilities were adequate we would argue that the liability will attach to the livery yard proprietor.

What however is the situation if the horse has escaped not due to any negligence or neglect on the part of the owner or keeper. A padlocked gate may have been bolt cropped by thieves intent on stealing the horses or other items, the horses may have been let out deliberately. There may never have been any previous problems in the area. Arguably the owner or keeper of the horses will not be negligent and will not have any liability at common law.

The Courts nevertheless will have a great deal of sympathy for the innocent party who maybe severely injured by an escaping animal. That was the crux of the House of Lords case of **Mirvahedy-v-Henley, House of Lords, March 2003**.

Mr Mirvahedy was driving home at night; he was seriously injured when a number of stampeding horses collided with his vehicle. He was undoubtedly an innocent party. The horses had escaped from a field, the fencing had always been adequate in the past but something had spooked the horses and they escaped by trampling the fencing, it was held that the escape of the horses did not result from negligence of the keeper or owner of the horses.

Mirvahedy is the leading case concerning the interpretation of section 2(2) of the **Animals Act 1971**. The wording is tortuous and opaque, it has been the subject of a good deal of legal debate and litigation and there have been various unsuccessful attempts to put down amendments to alter the Act which is very onerous in so far as the owner or keeper of animals is concerned.

It is necessary therefore to consider where and how a strict liability will therefore attach under the Animals Act.

Under the Animals Act where the damage is caused by an animal which belongs to a dangerous species then a strict liability will attach – section 2(1). The Act defines a dangerous species under section 6(2):

A Dangerous species is a species –

a) Which is not commonly domesticated in the British Islands; and

b) Whose fully grown animals normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be sever.

The Mirvahedy case involves horses which are not animals which belong to dangerous species but the Act provides a liability can attach under section 2(2) -

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 it being severe was due to the characteristics of the animal which 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...

All three subsections must be satisfied.

In the Mirvahedy case it was clear that under sub section (a) that the horses, unless restrained, were likely to cause damage, and that damage was likely to be severe. Under sub section (b) (and the Mirvahedy case revolved around the interpretation of this sub section) the horses were in a "flight and fright situation". That was a characteristic of the horses which are found at particular times and in particular circumstances. (The second limb of the sub clause).

Under sub section (c) the owner or keeper of the animals would know that horses will react in this way in a flight/fright situation. Such knowledge may be inferred from knowledge of the species generally rather than from any requirement is prove the horses in question had ever previously displayed these characteristics.

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

All three sub sections of section 2(2) of the Act were therefore satisfied and by a narrow majority verdict the claimant was successful in the House of Lords although he had been unsuccessful at first instance.

Returning then to our innocent motorist whose vehicle was struck by a horse which had escaped from a field (not by any negligence on the part of the owner or keeper of the animal) on the face of it therefore a strict liability will attach under section 2(2) of the Act. However what if the horse was just walking or trotting down the road, not acting due to any "flight or fright" characteristic? Indeed not acting due to any characteristic at all. We would argue under those circumstances that section 2(2)(b) of the Animals Act had not been satisfied and that there was no strict liability under the Animals Act as all three subsections had not been satisfied. May be worth also mentioning that almost certainly if the horse was standing still in the road, there would be no strict liability under the Act because the horse's dangerousness would not be due to a characteristic normally found in horses at all times, namely their size and weight rather than because it was exhibiting some transient or abnormal characteristic (as per Lord Nicholls at para 46 of the *Mirvahedy* judgment).

We would refer to the case of **Clark –v- Bowlt 2006 The Court of Appeal** The horse moved into the path of the moving vehicle and was struck by the car's front nearside. The claim failed because the incident did not involve any characteristic of the horse.

Highways Code

Paragraph 214 of the Highways Code makes reference to driving slowly and giving plenty of room when overtaking animals, horn shouldn't be sounded, nor the engine revved or the vehicle accelerated rapidly. Clearly motorists have a duty to take reasonable care and potentially the motor insurer will pick up a liability should the negligent or inconsiderate motorist cause damage to the horse or rider.

What if the vehicle has been struck by an escaping dog? Again the keeper of the dog has a duty to restrain the animal and keep a dog under control on the highway. In fact the owner and the person who has the dog in his possession may be guilty of a criminal offence if the dog is dangerously out of control in a common place if it causes injury or there is a reasonable apprehension that it might do so. Section 3(1) **Dangerous Dogs Act**. Arguably a liability is going to attach if the keeper of that dog has failed to keep the dog under control. However on occasions a dog will escape from an enclosed area, not necessarily due to the negligence of the keeper of the dog. The same considerations therefore apply, a liability may not attach in negligence, arguably a liability may not attach under the Animals Act as there was no likelihood of severe injury or damage, thereby not satisfying subsection 2(2)(a) of the Act, and was the dog acting due to a characteristic at that time? Subsection 2(2)(b).

If our innocent motorist's vehicle had been struck by a wild deer escaping from adjacent land is there any liability on the owner of that land? There isn't, it is a wild animal. Where reference is made to livestock in the Animals Act it does not include deer in the wild state. There would not therefore be any possibility of a subrogated claim.

There are however some areas of common land where fencing is not customary, livestock will stray onto the highway and under those circumstances the person who placed the livestock on the land is not regarded as having been in breach of his duty of care (8.2 Animals Act).

As an aside, returning to our innocent motorist. Let's say that a liability does attach either in negligence or under the Act the claim is for a few thousand pounds for the alleged whiplash, shock etc. We have successfully argued that the costs payable should be predictive costs only as the incident arises out of a Road Traffic Accident even though the claim is being pursued against a public liability or personal liability insurer.

2. Dogs

There have been several recent high profile incidents of children being attacked by dogs and there is a suggestion that the Dangerous Dogs Act should be amended to make it an offence for owners to fail to control their pets even within their own house or garden, at the moment the Dangerous Dogs Act only relates to “Public Places”.

New Control Laws may move away from “breed specific” legislation and instead focus on punishing owners who fail to control aggressive pets or who train them to be weapon dogs.

There also appears to be a considerable increase in dog attacks.

New law lets postmen bite back at reckless dog owners

Jon Ungoed-Thomas and Marie Woolf

POSTMEN who endure bites and growls on the way to the letter box are to be given fresh protection from aggressive dogs.

The government is to amend dangerous dogs legislation and make it an offence for owners to fail to control their pets within their house or garden.

Owners who allow their dogs to bite, maul or hound postmen or members of the public on their own land would for the first time face a criminal prosecution.

At present there is a loophole that means the owners of dogs who attack people on private property cannot be prosecuted. Victims can only take civil action.

Owners could also find themselves with a “dogbo” — a canine version of an antisocial behaviour order — imposed by the local authority.

This could lead to a fine, an order to take the dog to a professional trainer, or an instruction to make it wear a muzzle when out of the house.

Failure to comply with the dog control orders would result in fines or even the destruction of the dog.

Dave Joyce, health and safety officer at the Communication Workers Union, which represents postmen, said: “We’ve had six postmen who have had their fingers bitten off in the past eight months and over the years postmen have suffered appalling injuries including one who nearly had his arm torn off.”

In a letter to the union, David Cameron said: “We believe there needs to be greater emphasis on individual owner responsibility and ‘deed not breed’, to tackle the rise in the use of dogs as weapons.

“We support extending dangerous dogs law to cover all places, including private property, so that postal workers, for example, can be protected from dangerous dogs, and we support giving police and councils more powers to tackle the problem of dangerous dogs by the introduction of dog control notices.”

The new dog control law will move away from “breed specific” legislation that assumes that all dogs of a certain breed are dangerous. Instead, it will focus on punishing owners who fail to control aggressive pets or train them to be “weapon dogs”.

Compulsory micro-chipping of dogs is also being considered as a way of tracking and controlling dangerous dogs and making owners more responsible.

Ministers are expected, however, to ensure that householders whose dogs attack burglars who enter their home or defend them from a violent assault would not be prosecuted.

Bites from dangerous dogs put 6,000 victims a year in hospital

By Steve Doughty
Social Affairs Correspondent

THE number of people taken to hospital with dog bites has almost doubled in a decade, figures revealed yesterday.

Dog bite cases in casualty departments topped 6,000 for the first time this year.

Last month judicial authorities proposed new sentencing guidelines for the courts, suggesting two-year jail terms for the worst offenders as a result of the growing frequency of dangerous dog incidents.

The Sentencing Council said it wanted to ensure irresponsible owners are prevented from keeping dogs; dangerous dogs are put down; and attack victims are properly compensated.

According to NHS statistics, the number of dog bites reported at A&E departments has risen by 94 per cent over ten years – reaching 6,097 in the year to the end of March 2011.

Court convictions for dog offences have also been rising rapidly. The number of adults sentenced for dangerous dog crimes went up by 39 per cent in a year, from 855 in 2009 to 1,192 in 2010.

There was a 58 per cent increase in the number of people charged and brought before the courts over the same year, up from 1,077 to 1,705.

However, the scale of dog-related violence has persuaded ministers that further regulation, in addition to the 1991 Dangerous Dogs Act, may be necessary.

The Environment Department said: ‘We will be announcing new measures early in the new year that will better protect the public, allow the police and councils to better enforce the law and ensure dog owners take responsibility for their animals.’

Dogs on the loose, having escaped may attack and bite an innocent party. Even if the dog has never acted in this way before and was not normally of an aggressive nature it is likely that a strict liability will attach under the Act, there was likely to be an injury, the dog was acting under a particular characteristic at that particular time and under those circumstances and the owner or keeper would have knowledge that dogs might act in this way. All 3 sub sections are satisfied, see **Curtis –v- Betts 1990** – Bull Mastiff.

Certainly there is a likelihood of injury if the dog is an Alsatian or Rottweiler or other large breed, perhaps the situation isn't quite as clear cut with smaller breeds of dogs although terriers of course have a reputation of being "ankle biters".

Postmen seem to be vulnerable! We see a good many claims for minor bites/injuries. Arguably a liability may also attach under section 2(2) of the **Occupiers Liability Act**.

What is the situation where somebody is injured having been knocked over by a dog, which perhaps is acting boisterously. The dog has not attacked or acted in any aggressive way. The case of **Whippey –v- Jones Court of Appeal 2009** concerns such a case. The dog Hector appeared from behind a bush whilst Mr Jones was running along a footpath by a river, the dog knocked Mr Jones over. However it was found that there was no negligence and no strict liability under the Animals Act. There was no likelihood of injury; the dog was not acting due to any particular characteristic at the time. It was the judge at first instance who found the claim failed to establish any of the 3 limbs of the Act – the CA looked only at negligence.

A more recent case **Addis –v- Campbell & Leaman 2011** (one which I actually investigated) also went to appeal and following Whippey –v- Jones the injured party (who was severely injured and in a coma) was unsuccessful. In that case the dog Taz was let off its lead by a river and was playing around with other dogs when it allegedly jumped up and knocked Mr Addis over (indeed there was a good deal of dispute as to whether that even actually occurred) causing him to fall and strike his head on the concrete pathway. However no negligence was found and no strict liability under the Act.

56 the Highways Code makes references to not letting dogs out on the road on their own and to keep dogs on a short lead when walking on the pavement or path shared with cyclists or horse riders.

Under **Section 3** of the Animals Act where a dog causes damage by killing or injuring livestock i.e. sheep worrying, any person who is the keeper of the dog is liable for the damage, that is pretty unambiguous. Note it is the keeper not the owner who attracts the liability. Under **Section 4** the owner of livestock straying onto land and causing damage to property is also strictly liable. Often we see the situation where horses or cows have escaped onto neighbouring property or land (on occasions golf courses/swimming pools and the like) then the owner will have a strict liability. The Act under Section 4(2) interprets the persons who possess the livestock as being the owners.

There is a defence if the escape of those animals onto the land is the sole responsibility of the claimant in other words if they took the fencing down allowing the horses to escape from the neighbouring land onto theirs then they won't be able to pursue the matter.

There is also no liability under the Act if somebody trespasses onto land and is then attacked by a dog as long as the dog was not being kept there unreasonably as a guard dog – see section 5.3 of the Animals Act. **Cummings –v- Grainger 1977**. Nor we would argue would there be any liability under the Occupiers Liability Act 1984.

The Guard Dogs Act 1975 provides for the licensing and control of guard dogs. Its provisions are for criminal penalties not for civil liability.

A strict liability however attaches if the dog is listed as a dangerous dog under the **Dangerous Dog Act 1991**. There is a short list of such designated dogs where it is normally pretty much impossible to obtain insurance:

Pit Bull Terriers, Tosas, Argentinos, Brazilian Filas and any other dogs bred for fighting to be added to the list by the Secretary of State.

The Dangerous Dogs Act contains restrictions on the manner of keeping and controlling certain breeds of fighting dogs, there is debate concerning increasing the category's to include cross breed pit bulls/ Staffordshire bull terriers beloved of Essex Underwriters!

3. Owner/keeper

Who is liable therefore? The Act makes reference to the owner and the keeper of the animal, both can be jointly and severally liable. Section 6 of the Act sets out the definition of the keeper as being somebody who:

a) Owns the animal or has it in his possession; or

b) Is the head of a household of which a member under the age of 16 owns the animal or has it in his possession?

A person remains the keeper of that animal until it is taken into possession by another.

We have the situation therefore where a horse might escape and bolt from a livery yard, the livery yard owners had the horse in their possession and therefore were keepers but a liability may also attach to the owner of that animal. However 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 (clause 6 (4)).

In other words if an escaping horse is caught by another person and the horse is then secured in a field for its own safety if it then subsequently escapes there would be no liability upon that person who took the horse into their possession.

4. Insurance

Should the owner or keeper therefore attract a liability what insurance is likely to be available to the defendant? It is sometimes overlooked that **a household contents** policy will have a personal liability section which will provide an indemnity to the insured, and those permanently residing with the insured against their potential personal liability as either owner or keeper of the animals. The incident does not have to occur at or indeed anywhere near the risk address.

Typically policies will provide this personal liability cover and will normally only exclude the ownership of dogs under the Dangerous Dogs Act. However more and more we have noticed that some insurers are excluding all animals other than domestic animals. (We would still argue that a horse kept at or adjacent to the house is a domestic animal).

Cover is therefore often available under the household contents policy but may also be available more specifically under a Pet Protect or Equine policy.

Membership policies taken out through say Kennel Club or other breeders or Pedigree Club or so far as horses are concerned under the **British Horse Society** or possibly under the British Show Jumping Association, British Eventing or British Dressage may give personal liability cover. Many of these membership policies however operate in excess of any other cover that might be available. These membership policies are very much "add ons" to the membership and are not designed to be a policy of first resort. They do often have a much higher indemnity limit than under say a household policy which will only give £1m or £2m indemnity but they will only operate in excess of that limit.

5. Riding School/Riding Accidents

A good deal of my time is spent investigating Riding Schools, Trekking Centre, accidents and other incidents involving the riding and ownership of horses.

If you are going to learn to ride then you are likely to fall off, at some point you are possibly going to get injured. The defence of claims being pursued against Riding Establishments pretty much centres on the fact that if you are a grown adult you will appreciate that horses can be unpredictable, you might fall off, you might get injured and to that extent you have consented to that risk. As you can imagine that view is not too readily accepted by our opponents. Obviously the riding centre has a reasonable duty of care not least to provide a suitable horse or pony to match the experience and competence of the rider and to provide proper supervision and instruction. Nevertheless accidents will happen and at some point in time a person may very well fall, occasionally they may be injured.

Riding schools and trekking centres are encouraged to ensure that rider registration forms are always completed, that contains a disclaimer that riding is a risk sport and that the rider consents to that risk. Nevertheless this is a contractual undertaking and it is not possible to exclude or restrict his liability for death or personal injury resulting from negligence in view of the **Unfair Contract Terms Act 1977**.

The rider registration form asks for details of the rider's previous experience if any and also asks them to state their age, weight, height and any medical problems.

Even if the rider suggests that they are experienced and can walk, trot, canter etc the riding school should still question the client fairly closely as to just what activities they have been taking part in and to monitor them when they mount and when they first ride off. In fact it is usually fairly apparent to the instructors as to whether or not the rider has ever sat on a horse before or not. Ideally the school should arrange for a separate assessment of the riders ability before the first lesson and in particular before hacking out. This is not always possible. The school should assume that the rider is of a lower standard than is being suggested until they prove the opposite. If necessary a lead rein can be attached to the rider's horse.

Obviously a suitable horse should be allocated to match the riders experience and weight and they should not be asked to do more than they are capable of. Assuming that the school takes all these precautions then if an accident does occur then it should be possible to argue that the school have not been negligent.

However we still face the problem of section 2(2) of the Animals Act. Horses can and will on occasions act unpredictably. They will sometimes spook at the unexpected pheasant that flies up or a paper bag fluttering by. They will react to a sudden noise that nobody could have predicted.

Take the case of **Elliot –v- Townfoot Stables**. In that case a child fell from a pony which had bucked during a lesson in an indoor school. She suffered an injury. There was no negligence. It was argued that there was a strict liability under section 2(2) of the Act because the horse had bucked. The Court at first instance found that there was no likelihood of injury and therefore sub section (a) was not satisfied.

We often argue that although there may be a "possibility" of injury there is no likelihood particularly when riding at a relatively low speed in an enclosed ménage on a "soft" surface.

Contrast that however with the case of **Welsh –v- Stokes & Stokes, 2007**. There a rider fell from a horse on the road. The only witness to the accident was never traced but told the next person on the scene the horse had reared up and fallen over backwards and this version of events was accepted. She fell suffering severe head injury despite wearing appropriate headgear. It was held there that all three sub sections of section 2(2) were satisfied and that there was a likelihood of injury if one fell from a horse onto a hard surface.

Another case we were involved in was **Freeman –v- Higher Park Farm, Court of Appeal, 2008**. That involved an experienced rider who wished to go out hacking. She had hacked out the previous week on another horse and the insured were quite satisfied she was a competent rider. She returned for a second ride and was told that the horse that was available could on occasions buck. She said that she had no problem with that. She consented to the risk. Inevitably when they were out the horse did buck, she fell off and she was injured.

The case was run on the basis that she had consented to the risk of injury and the buck before setting off on a canter, was not a "characteristic".

Similarly there was a very recent case of **Bodey –v- Hall, 2011**. That involved an accident in a horse drawn trap. Mrs Bodey was an experienced equestrian although not particularly a carriage driver. She had gone along as groom to Mrs Hall. The horse had spooked and bolted and turned the carriage over. She suffered a serious head injury. She wasn't incidentally wearing a hard hat. There was no negligence. It was held that she had consented to the risk of injury and there was a defence under section 5(2) of the Act.

Seyf –v- Richmond Park. This is a case involved a horse which Madonna learnt to ride on in Richmond Park. It was argued that the horse was not suitable. It was a fairly forward going horse but the claimant was experienced. I rode the horse in the park without any problems. The other side then arranged for their own equestrian expert to attend who also rode the horse. I accompanied the ride on another horse. The expert had no problems at all. There was no history of the horse being dangerous. The claimant merely lost her balance and fell when the horse accelerated and drifted slightly to the right whilst cantering, a common enough incident. Fortunately the Court agreed with our views that the horse was not dangerous or unsuitable, there was no lack of supervision or control. The claimant was not successful.

Returning to the **Welsh –v- Stokes & Stokes** case the claimant in that case was also experienced and one might think that the 5(2) defence under the Act would apply there. However she was riding in the course of her employment and it is not possible to argue "consent" under those circumstances as under clause 6(5) of the Animals Act allows "where a person employed as a servant by a keeper of an animal incurs a risk incidental to his employment he shall not be treated as accepting it voluntarily".

Where therefore anybody working with horses in an employed capacity is injured it is extremely difficult to argue any defence if a strict liability attaches under section 2(2) of the Act unless the incident has been brought about solely by the claimant giving a potential defence under section 5(1) of the Act which reads "a person is not liable under sections 2 to 4 of this Act for any damage which is due wholly to the fault of the person suffering it". In an employers liability situation as you can imagine that would extremely difficult to successfully argue.

Kicking accidents

Apart from the dangers of falling from a horse one can get injured by being kicked or bitten. Oscar Wilde famously said that horses are dangerous at both ends and uncomfortable in the middle.

If the horse suddenly lashes out, kicks out and strikes somebody then potentially there is going to be a liability. If the horse has a propensity to do so and the owner or keeper has not warned the claimant of that propensity then there may well be negligence. Clearly the owner or keeper will also be vulnerable under the Animals Act if the horse was acting due to a particular characteristic at that time, and under those circumstances. Obviously there is a risk of injury and of that injury or damage being severe. Are there therefore any defences?

There may well be. Horses will kick out if they are being threatened. It is well known that one should not startle or suddenly approach a horse from the rear; it is likely to react in a defensive way. The injured party may therefore have brought about the problem themselves giving a potential defence under section 5(1) of the Act.

Accidents can often occur whilst riding out in company when a horse suddenly lashes out and kicks at another horse. Unfortunately sometimes the rider will be struck. It can certainly happen if one is riding out hunting. Riders should therefore obviously not run up the backside of other horses. If they do so then they are quite likely to get kicked and we would argue that they have brought about the problem themselves or consented to the risk.

The defence has been successfully argued in public liability cases involving horses kicking, firstly in **Jones v Baldwin [2010]** in which the claimant was riding in a show class and was held to have wholly caused the injury he sustained when he rode too close to another horse which kicked him. More recently in one of our cases of **Smith v Dallimore [2011]** in which an experienced rider who was taking part in a free lesson given by a supervised trainee instructor who was preparing for an exam. The claimant again rode too close to the horse in front and was kicked when the rider in front tapped her horse with a schooling whip. The claimant's proximity, rather than the reasonable use of the schooling whip, was found to be the cause of the damage.

Horses if they are immature and young should have a green tail ribbon which will indicate that they are "green". If a horse has a red tail ribbon on then it is a warning that it might kick and riders/others should keep clear. Liability therefore will not always attach.

We have without much success I have to say also been arguing a defence under Part 1 of the **Compensation Act 2006**. We have argued that horse riding is a desirable activity and providing that the defendant has taken all reasonable steps to avoid injury or accidents but nevertheless an accident has occurred then the Court should take that into account and not make a finding against the defendants. Those arguments don't so far seem to have had a great deal of success.

6. Misc

Despite the arguments of consent however the case of **McKaskie –v- Cameron 2009** went against the defendants. In that case a walker deviated from a foot path which skirts the edge of a field which contained a herd of cows with calves at foot. Even though she admitted knowing that cows under those circumstances could be dangerous she still succeeded. That case however may be something of an anomaly because the trial judge also found for the claimant under the Occupiers Liability Acts despite neither having been pleaded until after judgment was handed down and the 1984 Act never having been pleaded at all!

McKenny & another –v- Foster 2008, Court of Appeal is interesting. A cow which was standing still in the road was hit by the driver of a car, killing the passenger. The cow's escape from its field was quite extraordinary. It had been weaned from its calf and in what was presumed to be an attempt to rejoin it somehow clambered over or jumped a 6 barred livestock gate, made her way down a lane (in the opposite direction of her calf) and, either tiptoed over or jumped a twelve foot cattle grid. This was not a normal characteristic nor was it one which is known to normally manifest itself at particulars times. It was an atypical characteristic which the defendants would not have known about, in all 3 subsections were not satisfied.

Reference to the Animals Act is only applicable to England and Wales, Scotland has its own where there is no equivalent section 2(2) of the Act. Arguably therefore defendants are in a more advantageous situation in Scotland. **The Animals (Scotland) Act 1987**. However there is still a strict liability for dangerous species. There have been attempts to bring other animals within the wording of the Animals (Scotland) Act 1987, such a **Welsh v Brady [2009]** in which an injured person attempted unsuccessfully both at first instance and on appeal to persuade the Scottish court that black Labradors are likely to severely injure or kill someone unless restrained or controlled.

Northern Ireland follows England and Wales but typically moves the sections around so that section 2(2) for them becomes section 4(2). **The Animals (Northern Ireland) Order 1976**.

7. Summary

What does the future hold? There seems no likelihood of any immediate amendment to the Animals Act despite attempts to at least modify section 2(2) of the Act.

Nevertheless there are defences to the potential strict liability under the Act as we have seen. The Government has signalled that society should not be risk averse. It is hoped that they will encourage such activities as horse riding as a desirable activity.

There are also moves to amend and extend the Dangerous Dog Act.

Unfortunately the cost of insurance will close down riding establishments unless a sensible attitude is taken by the Courts. We have seen a move in recent decisions that would seem to suggest that the courts are indeed taking a more sensible view of matters and that there is an acceptance of risk on the part of participants. The case of **Tomlinson v Congleton [2003], House of Lords** is clearly helpful. In that case the claimant dived into a shallow lake, breaking his neck and it was held that there was no liability on the part of the owners of the lake to put up notices saying "No diving, shallow lake". Likewise, in **Trustees of Portsmouth Youth Activities Committee v Poppleton [2008]** the Court of Appeal held: *'Adults who choose to engage in physical activities which obviously give rise to a degree of unavoidable risk may find that they have no means of recompense if the risk materialises so they are injured'.* By the same token if you are a grown adult and you ride then you might expect to fall, you might be injured. It is not necessarily due to any negligence or blame on the part of any party. The pendulum may be swinging back in our favour if not.....