Neutral Citation no. [2006] NIQB 102 | *Ref:* **HIGF5541**

Judgment: approved by the Court for handing down | *Delivered:* **7/4/2006**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

SEAN WALSH

Plaintiff/Appellant;

-and-

DEREK CONNOLLY

-and-

BARNEY McCAULEY

Defendants/Appellants.

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HIGGINS J

[1] This is a plaintiff's appeal against the decision of the Deputy County Court Judge sitting at Londonderry whereby he awarded the plaintiff/appellant (hereafter referred to as the appellant) the sum of £7,500 against the first defendant/respondent (hereafter referred to as the first respondent) and dismissed the civil bill against the second defendant/respondent (hereafter referred to as the second respondent). The Notice of Appeal is in these terms –

> "TAKE NOTICE that the Plaintiff/Appellant hereby appeals against the whole of the decision of the Deputy Judge at Londonderry on the 16th June 2003 when he awarded the Plaintiff/Appellant £7,500

> damages against the First Defendant but dismissed the Plaintiff/Appellant against the Second Defendant (sic)."

[2] There was no cross-appeal by the first respondent. Therefore I treat this as an appeal on quantum as against the first respondent and an appeal on all issues as against the second respondent. The appeal was prosecuted and defended as if all issues were open. While a county court appeal is a rehearing I do not consider the notice of appeal permits the finding of the Deputy County Court judge on the liability of the first respondent to be reviewed. I have nonetheless reviewed in this judgment some of the evidence on the liability of the first respondent as it informed the other issues in the appeal.

[3] On 21 March 1995 the appellant went with the first respondent to the premises of the second respondent where two horses, kept in stables on the premises, required to be shod. The second respondent's premises were at Coolmore Point, County Londonderry. The appellant and the first respondent are residents of County Donegal and were in receipt of unemployment benefit in that jurisdiction. The appellant was aged 21 years and, like the first respondent, had been working with and riding horses, including thoroughbred racehorses, since his early teens. The first respondent was a farrier with considerable experience, but without formal qualifications. He shod horses for owners on both sides of the border on request. The second respondent so engaged him to shoe two horses. The appellant worked with the first respondent, was paid by him weekly in cash and was collected by him to go to various premises. There was a suggestion that the appellant was a trainee or apprentice farrier with the first respondent, but the arrangement was looser than that. It was casual work as and when it came along, though the first respondent said he regarded the appellant as an employee. No national insurance was paid and the first respondent did not have employer's public liability insurance.

[4] The appellant 's case is that he and the first respondent travelled to the premises of the second respondent. They were met by him. He pointed out the two horses to be shod and then left them to proceed with their task. There was no-one else about. The appellant's job was to remove the old shoes and to 'clench' the new ones after the horse had been shod by the first respondent. 'Clenching' involves securing the nail into the foot to tighten the shoe and then smoothing it. The appellant said he removed the shoes from the first horse, a three or four year old filly, believed to be called 'Foyle Flashing Steele'. He then moved to the other loose box and removed the shoes from that horse. He then returned to the first horse. He claimed he held this horse in the loosebox while the first respondent shod her. After she was shod he said commenced the clenching process. Having clenched the right foreleg he moved down the side of the horse to the right hind leg all the time running his hand over the horse's back to reassure her. He ran his hand down the hind

leg to lift the leg when the horse pulled away twice. He took hold of the rope attached to the halter and ran his hand again down the hind leg again whereupon the horse kicked out and struck him on the forehead causing an open wound. He was removed by ambulance to Altnagelvin Hospital where the wound was sutured and he was detained in hospital for two days. He has been left with a permanent 45mm long pale pink scar on the left side of his forehead. The appellant's case is that someone either the owner of the horse or the second respondent or the first respondent should have held the horse while he clenched her. He claimed he asked the first respondent to hold her but he responded 'I shod her on my own and you can clench her on your own'. The appellant had been involved when the horse was shod previously. The appellant claimed that on the previous occasion the animal was 'lunged' for a short period to 'take the steam' out of her, before the shoeing commenced.

[5] The first respondent said he had been shoeing horses for 10 years, sometimes as many as 8 – 10 horses a day. He claimed the appellant was very experienced with horses and between the two of them they had sufficient expertise to shoe both of these horses. On this occasion he found the horse to be quiet. His experience was that on most occasions the owner would be present and would hold the horse during the shoeing operation. On this occasion he shod her without the necessity for the horse to be held and then moved to the next horse leaving the appellant to clench the new shoes. He heard a noise from the adjoining box and going to investigate found the appellant lying on the ground injured. He said the appellant never asked for any assistance with the horse. He disputed the appellant's evidence relating to the manner in which he was injured. It was his opinion that for the appellant to be kicked on the forehead he must have been a distance behind the horse. He also said a person should never walk behind a horse due to the risk of being kicked.

[6] Lady Brookeborough gave evidence on behalf of the plaintiff. She has extensive experience of horses. She said she would never expect a blacksmith or farrier to shoe a horse without herself, or another experienced person who knows the horse, present at the horses head to control the horse and if necessary pacify her. It was her opinion that it is the owner's responsibility to ensure someone with knowledge of the horse is present to explain how the horse may be reacting. She described working with horses as a dangerous occupation. She would not recommend the practice of lunging a horse to calm her down, nor would she tie a horse inside a box. It was her experience that horses have a tendency to kick when they can and that being kicked by a horse can be a regular occurrence.

[7] Mr E B Smiley is a Fellow of the Horse Society and has represented Ireland at four Olympic Games and has extensive knowledge of all matters equine. He was called on behalf of the first respondent. He said that shoeing a

young horse can present difficulties if the horse is not prepared and handled properly. It was normal practice for a farrier to shoe the horse and leave the clenching to his apprentice or assistant. If problems arise with the horse it is when the foot is lifted or when the horse hears the hammer on the nail. He would not expect a horse to lash out when being shoed. If it were to happen it would be more likely during the shoeing, but it would be apparent early on if the horse was going to react in that way. In the majority of cases the farrier requires no assistance with the horse. Usually an owner will say the horse is quiet and if you need me "I am round the corner". It was not his experience that a horse should be held when being shod and he found that an experienced person can usually reassure the horse himself. There was always a possibility of a horse kicking out but he said this would not be normal behaviour. Horses are not natural aggressors he said but they will defend their territory. He described two types of kick - a high backward kick in an arc and a low kick to the side. It was his opinion that to be struck on the forehead the appellant was either bending down low close to the horse or was four or five feet away.

[8] As the second respondent was too unwell to attend court, a statement made by him was put in evidence by agreement.

[9] The evidence satisfies me that the first respondent was engaged by the second respondent as an independent contractor and that the relationship between the first respondent and the appellant was as employer and employee. A horse owner is entitled to rely on the expertise of the farrier and his assistant as to their requirements. I do not consider that in ordinary circumstances (of which this was one) the owner is responsible for providing someone to manage a horse, particularly when the farrier is accompanied by an assistant. I preferred the evidence of Mr Smylie and Mr Connolly on this issue. It may be otherwise if the history of the horse justified such a course of action. If the first respondent had required the assistance of the owner he could have asked for it. He did not and the owner and the court is entitled to infer that he did not require it. The appellant and the first respondent were well used to working together and with horses and I doubt if they approached this job in a different way from any other. One did the shoeing and the other the removal and clenching. In the case of a quiet horse, which this one was until the incident, neither required the assistance of the other. There were two of them present and it would have been easy for one to hold the horse while the other shod or clenched if that had been necessary.

[10] Mr Ferran who appeared on behalf of the appellant agreed with the submissions of counsel on behalf of the first respondent, that the appellant was not the employee of the first respondent. He argued that the second respondent owed a duty of care to the appellant due to the appellant's proximity to a horse which was in the second respondent's possession and control. He submitted that both experts stated that it was standard practice

for the owner/keeper to overview the shoeing of a horse. As the horse had required to be lunged before to calm her down (a bad practice according to Lady Brookeborough), it was reasonably foreseeable that she might become agitated and those in the vicinity of her might be subjected to risk of harm. It was no defence for the second respondent to say that he could rely on the expertise of an independent contractor. Such a defence is only available if the independent contractor is chosen with due care. The person chosen on this occasion was one who was unqualified, uninsured and claiming unemployment benefit. Mr Ferran submitted that the second respondent should be considered the appellant's employer and therefore the Workplace (Health and Safety and Welfare) Regulations (NI) 1993 and the Manual Handling Regulations applied also. He also relied on the Welfare of Animals Act 1972 and the Welfare of Animals Riding Establishment Regulations. The second respondent in my view is not the appellant's employer and there is no evidence that the premises were a riding establishment. The first respondent is an independent contractor who employed the appellant. Both were experienced with horses. The second respondent was entitled to rely on that and there is no evidence that he was aware of the fact that the first respondent was uninsured or lacking in formal qualifications.

[11] The main thrust of the appellant's case was that the second respondent was liable to the appellant under the Animals Order (NI) 1976. This Order introduced new provisions relating to strict liability for damage done by animals and replaces the previous common law rules. Article 3 provides –

> "3. The provisions of Articles 4 to 6 and Article 8 replace-
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> > (a) the rules of common law imposing a strict liability in tort for damage done by an animal on the ground that the animal is regarded as ferae naturae or that its vicious or mischievous propensities are known or presumed to be known;
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> > (b) the rules of common law imposing a liability for cattle trespass; and
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> > (c) section 1(1) to (3) of the Dogs Act 1906."

[12] For show-jumping purposes the registered owner of the horse, "Foyle Flashing Steele", was apparently, the second respondent's daughter. However, it was submitted that at the relevant time, the second respondent was either the owner or in possession of the horse. He was present and made all the arrangements and pointed out the animals to the appellant and the first respondent. Article 4 of the Animals Order provides -

"4. - (1) Subject to Article 6, where any damage is caused by an animal which belongs to a dangerous species, any person who is a keeper of the animal is liable for the damage.

(2) Subject to Article 6, 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 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 a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen years."

[13] Article 4(1) applies to dangerous species and Article 4(2) to non dangerous species. These are defined in Article 2(2) -

(2) For the purposes of this Order-

(a) a dangerous species of animal is a species-

(i) which is not commonly domesticated in the British Islands; and

(ii) 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 severe."

[14] It was accepted, correctly, that a horse is not an animal of a dangerous species. It was submitted that the evidence fulfilled the criteria required by Article 4(2). This Article applies where damage is caused by an animal which does not belong to dangerous species. In such a case the keeper is liable provided the other conditions are satisfied. The keeper is defined in Article 2(2)(b) -

> "(b) subject to sub-paragraph (c), a person is a keeper of an animal if-
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> (i) he owns the animal or has it in his possession; or
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> (ii) 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;
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> 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 sub-paragraph continues to be a keeper of the animal until another person becomes a keeper thereof by virtue of those provisions."

[15] There is no evidence that the second respondent is the owner of the horse nor is there any evidence that his daughter, alleged to be the owner, was at the relevant time under the age of sixteen years. There is however clear evidence that the second respondent was in possession of the horse at the relevant time. It was on his premises, in his loose-box, he engaged the first respondent to re-shoe the horse and pointed out the horse to him. For the keeper to be liable, the conditions set out in paragraphs (a), (b) and (c) of Article 4(2) need to be satisfied.

[16] It was submitted by Mr Ferran that Article 4 imposes strict liability on the owner of an animal. He relied on the House of Lords decision in Mirvahedy v Henley 2003 2 AC 491 which resolved the issue between two conflicting interpretations of section 2 of the Animals Act 1971. Section 2 is in the same terms as Article 4 of the Animals Order 1976. In that case the plaintiff suffered personal injuries when the car he was driving was in collision with the defendants' horse. The horse along with two others was in a field from which they escaped. They had panicked for some unknown reason. On the claim for damages the judge found that the field had been adequately fenced so that the defendants had not been negligent in that regard. He concluded that, although the horse had displayed characteristics normal for

its species in the particular circumstances (within the second limb of section 2 (2)(b) the Animals Act 1971 Article 4(2)(b) of the Animals Order 1976) , those characteristics had not caused the damage. The Court of Appeal allowed the plaintiff's appeal. The defendants appealed to the House of Lords. By a majority of three to two the appeal was dismissed. It was held that under section 2(2)(b) of the 1971 Act the keeper of a non-dangerous animal was strictly liable for damage or injury caused by the animal while it was behaving in a way that, although not normal behaviour generally for animals of that species, was nevertheless normal behaviour for the species in the particular circumstances, such as a horse bolting when sufficiently alarmed; and that, since the accident to the plaintiff had been caused by the defendants' horses behaving in an unusual way caused by their panic, they were liable to him. Lord Hobhouse analysed the majority opinion on the section in paragraphs 68ff –

> "68. This is the starting point for the legal question which has arisen in this case. The damage to Mr Mirvahedy and his car by the panicking horse when it charged into his car and landed on its roof was and was likely to be severe: section 2(2)(a). Similarly the keepers of the horse knew of the characteristics of horses in general and their horse in particular which made such damage a likely consequence of such conduct in a state of panic: section 2(2)(c). It is accepted that it is not a normal characteristic of horses to cause such damage. They may have the capacity to kill a man by kicking him on the head but it is not likely that any normal conduct of theirs will lead to that result nor that they have a normal propensity to attack human beings. If it had been the case that the horse in question was known to have characteristics which made such injuries likely in the ordinary course, there would be no question but that the requirements for liability under section 2(2) would have been satisfied and the defendants would be liable. But that is not this case. The question is whether the other alternative in section 2(2)(b) is satisfied: whether the likelihood of the damage or of its being severe was due to characteristics of the horse which are not normally found in horses except at particular times or in particular circumstances.
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> 69. Horses are not normally in a mindless state of panic nor do they normally ignore obstacles in their path. These characteristics are normally only found in horses in circumstances where they have been very

seriously frightened. It is only in such circumstances that it becomes likely that, due to these characteristics, the horse will cause severe damage. This case clearly comes within the words of section 2(2)(b). There is no ambiguity either about the facts of this case or about the meaning of paragraph (b).

70. The report of the Law Commission supported such a conclusion in its recommendations for the retention of the scienter principle: see paragraphs 17, 18 and 91 of the report, at pp 12-13 and 41. Using the example of a bitch with puppies, the Commission said, at paragraph 18(ii):

> 'In our view the fact that a particular animal belonging to a non-dangerous species shares [dangerous] characteristics with other animals within the species, either at a particular age, at certain times of the year or in special conditions, should not preclude liability where the keeper knows of the presence of these characteristics in the animal at the time of the injury. If the keeper of a bitch with a litter knows that it is prone to bite strangers, then even if this is a common characteristic of bitches at such a time, we think that the keeper should be strictly liable, subject to the permissible defences ...'

71. The contrary argument seems to be based upon the view that any normal behaviour of a domesticated animal should not give rise to liability. This point was clearly put in the judgment of Lloyd LJ in Breeden v Lampard (unreported) 21 March 1985 from which my noble and learned friend, Lord Nicholls, has already quoted. It is true that there is an implicit assumption of fact in section 2(2) that domesticated animals are not normally dangerous. But the purpose of paragraph (b) is to make provision for those that are. It deals with two specific categories where that assumption of fact is falsified. The first is that of an animal which is possessed of a characteristic, not normally found in animals of the same species, which makes it dangerous. The second is an animal which,

> although belonging to a species which does not normally have dangerous characteristics, nevertheless has dangerous characteristics at particular times or in particular circumstances. The essence of these provisions is the falsification of the assumption, in the first because of the departure of the individual from the norm for its species, in the second because of the introduction of special factors. Criticisms can be, and have been, made of the drafting of paragraphs (a) and (b) of section 2(2); but they should not be made, and are not justified, in this respect of the drafting of paragraph (b). It does not lack coherence.
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> 72. The statute, in this respect following the recommendation of the Law Commission, had to reflect a choice as to the division of risk between the keeper of an animal and members of the general public. Neither is blameworthy but it is the member of the public who suffers the injury or damage and it is the keeper who knows of the characteristics of the animal which make it dangerous and liable to cause such injury or damage. The element of knowledge makes the choice a coherent one but it, in any event, was a choice which it was for the legislature to make.
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> 73. For these reasons, which accord in most respects with those given by my noble and learned friend, Lord Nicholls, and to be given by my noble and learned friend, Lord Walker, I would dismiss the appeal."

[17] It is clear that in applying Article 4 several question require to be asked. Under sub-paragraph (a) – firstly, is the damage of a kind which the animal was likely to cause unless restrained and secondly, is the damage caused by the animal, of a kind which is likely to be severe. Under sub-paragraph (b) – firstly, is the likelihood of the damage (or of its being severe) due to characteristics not normally found in that species of animal; or, secondly, is the likelihood of the damage (or of its being severe) due to characteristics not normally found in an animal of that species except at particular times or in particular circumstances. Under sub-paragraph (c) – those characteristics (that is characteristics not normally found in animals of that species, or not normally so found except at particular times or in particular circumstances) were known to the keeper of the animal or to a person who had charge of the animal as the keeper's servant or a member of the keeper's household under sixteen years of age.

[18] In relation to sub-paragraph (a) there is no evidence that the damage sustained by the plaintiff was damage which the horse was likely to cause unless restrained. A kick to the head by a horse is likely to result in damage that is severe. In relation to the first part of sub-paragraph (b) kicking is a characteristic normally found in horses. In relation to the second part of sub-paragraph (b) the particular times or circumstances are the occasion of being re-shod. The evidence does not suggest that kicking by a horse during re-shoeing is normally found. In relation to sub-paragraph (c) there is no evidence that the characteristic of kicking or kicking during re-shoeing was known to the second respondent or to a member of his family under the age of sixteen years. Therefore the conditions necessary for strict liability to arise under Article 4(2) are not satisfied. In those circumstances I do not require to consider the exceptions from liability identified in Article 6.

[19] It was submitted that the appellant appealed the whole decree of the county court judge on the basis that the liability of the respondents should be joint and several. I do not find liability to be joint and several. The appellant has failed to make out his case against the second respondent and the appeal against the decision of the county court judge in relation to that issue is dismissed. I see no reason to differ from the view of the Deputy County Court judge on the issue of damages and the decree of the county court both as to liability and damages against the first respondent stands.