Neutral Citation Number: [2025] EWHC 435 (KB)

Case No: QB-2022-000994

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2025

Before:

MR JUSTICE COTTER

- -

Between :

HAZEL BOYD	**Claimant**
- and -	
DEBBIE HUGHES	**Defendant**

- -
- -

Emily Read (instructed by **RWK Goodman**) for the Claimant
Georgina Crawford (instructed by **Kennedys Law**) for the Defendant

Hearing dates: 25th, 26th, 27th, 28th November and 2nd December 2024.

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE COTTER

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Mr Justice Cotter:

Introduction

1. This is the judgment in a personal injury action. Both liability and quantum are in dispute and the Defendant also alleges that the Claimant has been fundamentally dishonest.

2. The basic facts are not in dispute and can be shortly stated.

3. On 23rd June 2020 when the Claimant, who was employed by the Defendant as a rider and stable hand, fell from a cantering horse and sustained a serious injury to her right arm.

4. The Defendant carried on a business as a racehorse breeder and trainer at Ty'r Heol Farm, Pantybrad, Tonyrefail, Porth, Cardiff. The Claimant was employed by the Defendant as a work rider and stable hand and was a very experienced horsewoman. The Defendant's premises included a horse-shoe shaped gallop with a carpet fibre surface that was about 4 furlongs (880 yards) in length, and a round; gallop of a similar length and constructed with a similar surface. There was also an indoor school.

5. At the time of the accident the Defendant had about 35 horses at her premises 12 of which were being exercised and trained. One of the horses being trained was a three year old gelding named Freezing (IRE), but known as "Foxy". He had been purchased by the Defendant in the Tattersalls sales in Ireland in September 2017 as a foal for £18,000.00. He was backed and broken in the late part of 2018 and early part of 2019 by another of the Defendant's employees, the head lad Allan Williams, and had been exercised regularly on the gallops from around that time i.e. 2018/2019.

6. By June 2020, as Foxy was still young, his weekday routine typically alternated between a day's canter exercise on the gallops followed by the horse walker on the following day. At the weekends all of the Defendant's racehorses tended to go on the horse walker or to be lunged.

7. On 23 June 2020 the Claimant was instructed to ride Foxy and to do three circuits of the round gallop. She was to lead another member of the Defendant's staff, Gemma Stead, riding another of the Defendant's horses called "Ivawood". They were accompanied by Allan Williams. The two horses walked on the road between the Defendant's training yard and the gallops, and were then ridden onto the gallop in single file with the Claimant's horse a few lengths ahead. They entered to the gallop along a stretch called the Shute and when they reached the gallop proper, they built up speed into a canter. Approximately 150 yards into the exercise Foxy moved to his right; the exact nature, extent and causes of the movement being in dispute, causing the Claimant to fall off and sustain a dislocation and articular fracture to her right elbow.

Claimant's case on liability

8. It is the Claimant's case that Foxy was known to shy/jink more easily than other horses and that he had previously shied at something when being ridden at a trot by the Claimant in the indoor school resulting in the Claimant falling off causing her some bruising. There were other similar incidents when the Claimant was lucky not to fall off. The accident occurred as Foxy suddenly dropped his right shoulder and shied/jinking sharply to the right. The Claimant who was standing up in the stirrup irons, was unable to keep her balance on the horse; her momentum took her forwards whilst the horse moved away to the right from underneath her and she fell off. She landed on the floor and was injured. Gemma Stead's horse jumped over the Claimant on the ground.

9. It is also the Claimant's case that the Defendant is strictly liable to the Claimant for the accident and her consequential injuries, by virtue of section 2(2) of the Animals Act 1971 ("the Act"). There is no claim in negligence. I shall deal with the specific requirements for liability to be established under section 2(2) of the Act in detail in due course. By way of overview, it is the Claimant's case that the damage (personal injury) was of a kind which the horse, unless restrained (and Foxy was not fully restrained) was likely to cause and/or if damage was caused by the horse, it was likely to be severe. Further, the likelihood of the damage, or of it being severe, was due to characteristics of Foxy which are not normally found except at particular times or in particular circumstances. It is the Claimant's case that the horse displayed the characteristic of shying/jinking and that this was because of particular circumstances. Whilst all horses can shy on occasion, they only do so when triggered to do so by particular circumstances. In this case the cause of or reason for Foxy shying was not known (neither rider saw anything unusual or amiss) but it is likely that he "perceived a threat". Foxy was more prone to shy/jink than other horses of his age and/or to do so more violently. The Defendant, an experienced racehorse trainer, was fully aware of the characteristic of Foxy (or any horse) shying/jinking due to what was perceived to be a threat which means that the knowledge requirement under 2(2) of the Act was satisfied.

Defendant's case on liability.

10. The Defendant accepted that she knew shying can be a characteristic of all horses. However, Foxy was no sharper than any other three year old thoroughbred.

11. Further, and in respect of section 2(2) of the 1971 Act;

    (a) It had not been established that Foxy did actually shy/jink and if he did the cause of his movement is unknown.

    (b) Shying at a perceived threat is not a characteristic "at particular times" or in "particular circumstances which is a requirement of section 2(2)(b) of the Act.

    (c) It was not "reasonably to be expected" that a shy would result in the Claimant suffering any damage through a fall.

    (d) It was also not likely that any injury sustained would be serious.

12. Given the Defendant's case factual findings are necessary as Foxy's behaviour and as to how the Claimant came to fall.

13. Further the parties disagree upon whether the Claimant has satisfied each of the three of the subsections under section 2 of the Act.

Claimant's case on quantum.

14. It is the Claimant's case that she has suffered a serious injury to her right elbow and whilst she has made a very good recovery considering the extent of the damage, she has lost her employment and suffers permanent residual symptoms; principally pain, an inability to lift heavy objects with her dominant arm and a restriction of movement. Eventually she has set up a dog care business but she has ongoing financial losses.

15. It is also the Claimant's case that she has never exaggerated the effects of the accident.

Defendant's case on fundamental dishonesty and quantum.

16. It is the Defendant's case that the Claimant did indeed suffer a serious injury but she has been fundamentally dishonest in that she has exaggerated the level of her ongoing disability; most notably when examined by the medical expert instructed on behalf of the Defendant.

17. The Claimant has also failed to give credit for sums paid under a compulsory insurance scheme.

Evidence on liability

Lay witness

18. I shall first set out the relevant content of the witness statements.

19. The Claimant stated that she was 40 years old at the time of the accident and had worked in horse racing since she was aged 18. She had worked for several racehorse trainers before the Defendant. She had an amateur licence and an apprentice licence meaning she could ride in races until she was 25. She started to work for the Defendant in July 2019, after leaving Evan Williams' yard. She would ride three or four "lots" per day and would also undertake usual yard duties of mucking out the horses, putting them on/off the walker, grooming, feeding, rugging the horses and general yard cleaning duties.

20. As to the circumstances of the accident she set out in her statement as follows:

> "We were roughly 150 yards into the exercise, and I was about in the middle of the gallop, when, without warning, the horse shied. He dropped his right shoulder and jinked sharply to the right. I would say he ended up on the far-right hand side of the gallop. I was standing up in the stirrup irons as normal and I couldn't keep my balance on the horse. I was effectively left in mid-air, whilst the horse moved away to the right from underneath me. I fell and landed on the ground and was injured.

> 30. Gemma was a few lengths behind me, and she shouted something at me which I thought was "Go left!" Anyway, as I went to roll away her horse almost had to jump over me on the ground. I stood up in a bit of a daze I suppose. I took my hat off and was thinking about going to get the horse, but my arm was mangled.
>
> 31. I have no idea what triggered the horse to do what it did but it was obviously something whether it was a bird or a rabbit (which were common) or a cat (there was a farm next door) or anything else moving in his vision. Sometimes we had geese or sheep wandering through the long grass. It is just in his nature to shy at movements or noises. I know that I am a good rider and have ridden plenty more nasty horses, but they were, in their own way, predictable. On this occasion, and even though I was paying attention to the job at hand, I simply did not anticipate what he did and what he did was so sharp that couldn't stay on. I had ridden horses for 27 years and would not have come off this horse had it not done something serious."

And

> "The Defence says that the horse was in a slow canter and stepped sideways slowly. No. That makes you think it was just part and parcel of a canter and that I must have been asleep to fall off. I am afraid that is nonsense. I am not saying the horse jumped a big distance – a horse doesn't have to do that to get you off. It was enough that it moved sharply out from underneath me."

And

> "If the horse caught something out of the corner of his eye he would drop his shoulder. He would go at the front of the string because he could be quite strong behind other horses. But the horse would behave like he did in front and behind.
>
> 26.As a two-year-old, I rode him trotting in the indoor school when perhaps some wind caught the side of the building and he dropped his left shoulder and went very sharply left. I came out of the back door rather than the side door landing on my backside and apart from bruises I was fine.
>
> 27. The horse had napped a few times on the gallop. The horse would pretty much shy at a blade of grass being blown. I did fall on another occasion with a bump or a scrape and at other times I was left hanging on after being "airborne" and could have come off just as easily as staying on, which I managed to do."

21. At the outset of her evidence the Claimant rectified an error in her statement in that she had not fallen off Foxy on any other occasion on the gallops (as set out at paragraph 27). She had fallen off him only twice; one when he was aged two and in being trained in the indoor school and then at the time of the accident.

22. Gemma Stead provided a statement on behalf of the Defendant. She had been employed by the Defendant as a work rider since sometime in 2018/2019 (over four years as at January 2023). She described Foxy as follows:

> "Foxy is a typical 3-year-old racehorse, not dangerous at all. If there are geese or sheep in the surrounding fields, he will have a look at them but most horses would. He is also generally fine around farm machinery.
>
> I have cantered him on the round gallop on many occasions and I have never experienced any issues doing so. Specifically, Foxy has never jinked with me on the round gallop or dropped his shoulder when riding him but horses can spook or move sharply. This would not generally cause me to fall off. I have never fallen off Foxy in any environment.
>
> Hazel and I both regularly rode Foxy. I do not know the exact number of times that she rode him but I would estimate it to be at least over 100 times and on many of those occasions she would have ridden him on the round gallop doing a similar canter exercise to what we were doing on the morning concerned."

23. Her statement covered the accident as follows:

> "19. …We began in trot and were soon into a slow medium paced canter. We were travelling along the first straight section of the track when, approximately 200 yards later, the incident occurred. We were not yet at a swinging canter or at a fast pace.
>
> 20. I had a good view of what happened as it took place directly in front of me. Foxy jinked to his right whilst in a canter, a movement that I would describe as nothing more than a side step. He did not turn to his right but moved off the straight line to the side and then back in.
>
> 21. Jinking is when a horse deters off a straight line for a stride as a reaction to something that might have spooked him. This can be a little unbalancing but not generally cause Hazel or me to fall off and I say this having previously watched Hazel stay on a horse that has jinked. Racehorses can be sharp and to be a work rider at a racing yard you should be able to stay on for those type of movements.
>
> 22. I did not see or hear anything that might have caused him to jink.
>
> 23. He did not go further to his right than the middle of the track and it was only for one stride. He did not change direction or change pace."

24. The Defendant, Debbie Hughes, explained that following an accident (not related to horse riding) her role at her yard was managerial, yard work such as mucking out, putting the horses on the walkers and she often watched the employees on the gallops. At the time of the accident Gemma Stead and the Claimant were her main work riders and Allan Williams, the head lad, would often lunge the horses.

25. She described the Claimant as a competent rider, certainly capable of riding all of the racehorses at the yard having worked as a work rider for approximately 9 years. She explained that as it was a small yard workers tended to ride the same horses week in/week out unless they raised any concerns. There were no concerns raised about Foxy.

26. She stated that Foxy was initially ridden by Allan Williams and Gemma Stead. When the Claimant joined she also began riding Foxy. Foxy was also ridden by Ms Berry who had a horse on livery at Derek Haydn Jones Racing yard up the road. Ms Berry is around 65 years old.

27. She explained that her racehorses were generally ridden 5 days a week and at weekends turned out and/or walked in the walker. As for Foxy's characteristics and temperament she stated:

> "Foxy is as sensible as any other three-year old racehorse at that age. He was not immature and whilst racehorses can shy or spook, he was not overly sensitive or difficult to manage. Aside from the incident in question, there have been no other accidents reported to me about Hazel falling off Foxy on the gallops. Nobody has ever reported to me that he is a difficult horse to ride or one that is especially sharp for his age or prone to jink whilst being cantered on the gallops or anywhere else."

28. Alan Williams was the head lad at the yard. He had a hand in developing Foxy early in 2019 working with him as a two-year old. He set out in his statement that:

> "8 Foxy is a genuine horse, there is nothing nasty about him. Initially, he could be a little skittish so we all knew not to move too quickly around him but as he grew up he improved. He is no sharper or more prone to spooking than any other three-year old racehorse. He is good around traffic as well as farm machinery.
>
> 9 We knew that Foxy was not going to be a competitive two-year old due to his physique therefore we decided to give him time to develop as a three-year old. He had his first race as a three-year old in August 2020.
>
> 10 Hazel would most certainly have ridden more sharp racehorses than Foxy during her career. We had horses at the Farm such as Frolic who were more advanced rides that Hazel rode regularly."

And

> "...(the Claimant) has never raised any concerns to me about riding Foxy. I believe that she even rode him at the Barrier Trials at Wolverhampton in 2020."

29. Mr Williams stated that he was aware of one previous accident involving the Claimant and Foxy whilst they were doing some work in the indoor barn. He did not see why she had come off but his understanding is that she was uninjured and got straight back onto Foxy to continue riding him.

30. As regards the likelihood of injury through a fall Mr Williams stated:

> "18 I have ridden plenty of racehorses in my career including on the gallops at Ty Heol Farm where they have jinked or shied without me falling off. I would say that in nine out of ten of those occasions, I have remained in the saddle. When I have fallen off, I have not been injured badly. More often than not, it is just your pride that gets hurt."

Expert evidence

31. Two equine experts provided reports; Ms Taylor on behalf of the Claimant and Mr Lane on behalf of the Defendant. There was little of significant difference between their opinions.

32. Ms Taylor stated:

> All horses shy/jink on occasion. This is very common every-day behaviour, although it does not happen all the time. In most circumstances shying and jinking does not result in a rider falling off. Although possible, I would not expect a rider of the Claimant's experience to fall off unless the Horse's actions were sudden, without warning, sharp (fast) and of sufficient movement to cause her to lose her balance and therefore unseat her. The fact that the Claimant did fall off suggests that the Horse's actions were sudden, without warning, sharp and significant."

And

> Young thoroughbred (TB) racehorses are immature both physically and mentally and are particularly unpredictable. Racehorses are trained to be fit and fast and tend to be more sensitive than other breeds of horse. They can be 'sharper' (more likely to shy, jink, whip around and behave unpredictably) than other older horses.
>
> All horses can be unpredictable, and all horses will on occasion shy. If the Claimant's evidence is accepted, then the Horse was known to be more prone to shying/jinking than the average horse. If it is found that the Horse had a propensity to shy more than the average horse, then in my opinion, from the evidence I have seen, the Claimant had the necessary skill to cope with this, although even the most skilful riders can fall from a horse when it shies. See 3.5 above.
>
> It is within the parameters of normal behaviour for all horses to shy/jink but only in particular circumstances - where they perceived a threat or are startled.

> Horses (especially young horses) can be startled, or take fright at many things that humans find normal, such as the movement of everyday objects (e.g., the movement of a trees branches), stationary objects (e.g., dustbins), a bird flying out of a hedge.

And

> Shying and jinking is common behaviour. In most circumstances shying does not result in a rider falling off, and consequently damage is not reasonably to be expected. However, in circumstances where a horse shies or jinks when travelling at 15-20 mph, it is reasonably to be expected that if the rider does fall they will be thrown from some height and force, in which case some soft tissue injury is likely, and in such circumstances it would not be surprising if severe injury was caused. Whether severe injury is likely depends on the force of the fall, how the rider lands, and the surface the rider lands on.

And

> Shying and jinking are both within the normal parameters of behaviour for all horses when in particular circumstances. The specific circumstances or 'trigger' that caused the behaviour are unknown, but on the balance of probabilities the Horse was reacting to a perceived threat and/or being startled. If the Claimant's evidence is accepted, it is reasonably to be expected there will be some damage such as soft tissue injury. Whether severe injury is likely depends on the force of the fall, the surface the rider lands on, and how they land. This is a matter for legal argument. The keeper would be aware that all horses can behave as this horse did on this occasion."

33. Mr Lane is also a very experienced equine expert. In his report he opined as follows;

> If the Claimant was a competent and reasonably experienced rider of young Thoroughbred racehorses then I would expect her to know that all horses can behave unpredictably on occasions and that such unpredictable behaviour can include or spooking and/or veering sideways unexpectedly and that generally 3-year-old Thoroughbred racehorses are more unpredictable than the average trained horse or more mature Thoroughbred racehorse.

And

> If the Claimant had ridden Foxy on many occasions (Gemma Stead's evidence is about one hundred occasions) and if the Claimant had fallen off on about three of these occasions (two previous occasions and the time of the accident – the Claimant's evidence) and if Gemma Stead had ridden Foxy on numerous occasions both before and since the Claimant's accident and had never fallen off Foxy, then I would expect that Foxy was probably no more unpredictable and no more difficult to ride than the average 3-year-old Thoroughbred racehorse."

(it is to be noted that as I have set out above the Claimant corrected her evidence from three falls to two falls)

And

> If a horse was to do something that a horsewoman such as the Clamant describes as 'dropping its shoulder' (discussed at Paragraph 3, above) on the majority of occasions that a horse does drops its shoulder, an experienced rider, such as the Claimant, will not fall off. They may fall off, but they probably will not fall off.
>
> It will be for the Court to decide how many times the Claimant had fallen off Foxy, but if she had ridden Foxy on about 100 occasions and fallen off 1-3 times, including the time of the accident, and if Gemma Stead had ridden Foxy on numerous occasions and never fallen off, then it would appear the risk of falling off Foxy was low.
>
> If the rider falls off then they may well receive minor soft tissue injury, by which I mean bruising or similar, but on most occasions that a rider falls from a cantering horse they do not suffer severe injury. They may suffer severe injury but most of the time they will not. People fall off horses on hundreds of occasions every day and very few of these falls result in severe injury, most result in no injury or very minor soft tissue injury. If falls frequently resulted in severe injury then hospital A&E departments would be packed with horse riders on a daily basis.
>
> If a rider falls onto the relatively soft surface of an all-weather gallop, then the risk of injury or of severe injury is less than if falling onto a harder surface.
>
> Any injury results from the rider falling onto the ground. How they fall will depend to a certain extent on the dexterity of the rider, the way the horse behaves and the surface onto which they are falling, but at the end of the day whether or not they are injured may amount to 'luck' (or bad luck).
>
> Foxy did not possess any characteristics that are not normally found in horses. All horses can behave unpredictably on occasions and such unpredictable behaviour can include spooking and/or veering sharply to the right and or veering slightly to the right and then moving back to the left. All 3-year-old Thoroughbred racehorses may behave unpredictably and generally may be more unpredictable than the average horse or the average older Thoroughbred racehorse, and I have seen no evidence that his behavioural characteristics did not fall within the normal range for 3-yearold Thoroughbred racehorses.

34. The experts produced a joint statement. The most relevant extracts are as follows;

> We agree that all horses may be unpredictable on occasions. Such unpredictable behaviour may include shying. The characteristic of shying is found in all horses on occasions.
>
> We agree that in the particular circumstances of perceiving a threat, any horse may shy away from that threat. This is normal behaviour for all horses. Not all

horses will behave in this way on all occasions, but any horse may behave in this way on occasion.

We agree that in the context of this case, a horse that is said to be 'sharp' is one that is generally considered to be more likely to shy than the average horse. AMT adds a horse that is said to be 'sharp' is one that is generally considered to be more likely to shy, jink or misbehave than the average horse.

We agree that we would not expect the alleged incident (this was a reference to the fall whilst Foxy was aged two and being trained) to put the Defendant on notice that the Claimant's accident might occur or that Foxy was any more likely to shy than the average 3-year-old racehorse.

We agree that a horse that 'shies' has probably been startled by a perceived threat. In shying, the horse may suddenly stop, and/or turn around, and/or move suddenly sideways away from the perceived threat.

We agree that if a horse shies because it perceives a threat it will move away from that threat.

We agree that in the context of this case, Foxy moved sideways.

We agree that all horses can shy on occasion and that on most occasions it does not result in a rider falling off.

We agree that if a horse shies violently this increases the risk the rider will fall

We agree that it will probably never be known what caused Foxy to behave as he did on the day of the accident.

We agree that on most occasions that a horse decelerates and/or changes direction a reasonably experienced rider probably will not fall off.

We agree that the more extreme or violent the deceleration and/or change of direction the more likely it is that any rider will fall off.

We agree that if a rider does not fall off then we would expect that no injury would result.

We agree that if a rider falls off, they may well receive minor soft tissue injury such as bruising or similar.

We agree that if a rider falls onto the relatively soft surface of an all weather gallop, then the risk of severe injury is less than if falling onto a harder surface.

35. Within the document an area of disagreement the following was set out at paragraphs 14.2.7;

> CL says that on most occasions that a rider falls from a cantering horse, they do not suffer severe injury. AMT disagrees because the risk of injury, or if injury

> occurs of it being severe is dependent on the particular circumstances. Where a horse shies at speed it is reasonably to be expected that if the rider does fall, they will be thrown from some height and force, in which case some soft tissue injury is likely, and in such circumstances, it would not be surprising if severe injury was caused. Whether severe injury is likely depends on the force of the fall, how the rider lands and the surface the rider lands on.

36. After the joint statement was produced Mr Lane produced a report from TRL Limited "British Eventing Falls Database 2023". The report was produced under a contract with British Eventing. The introduction states:

> 1 Introduction
>
> The British Eventing (BE) falls project started at the beginning of the 2001 Eventing season. It aims to collect data that can be used to develop a greater knowledge of how falls occur in cross-country events. This knowledge should assist in the improvement of cross-country courses and fences, and reduce the risk of falls and injuries to both riders and horses.
>
> Federation Equestre International (FEI) has a similar project which records data relating to falls that occur at FEI events. This project was started at the beginning of the 2002 Eventing season.
>
> A number of reports have been published presenting analyses of the information collected as part of these two projects.

37. As for the size of the database;

> TRL received information about 100 BE and 20 FEI events during the 2023 season. In 2023, the BE events were run over 386 courses with a total of 39,729 cross-country competitors competing, i.e. an average of 98 competitors per course. The FEI UK events were run over 43 courses with a total of 3,355 cross-country competitors competing, i.e. an average of 78 competitors per course.

38. So over 43,000 rides within competitions were considered. Falls were graded as follows;

> The severity of each fall is recorded in the BE database. The severity of the rider's injury is based on the fence judges' initial assessment; this assessment may be revised in the light of further medical information. The assessment is based on the following guidelines:
>
> - Fatal - Death within 30 days as a result of injuries sustained in the accident; not death from natural causes.
> - Serious - Admitted to hospital as an in-patient either immediately or later as a result of the injuries sustained in the accident, or died, more than 30 days after

the accident from injuries sustained; or one or more of the following injuries: fracture, internal injury, severe cuts or lacerations, crushing, concussion.

- Slight - One or more of the following injuries: sprains, bruises, cuts judged not to be severe.
- No Injury - No recorded injuries.

39. Given the nature of eventing the only analysis relevant to this case was as follows;

> **4.1 Falls not at a fence**
>
> Of the 98 falls not at a fence, 24 involved both the horse and rider falling, 74 involved just the rider falling and none were recorded as "No Fall" (i.e., the rider dismounted the horse rather than fell).
> Of the 24 falls involving both the horse and rider falling:
> One rider was recorded as sustaining a serious injury. Six riders were recorded as having slight injuries, and 17 riders were not injured.
>
> Of the 74 falls where only the rider fell:
> Two riders were seriously injured; two were slightly injured, and 70 were recorded as having no injuries.

Oral evidence

Lay witnesses

40. I start with the evidence of the Claimant. Due allowance must be given for the fact that, as with many witnesses, the experience of giving evidence was undoubtedly a stressful and intimidating experience for the Claimant.

41. She explained that on the day in question Foxy was taken to the gallops, along the shute and onto the gallop proper. She had not reached a full canter when the accident happened; she was still "going up through the gears". It was a dry and quiet day so "unexpected for a horse to do something".

42. The reality is that the Claimant's fall was unexpected and she can remember little of the mechanics of the fall save that they were still building up speed and Foxy moved sharply to the right across the gallops; "stepped from one side to the other" and "it happened that quick I couldn't say if I lost my balance". She estimated that foxy moved 3-4 feet to the right.

43. As for the cause of the horse's movement she saw "nothing physical" and there was no wind. She did not expect him to do anything. As I have already set out in her statement, the Claimant stated that she had no idea what triggered Foxy to do what he did but and it could have been anything moving in his line of vision and that "It is just in his nature to shy at movements or noises".

44. As for the likelihood of a fall she said that even an experienced rider can fall and there can be a lot of different factors involved. She did not expect him to do what he did, but "Nine out of ten times you don't fall, but if its quick and unexpected you could fall; it must have been quick for me to fall off".

45. She said that the surface of the gallops was "all weather" carpet fibre for absorption; it could be "patchy" and could hold water. She accepted that it could be possible that horses did not like parts of the surface of the gallops.

46. Having heard her evidence, and that of the other witnesses, it is my view that there were three unsatisfactory elements of the Claimant's evidence on the liability issues (these were identified wholly independently of my consideration of any credibility issues arising from exaggeration of the extent of her disability).

47. Firstly, the Claimant was adamant, and wrong, when she said that she always rode Foxy when she was in work and that she had never seen Gemma Stead ride Foxy. Ms Stead said that she had ridden Foxy on numerous occasions and that she and the Claimant both regularly rode him particularly after the Claimant injured her ankle in March 2020. She had ridden Foxy the day before the accident on the round gallop. The records indicate that she had ridden the horse and having heard Gemma Stead I am entirely satisfied that she did indeed ride Foxy whilst the Claimant was also working. Other examples immediately before the accident being on 17th and 19th June when Ms Stead rode Foxy leading out the Claimant on another horse called Frolic. It is difficult to understand how the Claimant could simply have forgotten Gemma Stead riding Foxy on these occasions.

48. Secondly I do not accept that the Claimant's evidence that she told Alan Williams, or Deborah Hughes, that Foxy was skittish when he was first to be used as a lead horse (at a time when he was aged 3). There was no mention of this in the witness statement and I find the explanation that she was not asked a question by her very experienced solicitor about whether she had ever told anyone Foxy was sharp/skittish to be implausible given that knowledge on the part of the keeper is a necessary ingredient under section 2 of the Act. It is accepted that when Foxy was aged two and the Claimant first rode him Alan Williams mentioned about being careful; this broadly accords with his recollection. However it does not appear to be in dispute that after that Foxy matured significantly. Mr Williams was clear that he had no discussions about Foxy not leading and that if the Claimant had mentioned an issue that he would have done something about it. I accept his evidence on this issue.

49. Thirdly, the Claimant has exaggerated how sharp Foxy was. The statements that he "could shy at a blade of grass" and that if he "caught something out of the corner of his eye he would drop his shoulder" and "it is just in his nature to shy at movements or noises" are inconsistent with him being ridden so many times without any mishap. As agreed by the experts if Foxy was significantly more difficult to ride than the average 3-year-old racehorse the expectation would be that the history showed that riders had fallen from him frequently. The Claimant was unable to explain the conflict between the lack of incidents and her evidence. When Foxy was still being trained and still "learning" the Claimant fell off him (he had not been out on the gallops at this stage), but she accepted that he continued to mature after that and that she did not fall off him on any other occasion before the accident although she

had ridden him on her estimation well over a hundred times (and in addition others had ridden him) no doubt past innumerable objects that would have caused a "highly strung" horse to shy, even more so if it had such a very low threshold (e.g. various wild animals, vegetation blowing in the wind, shadows).

50. In my view these three aspects of the evidence taken in combination indicate that the Claimant has made statements which are not entirely accurate (or reliable) to support her claim.

51. Mr Williams stated that he had worked with horses all his life and started at Tyr Farm about 9 years before the accident. He was clearly trying to help the Court with honest, fair and balanced evidence. He stated Foxy was "still a baby" at three years of age and was not really more prone to spook than the other horses but was sharp "a bit quick" if he did react.

52. He said that Gemma Stead would ride Foxy but it was the Claimant who rode him "most of the time".

53. I accept as accurate Mr Williams' evidence that initially, when younger, Foxy could be "a little skittish so we all knew not to move too quickly around him but as he grew up he improved." I also accept that it was his honest view that Foxy was no sharper or more prone to spooking than any other three-year old racehorse and was good around traffic as well as farm machinery

54. Gemma Stead remains a friend of the Claimant and I have already set out what she said about Foxy in her statement. Some of her answers within oral evidence were inconsistent with each other and also not consistent with what she had set out within her witness statement. It was also difficult at times to hear her answers due to difficulties with the link.

55. During her oral evidence she said that Foxy "did not really" react to more situations than other horses, "other babies" and that any horse of that age could shy. She described him as was "sharp but not very sharp" and also as a "typical three year old". She said that he could be very quick in his responses if he had been startled and compared to other horses in the yard he was one of the sharper/quicker ones in his reactions, but she "always found him okay". However she then agreed with the proposition that he was more likely to shy than the average horse if he perceived a threat. At other stages during questioning she said that he was more likely to react that "the others" on the yard (meaning horses of the same age). Standing back and taking her evidence as a whole my view is that she considered Foxy to be a typical or "normal" horse of his age, but in comparison with the other horses in the yard of the same age he was the most reactive to things that concerned him (whatever that be). Also, if he did react he was the quickest/sharpest amongst the horses in terms of his movement

56. She agreed that to her jinking meant no more than moving sideways and shying meant the same as jinking (so shying meant no more than moving sideways).

57. She was asked by Ms Read if Foxy was likely to shy if he perceived a threat and she said that was not necessarily the case as it could be "something he has seen or thinks that he has seen". I asked her about Foxy jinking or shying on the gallops and

whether apart from perceived threats he jinked/shied for other reasons, such as concern about the surface she answered that it "could be anything", "a change of colour on the surface, something he has seen in the distance ...could be anything". I asked if in her view an accurate overview that there could be a shy and jink for some reason but we would not know what it is, and that nothing more than that could be said, and she said that was "definitely" the case. She reiterated in answer to Ms Read that the movement could be a response to a speck of colour on the gallops "could be anything" but that the horse would have some reason in its mind.

58. She said he had seen Foxy shy/jink previously "on maybe five occasions"; a sharp movement but the Claimant, who was riding him at the time, stayed on. He had not jinked when she had ridden him.

59. As regards the accident she stated that they entered the gallop from the shute and she was four lengths behind and slightly off to the right side (i.e. not directly behind the Claimant on Foxy). She said that there were different speeds of canter and it can also be perceived differently depending on the stride of the horse. She thought that they were travelling at approximately 15 mph.

60. Foxy jinked to the right and then back left. It happened quickly and the Claimant fell. She did not see the horse change speed and he did not change direction. She said agreed that the movement although she described it as a side step could have been sharp and sudden for the Claimant.

61. Ms Stead explained that she had fallen off a horse shying a long time ago in the past and broke her ankle. The horse had been alarmed ("spooked") by a small patch of snow on the side of the gallops.

62. She said that the surface of the gallops was processed carpet; "its soft", chopped up with a stone base underneath" and was "relatively thick".

63. The Defendant, Ms Hughes, was firm in her evidence that Foxy was no sharper than any other three year old colt (she had been around horses since 1984 and always broke in her own horses as a trainer). She described him as still immature; "backward and weak". He was on "five star fuel" at the time.

64. As for the causes of shying she said that horses such as Foxy can "shy at anything…they could misconstrue a branch…anything".

65. Ms Hughes explained the nature of the gallops surface. It was a Jockey Club approved surface of chopped carpet fibre two feet thick, under which there was a membrane and then a layer of stone for drainage and then clay. It was walked and checked each day by the handyman for holes (as animals could dig in it) and harrowed regularly to ensure no lumps on the surface.

Expert Witnesses

66. As I have set out there was very little difference between the views of the equine experts set out in their written reports and the joint statement. Their oral evidence did not reveal any significant differences of opinion. When evaluating their evidence it must be borne in mind that they had not seen the movement of the horse; only

heard the best efforts at descriptions of an event that happened very quickly and was of a very limited duration, and they also had not inspected the surface of the gallops.

67. As for the horse's movement Mr Taylor agreed that if Foxy's movement was only 3-4 feet to the right that the horse could get itself back on the same line/path in a couple of strides. She also agreed that a horse could take evasive action because of the surface of the gallops or as little as shaft of light. However she believed that for a shy (i.e. what she described as a shy in her reports and joint statement) it was the flight mechanism in operation and therefore it was not simply the case of the horse not liking something; it had to perceive a threat.

68. As for the likelihood of injury Ms Taylor said that "just" a fall from a cantering horse would not be likely to cause injury but that a speed of 15-20 mph would generate "quite a bit of force" and the height of the fall had to be considered. That is why she added the last sentence in paragraph 14.2.7 (set out at paragraph 35 above). She did not disagree with Mr Lane's statement that on most occasions a rider falling would not sustain severe injury rather she was "adding a rider" that injury depends on the force of the fall, how the rider lands and the surface landed on; this being common sense.

69. Mr Lane agreed that the dropping of the shoulder could simply be a reference to "a tilt" given the movement to one side. He said that shying was not a black and white situation (i.e. it was a range of movement) and he did not agree that it necessarily needed something violent in terms of movement to cause a rider to fall, as a rider can be caught unawares. If any horse moves sideways any rider can be unbalanced and fall off; the fact of falling off does not necessarily tell you anything about the degree of movement involved. He said that in most cases when there is such a movement the rider will not fall; "probably won't; possibly will". As for injury there is chance of minor injury if you fall off during a canter and severe injury is always a possibility (but no more than that). He did not consider that the speed here made a significant difference. He said that the ground onto which the riders fell in the TRL study (set out above) would be harder ground than the chopped carpet surface onto which the Claimant fell.

Findings of fact

70. I make the following findings of fact.

71. Horses have evolved to have natural flight and defensive behaviour because they were prey that needed to survive being hunted by being able to detect and avoid predators. All horses can shy when faced with a threat to their safety; the nature and extent of both the threat and reaction can vary considerably. As the experts explained when shying, the horse may suddenly stop, and/or turn around, and/or move suddenly sideways away from the threat.

72. An "average" 3-year-old racehorse, because it is young and relatively inexperienced in its training, may be more unpredictable in its behaviour than an older racehorse. Some 3-year-old racehorses will be more unpredictable than others.

73. I turn to Foxy's characteristics. Having arrived at Tyr Heol Farm in 2017 as a foal, Foxy was aged three as at the 1st January 2020. He had not yet raced as, to quote Mr

Williams, (who described him as "still a baby") he had yet to grow into his frame and was a bit on the small side. Foxy was essentially a normal three year old, As the Claimant stated:

> "He wasn't nasty and was a cheeky chappy who was maturing but not yet mature."

74. After taking into account all the lay witness evidence (including the inconsistencies in Gemma Stead's evidence) I find that Foxy could properly be described as entirely normal for his age in his behaviour and reactions but out of the three racehorses of his age in the yard he was the most likely to react if he saw something he did not like and also any movement by way of reaction in such circumstances would be the quickest of the horses. This has been described as him being "sharp"; it is in comparison to the limited pool of 3 other horses.

75. Normal animal behaviour can consist of a range of reactions to stimuli/thought processes and I accept the evidence of Allan Williams and Debbie Hughes and do not find either Foxy's tendency to shy or how he would shy, to be outside usual the range of reactions for a horse. The fact that another horse of the same age in the yard may have been less quick to react does not alter matters.

76. Apart from one incident in the riding school when he was two (when the Claimant was riding him) there had been no other falls from Foxy prior to the accident. The experts agreed that the incident in the school is of little relevance given his age and state of training at the time. The Claimant had ridden Foxy on many occasions (probably well in excess of a hundred occasions) and Gemma Stead had also ridden Foxy on numerous occasions both before and since the Claimant's accident (as had Ms Berry). The proof of the pudding is in the eating and given this history I find that Foxy was no more unpredictable or difficult to ride and no more liable to shy/jink or to do so more suddenly or violently than the average racehorse of his age. Also, and importantly, when he did shy/jink there were no falls caused.

77. It is my finding that Foxy did not possess any characteristics not normally found in horses. I shall deal with the Claimant's case as to a characteristic that he is said to have shared with other horses; the propensity to shy/jink at particular times or in particular circumstances in detail in due course.

78. I now turn to the cause of the accident.

79. There was a significant degree of agreement in respect of the general circumstances of the accident, however some issues of fact remained to be resolved. My findings are as follows.

80. The Claimant, who was riding Foxy, and Gemma Stead, who was riding Ivawood, went along the chute and onto the gallops proper and started increasing speed. When they reached a point about 150-200 yards down, on the left hand side/to the middle of the gallop (which can accommodate three horses abreast) Foxy moved unexpectedly to the right; variously described as a "jink" or sidestep or dropping of the shoulder, and then immediately back to the left. The Claimant estimated he moved three to four feet to the right and I find it was no more than that. Having heard her evidence I do not accept after he moved to the right he "ended up on the far right

of the gallop". In my view this is inconsistent with Gemma Stead's general impression of the right then left movement (more of a" sidestep") and also, to a degree, with the Claimant's own oral evidence that the movement was 3-4 feet to the right.

81. Although the movement did not involve a significant change of direction, it happened quickly and the Claimant, who was in the normal position for rider such as her (a working rider) cantering on the gallops in that she was out of the saddle and in short stirrups (which would make maintaining balance more difficult) lost her balance and fell off landing in the left to the middle of the gallop. I accept Mr Lane's analysis that it had not needed "something violent" in terms of movement to cause the Claimant to fall as she was clearly caught unawares. If any horse unexpectedly moves sideways a rider can be unbalanced and fall off, even a very experienced/professional one (albeit rarely).

82. The cause of Foxy's movement is unknown. He did not bolt or appear to panic at any stage. When Gemma Stead retrieved him, he seemed wholly unbothered or distressed; not "stressed or sweated up". As I have described the movement was effectively a "side-step" and he was very quickly back on the same path and if the Claimant had not been unseated the canter would have continued as normal. In short there was no sign of the flight mechanism having kicked in apart from the sidestep movement. Also, there was no detectable potential hazard or stimuli which was apparent to the Claimant who was riding the horse, or Gemma Stead who was riding behind.

83. The gallops were specially constructed for purpose and were subject to regular inspection and harrowing once a day as animals could dig into the surface. Foxy was very familiar indeed with the ripped carpet surface in general and there were no observable candidates for a perceived threat such as another animal, wind blowing or a noise. The Claimant, who was paying attention to what she was doing did not anticipate any issues and did not know why Foxy suddenly moved to the right. She could see nothing that could be perceived as a threat. Likewise Gemma Stead who gave evidence that Foxy could shy/jink (which in her mind simply means a sharp movement to one side) because of something he has seen or thinks that he has seen; "could be anything", "a speck of colour on the gallops...could be anything". She did not describe his movements as necessarily linked to a threat or perceived threat.

84. In the joint statement the experts agreed that all horses may be unpredictable "on occasions". Such unpredictable behaviour may include shying/jinking. This characteristic is found in all horses on occasions. Mr Lane, when opining that Foxy did not possess any characteristics that are not normally found in horses, stated;

> "All horses can behave unpredictably on occasions and such unpredictable behaviour can include spooking and/or veering sharply to the right and or veering slightly to the right and then moving back to the left."

I accept this evidence, and the difference with predictable reactions in particular circumstances is noteworthy. It appears to me that the reality is that the reasons on "these occasions" were wholly undetectable. There is a limit to reliable analysis of horses "psyche" and as a result care must be exercised when seeking to analyse what

Foxy did not to assume that his actions and reactions have what we would consider a sensible rationale.

85. As Mr Lane neatly put it; "the horse has done something and we speculate".

86. The Claimant's case; which needed to be proved, is that Foxy was reacting to a "perceived threat". Whilst it is the agreed expert's view was that it will never be known what caused Foxy to behave as he did on the day of the accident, they also agreed that Foxy probably moved sideways as he had "perceived a threat". They explained that a horse may suddenly stop, and/or turn around, and/or move suddenly sideways when it perceives a threat (so a wide range of reactions).

87. One must be careful of false logic a fortiori when seeking to explain a wide range of movements through undetectable stimuli, as even if it were the case that a horse always moves sideways when cantering if it perceives danger that does not mean every time a horse moves sideways it perceives danger as this would ignore the counterexamples which refute the premise e.g. a horse may move sideways because it sees an uneven patch on the ground and wishes to avoid it. Having heard both experts it is clear that on balance they each think that Foxy moved suddenly right because of a perceived threat of an unknown nature. However they are wholly reliant on witness descriptions with little by way of objectively ascertainable fact (save that the horse deviated from a straight line and the Claimant fell off) and had never visited the gallops and inspected the surface or surroundings. The possibility of the surface being a reason for the movement played no part in their analysis. Ultimately the cause of the movement is an issue of fact for me and it in my task to consider and assess all the evidence (oral and written); we do not have trial by expert.

88. It must also be recognised that the perceived threat analysis must rely, in part, on the argument that, as for the lack of an identifiable cause, given the very wide range of potential stimuli which could cause a horse to jink/shy (as indicated within the evidence) , and such stimuli being to a human's eyes so normal/mundane, the fact that nothing was detected by either the Claimant or Gemma Stead is unsurprising. As I shall set out in due course this argument has a knock on effect when considering the particularity of the circumstances in which the horse reacts. How could anyone possibly identify or predict the circumstances in which there may be a reaction, which itself may be very varied (and take appropriate steps)?

89. I accept that the horse had some reason for moving as it did. It did not stumble; it was an intentional "side-step". I also accept the evidence of Gemma Stead that the horse may have moved simply because he did not like something on the surface of the gallops such as change of colour. In my view it is difficult to see how a horse simply avoiding a patch of gallops by "jinking" around it could be readily considered as it reacting to "a perceived threat" i.e. the flight mechanism kicking in, unless any change in direction by a horse to avoid ground of which it is uncertain is to fall into this category.

90. In a case such as this the civil "balance of probability" test meant that the court has to be satisfied on rational and objective grounds that the case advanced by the Claimant as to the cause of the accident is stronger than the case for not so believing. This requires careful analysis of the arguments for and against the suggested explanations having regard to the totality of evidence. At the end of any such

systematic analysis, the court has to stand back and consider whether it is satisfied that the suggested explanation was more likely than not to be true.

91. Whilst ordinarily the principle of parsimony; the simplest explanation is usually the best one, can be a useful guide in life it has limited force when faced with a judgment of whether it has been established that one unknown (a perceived threat) is more like than another unknown (e.g. a perceived problem with the surface of the gallops). In my judgment there is nothing from the nature of the movement; which was not a rear or a bolt or otherwise obviously in reaction to having been frightened or threatened, (the move was to the right and quickly back to left) or the horse's general demeanour afterwards to make one more likely that the other.

92. After much careful thought on the issue it is my view the only finding that can properly be justified is that the horse saw or heard something, or thought it saw or heard something in its environment , which included the surface of the gallops, which it thought required it to effectively sidestep or jink/shy sharply to the right and back again. To go further is to clothe the finding with too much certainty. I shall return to this issue in detail in due course.

93. I will consider some further aspects of the facts when considering the specific issues in relation to the matters to be established under section 2 of the Act. However it is helpful to first set out the law.

The Animals Act 1971

94. Section 2 provides that:

> "(2) Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if—
>
> (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and
>
> (b) the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and
>
> (c) those characteristics were known to that keeper or were at any time known to a person who at 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.

95. Over the last fifty years section 2 has been repeatedly criticised, on occasions in a trenchant manner, by Judges and academics. Lord Scott described it in **Mirvahedy v Henley** [2003] 2 AC 491 as "judicial excoriation in a number of cases".

96. I confess that like many others I have struggled with how to approach the separate requirements.

97. The leading authority is **Mirvahedy**. The case turned upon the interpretation of section 2(2)(b) and the meaning of what was normal behaviour for the species in particular circumstances. However it also gave some guidance as to the interpretation of section 2(2)(a).

Section 2(2)(a)

98. There is a general interpretation provision at section 11 in which damage is defined as, including "…death or injury to any person including any disease and any impairment of physical or mental condition."

99. There has been little judicial consideration of the phrase "unless restrained". Philips LCJ in **Clark v Bowlt** [2006] EWCA Civ 978 equated unless restrained with "unless tethered" in a case where the horse was being ridden (and no point was taken in respect of restraint). Otherwise in all cases concerning riders who have fallen from horses there has been no consideration of the term.

100. It is my view that for the purposes of this section to be under restraint means so kept under control as to avoid any reasonably foreseeable risk of damage (e.g. a dog which is on a fixed chain or in a cage/pen cannot bite a person unless they by pass the restraint). I cannot see how ordinary riding equipment used whilst in the process of riding could qualify as restraint. It provides a degree, sometimes a high degree of control, but no morel control as the facts of the numerous authorities to which I have been referred readily testify.

101. In his dissenting Judgment in **Mirvahedy** Lord Scott considered the meaning of the word "likely" as used in section 2(2)(a). He could not endorse the interpretation of Lord Justice Neill in **Smith v Anger** (The Times 5th June 1990); a case which concerned a dog which attacked another dog and in the process injured the Claimant. Lord Scott stated at paragraph 97;

> "……Neill LJ directed himself first to the meaning to be given to the word 'likely' in section 2(2)(a). He rejected 'probable' or 'more probable than not' as correct and preferred 'such as might happen' or 'such as might well happen'. I would respectfully agree with the Lord Justice's rejection of 'probable' and 'more probable than not' but am unable to agree that 'such as might happen' a phrase consistent with no more than a possibility can be right. 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'."

So he expressly rejected likely as meaning possibly. In subsequent cases before the Court of Appeal, his interpretation has been adopted as the correct one. In **Freeman v Higher Park Farm** [2008] EWCA Civ 1185, Lord Justice Etherton stated that it was not in dispute that 'likely' in section 2(2) bore its natural meaning of 'reasonably to be expected'. In **Turnbull-v- Warrener** [2012] EWCA Civ 41. Lord Justice Maurice Kay stated:

> "Although there have been semantic debates about the meaning of 'likely' in section 2(2)(a) it seems to me that it has now become settled. It means 'reasonably to be expected'."

102. The next issue is upon what facts/circumstances is the likelihood of injury and /or severe injury are to be assessed? In **Mirvahedy** Lord Scott noted that a point of construction arose but concluded that as the issue had not been addressed in the appeal it could be taken no further.

103. The phrases "was likely to cause" and "was likely to be severe" mean that issues must be considered prospectively and simply not assumed with the benefit of hindsight.

104. Neither the likelihood of injury, nor the severity of it, should be assumed from the circumstances of the accident, or the fact that the claimant did, in fact, suffer a severe injury. The causation of injury in the accident provides some relevant evidence within the prospective analysis, but no more than that. So much, in my view, is relatively straightforward. However the question of level of particularity/generality is more problematic.

105. In **Turnbull,** Lord Justice Lewison stated:

> "If you start with severe injuries resulting from the accident itself,…"[as the trial judge in Welsh had done]"…and the particular circumstances in which it took place, then the question of whether the damage is 'likely to be severe' answers itself. If the injury was, in fact, severe it would be almost inevitable that, barring some freak, it was likely to be severe. To borrow from Lord Hobhouse in a case of occupier's liability, Tomlinson v Congleton Borough Council (2004) 1 AC 46, 79, it is a fallacy to say that because drowning is a serious matter there is, therefore, a serious risk of drowning. The problem, as I see it, is the level of generality at which you ask and answer the question. If the question is if you fall off a rearing horse onto a hard surface and the horse falls on top of you, is the injury likely to be severe, you may get one answer. But if the question is if you fall off a horse, is the injury likely to be severe, you may get another. I do not believe that this problem has yet been squarely confronted in the cases."

106. In **Lynch -v-Ed Walker Racing** [2017] EWHC 248, after noting the comments of Lord Scott and Lord Justice Lewison, Mr Justice Langstaff stated:

> "23. In common with their Lordships, I too 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.
>
> 24. 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."

107. In **Dennis -v- Voute & Another** [2022] EWHC 2117 Her Honour Judge Howells was faced with a factual dispute as to whether a colt which was being led at Tattersalls spooked and shied away or tripped and stumbled. There was no identifiable event which the Claimant could point to as causing the horse to spook. After a very through and careful analysis the Judge concluded that, on balance, the horse stumbled. She continued on to consider section 2 (2). After a review of the authorities, she concluded that the proper approach was to consider the sections of section 2 (2) separately and sequentially. Judge Howells then stated:

> "44. In terms of the particularity/generality point, it was conceded by Mr Harris that I need to look at this particular horse at this particular place and unrestrained, but I consider the question for me to determine, in looking at the first limb of s.2(2)(a) following the approach in *Clark v Bowlt* , is: was the damage which this yearling caused damage of a kind that this yearling, unless restrained, was likely to cause. To introduce a wider analysis of the s.2(2)(b) characteristics in specific circumstances at this point in looking at s.2(2)(a) would, in my judgment, be to introduce too great a particularity into s.2(2)(a) . Further, to do so, in my judgment, would render the provisions of s.2(2)(b) largely redundant. I am reinforced in my judgment by para.96 of *Mirvahedy*.
>
> 45. In respect then of the second limb of s.2(2)(a) where the damage, if caused, was likely to be severe, the defendants accept and have conceded that the level of generality of which the second limb of s.2(2)(a) should be considered cannot be the same as the first. This is a matter which is reflected in the different way the courts, as set out above, have considered the second limb of s.2(2)(a)."

108. When considering section 2(2)(a) on the facts before her she said that she "took out the particular characteristics in 2(2)(b) but recognised that this was a thoroughbred yearling shown at Tattersall;" a large leggy animal. She noted that without a trigger it was not likely to cause injury. Also that had there been a trigger (an example of a chair was given), again it was accepted that there would not be injury and accordingly the first limb of section 2(2)(a) was not satisfied. She then noted that the expert evidence did not support the finding that the damage, if caused, was likely to be severe.

109. On behalf of the Claimant, Ms Read argued that the particular circumstances of the accident and also the relevant characteristic under section 2(2)(b) must be considered when considering the issues under both limbs of section 2(2)(a). She submitted that it would be wrong and artificial to ignore the fact that there was a rider in place also the fact that an injury did in fact occur which must be a relevant consideration within, although she concedes not determinative of, the assessment of the likelihood or injury and/or of severity of injury.

110. Ms Crawford accepted that, given the wording of the section, a degree of particularity must be considered under the second limb of the section. However she argued that was not so with the first; which she argued must be considered without any particularity (so not even with a rider in place).

111. The first limb of section 2(2)(a) obviously cannot be considered with the animal within a factual vacuum. Once it is recognised that at least part of the factual matrix must be applied it then becomes a question of degree. For my part when considering the first limb of section 2(2)(a) in the context of behaviour of a horse when ridden it is difficult to see how the particularity of a person being in the saddle can be sensibly and properly ignored when assessing whether the damage (injury) was of a kind likely to be caused (reasonably to be expected). Otherwise if this factual particularity were stripped away when considering the question under the first limb of section 2(2)(a) one would be left in a case such as the present, with an assessment of the likelihood of damage being caused by a horse standing, walking or canting unridden when it moved. Sensibly this cannot have been intended to be the correct approach if the behaviour was exhibited whilst the horse was being ridden.

112. As for the second limb; the likelihood of injury being severe it is only relevant when injury was not likely. As a result this must require sufficient particularity as to the general method of this unlikely injury to allow severity to be considered (e.g. falling off it is unlikely that a person would fall off).

113. In my view beyond these general observations in a case involving a horse which was being ridden matters the degree of particularity with which the alternative requirement in section 2(2)(a) should be considered must be case specific and intended to reflect the wording of both sections 2(2)(a) and 2(2)(b). I shall return to this issue.

114. Another issue is the extent to which the likelihoods under both limbs of section 2(2)(a) can be taken as obvious or self-evident. This is a central issue in this case.

115. In **Welsh-v-Stokes EWCA Civ 796** the Claimant, who had suffered injury after a fall from a horse, made a claim under section 2. The accident on occurred on a road when the horse reared up, the Claimant fell off and the horse fell on her. The trial Judge found that personal injury was likely to be severe as

> "anyone falling off a horse that has reared up and falling onto a tarmac road, is likely, in my judgment, to suffer severe injury; still more so is this likely to be the case, in my judgment, if the horse falls backwards on her."

116. This finding, in my view unsurprisingly, was not challenged on appeal. Dyson LJ said at paragraph 40 that:

> "If a horse rears in the particular circumstances and the rider falls from the horse, she is likely to suffer severe damage. That may be because she falls onto a hard surface (which need not be a tarmac road) or because the horse falls on her or some other way."

117. In my view **Welsh** which concerned a very different fall from that in this case, and where the appeal largely focussed on section 2(2)(b) provides limited assistance on the extent to which evidence is required as to the likelihood of damage being caused, or if caused, the likelihood of it being severe.

118. In **Freeman-v- Higher Park Farm** [2008] EWCA Civ 1185 the horse which was supplied by the Defendant for a fee bucked violently as it was beginning to canter during a hack organised by the Defendant on Chobham common. The Claimant (who rode "fairly regularly") fell off. The trial Judge found that neither limb of section 2 (2)(a) was satisfied. Etherton LJ held that the Judge had failed to approach the section correctly in that he failed to consider the likely severity of injury if the horse had caused physical injury (paragraph 32). He also rejected the need for evidence, stating at paragraph 34;

> "…it is obvious that, if a horse bucks on beginning to canter so that the rider falls off, it is reasonably to be expected that severe injury will result. In Welsh-v-Stokes….Dyson LJ, with whom other members of the Court agreed, regarded this as self evident in the case of a rider who falls from a horse that rears. I see no reason why the same approach should not be appropriate in the case of a rider falling from a bucking horse about to canter."

119. In **Goldsmith-v- Patchcott** [2012] EWCA Civ 183 the Claimant was riding a horse she was looking after for a friend when "something startled the horse" which reared up and started to buck violently. Section 2(2)(a) had been conceded and was not in issue in the appeal. Whilst reviewing the law Lord Justice Jackson stated;

> "33. It can be seen that sub-section (2) (a) catches two types of damage. First, there is damage which the animal is likely to cause, if the animal is not restrained. Secondly, there is damage which the animal is unlikely to cause, but which is likely to be severe if the animal does cause it. It should be noted that this sub-section will only eliminate a small number of cases. Most animal-related damage which someone wishes to sue about will fall into one or other of those two categories."

120. In my judgment this obiter observation, which was relied upon by Ms Read in this case, is of limited assistance when section 2(2)(a) is in issue on the particular facts of the case.

121. In **Turnbull v Warrener** [2012] EWCA Civ 142 the Claimant, an experienced horsewoman made an arrangement to ride the Defendant's horse. The horse

developed a sore mouth so a decision was taken to ride it with a bitless bridle (something it had not experienced before). The horse was initially compliant when ridden on the day in question and then set off at a gallop (it did not bolt but was going faster than the Claimant wanted it to go) and suddenly veered to the right and went through a gap in the hedge at which point the Claimant fell off landing on a tarmac area and sustaining injuries. Mr Lane gave evidence on behalf of the Claimant and was cross examined about the likelihood of severe injury. The trial Judge held that if there were damage it was not reasonably to be expected that severe injury would result.

122. Lord Justice Maurice Kay rejected the appeal because the defendant had made out one of the statutory defences in section 5. However he considered whether the Judges finding in relation to section 2 (2)(a) was permissible on the evidence before him. He noted the judgments in **Welsh** and **Freeman** and stated:

> "14. In the light of this approach, one cannot blame a claimant for failing to adduce expert evidence of the likelihood of severe injury. What, then, is the position if the claimant's expert gives answers in cross-examination which are helpful to the defendant on this issue? Is it open to the judge to displace what was previously considered to be obvious? Or was it impermissible (that is, perverse) so to conclude in this case?"

He concluded:

> "16. Notwithstanding the skill of the cross-examination, I do not consider that its product was sufficient to produce the heterodox finding which eventuated. At most, it discounted a probability. However, that is not the same as a likelihood, with its received meaning of "reasonably to be expected". Moreover, in the circumstances in which the judge was considering the issue (hurriedly, and without the benefit of oral submissions late on the second day of the trial), it is not clear that he had in mind the "reasonably to be expected" test. In my judgment, the decision on section 2(2)(a) was not a permissible one, either because it was not really supported by the evidence and was contrary to received wisdom or because it resulted from a failure to apply the correct test."

123. The other two members of the Court disagreed with him on this point. Lord Justice Stanley Burnton said, at paragraph 39:

> "39. First, in my judgment it was open to the judge to find, on the evidence before him, that the requirement in section 2(2)(a) was not satisfied. I agree with paragraphs 8 to 13 of the judgment of Lewison LJ. The judge was bound to consider the application of that paragraph on the evidence before him, rather than on what judges in previous cases had considered to be obvious as a matter of fact. The effect of Mr Lane's evidence was not wholly clear, but neither side sought to clarify it, and it was

> left to the judge to assess its effect. It was open to him to make the finding he did."

124. Lord Justice Lewison considered **Welsh -v- Stokes** and stated:

> "54. These statements seem to me to be statements of fact rather than rulings on the law. In the present case the judge heard expert evidence on the likelihood of serious injury, which Maurice Kay LJ has quoted. The evidence was that riders fall off horses every day and do not sustain severe injury. I would not characterise the first three questions as controversial. Almost anyone who has ever ridden will have the experience of having fallen off a horse, getting up and remounting the horse. I do not, with respect, regard it as self-evident that a rider who falls off a rearing horse (or for that matter a cantering horse) is likely to suffer severe injury. It has not been suggested that the expert evidence on the likelihood of injury was inadmissible, even though Etherton LJ suggested that expert evidence need not be called. In my judgment the judge was entitled to rely on that evidence and make the finding of fact that he did. In respectful disagreement with Maurice Kay LJ I would uphold the judge's decision on section 2 (2) (a)."

125. The issue was also before Mr Justice Langstaff in **Lynch**. The Appellant's counsel relied on **Welsh**, **Freeman** and **Goldsmith** in support of a submission that if an injury has been caused by a two year old racehorse whipping round, it is probably because the rider will have fallen. If the rider has fallen and suffered personal injury, it is "obvious" that such injury might well be severe. Langstaff J considered the authorities and concluded in respect of **Freeman** (which he considered provided the most support for the Appellant's submission:

> "32. That decision is not binding upon me nor, in my view, could the question whether an injury was or was not likely, in the sense of reasonably to be expected, sensibly be described as an issue of law. It is, rather, a question of fact. It may be that in some circumstances, such as those before Etherton LJ, in the absence of any other evidence it is open to a court to conclude that any injury would be severe. Although as Lewison LJ's own personal comments make clear, he would not himself necessarily share that view. But, as a matter of law, this is a question of fact ultimately to be determined by the Court, usually at first instance."

126. I agree with this analysis. The issue is fact specific and to be determined on the evidence before the Court. It is true that in some cases (**Welsh** being a paradigm) a fall onto tarmac with the horse then falling on top of the rider may mean that the conclusion as to likelihood can be easily reached. In other cases, and in my judgment the current case is one; matters are very far from so straightforward.

Section 2(2)(b)

127. The much criticised wording of Section 2(2)(b) is ambiguous. One interpretation of its meaning is that it describes two different categories of damage in respect of which there will liability. Firstly in respect of damage which was likely, or was likely to be severe, because of characteristics not usually found in animals of the same species. Secondly in respect of damage which, while not likely, or likely to be severe, because of the characteristics of the animals of the same species in normal circumstances was likely, or likely to be severe, because of characteristics of animals of the same species at a particular time or in particular circumstances.

128. A different interpretation is that the subsection sets out a single category of damage, specifically damage which was likely, or likely to be severe, because of characteristics not normally found in animals of the same species even if they were found in such animals at particular times or in particular circumstances.

129. The dispute as to the correct interpretation was given its quietus by the majority of their Lordships in **Mirvahedy**. Three members of the House of Lords held that section 2(2)(b) had the first meaning; two that it had the second meaning. That subsequently senior Judges have expressed considerable concerns about the resulting extent of liability (such as Lewison LJ in **Turnbull**) does not alter the test to be applied.

130. In the present case it is the Defendant's submission that the Claimant cannot satisfy subsection 2(2)(b) because the propensity of horses (specifically young racehorses) to shy at "perceived threats" i.e. not at identifiable causes/threats is neither abnormal nor to be found only "at particular times or in particular circumstances."

Analysis

131. I have approached the sub-sections of section 2 sequentially (such being "important" in the view of Lord Justice Neill in **Smith-v-Ainger [**1990] WL 754371). However in this case the result would not have been different if the approach had been otherwise.

Section (2)(2)(a)

132. Ms Crawford raised the question of whether Foxy was restrained. I can deal with this issue very shortly on the facts of this case given the analysis set out above. The horse was not restrained applying the meaning of term in section 2.

133. As for the likelihood of injury being caused, or if caused that it would be severe the Defendant' s pleaded case was:

> a…..
>
> b…it is denied that a shy and/or sidestep in canter is likely to cause any damage. On most occasions when a horse side steps/changes direction/decelerates, even in canter, the rider (particularly an experienced rider such as the Claimant) will not fall.
>
> c….

d….regardless of the exact circumstances leading to the Claimant's fall… it is denied that severe injury was likely. On most occasions when a rider falls from a horse in canter, particularly onto a soft surface such as the gallops in question, they do not suffer severe injury.

134. The submissions of Counsel differed as to;

(i) the level of particularity with which issues are to be addressed (as set out above)

(ii) the need for, the nature and extent of, relevant evidence given that degree of particularity;

(iii) the conclusion to be reached given the facts as found.

135. As I have already set out in my judgment in a case involving the behaviour of a horse when ridden the extent of particularity beyond that fact i.e. that the horse was being ridden, required for the assessment of either limb of section 2(2)(a) will be case and circumstances specific. As Langstaff J observed the degree of particularity must not be so high as to mandate a conclusion or in my view too general to render the assessment artificial.

136. When considering the first limb that there was a rider on a moving horse are in my view obviously and minimum relevant particulars.

137. As for the second limb, as the trial Judge stated in **Welsh** the starting point is the accident itself i.e. that although it was an unlikely consequence, the rider has fallen off.

138. As for the need for and/or reliance upon evidence as to likelihood and severity of injury as I have already set out, I agree with the analysis of Mr Justice Langstaff in **Lynch**.

139. As for the nature and extent of the relevant evidence on these two issues Ms Crawford relied on various aspects which are set out below. Ms Read submitted that much of this evidence was of little, if any assistance and that the answers to the questions posed under section 2(2)(a) were "self evident".

140. Before considering what can be properly considered when considering the two different likelihoods, it is first necessary to set out the detailed relevant factual background. In no particular order the matters which are potentially relevant to the assessment under section 2(2)(a) as matters of "particularity" are as follows

(a) I have set out the fact of the accident itself; how it occurred and the injury sustained

(b) As agreed by the experts all horses can shy and on most occasions it does not result in a rider falling off.. The likelihood of a rider falling off is a function of a number of factors including the position of the rider and the nature of the movement. The more extreme or violent the deceleration and/or change of direction the more likely it is that any rider will fall off.

The experience of the rider is also another obvious factor such matters are common sense. The risk of injury from falling is also function of various factors including the height of the fall and the surface impacted.

(c) The Claimant was an experienced professional rider. Whilst this may ordinarily mean she was less likely to fall off than a non-professional rider it also meant that she rode in a less stable position (out of the saddle and on the stirrups) than many if not most riders would when cantering.

(d) The agreed evidence of the experts that if a rider falls off, "they may well receive minor soft tissue injury such as bruising or similar".

(e) The evidence of Mr Lane that on most occasions that a rider falls from a cantering horse, they do not suffer severe injury.

(f) The evidence of Ms Taylor that the risk of injury, or if injury occurs of it being severe is dependent on the particular circumstances. Whether severe injury is likely depends on the force of the fall, how the rider lands and the surface the rider lands on.

(g) The surface of the gallops was two feet of ripped carpet pieces; a Jocky club approved surface. The Defendant's case on this surface lessening impact was clear (and pleaded). The Claimant said that the surface on the canter was not "soft play" and although soft that was "only if you compare it to concrete" and that "you can easily get injured falling on an all weather gallop…you can be pretty much unscathed or you can be badly injured " and " you cannot possibly say that it would be surprising if a person was injured falling". However given the three elements of her evidence to which I have referred, and in particular her exaggeration of Foxy's propensity to shy, I treat the Claimant's evidence on this issue with some caution. It was the agreed evidence of the experts that if a rider falls onto the "relatively soft surface" of an all weather gallop, then the risk of severe injury is less than if falling onto a harder surface. I am satisfied that there was a significantly reduced risk of severe injury caused by falling onto this approved surface when compared to ordinary ground (and a very much greater reduction when compared to a road). Beyond that I cannot properly go as I have no more detailed or focussed evidence. I should add that I do not fully understand the relevance/ significance of comment in the Claimant's statement given (without any detail) that the surface was "patchy". The Defendant's unchallenged evidence was that the surface was given a walked inspection every day and also harrowed.

(h) The evidence of the head lad Allan Williams (which I accept as honest and accurate).

> "I have ridden plenty of racehorses in my career including on the gallops at Ty Heol Farm where they have jinked or shied without me falling off. I would say that in nine out of ten of those occasions, I have remained in the saddle. When

> I have fallen off, I have not been injured badly. More often than not, it is just your pride that gets hurt.
>
> He clarified during his oral evidence that when he said not injured badly he meant he had just been bruised.

(i) The evidence of Gemma Stead which I find as both accurate honest as regards her experience at the yard, that;

> "Jinking is when a horse diverts off a straight line for a stride as a reaction to something that might have spooked him. This can be a little unbalancing but (would) not generally cause Hazel or me to fall off and I say this having previously watched Hazel stay on a horse that has jinked. Racehorses can be sharp and to be a work rider at a racing yard you should be able to stay on for those type of movements."

And

> "I have ridden on the round gallop as well as the Bottom Gallop at Tyr Heol Farm, almost daily since working for Mark and Debbie Hughes and have experienced cantering a racehorse when it has jinked on many occasions and no differently to how Foxy jinked on the morning of the accident. I have almost always been able to withstand the jink and not fall off."

She also referred to one other occasion on the gallop when a horse whipped around and she fell off but was not injured.

(j) The evidence of the Defendant which I accept that;

> "I would say that all of my recent riders at Ty Heol Farm, namely Keith Bodley, Allan Williams, Gemma Stead and Hazel Boyd, will have all experienced a racehorse jinking or shying on the gallops and have remained in the saddle and not fallen off. In my experience, it is not common for a competent rider to fall off a racehorse when it jinks or shies."

(k) The evidence that when ridden on the gallops (the number of times is not clear save that it is well in excess of a hundred) Foxy had shied before only on a relatively rare basis when being ridden by either the Claimant or Gemma Stead (five times with the Claimant riding, never when Ms Stead was riding) and without any falls.

(l) The TRL evidence which although it must be treated with appropriate caution, supports Mr Williams evidence. I take into account that in **Welsh** in 2008 Etherton LJ dismissed the Appellant's counsel's suggestion that the Claimant should have produced evidence of injuries throughout the country sustained by riders who fell off horses, with an analysis of the range and degree of severity of injuries sustained as "quite unrealistic and unnecessary". It is certainly

difficult to see how the Claimant could have undertaken such a wide analysis without reliable statistics being recorded (and without obvious bias if the records only considered those who attended hospitals). However in this case Mr Lane was able to produce a report from the TRL British Eventing Falls data base which to his knowledge (as a very experienced expert who has appeared in a number of the reported cases) provides "the only comprehensive statistics concerning rider falls which are available". In my view they do provide some objective evidence based assistance as to the general picture of falls from horses. The statistics show the risk of severe injury arising from a fall during eventing (so not whilst merely walking or cantering at leisure) and onto what Mr Lane said was likely to be harder ground than the gallops in this case, was less than 3%. Out of 74 falls thankfully only two people sustained severe injuries.

(m) The Claimant's evidence that "a lad was paralysed falling off a cantering horse onto her gallop" (this being a different gallop but with the same surface). The circumstances in which this accident occurred are not in evidence before me.

141. It bears repetition that the test under either limb of section 2(2)(a) is to be applied prospectively. Because an accident has occurred and the relevant method of injury can be established a greater degree of relevant particularity will ordinarily (but not always) assist a Claimant to establish either requirement

142. The first question is whether the damage was of a kind that the horse was likely to cause.

143. I take a rider on a moving horse as minimum particularity

144. I reject the submission of Ms Read that the answer is self evident. With due respect given the evidence which I have set it is anything but self evident

145. After weighing up the relevant evidence I am not satisfied on balance that the first limb is satisfied. Taking the issue prospectively and with no more particularity a sudden jink/shy/sidestep to the right whilst a horse is moving is not likely to unseat a rider; it would not be a reasonable expectation that a rider would fall off. It was something that might happen; a possibility; but a mere possibility is not enough. Put simply it is not in the same category of severe movement as a bolt, buck or rear (when it some cases the intention of the horse will be to unseat the rider). Unusually perhaps additional particularity would not assist the Claimant. As I have set out above she was a professional and there was a lack of prior falls.

146. Turning to the second limb. The starting point in terms of particularity is a fall; unlikely though that was.

147. Ms Read again submitted that the answer was "self-evident". She relied upon statements made by Dyson LJ in **Welsh** and Etherton LJ in **Freeman**. However as I have already set out in **Welsh** the accident occurred on a tarmac road when the horse reared up, the Claimant fell off and the horse then fell onto her. The trial Judge's finding was that personal injury was likely to be severe as "anyone falling off a horse that has reared up and falling onto a tarmac road, is likely, in my judgment, to suffer

severe injury; still more so is this likely to be the case, in my judgment, if the horse falls backwards on her". This finding, in my view unsurprisingly, was not challenged on appeal.

148. In **Freeman** where injury resulted from a horse bucking there was no evidence at trial on the issue of the likelihood of damage, if caused being severe. LJ Etherton saw no material difference in approach between a house rearing and horse bucking.

149. However every case must turn upon the relevant evidence and findings of fact and neither **Welsh** nor **Freeman** concerned a fall as a result of a jink/shy/movement to the right; rather they were concerned with falls arising from a "violent buck" or rear. Also in this case I have the benefit of evidence directly addressing the issue of the likelihood of injury from falls.

150. Apart from the way in which a rider is likely to fall (which is likely to differ with the cause), the speed at which a horse is taken to be moving and the surface onto which the rider falls are obviously important particulars in the assessment of the likelihood of injury from any fall being severe. If the surface is a road the answer may be markedly different to a horse being ridden on other surfaces. In the present case (and again perhaps unusually) particularity does not assist the Claimant to prospectively satisfy the requirement as the surface onto which she fell was specially constructed for purpose and was to a degree shock absorbent. Taken as a broad generality, horses are also not as likely to be ridden at speed on roads/tarmac as on other surfaces.

151. The issue of the degree of particularity and specifically the relevance of the speed at which the Foxy was ridden and the surface upon which the Claimant fell to the prospective assessment under the second limb of section 2(2)(a) is not a straightforward one to answer. Ultimately it has not been necessary to determine it as I am not satisfied on the evidence presented in this case that taken as a generality if a person falls from a moving horse as a result of it shying/jinking/moving suddenly to the right it is likely (reasonably to be expected) that they suffer severe injury. Also in this case additional particularity would not assist the Claimant as it would be wholly artificial to approach the test on the basis of a fall onto tarmac or onto particularly hard ground given that this was not the case. Here the surface further reduced the risk that severe injury would result from a fall.

152. Again if the test has been as formulated by Neill LJ in **Smith** it would have been satisfied; but that is not the correct test.

153. By reason of the matters set out above the Claimant has failed to satisfy either requirement under section 2(2)(a) and the claim fails.

154. However it is proper that I continue to consider my analysis of sub-section 2(2)(b).

Section 2(2)(b)

155. The question is whether the likelihood of the damage, or of it being severe, was due to characteristics of the animal which are not normally so found except at particular times or in particular circumstances. In this case the Claimant (who bears the burden) sought to establish that;

(a) A shy in reaction to a perceived threat is not something found except "at particular times or in particular circumstances" and

(b) Foxy's shy was due to that characteristic.

156. Dealing with them in reverse order the first and obvious point to make is that every case turns upon its own facts.

157. In this case for the reasons which I have set out above the Claimant has failed to discharge the burden of proving the existence and causative effect of the characteristic relied upon; that the shy/jink/sharp movement to the right was due to Foxy having "perceived a threat". I have set out the limit of the finding which can properly be made on the evidence. The horse saw or heard something, or thought it saw or heard something in its environment , which included the surface of the gallops, which it thought required it to effectively sidestep or jink/shy sharply to the right and back again. So the case based on a perceived threat fails on the facts unless the nebulous nature of the characteristic is such that the finding that I have made is still said to equate to a response to a perceived threat. In my view it does not. However I shall consider the position if I were wrong on this i.e. it amounts to a sufficient clear characteristic. It is then necessary to consider my finding against the requirement of the subsection.

158. Section 2(2)(b) refers to the characteristic being not normally found except at particular times and particular places.

159. There is well settled a presumption that every word in an enactment is to be given meaning. As stated in Bennion, Bennion, Bailey and Norbury on Statutory Interpretation Chapter 21.2

> "Given the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded."

160. It is therefore necessary to be able to identify "particular" times or circumstances when the characteristic is exhibited. It is the Defendant's case that this is not possible in this case; so there is no relevant characteristic with the result that section 2(2)(b) is not satisfied.

161. It is not in dispute that a horse may shy, buck or rear due to a certain type of identifiable stimulus; such as passing car or agricultural machinery or a loud noise, or being forced to go forward when it does not want to do so. A horse may also react when clearly terrified by an event (in **Mirvahedy** it was found such an event occurred). Any owner armed with knowledge of these characteristics (as required for liability under section 2(c)) can take appropriate action to avoid or minimise it or at the least evaluate the risk and either decide to insure against it or not to run it.

162. However the characteristic relied on the Claimant in this case is a horse shying as a result of a stimulus which is it perceives as a "threat" even though the nature and extent of such a stimulus cannot be identified and/or predicted

163. As Ms Taylor stated in her report

> "All horses shy/jink on occasion. This is very common every-day behaviour, although it does not happen all the time.

Although the Claimant exaggerated when she referred to Foxy potentially shying at a blade of grass; it was common ground that, as is within the normal range of behaviour for a horse of his age, he could perceive very many and varied things as concerning "he could shy at anything" examples being a change in colour of a surface, a shaft of sunlight, a patch of snow, movement of a branch of a tree in the wind, a bird, a rabbit. Often no cause can be identified at all; perhaps because it was fleeting or momentary. The examples I have identified (and they are just examples) are ordinary and regular features of most outdoor rural environments or other places where horses are kept or trained. Given the sheer width of the propensity it is not possible to identify any particularity. Indeed in my view a proper description would be that he could react to something in its environment at most times and in most circumstances.

164. As Ms Read conceded if a perceived threat caused by innocuous elements ordinarily found in the outdoor world is sufficient to satisfy subsection 2(2)(b) then the keeper has to face sections 2(2)(b) and 2(2)(c) always being established if a horse shies/jinks/sidesteps regardless of fact that the cause could not be identified let alone guarded against (as most keepers will be aware of the possibility of a horse shying without apparent reason). Ms Read submitted that this result, which subject to section (a) being satisfied would be strict liability, must be viewed in the light of the defence at paragraph 5(2) of the Act. 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. So a non-employed person would not have a claim under the act. However this defence requires proof of the knowledge of any Claimant rider and in my opinion cannot adequately support the submission that the draughtsman intended the phrase in particular times or circumstances to be interpreted as widely as the Claimant argues that it should be in this case.

165. Ms Crawford submitted that the Claimant had failed to satisfy Section (2)(2)(b) in particular times/circumstances could not be identified.

166. It is necessary to return to the authorities on this issue.

167. In **Mirvahedy** it was not clear what frightened the three horses which broke out of a field (as no witness was there to observe what happened) but something did which was sufficient to "terrify" them. Lord Nicholls stated at paragraph 2

> "something appears to have frightened them very badly, but nobody knows what it was."

He also stated that the behaviour of the horse was

> "usual for horses when sufficiently alarmed by a threat. They attempt to flee, ignoring obstacles in their way, and are apt to continue in their flight for a considerable distance, even beyond the point where the perceived threat was detectable."

168. The trial Judge stated that he found it very hard to contemplate or define the characteristics that are not normally found in animals 'except at particular times or in particular circumstances'. He was concerned at the generalness of words which are expressed as a limitation as to time and circumstance "but which can be applied to any case and are therefore no limitation at all" as "all times and all circumstances can be said to be 'particular'. One can always find particularity attaching to any time or to any circumstance".

169. At paragraph 43 Lord Nicholls after referring to the trial Judge's concerns stated:

> "43. In other words, if the tendency of a horse to bolt when sufficiently alarmed is to be regarded as a normal characteristic of horses "in particular circumstances" and, hence, a horse with this characteristic will meet requirement (b), it is not easy to conceive of circumstances where dangerous behaviour which is characteristic of a species will not satisfy requirement (b). A normal but dangerous characteristic of a species will usually be identifiable by reference to particular times or particular circumstances. Thus the Cummings interpretation means that requirement (b) will be met in most cases where damage was caused by dangerous behaviour as described in requirement (a). 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 behaviour was characteristic of the species in those circumstances."

He recognised that this is a cogent argument, however was not persuaded by it.

170. Lord Hobhouse stated at paragraph 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)."

171. At paragraph 139 Lord Walker stated:

> "138. After these general comments I come to the particular linguistic difficulties presented by section 2(2). One is the meaning of the important term "characteristics" used in paragraphs (b) and (c) of section 2(2), but not defined in the Act. The context makes clear that the expression cannot mean something buried in an animal's psyche (as Devlin J said in *Behrens v Bertram Mills Circus Ltd [1957] 2 QB 1*, 18, it is not practical to introduce conceptions of mens rea and malevolence in relation to animals). It must refer to character or

> disposition as evinced by overt behaviour—for instance, a dog which had the habit of attacking people who were carrying bags: *Kite v Napp The Times, 1 June 1982*). The distinction between "permanent" and "temporary" characteristics drawn by Stuart-Smith LJ in *Curtis v Betts [1990] 1 WLR 459* , 469h, is useful but must be treated with some caution: all dangerous characteristics are likely to be more or less permanent but they may show themselves either frequently and randomly (as with the unreliable horse in *Wallace v Newton [1982] 1 WLR 375*), or under a stimulus peculiar to the particular animal (such as bag-carrying in *Kite v Napp*), or under some internal or external stimulus (such as the animal's hormones or a perceived challenge to its territory) which can be expected to produce similar behaviour in most animals of its species.
>
> 139. That is the point to which the words "at particular times or in particular circumstances" are directed, but there is force in the observation made by the trial judge, in his careful judgment, that one can always find particularity attaching to any time or to any circumstance. I consider that Mr Sharp (for the respondent) must be right in suggesting that predictability (of how animals of the same species react to a particular stimulus or situation) is one of the indicia of characteristic behaviour which falls within the second limb of section 2(2)(b)."

172. Their Lordships (who were in the majority) were considering the predictable tendency of a horse to bolt when very seriously frightened by an external stimulus. Lord Nicholls was of the view that a normal but dangerous characteristic of a species will usually be identifiable by reference to particular times or particular circumstances and being very frightened by something is such particular time. It does not appear to me that their Lordships considered the potential for liability to arise when the characteristic is that a horse may or may not perceive a threat that may not exist and/or is posed by a mundane countryside feature that may be present or arise at most times and in most circumstances with little or no possibility of prediction.

173. In **Clark-v-Bowlt** [2006] EWCA Civ 978 the Claimant was driving a car which came into collision with a horse ridden by the Defendant which (having no sign of panic) suddenly moved from a grass verge into the road in a movement which the Defendant could not control. Lord Justice Sedley observed at paragraph 24

> "Section 2(2) is not intended to render the keepers of domesticated animals routinely liable for damage which results from characteristics common to the species. It requires something particular, and there was nothing of the specified kind to render the keeper liable here."

174. In **Welsh** the trial Judge found that the horse was capable of rearing up at particular times or in particular circumstances when he did not want to go forward and, in addition, he had a rider on board who was unable to handle him and gave him confidence in that situation. Dyson LJ found these to be particular circumstances

(paragraph 39). He described "in the particular circumstances" in **Mirhavedy** as being "some form of fright or other external stimulus."

175. In **Freeman**, Etherton LJ found that the Judge could not be faulted for concluding that the Appellant had not discharged the burden of establishing that the second limb of s.2(2)(b) was satisfied. He stated:

> "42. Mr Aldous submitted that, if the characteristic of bucking, including bucking when beginning to canter, is normally found in horses generally, then inevitably the second limb of s.2(2)(b) is satisfied since such a characteristic is only found at particular times or in particular circumstances. He submitted that "particular" in the context means anything that is not continuous.
>
> *43…*The characteristic which falls within the second limb of s.2(2)(b) must be one that is normally found in animals of the same species but only at particular times or in particular circumstances. The gloss which Mr Aldous seeks to put on the word "particular" would reduce the first limb of s.2(2)(b) to characteristics which are continuous and always present. It would eliminate from normal characteristics in the first limb of s.2(2)(b) any intermittent activity of any kind. It is clear, however, from the Law Commission report and the decided cases that this is not the correct interpretation and that the words "at particular times or in particular circumstances" in the second limb of s.2(2)(b) denote times or circumstances which can be described and predicted.
>
> *44.* In Mirvahedy at para. [139] Lord Walker said that it must be right to suggest that predictability (of how animals in the same species react to a particular stimulus or situation) is one of the indicia of characteristic behaviour which falls within the second limb of s. 2(2)(b). As Lord Nicholls observed in Mirvahedy at para. [43] "a normal but dangerous characteristic of a species will usually be identifiable by reference to particular times or particular circumstances" [my emphasis]. That must, however, be a matter of evidence in every case. In the present case, there was no evidence whatever that horses generally buck at particular times or in particular circumstances."

176. In **Clark** the Court of Appeal held that the Claimant had failed to establish that either section 2(2)(a) or 2(2)(b) was satisfied. The Lord Chief Justice stated:

> "13. Instead of asking the right question the judge identified as the relevant characteristic the propensity of a horse "in particular times and in particular circumstances" to "assert an inclination to move otherwise than as directed". There are the following difficulties with the judge's conclusion that this equine propensity satisfied the requirements of (b):

> (i) I doubt whether a propensity occasionally to move otherwise than as directed can be described as a characteristic of an animal.
>
> (ii) If such a propensity can be described as a characteristic, then I question the judge's assertion that it is one that is not normally found in horses "except at particular times and in particular circumstances". The judge failed to identify either the particular times or the particular circumstances when this characteristic manifested itself. Indeed in saying that this was a characteristic of horses *generally* the judge came close to accepting that the propensity was a normal characteristic of a horse, not one that only arose at a particular time or in particular circumstances."

177. The Lord Chief continued:

> "Where it is a characteristic of an animal only to cause damage at a particular time or in particular circumstances, the animal, if normal, will not have been likely to cause damage save at that particular time or in those particular circumstances. A horse is liable to cause damage of the kind caused by Chance if given a severe fright. Chance was not, however, given such a fright. Can it be said, nonetheless, that Chance was likely to cause the damage which she caused by moving into collision with Mr Clark's car? On the judge's findings of fact, it seems to me that the answer is plainly "No."

178. In **Bodey -v Hall** [2011] EWHC 2162 David Pittaway QC sitting as a Deputy Judge found at paragraph 37:

> "37. The conclusion I have reached is that a predisposition of a horse to behave unpredictably by running away when confronted by an unknown stimulus can properly be identified as a characteristic. I do not see the distinction that Mr Westcott sought to draw between cases involving horses that buck or rear and the present case. The manifestation of the characteristic is to shoot forwards uncontrollably. The stimulus caused the horse to be frightened but the characteristic is that to be found in horses that when frightened they will shoot forwards at speed in an uncontrolled manner."

179. In **Goldsmith-v- Patchcott** (see above) "something startled the horse" which reared up and started to buck violently. It was argued that the Judge erred in holding that the requirements of section 2(2) were satisfied. Lord Justice Jackson, who stated that it was not obvious what purpose section 2(2)(b) served stated:

> "53 Mr. Browne, relying upon a dictum of Etherton LJ in Freeman, submits that the phrase "at particular times or in particular circumstances" denotes times or circumstances which can be described or predicted. Horses do not only buck when startled or alarmed. Therefore the bucking in this case does not fall within the second limb of section 2 (2) (b)…

> 54. I do not accept this argument. In the light of the authorities set out in Part 5 above, section 2 (2) (b) should not be given the restrictive interpretation for which Mr. Browne contends. On the evidence the judge found that bucking and rearing were a characteristic of horses in particular circumstances, namely when they were startled or alarmed. In my view, the judge's conclusion that the requirements of section 2 (2) (b) were satisfied follows logically from that finding."

180. In **Ford-v- Seymour Williams** [2021] EWCA Civ 1848 Lady Justice Carr considered the facts in **Mirvahedy**, **Welsh, Freeman**, **Goldsmith** and **Turnbull** and stated that;

> "35. It can be noted that in every instance where the keeper was held liable the court identified not only the characteristic behaviour such as rearing, but also the particular time or circumstance when the characteristic manifested itself. That time or circumstance was something that could be "described and predicted". In each case where liability was established, there was a particular event triggering a reaction which caused severe damage in circumstances where the keeper knew that such an event could lead to the reaction in question."

181. In **Ford** the Appellant argued that, where expert evidence has identified that a horse will only rear in certain given times or circumstances, it is not necessary for the purpose of s. 2(2)(b) to identify the time or circumstance that was actually engaged; by definition, one of the times or circumstances must have arisen. Lady Justice Carr noted that, as identified in Lord Nicholls in **Mirvahedy**, a normal but dangerous characteristic of a species will usually be identifiable by reference to particular times or particular circumstances, but also that Lord Nicholls indicated that does not empty s. 2(2)(b) of all content. She concluded that the authorities demonstrate that it is necessary to identify not only the characteristic but also the particular time or circumstance in which it arose. She stated:

> "39. That is the correct approach as a matter of construction and principle, for a number of reasons:
>
> i) First, as the Judge commented, as a matter of language s. 2(2)(b) is focusing on the link between the damage and the characteristic. The damage must be "due" to the characteristics of the animal;
>
> ii) Secondly, the reference to (plural) "times" and "circumstances" reflects the fact that there may be multiple causes of a particular characteristic, not that it is unnecessary to identify what the particular cause (or causes) was on the occasion in question when the damage occurred;
>
> iii) Thirdly, liability under s. 2(2) for an animal which does not belong to a dangerous species would otherwise be materially the same as the liability arising under s. 2(1) for an animal of a dangerous species. As Lewison LJ identified in *Turnbull* at [47]:

> "…the Law Commission did not proclaim an intention to widen the existing scope of the law to the extent that it would be necessary to catch an ordinary riding accident".
>
> iv) Fourthly and fundamentally, s. 2(2)(b) needs to be construed in the context of s. 2 as a whole. Identification of the particular time or circumstance in question is necessary for an assessment of whether or not a keeper has the relevant knowledge for the purpose of s. 2(2)(c) . As the facts of this case themselves demonstrate, it is possible for a keeper to have knowledge of the fact that it is normal for a characteristic (here rearing) to manifest itself as a result of one particular time or circumstance (here disobedience) but not another (here a catastrophic internal failure)."

182. In my view the Claimant in this case has not established a characteristic that is normally found only at particular times or in particular circumstances; rather it is a general, normal characteristic of horses to shy/jink or move sharply (itself comprising a wide range of movement and markedly distinct to the more violent actions e.g. rearing, bucking or bolting) in response to a very wide range of sights or sounds present (or which the horse believes to be present) and which can occur at very many times and in very many circumstances which cannot be described or identified in any more detail or predicted.

183. I consider there to be a material difference between a horse that rears, bucks or bolts in response to being startled or frightened by some identifiable external stimulus, or made to move forward when it does not want to do so, and a movement sideways in response to something which a horse sees or hears or believes it sees or hears and which it does not like or perceives to be a threat even when it is a wholly unpredictable response to an unidentifiable, ordinary and everyday part of the environment. I do not consider it a distinction without a difference. In my view it would so waterdown the requirement as to render it nugatory.

184. In my judgment it falls short of the line of adequate particularity. The Claimant would therefore not have satisfied section 2(2)(b) on the basis that my finding equated to a characteristic.

185. For the reasons set out above the claim fails.

186. Had liability been determined as a preliminary issue (as in my judgment it clearly should have been) then this would have been likely to be the end of the matter. There would have been no detailed preparation and presentation of the quantum issues with consequential wasted expenditure of costs. However, given the trial timetable with which I was presented it was too late to try and fashion a method of determining liability first. As it is I have heard medical evidence (lay and expert) and heard detailed submissions upon fundamental dishonesty and quantum and must therefore deal with the issues.

187. I turn first to fundamental dishonesty.

Fundamental Dishonesty

188. The Claimant suffered what the experts describe as a "very nasty" injury to her dominant right elbow the residual symptoms of which will never improve and may get worse. She was taken to hospital where she was seen, examined and x-rayed. The elbow was dislocated and so was manipulated. Following the operation she was informed by her treating Doctors that they were unhappy with the appearance of the x-rays on 3rd July 2020 she underwent surgery on the right elbow and was treated in a brace afterwards for approximately six to seven weeks.

189. The evidence concerning the nature and extent of the Claimant's injuries and disabilities came from;

a) The Claimant and Jenna George (statements and oral evidence).

b) James Morris (statement admitted under the hearsay provisions).

c) Surveillance films.

d) The surveillance operatives (statements and oral evidence).

e) The medical records (including the physiotherapy records).

f) The medical experts (reports and oral evidence).

g) The various photographs, social media messages and other relevant documents.

Chronology

190. The relevant chronology is as follows;

2020

(i) 23rd March 2020 – June 2020 First Lockdown National lockdowns (the national lockdowns were late March 2020 - June 2020, January 2021 – July 2021 and local lockdowns (tiers) (September 2020 – November 2020)

(ii) 23rd June 2020; Accident

(iii) 23rd June RIABS income replacement commences

(iv) 3rd July operation

(v) 17th July; Injured Jockeys Fund residential rehabilitation commenced in Lambourn, Berkshire.

(vi) 27th – 29th July; Oaksey House Physiotherapy

(vii) 17th -21st August Oaksey House Physiotherapy

(viii) On 17 August there is reference to football and rugby training within the Oaksey House records

(ix) 1-4th September; Oaksey House Physiotherapy

(x) 14-18th September; Oaksey House Physiotherapy

(xi) On 14th September there is reference to riding 2 lots in the Oaksey House records

(xii) At some stage the Claimant returned to football at the beginning of the 2020/21 season (as she explained in her oral evidence)

(xiii) Sept 2020 – Nov 2020 Tiered Lockdowns

(xiv) 14th October Llantwit Fadre RFC "Pink Rhinos" Facebook photograph "Awesome Covid safe session tonight" (gym based fitness)

(xv) 23rd October; The so-called 17 day "stay-at-home" "firebreak", followed by continued social distancing.

2021

(xvi) January 2021 – July 2021; Lockdown

(xvii) 26th April; Surveillance ("the First Footage" showing the Claimant dog walking and rugby training. Ms Read submitted within her chronology that this is the first day training was permitted in Wales with no football or rugby in 2021 beforehand.

(xviii) 4th June; Consultation Mr Rogers. It is the Defendant's case that the Claimant misled Mr Rogers as to the extent of her disability. Mr Rogers recorded the extent of disability as;

> 3.4 She still has weakness in the right arm with reduced range of motion so the arm will not straighten and she cannot reach her shoulder…She has a little tingling in the posterior aspect of the elbow over the scar but her hand function is fine the scar tends to be itchy and she tends to scratch it.
>
> 3.5 She utilises over the counter paracetamol approximately 48 per month which she takes when her pain is at its worst and estimates that the pain can reach 5-7 out of ten. The pain is worse in cold weather, exacerbated by lying on the arm or overusing it and the decreased strength means she can only carry a bag for a few steps.

And

> 7.4 Normally Ms Boyd lives on her own but lived with a friend for 4 to 5 weeks after the accident to help look after her and her two dogs. She is

> back home now doing light domestic work but is unable to do any heavy domestic work.
>
> Sports, Social and Leisure Activities
>
> 7.6 Aside from the horse riding she also used to enjoy playing rugby and this has now stopped and also played football although she still undertakes an element of football training.

Mr Rogers opined:

> 9.2 Her progress following her surgery has been somewhat slow with limited hands-on physiotherapy. She is now approaching a year following the injury and therefore I would recommend some intensive therapy to the arm to help to both try and improve both the range of motion and the strength in the arm. I think further improvement in the range of movement and strength in the arm will occur over the next 12 months, at around 2 years post injury I think any residual symptoms can be deemed as being permanent.
>
> 9.3 The impact with regards these activities appears to be a combination of both reduced range of motion and the strength in the arm. She is struggling currently to strengthen the arm in part due to the reduced range of motion and secondarily to the pain. The reduced range of motion in the elbow would cause difficulties with reaching up, particularly above shoulder level into cupboards etc, doing her hair and makeup etc as this will then have to be undertaken by one hand only.

And was sufficiently optimistic to state:

> 10.4 If her pain has settled and her strength has improved then alternatively she may feel that she wishes to try to return to horse riding and this would not be unreasonable. However depending on her pain and range of motion of the elbow it would be on a trial basis and it may be that she would find that certain aspects such as applying the horses tack etc she is unable to undertake and therefore.

(xix) 25th October 2021; the Claimant made a video to show her range of movement for disclosure.

2022

(xx) 17th March; Date of First Schedule of Loss

(xxi) 28th March; claim issued (limited to £100,000)

(xxii) 1st June; second examination by Mr Rogers

> "3.1 It is now approaching 2 years following the injury and surgery to Ms Boyd's right elbow. Unfortunately despite the input of physiotherapy and her trying to strengthen her

arm she still complains of restricted range of motion in the elbow, pain and ongoing weakness.

3.2 In terms of pain. The pain tends to be worse first thing in the morning and eases with painkillers and then will be exacerbated by any activities, for example carrying shopping bags for a short distance, and then again will ache during the evening.

And

Domestic Activities

7.4 With regards to her restrictions around the house and home, she has now adapted to the restricted motion in her elbow and is able to undertake most of her activities of daily living at home but would not be able to do any heavy lifting.

Sports, Social and Leisure Activities

7.6 She is able to continue playing football but has not been able to return to the gym as it is too painful to exercise the arm.

9.3 Due to the ongoing weakness and pain she has not been able to return to her previous duties as a work rider and therefore this work restriction will remain indefinite. She is also likely to be restricted in the open job market to work that does not involve heavy bi manual work and indeed as it is her dominant hand she may also struggle with activities which require any heavy dominant hand use.

9.4 In terms of her domestic activities, she now has adopted to her ongoing disabilities and activities around the house, apart from any heavy lifting**.**

(xxiii) June RIABS income replacement ceases

(xxiv) 3rd June; picture of the Claimant on a quad bike

(xxv) 9th June; Claimant filmed on a rope swing

(xxvi) 24th June; Oaksey House records (17th July 2020 to 18th September 2020) sent to Defendant

(xxvii) 16th July; the Claimant is listed in her football Team B for 5-a-side tournament. Between July and October 2022 she is in listed in the team for several matches, on one occasion winning the (curiously titled) "man of the match" award)

(xxviii) 19th September; Consultation Mr Wand which took under 20 minutes) and also surveillance ("Second Footage"). Although his final report was not completed for some months (and after the provision of the Claimant's

statement); it is helpful to set out the material content for this issue at this stage of the chronology;

> 5.1 Ms Boyd is right-handed. She has grossly impaired right arm function, as a result of the elbow injury. She has a severely restricted arc of elbow movements. The elbow is constantly painful. The pain affects her sleep. If she attempts to lift anything, she has increasing elbow pain. She has pain at the terminal arc of flexion and extension of the elbow. She has good and largely unrestricted supination of the forearm, but pronation remains restricted.
>
> 5.2 As a result of on-going issues affecting her right elbow, Ms Boyd is unable to use her right arm to any significant degree. She cannot lift anything other than very light weights using her right hand. She cannot brush her teeth right-handed. She cannot comb her hair. When she eats, she does so left-handed. She is unable to do any significant cooking. Despite these issues, she is able to dress and undress independently (doing so when sat). She lives alone and is self-caring. She is able to drive a car, but for short periods only. She requires assistance from friends in certain aspects of daily living. She is able to do a certain amount of washing up, albeit with difficulty. She does not iron clothes. She is unable to change bed linen. She is unable to do gardening. She walks her dogs, but does not hold onto the dog lead with her right hand. When she goes shopping, she carries the bags in her left hand only. She said that she had not returned to any active sport (other than dog walking) but according to her witness statement she has recently returned to playing football. Her left hand and shoulder function remain largely satisfactory.
>
> **Summary, Prognosis and Opinion**
>
> 15.1 …..A steady state has now been achieved in terms of recovery. Ms Boyd has constant pain in her right elbow, a grossly restricted arc of right elbow movements and very limited function of her right upper limb. She requires the regular use of analgesic medication. There has been no recent improvement. She has been unable to return to horse riding as a result of the injury and accordingly she has not returned to her previous employment. Presently she is on Universal Credit.
>
> 15.2 This was a very serious elbow injury, which has resulted in significantly compromised right upper limb function. The prognosis is guarded. I think further improvement is improbable.

(xxix) 20th September; surveillance ("Third Footage")

(xxx) 18th October; "Pup Hub" incorporated

(xxxi) 23rd December 2022; Costs and Case Management hearing before the Master

2023

(xxxii) January-March 2023; Claimant in the starting line up for several football matches

(xxxiii) January; Pub Hub opens for business (advertising included a dog walking service)

(xxxiv) 27th January; Lists of Documents exchanged including the video taken by the Claimant of her range of movement

(xxxv) February onwards, various images of the Claimant walking dogs

(xxxvi) 2nd February; inspection provided by the Claimant (video of ROM sent)

(xxxvii) 27th March; Claimant's witness statement (exchanged 30th March 2023). It included the following extracts.

> 13. I used to enjoy playing rugby as well as football. I took up rugby about three years before the accident and would do one or the other three days a week. But I cannot play rugby now because of the arm. I have gone back to football in a Sunday League, but it is very low level. I have to do something to for wellbeing.

And

> 22.Before the accident, I would say I was a sociable person and. I used to go out and enjoy seeing friends as well as playing darts and pool. I have to cut back on that because I can't afford to go out as much. I still play a bit of darts but I have to throw left handed because of the injury.

And

> 45. In the months after the accident, when the arm was passive and not being used, I reckon pain was around 3/10. It got up to 5-7/10 on normal day to day activities. But it got up to 10/10 on rehab exercises because I was really being pushed. It felt like her skin was being ripped apart.

46. Mentally I was not coping brilliantly. I was so low and frustrated a couple of months after the accident I swallowed some tablets after thinking about suicide. But then I made myself sick. I have always been a worrier and was very conscious about my money situation. I was in rented accommodation and know every outgoing down to the last pound.

47. Rehab was hampered by the lockdowns in Wales and, later, England, which meant I could not travel to Oaksey which was massively frustrating.

And

48. In June 2021 the medicolegal expert, Mr Rogers said that I needed intensive physiotherapy to make the best improvement I could. I was referred to another physiotherapist by my GP, which was good.

49. I recall that the physiotherapist was not sure what "intensive" meant, saying that it would be different for each patient and advised that in my case one factor was the risk of arthritis because of the loss of cartilage. Intensive work on the joint might speed up the arthritis. My physiotherapist advised me that no matter what I can achieve it will not enable me to go back to work with horses because I would never have the strength to hold one. I know that is true. I can just about hold a single dog.

50. So, I was given yet more exercises to do three times a week, which I followed carefully. I was also advised to stop exercises, if my joint aches, because that is doing too much for the joint. In fact, it might only take one or two minutes for the joint to start aching.

51. During 2021 I did use a local gym to do strength and conditioning. But I was restricted by not being able to use my right arm properly and I couldn't even do push-ups or burpee's. Although, I could lift the 15 kg free weights bar (without any weights on it**)** using my hands to waist level, I could not flip it and rotate it up to my shoulders, never mind above my head. I could not lift it if any weights were put on the bar because of the weakness in my right arm.

52. 15 months after my accident I spoke with my solicitor and at that time I estimated that I was taking perhaps 48 paracetamol per month, buying 3 to 4 packets of 16 tablets each month. But I wasn't taking them every time I felt I needed something because I didn't want to take too much.

53. Pain and discomfort with a throbbing ache with stiffness would come and go. It was particularly bad in the morning and in cold weather so Autumn, Winter and Spring. Pain was brought on lying on it, trying to go to sleep. The pain in the morning tended to wear off by using the arm, but then again, overusing it could bring on pain. I used some cheap freeze patches but not did not use heat.

54. In fact the pain and discomfort has not changed much if anything since after the early sessions at Oaksey House in 2020.

55. I couldn't carry a full bag of shopping in my right hand more than a few steps.

56.As far as my range of movement was concerned, I couldn't touch my shoulder. The arm does not straighten.

57. I also started taking Lansoprazole for acid in my stomach, which is something new since the accident.

> 58. The fingers around my knuckles were also painful. My GP looked at my fingers a bit later and said it was something connected to nerve damage around the elbow.
>
> And
>
> > 62. Until this year, 2023, I haven't worked because of my accident.
> >
> > 66. I was interested in getting the LGV driving qualification, so was given help by the Jockeys Education and Training scheme (JETS) who offered to contribute to the cost of the driving qualification. They also offered to help me with a CV.
> >
> > 67.Before this I had thought about bar work, house sitting, dog walking or even gardening although aside from house sitting (which is something I wouldn't know where to start with) seemed to require physical abilities – lifting or controlling unruly dogs – I no longer had. They were not very good options.
> >
> > 69.But I had not tested whether I could drive, full time. I just wanted to replace my lost earnings, and get back to some work, and this could do it for me. In the back of my mind, I was aware of the one hour and thirty minutes' drive from Wales to Lambourn, which caused my arm some serious discomfort. But I was hopeful and wanted to stay positive.
> >
> > …….
> >
> > 72. However, I came to realise that I cannot physically cope with it. The truth was that whenever I did a long drive there was payback with the arm. For instance, I drove five hours to visit my sisters in Kendall. It was a painful experience and had to take my Co-Codamol and put my arm in a brace. It took a good couple of hours afterwards to feel better. Driving all day is unrealistic, and I just can't do it, physically.

(xxxviii) 12th May; date of Mr Wand's report

(xxxix) 24th May; expert equine and medical reports exchanged

(xl) 13th July; surveillance served on the Claimant by the Defendant

(xli) 18th August; second schedule of loss

(xlii) 5th October; Mr Wand supplemental report

(xliii) 17th October; original Trial date

(xliv) 10th November; Claimant's second witness statement. Given that this is her response to the allegation of fundamental dishonesty it is necessary to set it out at length

> "The allegations are wrong and massively upsetting.

4. Before I go into the detail I make some general points. I believe that the Defendant has formed the belief that I claim that I am effectively one armed and I can barely use my dominant right arm. I can see why you might have questions about that if you look at some evidence in isolation. But if you look at all the things the Defendant knows about me, I truly do not know why they are attacking me for being dishonest and making things up".

5. They know that I am running a dog day care centre and they know that I was playing football when I made my first statement, earlier this year. They know that I am generally working on my own in the business, looking after dogs. My solicitor tells me that they knew about plans for the business well before it started and well before witness statements were exchanged. I haven't wanted to make anyone think that I have a useless right arm. I can see how holes can be picked in odd things said but how can they think that I would, on the one hand, exaggerate my disability and want to pretend I had a useless arm, whilst at the same time saying I play football and that I run a business looking after up to 5 or 6 dogs a day or more, with a right arm that is useless?

6. I am not very academic, but I have not tried to answer people's questions untruthfully and I have not tried to exaggerate. I have been very open about plans for the start-up of the business.

Painkillers

14. The Schedule of Loss refers to paracetamol being taken being paid for just less than two years. I confirm I continue to take painkillers after that point in time but have not had to pay for them. I have a repeat prescription for co-codamol 30/500 which provides 60 tablets per month although, actually, I was given 100 last month. 30/500 means 30mg codeine and 500mg paracetamol. The dose of codeine is the highest in the range of 8mg, 15mg or 30mg for co-codamol. The number of tablets I take depends on what I have been doing and the number has increased having started to work with the dogs. I always run out of my monthly prescription before I can pick up my new prescription.

18. In relation to driving my own car, the Defendant complains that Mr Wand has recorded me saying that "I am able to drive, but for short periods only". That is wrong and I can't believe that is what I said, or that Mr Wand thought that was a true reflection of my case. Mr Wand and the Defendant has not taken on board that I said in my first statement I was thinking about a driving job, which would not make sense if I said I was not "able to drive" anything but short distances. In that statement I gave a couple of examples of long journeys. I said that I could drive for an hour and a half in relation to one journey and 4 hours on another journey but that it was painful. I would not say and have not said I cannot drive, because I can. I could

drive for long periods. I just hurts and I could not do it full time, professionally.

19. In relation to a section of film of me dog walking, the defence notes that on 22.9.2022 Mr Rogers records me saying "she is back home doing light domestic work but is unable to do any heavy domestic work." There is a typo; the date of the Report was 22.9.2021 following the exam on 4.6.2021. More importantly, ignored is the fact that, in his second report, following an exam on 1.6.2022, he said, "She… is able to undertake most of her activities of daily living at home but would not be able to do any heavy lifting." This is accurate. I still cannot pick up a full kettle or a Henry vacuum cleaner, or 6 cans of dog food in my right hand.

20. The Defendant notes that Mr Wand said that "As a result of on-going issues affecting her right elbow, Ms Boyd is unable to use her right arm to any significant degree. She cannot lift anything other than very light weights using her right hand." That must mean the impression formed by Mr Wand because I would not have said that and I refer to what I have actually said, which, again, is not noted by the Defendant. I said 140 at paragraph 51 of my first statement that I lifted a 15 kg free weights bar, using both hands. I said at paragraph 55 that I could not carry a full bag of shopping. I can get something like an electric shock. Mr Wand's words are not my words.

21. The Defendant notes that Mr Wand recorded that, "She walks her dogs, but does not hold onto the dog lead with her right hand." I would not have said that because I could. Whether I can hold a heavy dog that is making off very sharply is another thing.

22. As I said at paragraph 92 of my first statement, I will walk one dog on a lead and others off it for work. In fact I can manage two good dogs and there will be times I hold more for one reason or another such as when I am worried for them, but a better way to say it is that my preference is to have just one because having more than one is a worry. Walking dogs is not a question of whether I can just hold a dog's lead in either hand, which I can. It's not as simple as that. If a dog gave a proper yank, I would want to let go deliberately so I don't get dragged over. I am actually conscious that having my left arm free might be better to break my fall if I was dragged over. If I have the lead in my right hand, I can still swap it to the left.

23. In the film, the other two dogs are my own – Tonic and Star – and they walked off the lead leaving just the Husky on the lead. Starr is a Yorkshire Terrier and is small and lightweight. Tonic is the medium sized dog. Tonic pulled me over last year and I fractured my thumb.

….

I have spent over 20 years in racing where people (and horses) carry all sorts of injuries whilst working. People ride with all sorts of

injuries that would result in other people staying at home from work. 141 Racing people don't complain. They just get on with it. If I stopped everything when my joint aches I wouldn't do very much at all.

26. The quote is correct in that I "might" get aching after only a short time. It is possible (I can't remember) that I took painkillers in advance of walking the Husky for the people who owned the hairdressers we were standing outside. But, of course, I always have some pain and discomfort. It would certainly be more painful afterwards but that's my life now. This doesn't mean I can't use my arm. You have to carry on.

29. I used to play rugby before the accident. I played number 9 (scrum half). I needed to keep fit after the accident so went to training sessions during the season 2020-2021. It must have been quite a long way into the season. I did not do tackling and I did not play in matches. I can't remember when, but, some time in the lead up to the 2021-2022 season, I went to pre-season training and tried using a tackling bag. It confirmed that I was never going to get back to playing and I stopped. It was much too painful and that was just hitting a padded bag.

31. When I saw Mr Wand, I just answered his questions. I cannot remember the details of the conversation and can only comment on the probability that I did or did not say something. I wonder if he asked me whether I was doing any sport at that time, rather than whether I had done any since the accident. When I saw him I had stopped rugby training a year beforehand. Not mentioning the football, if didn't, doesn't make sense. It can be seen that my statement that I was not misleading about the football.

32. I said in paragraph 13 of my first statement that I cannot play rugby now. That is true but Defendant has made what I can see is an understandable conclusion that I have not picked up a rugby ball since the accident. That is not what I meant, and I was not trying to be clever or hide anything. I did do some training which included some touch-rugby (strictly no tackling, rucks and mauls) but have not played normal rugby. The Defendant could have asked.

33. During the training it can be seen that I do various things. There is nothing that I said or ever meant to say I could not do. I am wearing an elbow support.

42. In reference to film at 8:06 pm the Defendant notes that in my first witness statement, at paragraph 22 I said that "I still play a bit of darts but I have to throw left handed because of the injury." I should have corrected what my solicitor typed. I do sometimes have to use my left hand, but generally I can use my right hand to play darts.

43. In reference to film at 8:12 pm the Defendant notes that "Report of Mr Rogers dated 22.09.2021, para 3.4 states "weakness in the right arm with reduced range of motion so the arm will not straighten and she cannot reach her shoulder"." That is correct. I cannot straighten the arm and you can see that my arm never straightens in this or any film. Nor can I bend the arm so that I can cock my wrist and touch my shoulder.

48. I can use a toothbrush right-handed. I do not have upper teeth; the front ones were knocked out in a riding accident and the other ones were taken out after becoming infected. I don't know why Mr Wand records that I cannot brush my teeth. I do not know why I would have said I cannot brush my teeth with my right hand.

49. I don't own a comb or a hairbrush. I don't need one; I have very short hair. I wouldn't brush it never mind comb it. As a woman I might theoretically use a hairbrush, but not a comb. I could comb my hair if I did have a comb, but I don't. So I do not know why Mr Wand records that I cannot comb my hair.

61. Before my injury I was a good goalkeeper. I concentrated more on rugby in the years just before the accident and when I stopped the rugby training I still had the football. 147 After going back to football after the accident, I did not choose to play goalkeeper and I tended to play as a defender but sometimes ended up in goal. The team did have a goalie but whilst she played in goal for matches, she was unable to train some week. I think I started one actual match in goal but had to come off after 20 minutes. I was asked to be goalie more often during training. I wanted to help but I couldn't be fully committed. Like catching rugby balls I can catch footballs and make saves. Anyone can soften a catch or stop by letting their hand or arm "give" rather than be rigid. You can adapt and fall without taking much, if any, weight on the right elbow, using your side or shoulder, for instance.

62. I can be seen passing the ball with my right hand. I can move my arm so that I can throw it a short way, almost rolling it out, but it is not a great technique which would use a whipping action extending or putting pressure on the elbow or wrist. What I can be seen doing is mainly just swinging my arm and essentially the ball leaves my hand rather than the arm/hand whipping and controlling the ball properly. Before injury I would be able to throw it over-arm from the 18-yard box to the half way line. Not afterwards.

(xlv) 4th December; Mr Rogers' supplemental report having viewed the surveillance evidence.

2024

(xlvi) 20th February; joint statement (Mr Wand/Mr Rogers)

(xlvii) 19th April 2024; third Schedule of loss

Defendant's case

191. Ms Crawford submitted that the Claimant had clearly been dishonest and fundamentally so. When she saw the medical experts (and also when she prepared her statement) she knew that she had made and was continuing to make an excellent recovery from an admittedly a nasty injury yet concealed this and portrayed herself as significantly disabled.

Surveillance

192. A brief summary of the surveillance is as follows:

193. On 26th April 2021; the Claimant was filmed participating in rugby training (with an elasticated brace on the arm). The session was clearly not intended to be a full contact session and whilst the Claimant runs, moves the arm and passes the ball; she does not engage in a full tackle and does not fully spin pass using the right arm (she stated that she cannot now do a 15-20 metre pass as she previously could). She is also filmed walking a dog on a lead which at one stage outside a shop clearly pulls on its lead.

194. On 19th September 2021 the Claimant was filmed attending at Mr Wand's offices.

195. On 20th September 2021 the Claimant was filmed participating in a football training session for one hour. She spends part of the session in goal (on occasions trying to stop shots). When she throws the ball out with her right arm the action is not a full force throw (which she said that she could previously do).

Medical evidence

196. When presented with the surveillance Mr Wand stated;

> "There is a sequence, dated the 20th September 2022 when Ms Boyd is seen to play football. In this sequence she plays in goal and appears to use both arms normally. When she falls over, she uses her right hand to push herself back up onto her feet. She saves the ball with both hands. The arc of elbow movements displayed during these sequences is greater than that which she demonstrated to me at the time of my examination. During the course of the video sequence, she does not display any significant disability affecting her right arm.
>
> Ms Boyd displayed surprisingly normal elbow function when the videos were shot. She did not display any significant disability. Irrespective she did sustain a significant injury to right elbow as a result of the accident of 23rd June 2020, despite (based on the video evidence) having made a surprisingly good recovery from

> this serious injury. Clearly she is capable of light to moderately strenuous work using her right arm but I think she would have some difficulty in conducting some of the more strenuous work of a stable hand (e.g. fitting a heavy saddle, mucking out, moving a heavy bale of hay etc).
>
> The video evidence indicates that Ms Boyd is not disabled according to the DDA definition ("has a physical or mental impairment which has a substantial and long-term effect on her ability to carry out normal day to day activities"). Ms Boyd clearly enjoys playing contact sport and appears to use her arm normally and I am sure can carry out her normal day-to-day activities.
>
> I do not consider the surveillance footage and evidence is consistent with the history as provided by the Claimant or my examination findings. Taking into account the video footage, I think it likely that Ms Boyd is able to go about household chores in a largely unrestricted fashion. It is likely that she, taking into account the severity of the injuries and her subsequent treatment, would have some disability in regard to upper arm function, but her disability is clearly substantially less than stated to me at the time of my examination of her."

197. He added the following on 2nd January 2024:

> "In regard to the updated Witness Statements, I can only reiterate that the symptoms that are recorded in my report of the 12th May 2023, were the symptoms as stated to me at the time of my examination of the Claimant on the 19th September 2022. I maintain the view expressed in my letter of the 5th October 2023, that the video evidence was at variance with the level of disability as documented to me by the Claimant. This does not, of course, mean that the Claimant does not have any issues affecting her right elbow, simply that the disability stated is evidently less than that which was documented to me at the time of my examination of the Claimant. Accordingly, it is not possible to make an accurate assessment of the true level of the disability that the Claimant experiences as a direct consequence of the right elbow fracture/dislocation."

198. Mr Rogers set out his view of the surveillance in his report of December 2023 that;

> "In terms of the video surveillance and my medical reports, the surveillance does not really show anything out of context compared with her information given to me for her medical reports."

"She reports stiffness and pain in the elbow. The pain in particular can be variable and reach a 5 to 7 out of 10. I note there are various readings for her elbow range of motion, an element of these is likely to be down to observer error. There is also likely to be some variation in elbow range of motion dependent on the time of day, activity level, soreness in the elbow and swelling etc. at the time (and the Claimant added use of painkillers)."

and

"When I originally saw her she had a range of motion 70° to 135° (normal should be 0 to 150°. On the final report range of motion was 40° to 100° with both myself and Mr Wand and looking at the video and the surveillance she is probably getting closer to 110° to 120° as that is what is required to get your hand to your mouth. During the videos I have not seen her demonstrate full flexion or extend the elbow fully."

"The actual range of motion at this stage is not important however, as she has a functional range of motion that would allow her to undertake most activities of daily living and she indicated to me that she can undertake all of her activities of daily living and was playing football. What she struggles with is pain and strength in the upper limb. Whilst in the video surveillance she is seen walking the husky dog, he seems to only pull sharply on one or two occasions. Likewise in all of the football / rugby events she tends to favour pushing up on her left arm to get up off the floor and is seen rubbing her right elbow which would indicate she is suffering from pain. Again there is one event where she is pulled up by her right arm but this is a single solitary event, so the surveillance does not alter my original opinion that she is likely to struggle with heavy repeated bimanual tasks. In my opinion there is a difference between a husky dog and a horse in terms of the strength requirements to ride and lead a horse.

Mr Wand's medical report however tends to indicate more significant disabilities of daily living and therefore in my opinion these videos do contradict the information as recorded by Mr Wand at the time of his medical report (it's accuracy subsequently disputed by Mrs Boyd). It does seem unusual however why she would give different information to Mr Wand as opposed to myself as if she was exaggerating for gain I would have anticipated similar claims being given to both of us. 4.6 In terms of my medical report, I have seen nothing in the video surveillance to contradict her claim to myself that she does not feel that she is able to undertake heavy bimanual tasks. Ultimately however it would be up to the Court to determine whether they think that she is exaggerating her symptoms for financial gain however the schedule of damages provided to myself does not contain any claims other than the loss of

> employment/future potential surgery if she is exaggerating the symptoms she does not appear to have requested financial help for helping with shopping trips gardening etc. which I would have expected."

199. The Joint Statement of Mr Rogers and Mr Wand is dated 24th February 2024. The comments about the Claimant's injuries and ongoing symptoms were described by Ms Read as "shrouded in agreement", this statement having been prepared after consideration of the surveillance and facebook entries. The material parts are as follows;

> "2. Both experts agree this was a significant injury to the dominant right elbow and that it would be unusual for the elbow to have a full range of pain free motion following this injury.
>
> 3. Both experts would expect a degree of ongoing pain and discomfort and restriction of certain activities from such an injury.
>
> 5. Both experts agree she is likely to be restricted in terms of heavy bimanual physical activity and therefore both experts agree that in their opinion she is not suited to return to work as a stable hand.
>
> ..
>
> 7. Both experts agree that the video shows that she is functioning within a doggie day care centre and can lead even some big dogs with her right arm. She is also self-caring and both experts agree that she should not require any help with any of her activities of daily living, but again she may require help with heavy DIY tasks.
>
> Q1. Lifting a 15 kg free weight bar without any weights on it using both hands to waist level in 2021.
>
> This was not specifically asked by either expert in their interview. Both experts agree that the video evidence would tend to indicate that she is able to achieve this. Mr Wand felt that the ongoing disability level described to him was inconsistent with this.
>
> Q.2 The Claimant has considered becoming an LGV driver in order to make a living following the accident…
>
> Both experts agree the video evidence is consistent with her being able to undertake this task but it would be up to the court if it was felt reasonable to engage in this line of work with her subjective report of pain.
>
> Q.3 The Claimant was also considering a job in security at a racing stable and since the accident she can just about hold a single dog on a lead in her right hand but does not have the strength to hold a horse.
>
> Again the impression given to Mr Wand is of a more significant disability and he would not have anticipated her being able to lead a dog in her right hand. Mr Rogers' impression of her disability would be that she would not have been able to

lead a large dog in the injured hand. However both experts agree that the video evidence does show her leading a large dog on a lead but both experts agree that their assessment would be that she would not be able to safely lead a horse and the video evidence has not shown this ability.

Q9. Answer…

Both experts would indicate that whilst she has a physical condition that is permanent and affects the type of paid work that she can reasonably undertake, they do not feel that in their opinion her ongoing restrictions in terms of heavy lifting indicate a substantial effect on her ability to carry out normal day to day activities as judged by her statements and the video evidence.

Both experts agree there is a risk of developing osteoarthritis in the elbow particularly with the coronoid fracture with involvement of the coronoid in the fracture and they have estimated this to be 30% risk over a 10-to-20-year time period. This is potentially likely to result in some increase in stiffness, pain, and discomfort. In the worst scenario an elbow replacement may be required but both experts agree that the risk of this would be extremely low i.e. in all probability would not be required and would be postponed until at least until she is into her 60s."

200. Counsel also produced an agreed table of reported range of movement

Date	
17.8.2020	R-AROM F 290 E to -40 (Injured Jockeys Fund IJF)
18.8.2020	R-AROM F 285 E to 30 degrees (IJF)
19.8.2020	R-AROM F to 90 E to -35/stiffness & P limiting (IJF)
20.8.2020	R-AROM F 80. E -40 (IJF)
2.9.2020	O/flexion 90 deg extn -45 deg (IJF)
	A/flexion 100deg extn 45 deg (IJF)
3.9.2020	AROM: Flexion 80 degrees Ext:95/100 degrees (IJF)
	Supination 2/3rd available range (IJF)
15.9.2020	Elbow flex: 90 degrees, Elbow ext 110-120 degrees (IJF)
18.9.2020	PROM: F to 100 E to -30 (IJF)
22.10.2020	10-100^{o} (Hospital, noted by experts)
17.12.2020	active supination and pronation and active 30^{o} - 160^{o} of flexion with no definite end point in extension (Hospital, noted by experts)

4.6.2021	70º to 135º (Mr Rogers)
25.10.2021	Video of ROM taken by C for purpose of disclosure delivered to D 2.2.2023 (Analysed by experts in their reports: by Mr Rogers as 30º to 110/120º [p654] and by Mr Wand as 40º to 110º [719])
1.6.2022	50º to around 100º (Mr Rogers second report)
19.9.2022	50° to 100° of flexion. She had full supination, but pronation was restricted to 75% of the predicted range. (Mr Wand examination).

Lay witness evidence

201. The Claimant was cross-examined at length. She did not accept that the surveillance evidence showed her to be capable of doing things which she had stated to either the medical experts, or within her statement, that she was incapable of doing. She said that she took pain killers and "just get on with things". She said she cannot fully straighten her arm (which she demonstrated) with pain as an inhibitor of movement and cannot carry /move heavy things with the arm in extension.

202. The Claimant stated that she takes regular painkillers (she is given 60 high-dose co-codamol tablets a month (500mg)) and uses ice when necessary.

203. She said that she had tried rugby training but had given it up in 2022 as she was disheartened that she could not play a game as he could not tackle. She stated that she could be seen in the videos holding/rubbing her arm during the training. She needed to stay fit and was still optimistic of improvement in the arm at this stage. She said there was a clear difference between training to get fit and "playing rugby" and as she had correctly and honestly stated she has not be able to return to playing after the accident (as opposed to training).

204. She denied that the dog which she had on a lead as shown on surveillance pulled her so that there was strain on her arm. She said that she had her own two dogs and that even when working in the Pub Hub she would only walk one dog any distance on a lead (though she would have another dog on the lead e.g. on the Taff Trail if it was necessary due to other dogs/people being present).

205. She said that she was wholly honest in her video of the range of movement and that she took painkillers before football training and had made it clear that she had returned to playing football (as opposed to not returning to playing rugby). She was taken to reports of her football games and she agreed that she played (usually up to half time /50 minutes). She played in central defence and not in goal (as she had done previously).

206. The Claimant said that she had ridden out two lots of horses at Lamborn at the suggestion on the Oaksey House rehabilitation team in September 2020 when they were still "optimistic" about her recovery. She was in a brace and sat on a quiet horse and walked and trotted; then tried "a bouncier" one and did not feel in control as the horse may pull too much for her to hold it. She had wanted to get a "horse fix" but

it knocked her confidence "mentally and physically". She was "gutted" because she could not do it. She was at times during her evidence clearly (and in my judgment honestly) emotional about the loss of her work with horses. She said that she had a "resistant attitude" and a "high pain level" to pain and still uses painkillers. She initially bought paracetamol and was concerned about getting addicted and did not restart use of pain killers solely to support her claim. She now gets them on prescription (co-codamol).

207. The Claimant explained that she can throw things such a dog toy and can throw a dart right handed. She was a passenger on a guided quad bike tour (as shown on a social media post) and did not ride it. She tried to qualify as a HGV driver but failed the test. However she then realised that she could not cope with long distance

208. The Claimant said that before her medical examinations she did not take painkillers as "I wanted them to see…(the extent of her symptoms)" She did not accept that she had lied to Mr Wand and said that he had not accurately interpreted and or recorded the answers to her questions (they were not her words) and also that there may have been misunderstandings. For example as regards cooking she would have said that she could not pick up a boiling pan of water. As for other content of Mr Wand's report she did not need to comb her hair, lived a fairly simple existence microwaving her meals and had lost all of her upper teeth so wears a partial denture and does not brush these. She would also naturally eat with a fork in her left hand.

209. She also denied trying to mislead Mr Rogers or not being truthful and knowingly inaccurate within her statement.

210. Ms Jenna George gave evidence. She was a fellow rugby player and is a friend. She said that in training people would be "cautious around Hazel and if she fell to the floor everyone would wince". She knew that the Claimant was very sore after sessions as they had conversations about it. She knew that she was taking a lot of painkillers and thought it was too many.

211. Mr James Morris was formerly the Claimant's rugby coach and is a friend. He confirmed that the last time that the Claimant had played a match was before the accident. After the accident she had done some training but had then given up. It was obvious to him that she was carrying an injury and was not working the right arm "as it should" and she could not pass properly. Also "she couldn't afford to be tackled or fall to the floor in an uncontrolled way". She could not manage tackle bag.

212. I accept the evidence of both Ms George and Mr Morris as honest overviews of what they can recollect.

213. I heard from employees of the surveillance company; Jeremy Ward '(Operations Director, the Surveillance Group, Steve Panks '(a surveillance operative) and Gareth Walkinshaw (a surveillance operative). I need not deal with the evidence in detail but having seen the footage I reject the suggestion of selective filming (so as not to catch times when the Claimant seemed to be struggling). Their evidence took matters no further.

Oral evidence of medical experts

214. Both experts gave very measured evidence. There continued to be very little between their opinions.

215. Mr Rogers said that he had not detected exaggeration at his examinations. As regards the rugby training, he stated that the Claimant would have struggled to do what she is shown doing with the range of movement which he saw at the examination (five weeks earlier). He also though that walking dogs was not consistent with the level of pain he thought that she had**.** He would have expected the activities shown to cause pain and would not have expected her to return to contact sports. He was aware of the football training but was not aware that she was back to football matches. However he did not see anything in the football footage which was outside the expected range of movement.

216. He said that pain and effort are variables which affect what is achievable as a range of movement. Mr Rogers did not think that the Physiotherapy records were of much assistance as regards range of movement.

217. He was not surprised by the Claimant's evidence that she could not carry a heavy shopping bag given that the arm would be in extension. He would anticipate that there were several activities (e.g. cooking and gardening) that he would still have difficulties with.

218. He obviously considered it of importance that the Claimant had not attempted a return to riding (given that she had lost the combination of her livelihood and passion).

219. Mr Wand gave very fair answers to the questions asked of him in cross-examination and conceded that there was some limited room for misunderstanding. However he was unshakeable that he has asked "direct" questions of the Claimant (rather than asking for a general assessment) and got simple answers which he had accurately recorded by writing them down at the time (albeit not verbatim) and later dictating up. The questions followed on from his pre-examination preparation and he was trying to determine the extent of disability. He considered the possibility that he had made mistakes as highly unlikely. He had based his opinion on what she had told him.

220. He was consistent and in my view reliably accurate as to what had been said at his examination (although he was surprised only it only lasted for 20 minutes).

221. Mr Wand said that the surveillance evidence came as a surprise. When he saw the Claimant, he thought she had suffered a serious injury with a bad outcome and he had not been surprised by what she told him. When he saw the video he was surprised by what she could do. She had a usable and functional arc of movement (as opposed to a full range of movement) and was using her arm quite well.

222. Mr Wand confirmed that the Claimant had suffered a serious injury. He did not think that she could work as a stable hand.

Submissions

223. It was Ms Crawford's submission that when the Claimant saw the experts and when she complied her first statement (and as a result when the case was presented in pleadings) she knew that she had made, and was continuing to make, an excellent recovery from a nasty injury (and was not properly described as disabled). Specifically she knew that she had been able to;

a) return very quickly to (and to continue with) active contact sports
b) walk a (large strong) dog using her right arm (and multiple dogs by time the witness statement was drafted)
c) cope without pain relief
d) achieve a good and functional range of movement
e) throw a dart right handed

224. The dishonest impression that she had given to the experts and set out in her first statement (and pleaded case) was that she had not made an excellent recovery and that;

a) She had a limited range of movement
b) Was in constant pain exacerbated by any activity
c) Took part in no active sports/or only to a very limited extent (training only)
d) Was unable to walk a dog
e) Was unable to throw a dart right handed

And as a result of these restriction was disabled.

225. Ms Crawford submitted that the dishonesty started at time of the first examination by Mr Rogers June 2021, and continued until it was revealed through surveillance. Further it tainted the whole claim as it affected the level of general damages, and all (save past care) of special damages. Dishonesty was exposed by the Defendant at an early stage which resulted in a shift in position eg from 'disabled' in first schedule of loss to 'mild to moderately disabled/for court to determine' in second iteration (and then the introduction of three alternative bases for future loss claim).

226. Ms Read submitted that Defendant had failed to identify the element of dishonesty which it is said fundamentally undermines the Claimant's pleaded case and an allegation of fundamental dishonesty could not properly be made on the evidence before the Court. She argued that

i) The Claimant had not said anything under oath or in her pleadings or witness statements that was dishonest.

ii) Even if she could move her elbow more than she demonstrated to Mr Wand and told him that she was unable to comb her hair, cook, brush her teeth, change her bed linen, finish her washing up or walk her dogs, such matters were not fundamental to her claim. Rather there has been no effect at all, or at most very limited, on the presentation of her claim.

Law

227. Section 57(1)(a) Criminal Justice and Courts Act 2015 provides:

> "Personal injury claims: cases of fundamental dishonesty
>
> (1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim") -
>
> (a) the court finds that the claimant is entitled to damages in respect of the claim, but
>
> (b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.
>
> (2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.
>
> (3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.
>
> (4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim."

228. The burden is on the Defendant to establish on the balance of probabilities that the Claimant has been fundamentally dishonest.

229. The first matter to be addressed in a case where fundamental dishonesty is raised is whether the claimant has been dishonest. The Supreme Court addressed the elements the court must consider in deciding whether dishonesty is made out in **Ivey v Genting Casinos UK Limited (t/a Crockfords Club)** [2018] AC 391.

230. The next issue is whether such dishonesty can be properly characterised as fundamental in relation to the primary claim or a related claim. The question of what is properly considered fundamental has been analysed in cases directly concerned with section 57 and also in relation to one-way costs shifting (QOCS). In **Gosling v Hailo** (unreported; 29 April 2014) His Honour Judge Moloney QC said when concerned with a QOCS issue:

> "45. The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole

> of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty.""

231. In **Howlett v Davies** [2018] 1 WLR 948 Lord Justice Newey agreed with a description of this analysis as "common sense". However, in **Denzil-v-Mohammed [2023]** EWHC **2077,** Mr Justice Freedman said of this paragraph;

> "This is helpful to distinguish between what is fundamental and not fundamental. However, I express concern about looking for a "corollary" term, perhaps meaning a converse term. If it is not fundamental, it does not follow that it must be *"incidental"* or *"collateral"*. Something might not go sufficiently to the root of the claim and therefore not be fundamental without going so far as to say that it is incidental or collateral. The other wording that is then used for something that is not fundamental as being dishonesty as to a collateral matter or *"some minor, self-contained head of damage"*. It is easy to understand the use of these definitions, but it is important that they are confined to assist in applying the words of the statute itself without taking over from the statute so that the words of elaboration or metaphor replace the statutory words".

232. In **London Organising Committee of the Olympic and Paralympic Games v Sinfield** [2018] EWHC 51 (QB) Mr Justice Knowles held that a Claimant should be found to be fundamentally dishonest if he has acted dishonestly and has thus substantially affected the presentation of his case on liability or quantum in a way which potentially adversely affects the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation. He explained "substantially affects" is intended to convey the same idea as the expressions "going to the root" or "going to the heart" of the claim. Within the judgment Knowles J referred to the decisions of three very experienced Judges in County Court cases that the fundamental dishonesty requirement;

(a) May be tested against the courts approach to lies ; if a lie is told merely to bolster an honest claim or defence, then that will not necessarily tell against the liar. But if the lie goes to the whole root of the claim or defence, then it may well indicate that the claim or defence (as the case may be) is itself fundamentally dishonest." per His Honour Judge Hodge QC in **Meadows v La Tasca Restaurants**.

(b) means a substantial and material dishonesty going to the heart of the claim – either liability or quantum or both – rather than peripheral exaggerations or embroidery; per His Honour Judge Harris QC in **Rayner v Raymond Brown Group**.

(c) has a twofold purpose; first, to distinguish any dishonesty from the exaggerations, concealments and the like that accompany personal injury claims from time to time. Such exaggerations, concealment and so forth may be dishonest, but they cannot sensibly be said to be fundamentally dishonest; per His Honour Judge Hughes QC in **Menary v Darnton**,

233. In **Elgamal v. Westminster City Council** [2021] EWHC 2510; [2021] Costs LR 973 ("Elgamal"**)**, Mr Justice Jacobs accepted at para. 72 that whether dishonesty was sufficiently fundamental is essentially a simple 'jury' question. He said at para. 113:

> "If there indeed is a serious injury, and a claimant has been honest about that, then a court may readily conclude that a degree of exaggeration may not go to the heart of the claim, but would more appropriately be regarded (to use some of the words used in the authorities) as incidental or collateral or embroidery. By contrast, in a case where a judge dismisses a claim because the injuries have not been proved at all, then a finding of fundamental dishonesty may easily follow in a case where the claimant has asserted the existence of those injuries: see eg *Pegg v Webb [2020] Costs LR 1001* (a case dealing with CPR 44.16 rather than s 57 of the Act) para [20]. The position will likely be similar if there is some injury, but it is not of any great significance, and the Claimant has exaggerated so as to make it appear very serious."

234. In this case the parties in this claim adopted my overview of the law in **Muyepa** [2022] EWHC 2648 and agreed that the three questions which I set out may be instructive when considering whether or not dishonesty has been fundamental;

> 388. In cases of this nature when considering whether the Claimant's dishonesty has been fundamental dishonesty in relation to the primary claim or a related claim I have found the following three questions (which have a degree of overlap) to be helpful
>
> (a) At what stage and in what circumstances did the Claimant's dishonest conduct start? In some cases the true core of the claim, the base, can be determined without considerable difficulty and the dishonesty can be traced to a point/time when the Claimant decided to consciously exaggerate for financial gain, for example after an operation or treatment has alleviated symptoms. The timeframe may be an extended period, e.g. as residual symptoms gradually ease, or sharply defined. In other cases it may be more difficult to identify when the dishonest conduct started. In any event the court is entitled to proceed with considerable caution in answering this question given the limits of any reliable evidence.
>
> (b) Does the dishonesty taint the whole of the claim or is it limited to a divisible element?
>
> (c) How does the value of the underlying valid claim (which the court must assess) compare with that of the dishonestly inflated claim? There is no set ratio as to what constitutes fundamental dishonesty but it is usually important to consider relative values.

235. Although I suggested that these questions may assist I did not attempt to further define or elaborate upon the statutory test, rather I stated;

> "381. The burden is on the Defendant to establish on the balance of probabilities that the Claimant has been fundamentally

> dishonest. I would respectfully agree with Lord Faulks' comment that application of the test within the section is well within the capacity of any judge who will know exactly what the clause is aimed at. I also do not believe any gloss is needed upon the plain wording. The issue is highly fact specific".

236. In **Denzil** Mr Justice Freedman was clearly of a similar view. He stated;

> "41. I refer to the substantive law above as to what amounts to "fundamental" dishonesty for the purpose of section 57 of the 2015 Act. I observe from the authorities, namely:
>
> (i) There is a danger about elaboration and metaphor. Otherwise, the Courts will be applying the elaboration and metaphors of previous judges such that the word of the statute will fade into history and will not be applied: see *Elgamal* at para. 70 per Jacobs J.
>
> (ii) The statutory word "fundamental" should be given its plain meaning. The expressions "going to the root" or "going to the heart" of the claim are often sufficient to capture the meaning of the statutory word. Provided that it is understood in the same way, it might assist in some cases in respect of applying the word "fundamental" to consider whether the dishonesty "substantially affected the presentation of (the) case, either in respects of liability or quantum, in a way which potentially adversely affects the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation": see *LOCOG* at paras 62-63.
>
> (iii) The question whether the relevant dishonesty was sufficiently fundamental should be a straightforward jury question. As stated above, this judgment would return to this. *"It is a question of fact and degree in each case as to whether the dishonesty went to the heart of the claim. That must involve considering the dishonesty relied upon, and the nature of the claim both on liability and quantum which was actually being advanced":* see *Elgamal* at para. 72 per Jacobs J.
>
> (iv) It will often be appropriate in this holistic exercise to consider the extent to which the alleged dishonesty resulted in an inflated claim, that is the extent to which the dishonesty, if not exposed, would potentially have resulted in a higher quantum of recovery in respect of the claims made. This involves consideration of the various losses claimed by a claimant and assessing the potential impact of the alleged dishonesty on the award for those losses: see *Elgamal* at para. 73 per Jacobs J.
>
> > "In some cases, it will be obvious that the dishonesty had a potential impact on the amount that might be awarded for a particular head of loss. For example, a personal injury claim will invariably involve a claim for PSLA, and a dishonest description of symptoms and suffering will inevitably have a potential impact on the PSLA. The significance of that potential impact is a matter for consideration in the context of whether the dishonesty went to the root of the claim. Conversely, it may be clear that

> the alleged dishonesty has no material impact on a particular head of loss..": see Elgamal per Jacobs J at para. 74."

237. I respectfully agree with this analysis. As I set out in **Muyepa** at the Committee stage of the passage of the Criminal Justice and Courts Bill through the House of Lords, Lord Faulks QC conceded that an adverb to qualify a concept such as dishonesty is not linguistically attractive but it sends a message to a Judge, who, as a result will know exactly what the clause is aimed at. Rather than set out a detailed description of an elephant Parliament has clearly trusted a Judge to know one when he/she sees it.

Analysis

238. I make the following findings of fact.

239. The Claimant deliberately exaggerated/overplayed her symptoms to both Mr Rogers and Mr Wand. In respect of Mr Wand's examination, she knew that she was not giving honest answers to some of his straightforward questions. The following information was, I am satisfied, given by the Claimant in response to questions posed of her and she knew it was not true and did not give an accurate picture:

a) She cannot brush her teeth right-handed.

b) She cannot comb her hair.

c) When she eats, she does so left-handed.

d) She is unable to do any significant cooking.

e) She is able to drive a car, but for short periods only.

f) She is (only) able to do a certain amount of washing up, albeit with difficulty.

g) She is unable to change bed linen.

h) She is unable to do gardening.

i) She walks her dogs, but does not hold onto the dog lead with her right hand. She also gave the impression that she could not lead a dog in her right hand to Mr Rogers. She accepted such an impression (if given) was not right.

240. The Claimant did not fully disclose to either medical expert that she had resumed football and rugby training in August 2020.

241. The statement within her witness statement that she could not throw darts right handed was also not true. I accept what the Claimant said in relation to the quad bike; she was a pillion passenger on a guided tour.

242. The matters set out above establish dishonesty.

243. Having found that the Claimant has been dishonest, the next question is whether the dishonesty can be properly characterised as fundamental in relation to the primary claim or a related claim.

244. Fraudulent personal injury claims have long been, and remain, a well-recognised and extensive problem. **In South Wales Fire and Rescue Service v Smith** [2011] EWHC 1749 (Admin)**,** Moses LJ said of such claims;

> "For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant can receive just compensation."

245. There should be no doubt that throughout any analysis of this issue the essential importance of ensuring claims are pursued honestly must be borne in mind. The question is intensely fact specific and, as is often case with Judicial decision making, it is not the clear or egregious cases that are the most problematic and require the most anxious scrutiny, rather those on the borderline. This is such a claim and I confess that I have not found the question whether the Claimant's dishonest exaggeration was fundamental an easy issue to determine in this case.

246. I have considered the three questions which I set out in **Muyepa**. I take them in turn.

247. At what stage and in what circumstances did the Claimant's dishonest conduct start?

248. The Claimant, who suffered a very nasty injury, had an admirable approach to her rehabilitation as she strove to return to riding; her employment and passion. She was candid with the physiotherapists (as recorded in the notes) and was optimistic about her recovery. She started participating in sports; football and rugby training in August 2020. She lives alone and survived without and care/assistance beyond the first few weeks.

249. The Claimant's excellent recovery then plateaued; indeed in terms of pain it went backwards (probably because of her level of activity). She had a restricted (although functional) range of movement, but was restricted in what she could lift/carry with her right arm. She realised that she would not be able to return to working with horses and this clearly was a very bitter blow for her. She began to consider alternative employment.

250. The Claimant deliberately overplayed her symptoms and level of disability to Mr Rogers and Mr Wand. I considered the part of her evidence when she explained that she has not taken painkillers before the examinations because she wanted then to see what it was like to be illuminating. The Claimant was anxious that her level of disability was not underestimated; so she exaggerated elements of it. She knew that she had lost her employment, ability to play sport as she previously had (to play games of rugby or be a goalkeeper, as she had been, in football), was to a degree reliant on painkillers, had to reduce her socialising and watch her income carefully (she was on universal credit) and faced an uncertain future. As she candidly set out in her first witness statement (so before the surveillance was disclosed)

> "mentally I was not coping brilliantly. I was so low and frustrated a couple of months after the accident I swallowed some tablets after thinking about suicide. But then I made myself sick. I have always been a worrier and was very conscious about my money situation. I was in rented accommodation and know every outgoing down to the last pound".

251. This was the stage, context and it appears likely to me motivation, for the start of dishonest exaggeration.

252. It started at the time of the examination by Mr Rogers; but was at its most serious when she was examined by Mr Wand.

253. Importantly the Claimant then disclosed her return to Sunday League football, attempt so get an HVH licence work with dogs and the setting up of the pub hub dog care day centre (walking one dog on a lead) before she was aware of the surveillance. Mr Wand had the opportunity to review her statement; indeed he noted that she had returned to football.

254. Did the dishonesty taint the whole claim?

255. I do not accept the polarised overviews of the nature, extent and effect of her misleading statements advanced by either Counsel. The accurate assessment lies in the middle ground.

256. The surveillance is very far from being "frankly devastating" (per **Gosling-v-Hailo**). When taken against the Claimant's Schedule, statement and what she said to Mr Rogers the surveillance is not as damaging to the Claimant's case (in that it expose such a difference between the true picture and the exaggerated picture) as Ms Crawford submits. However it is not of no effect.

257. How does the value of the underlying valid claim (which the court must assess) compare with that of the dishonestly inflated claim? It is difficult to see how the dishonest exaggeration potentially inflated the claim other than in relation to an award of pain suffering and loss of amenity. The dishonesty did not develop beyond exaggeration of the extent of her disability on aspects of daily life. The Claimant has made no continuing care claim or claim for equipment or adaptions, and I am satisfied that, despite her hopes, she was unable to continue to work as a rider or a stable hand. She disclosed her attempt to train as an HGV driver. I do not accept that the claim in relation to painkillers is dishonest. In my judgment the content of the schedule has not materially altered between the first and third schedule (other than the approach of Counsel as to the disability issue; which realistically represented refinement rather than significant underlying change).

258. Returning back to the binary question of whether the dishonesty was fundamental or not, whilst I recognise that the Claimant's dishonest attempts to bolster a valid claim through exaggeration may have had some impact on an award for general damages, after some hesitation I am not satisfied that the Defendant has established that taken together the effect could be properly categorised as fundamental. This requirement must not be watered down. In my view it is of central importance that the core or heart of the claim remained unaffected by the exaggeration. Specifically

i. Neither expert found inappropriate signs on examination. Overall the Claimant has disclosed that she is doing better than expected in terms of use of the arm

ii. The restricted range of movement shown in the video of the Claimant demonstrating her range of movement, in October 2021 is broadly consistent with what she showed/demonstrated in Court (the Defendant had the video in February 2023 and could easily have shared it with Mr Wand, whose report was completed on 12th May 2023). The range of movement in an arm following an injury such as this can vary with the levels of pain and what a person has been doing (as the Claimant stated it did).

iii. The Claimant still takes painkillers daily.

iv. The Claimant has never returned to her work with horses (which was a central part of her life for very many years). She was initially optimistic and clearly did everything that he could to return to riding (she was commended for her hard work in during rehabilitation) but could not do so (this had a very considerable mental impact). She could not work as a stable hand due to the level of physical activity. So she has lost her vocation; a career she had pursued since she was 18.

v. She never returned to contact rugby and stopped training after becoming disheartened that she could not play games.

vi. She cannot lift/carry heavy weights with her arm extended. She cannot carry a heavy bag of shopping (such as six tins of dog food) or a vacuum cleaner or a full kettle.

vii. She voluntarily declared that she tried to retrain as an HGV driver, and also returned to playing football and was setting up a dog walking business before she was aware of the surveillance (so has been fully open about running a business that necessarily involves walking dogs and sometimes keeping them on leads).

viii. The Claimant has never put forward a care claim beyond the first few weeks post accident. She has lived alone and coped independently. That is no specific element of special damages which has been impacted.

259. After some significant hesitation I have concluded that the effect of the dishonest exaggeration was not sufficiently significant to mean that it went to the root or heart of the claim. It was dishonest embellishment in an attempt to underpin an essentially honest claim. The Claimant should consider herself fortunate that her conscious exaggeration has not had devastating consequences, in the end it is the extent of voluntary information (pre-disclosure of surveillance evidence) and the limited potential impact on the damages claimed that has persuaded me, by a narrow margin, that the Defendant has not satisfied the burden of establishing fundamental dishonesty.

Quantum

260. The Parties' cases on quantum of damages are set out in the schedules of loss and counter schedule and detailed written submissions and it is not necessary to set them out in detail.

261. Given my findings as to liability and fundamental dishonesty I will only deal with the main areas of dispute and give brief reasons. I would expect the parties to be able to calculate a final sum on the basis of my findings.

PSLA

262. I shall not repeat the matters set out in detail above. The injury was to the Claimant's dominant arm and left residual pain, some permanent restriction of movement and a 14cm post operative scar. The Claimant who has adapted remarkably well to her serious injury still takes painkillers on a very regular basis and there is a 30% risk of developing osteoarthritis in the future.

263. The Claimant has undoubtedly a significant loss of amenity as regarding her ability to ride and consequential time spent with horses but care must be taken not to double count with loss of congenial employment. She lost the ability to play rugby matches and had some limitation on her footballing activities (having previously been a goalkeeper).

264. Ms Crawford suggested a figure of £20,000 (to include scarring) which would be at the bottom of the range for less severe injuries to the elbow (£19,100-£39,070) within the Judicial College Guidelines. Ms Read submitted that a figure of £45,000 is appropriate (which lies in the gap between the less severe range and the range for a severely disabling injury (£47,810-£66, 920).

265. In my view the appropriate award for the elbow is £37,500 which to which I add £2,500 for the scarring resulting in an award for pain suffering and loss of amenity of £40,000.

Loss of Congenial employment

266. The Claimant lost her employment with horses which she had since she was 18. However there are two features which do have a degree of impact on the level of an award for loss of congenial employment. Firstly it is unlikely that she would have been riding professionally past 50 (so another ten years had the accident not occurred). Secondly there is some congeniality with her replacement occupation; working with dogs and with a significant amount of time outdoors

267. Claimant initially sought £10,000 in her schedule and this increased to £20,000 (based on the Claimant riding /working with horses until she was aged 68).

268. Ms Crawford submits says a full award should be £5,000-7,500; but suggests a third of this figure is appropriate.

269. It is undoubtedly the case that the Claimant's job was also her passion and had been since she was 18 years old (unlike most forms of employment). It was cut short; but only by a limited period given her age. Bearing in mind the overlap with loss of amenity apart from employment (as I awarded an element for an inability to ride as loss of amenity) my view is that an award of £2,750 is appropriate.

Past Losses

270. After the accident (on 23rd June 2020), and as set out in detail above, the Claimant had residential rehabilitation and received payments from the RIABS income replacement scheme (which for the reasons set out below can be offset against losses). By the late summer she was engaged in physical activity but from September 2020 there were tiered lockdowns due to COVID and from January 2021 to July 2021 there was a national lockdown. She saw Mr Rogers in June 2021 and he recommended intensive physiotherapy and was sufficiently optimistic about her potential recovery that he stated that if her pain settled and strength improved, she may wish to return to horse riding (on a trial basis). The Claimant had not been dismissed by the Defendant.

271. Ms Crawford submitted that the Claimant had failed to mitigate her loss by obtaining alternative employment (indeed receiving any income) before limited remuneration came from the Pub Hub in August 2023 (so more than three years after the accident). Although she was unable to undertake heaving lifting and had some residual disability it was argued;

> "She was capable of replacing her pre-accident income or even bettering it (security work, or HGV/LGV driving or utilising her equine /animals care NVQ1 and 2 "grandfather rights") long before her RIABS replacement stopped in June 2021."

272. In my judgment the argument that despite the well-known economic consequences of the Lockdowns and her residual disability the Claimant should have found employment before the late summer of 2021 is unrealistic. However I accept that by the autumn of 2021 the Claimant should have been looking for some form of employment and it was unreasonable not to do so. I have no doubt that the income placement payments which she continued to received up to June 2022 meant that she did not feel that it was necessary to try and find some form or employment however limited /part time. Ms Read submitted that "she had tried to become an HGV driver and cannot be held unreasonable for failing her theory test (on 13th July 2022)". Also that it was not unreasonable of her not to pursue a career in race security given the long waiting list of applicants and that it was not directly put to the Claimant that she could have found employment as a delivery driver. I bear these factors in mind. However study for an HGV theory would not have prevented employment and she had an excellent record as a hard working employee over many years. The Claimant stated:

> "…I had thought about bar work, house sitting, dog walking or even gardening although aside from house sitting (which is something I would not

> know where to start with) (they) seemed to require physical abilities -lifting or controlling unruly dogs -I no longer had. They were not very good options".

And also (in relation to the dog care business)

> "There are no other obvious opportunities presenting themselves. I don't know what else I will be doing if this business fails".

In my view her opportunities would have been (and still remain) limited in terms of occupation and availability or work (given relevant geography). However from autumn 2021 she could and should have been seeking (at least part time) employment in some form of elementary service occupation and could have sought advice about employment opportunities. It was not reasonable to simply let time pass. It is conceded that from April 2026 the Court should proceed on the basis of the Claimant earning the national minimum wage (£20,080) based on 35 hours per week even if the Pub Hub fails i.e. it is conceded that she could find employment. However I do not accept Ms Crawford's simple submission in relation to past losses that the Claimant could have found employment "in pet care" at a salary of £24,401 net. Such full time work is not easy to find. I do accept that employment of some form in relation to animals was and is something that she could manage physically (given what she can do with dogs).

273. The Claimant stated that "in the second half of 2022" an opportunity came up which looked positive; to set up a dog care centre. As she stated "the year dragged on" without much progress and eventually she went into partnership with the landlord of an industrial unit (Chris) with effect from February 2023.

274. Mr Crawford submitted that as the Claimant had drawn no salary from the pub hub (despite working effectively full time) and taken no dividends (whereas her partner in the business did take dividends); that credit should be given for £18,392.70 for the tax year ending April 2024 (and from then to trial).

275. It is correct that the Claimant did not take any earning from the business from February 2023 until 1st August 2023 when she began being paid via PAYE at the weekly rate of 15 hours x £156.30 i.e. a very limited amount roughly a year after the proposition was first mooted. The hours paid for reflected what the business could pay and not the hours actually worked by the Claimant. I accept that her business partner was very flexible in relation to the fledgling business; but believe that there is merit in Ms Crawford's argument (taken together with her overarching submission about a failure to mitigate) that the Claimant could and should have done more within this period to gain remuneration; even if limited part-time employment with the period of Autumn 2021 to August 2023. It is difficult to be much more specific than that.

276. Had the Claimant remained employed by the Defendant (i.e. if the accident had not happened) she would have been made redundant in September 2023. I very much doubt that finding alternative employment at an equal level of remuneration would have been the straightforward and seamless exercise that was implicit within the submissions/schedules as advanced on her behalf. Although experienced and well thought of, jobs in the horse world were not plentiful (there are few other trainers in

the locality; she had only moved from Evan Williams in June 2019) and she was not a "long term prospect" as a rider given her age. In my judgment there is likely to have been a gap with some form of interim employment. I had no detailed evidence on the issue.

277. In relation to earnings within riding/the equine world The National Joint Council for Racing Staff ("NJC") is a body that sets minimum terms of engagement for staff. The Defendant said that she paid staff according to NJC rates and the Claimant argues that these minimum rates would have applied whatever her employer within the industry.

278. Ms Crawford submitted that says that rates would have been limited to NJC rates; £22,300 net per annum based on 40 hours a week plus 5 hours overtime.

279. According to her P60 to April 2020 she had earned £22,805 gross (including the work with Evan Willams). The pro rata annual pay with the Defendant (based on her employment since June 2019) was £22,387.03; so as Ms Read submitted "broadly consistent"

280. At the time of the accident the Claimant was working part time having had her hours reduced due to the lockdown in March 2020. Her pay was £242.83 in the week before the accident; equivalent to £12,627.16 net per annum. "Doing the best she can" the Claimant believes that she would have returned to employment with the Defendant or another trainer by September 2020. This was the basis of the calculation in the schedule. The Defendant denied that the Claimant would have returned to work full time (see Counter-schedule paragraph 22C). Also the Claimant has failed to factor in the effect of the 2021 lockdown.

281. Ms Read set out the full time NJC annual rates through to the rate effective from 1st April 2024 in a specific note on loss of earnings (see Table B). They are as follows:

    (i) With effect from 12th April 2021; £22,819

    (ii) With effect from 12th April 2022; £25,785

    (iii) With effect from 12th April 2023; £26,404

    (iv) With effect from 12th April 2024 £28,989

282. Given that these are the official NJC figures (and so should be a matter of record) I have proceeded on the basis that these figures are not in dispute (although that in her written note for closing Ms Crawford set out a figure of £28,485.52 gross. Had it been necessary I would have sought further clarification on this issue.

283. These figures were <u>not</u> the figures use in the April 2024 schedule of loss and used for the calculation of £98,853.94 before credit for earnings (those figures being higher). Had I decided that a strict multiplier/multiplicand approach was appropriate a detailed recalculation would have been required before an attempt was made to factor in other determinants.

284. As regards pension it is very difficult to estimate what the pension implications would have been of the Claimant's likely employment had the accident not occurred and also what part-time employment may have contributed by way of pension. Also the Pet Hub should have been paying pension contributions (and should now rectify this). The Schedule seeks a sum of £2,444 based on full employment since September 2020 and no offsets.

285. As is apparent from the above there are a number of what have been referred to in cases in the past as "imponderables" in relation to the Claimant's post employment related losses.

286. In **Scarcliffe-v-Brampton** [2023] EWHC 1565 when faced with an assessment of past and future employment related losses which had to take into account a multiplicity of factors which impacted on the ability/desire to work I concluded a lump sum assessment was appropriate for both past and future loss of earnings: I stated;

> "209. It is well recognised that when dealing with future employment related losses the court may take account of what have been referred to as "imponderable factors" through/within a lump sum assessment cover loss of earning capacity, loss of benefits and allowances and pension loss. Such an approach has for many years been referred to as a "Blamire" award following the decision of the Court of Appeal in **Blamire-v-South Cumbria [1993] PIQR Q1**. The Claimant still bears the burden of establishing loss and a Blamire award is an assessment of loss based on available information before the Court. As I stated in **Muyepa-v-Home Office**"

"I see no reason in principle why such an approach cannot be used for the assessment of past employment related losses and this appears to have been the view of the Court of Appeal in **Willemse-v- Hesp [2003] EWCA Civ 994** . Lord Justice Potter stated:

> "Miss Perry's alternative submission is that, in any event, the judge was wrong to take a multiplier/multiplicand approach even on the basis of £10 an hour for earnings loss in the light of the uncertainty as to the number of hours worked by the claimant upon the boat. She submits that the judge should simply have attempted a broad assessment on the lines approved by this court in *Blamire v South Cumbria Health Authority* [1993] PIQR/Q1. The approach in *Blamire* was of course one which related to award of a global sum to assess as at trial the present value of the risk of *future* financial loss. However, to the extent that it represents an example of the necessity on occasion, in the light of uncertain circumstances, for the court to award a global (and somewhat impressionistic) sum, I accept that it affords Miss Perry some assistance in principle in relation to pre-trial loss. Had the judge decided that, on the general state of the evidence and his judgment of the claimant, a *Blamire* (i.e. round sum) award was all that was appropriate, I cannot think that this court would have interfered. Equally, however, the judge having felt able to take the approach he did as the just way of dealing with the difficult question of past- earnings loss, I do not think that this court should interfere with the sum awarded in that respect."

On occasions whilst the Court may be satisfied on the evidence that there has been past loss, it may not be possible, due to the nature and extent of factors which are very difficult, if not impossible, to individually assess on the balance of probabilities, to set out a precise calculation up to trial. It would clothe matters in too much certainty. The court has to do the best it can, bearing in mind that the burden is on the Claimant, to assess the loss globally taking into account the relevant factors that bear upon employment. At times the Court has been very candid about such a process as regards future employment related losses. In **Tait- v-Pearson [1996] PIQR Q92** Butler-Sloss LJ set out that;

> " It would, in my view, be preferred at this stage in the Court of Appeal to stand back and look broadly at the figure, and to do what judges over the years have done, which is to pluck a figure from the air as best to provide an appropriate recognition that he has a financial loss of the future, because it is known that he will not be able to earn at the rate that he has earned in the past, but allowing for all the vagaries, uncertainties of partly, unemployment and partly not."

287. I recognise that a Judge should be slow to adopt a broad brush lump sum analysis as opposed to a detailed analysis but in my view given the number of "imponderables" which I have set out, it is appropriate in this case to adopt a lump sum approach to past employment losses as to seek to do otherwise would indeed clothe the issue in inappropriate certainty. Specifically it is necessary to factor in

(a) When/if the Claimant would have returned to full time work (or increased hours) with the Defendant

(b) What would have happened after the Defendant's business closed in September 2023 i.e. what work could she have achieved in terms of earnings (and pension) and at what rate

(c) What earnings (and pension) the Claimant could have achieved between Autumn 2021 and August 2023

288. The starting point is the "ceiling" loss of earnings and pension before consideration of these factors in respect of which, in my judgment on the evidence before me, it is not possible to factor in detailed figures.

289. In my view an appropriate lump sum, taking into account all the factors set out above for earnings and pension would be £47,500.

290. As for travel costs Ms Crawford says £50 admitted. I would award £150 as claimed.

291. In respect of care, the sum sought is £2,121.69; 38 days at 6 hours a day at £9.29. I would have awarded this sum less any days spent in residential care before 30th July (which should be a matter of record).

292. I would have awarded the cost of paracetamol at £31.

Future Losses

293. Ms Read submitted that the Claimant falls to be considered as disabled for the purposes of a calculation using the Ogden tables. This requires;

(a) The Claimant to be disabled under the definition within the Disability Discrimination Act 1995 (rather than the Equality Act) in that the impact of the disability has a substantial (being more that minor trivial) effect on her ability to carry out normal day to day activities; and

(b) For the disability to limit/affect either the type or amount of work that the Claimant can do.

294. As I have set out at **paragraph 199** above the medical experts did not think that the Claimant met the criteria under (a) above as judged by her statements and the video evidence.

295. Having carefully considered the extent of the impact of the Claimant's residual symptoms I do not consider her to be disabled under the Disability Discrimination Act definition.

296. The Claimant would not have worked as a professional rider as suggested in the schedule of loss; rather 50 is, as she conceded, a realistic maximum.

297. The assessment of "but for loss" therefore requires adjustment as at 50 (5 years and 1 month) it is unlikely that she would have been able to continue as a professional rider.

298. The Claimant gave/produced no evidence in relation to what she was likely to have done after age 50. This was no doubt in part because her schedule was based on continuing until she was aged 60. This alone makes the assessment of future loss post 50 very difficult. In the Schedule it is simply pleaded that she would have earned the national living wage.

299. It is also difficult to make a reliable projection of likely earnings from the Pub Hub. Mr Crawford submitted that the relevant figures were:

(a) £16,919 (on the basis of 35 hours a week)

(b) £20,652 net. (on the basis of 40 hours a week); this figure equating to the national living wage

and that it was appropriate to proceed on the basis that the business could support 40 hours a week. Ms Read submitted that the Pub Hub's maximum potential should be taken as £16,919.87.

300. Again there are imponderables to contend with assuming that the starting point that by trial the Claimant would have found employment at the full NJC rates; specifically

(a) What are the likely earnings from the Pub Hub over the next five years?

(b) What would the Claimant have earned after age 50?

(c) What are the likely earnings from the Pub Hub after the next five years (and as a result what is the differential between what she would have been earning and what she is likely to earn)?

(d) What could the Claimant earn if the pub hub fails and she is on the general labour market?

301. I have little or no evidence on any of these issues. Even less on the issue of pension loss.

302. Ms Crawford's submission was that if the Pub Hub is likely to support 40 hours a week at the national minimum wage (and make a pension contribution) within five years then post 50 there would be no loss save for a figure to reflect loss of earning capacity ("Smith-v-Manchester"). To this would be added the figure to reflect the differential between what would have been earned and will be earned over the next five years.

303. The calculation in the schedule is that the Pub Hub will not support 40 hours. However, it is conceded that from April 2026 the Court should proceed on the basis of the Claimant earning the national minimum wage (£20,080) based on 35 hours per week even if the Pub Hub fails. This concession has an impact on any award for loss of earnings capacity.

304. Ms Read argues that it is also necessary to take into account the risk of osteo arthritis having an additional impact on employment.

305. The schedule (which is incorrect in that it assumes a change of occupation at 60 and not 50) accepts that the calculation of future employment loss "is not simple". That is an understatement given the factors set out above.

306. Again I am driven (reluctantly) on the basis of the evidence before me to a lump sum approach. I cannot see how it could be calculated otherwise.

307. In my judgment a sum to reflect all future employment and pension losses is £40,000.

308. As for other losses prescriptions are free in Wales; so no loss is recoverable.

Deductibility of RIABS payments

309. Ms Crawford submitted that the sum of £77,159,23 paid under the Racing Industry Accident Benefit Scheme ("RIABS") scheme should be credited against any award of damages. Otherwise there would be double recovery. Ms Read submitted that the payments should not be deducted.

310. The principles to be applied when considering this issue were set out in **Gaca-v-Pirelli** [2004] EWCA Civ 373. I shall not set them out for the purposes of this shortened analysis (the parties acknowledged that I was familiar with them having been Counsel for the successful Appellant in that case). Given that the principles are

well settled, and as I stated at the outset of the trial, I was puzzled as to what was in issue.

311. It became clear as the evidence progressed that this issue had not been adequately explored with the Claimant before trial. Her witness statement she set out;

> "63. In the first two years after the accident, I received income replacement insurance benefits through the Racing Industry Accident Benefit Scheme, an insurance scheme I paid into."

312. If this was correct then the scheme payments were not deductible. However it was incorrect as she made no direct or indirect payments to the scheme whilst employed by the Defendant. Although there are compulsory employer contributions and employee contributions; the Defendant made all payments as part of the employment package ("a perk") and the Claimant made no contributions (there were no deductions from her wages as there had been with previous employers).That being the case it appeared to me that the starting point must be that the payments would have to be accounted for (i.e. credit given).

313. In her closing submissions Ms Read submitted that

a. The Claimant had contributed to the scheme for years and with her previous employer this was shown on her payslip.
b. The scheme is funded by stable staff across the industry and trainers, it is a charitable scheme and not a private insurance scheme.
c. It would be contrary to the purpose of the scheme that the Claimant should have her damages reduced so that she would gain nothing from this scheme into which she has paid for many years.
d. The fact that the payment was "not registered as a deduction" on the Claimant's payslip did not affect matters.
e. The "Temporary Total Disablement (weekly benefits)" payments made by RIABS were paid to the Defendant until August 2020
f. The payment under Section B- Capital Benefits does not amount to double recovery in any event, it is not a payment for loss of income and cannot be offset against her care claim or general damages. It is a discretionary payment made in recognition that her injury has ended her career.
g. The Defendant did not at any point tell the Claimant that she was paying her RIABS contributions for her as a perk and not deducting these from the Claimant's salary.
h. The Defendant accepted that her salary and pay scheme was dictated by the National Joint Council for Racing Staff. Memorandums of agreement from 2021 to 2024, clearly that "paid full or part time racing staff of licenced and permitted trainers who are between 16 and 65 years and registered with the British Horseracing Authority will have deducted £3.50 from their net wage per week of employment as a contribution to RIABS."

314. In my judgment these points when taken individually or cumulatively do not alter the initial conclusion that the payments must be the subject of credit within the claim. The starting point remains the recovery of net loss (see **Parry-v-Cleaver** [1970] AC 1; which is subject to the two exceptions to double recovery (i) payments made gratuitously ("the benevolence exception") and (ii) insurance monies.

315. Here the payments cannot fall under the benevolence exception. Payments of benefits under this compulsory insurance scheme (which the Claimant was aware of) cannot be considered as equivalent or analogous to payments made by third parties out of sympathy.

316. The scheme is an insurance scheme; so years of previous payment are of no effect (in terms of benefit or level of contribution). You are insured to the same extent in so long as payments are made.

317. The unarguable fact is that the Claimant made no financial contribution to the scheme; the payment made on her behalf was a perk of her employment. That it was not being deducted was obvious from her wage slips. So the Claimant did not "buy" the insurance with sums "prudently spent on premiums" (per Lord Reid in **Parry**). As Lord Justice Dyson stated in **Gaca** at paragraph 50; "Time and again reference has been made to the need for payment of the premium by the Claimant" and at paragraph 56;

> "It follows that an employee is not to be treated as having paid for, or contributed to the cost of, insurance merely because the insurance has been arranged by his employer for the benefit of his employees. The insurance monies must be deducted unless it is shown that the claimant paid or contributed to the insurance premium directly or indirectly. Payment or contribution will not be inferred simply from the fact that the claimant is an employee for whose benefit the insurance has been arranged".

318. The discretionary element of the payment still reflects a loss of career and so is properly offset against the claim.

Conclusion

319. For the reasons set out above the claim fails.

320. I will leave it to the parties to draw up a final order unless there are any outstanding issues which require a further hearing.

Procedural issues

321. As I stated at the outset of the trial, I was concerned that this matter was before a High Court Judge in the Royal Courts of Justice as a trial of all issues in the claim. It appeared to me that both the venue and level of Judge were wrong and that something had gone badly amiss in the issue and management of the claim.

322. Having indicated that I would invite comment I asked for an explanation after closing submissions on the following issues

(a) Why given its value on the Claimant's full pleaded case of significantly less than £500,000 (the case having been issued with a limitation of £100,000) was the case not issued in the Cardiff County Court (given that both parties and their witnesses all live relatively close to Cardiff). I note in this context that six of the liability authorities cited to me were tried at first instance by County Court Judges?

(b) Why, if it was appropriate to issue in the High Court, was the case was not issued in Cardiff District Registry (see generally my observations on the practice of issuing in the RCJ cases which should have been issued locally in **Jennings** [2023] EWHC 2039; at paragraph 43 et seq)?

(c) Why, even if issue in the RCJ was appropriate, was a transfer to Cardiff and/or to the County Court was not sought at a later stage (even if just for trial) or, indeed, at any stage on behalf of the Defendant?

(d) Why no consideration was given to the trial of liability as a preliminary issue; as it was it each of the authorities on liability cited to me?

323. In response on behalf of the Claimant it was stated

a) "The quality of the judiciary and case management at the RCJ including trial listing and facilities including remote evidence, is a significant benefit to the administration of justice for our clients. With respect to the County Court, the administration of a case is comparatively woeful."

b) "The Claimant has always maintained the claim at the lower end of the High Court jurisdiction, and in circumstances where the bulk of the five days originally envisaged was for experts and lawyers (none based in Wales), London seemed the most appropriate forum."

c) Animals Act work is specialised and the parties' solicitors are in or around London.

d) There would no clear saving in costs. Indeed, to the extent that costs are material, lawyers travelling to Cardiff for seven days would probably increase costs.

e) The Trial has, as anticipated, been conducted very efficiently with witnesses and of course, the Judge, in different locations.

f) A Trial in Cardiff would have required a change in counsel (for personal reasons).

324. On behalf of the Defendant it was stated:

a) Prior to the application to amend the Defence this was a (relatively) straightforward trial on the Animals Act and quantum.

b) At the time of the application to amend the defence in July 23 (and the vacation of the trial date and relisting) a split trial was not considered appropriate (although the suggestion was raised by the Claimant's counsel) on the basis that credibility had a bearing on facts in issue on the liability question.

c) It only became apparent under cross examination that the value of the claim decreased and had the Defendant been aware of her evidence prior to trial the RCJ nor the District Registry would have been needed and the claim could have been dealt with within the County Court.

325. In my view these responses contain erroneous reasoning which led to the case not proceeding in line with the overring objective and at proportionate cost. Sadly some of this reasoning still regularly underpins the approach of some legal representatives in personal injury and medical negligence cases.

326. I make the following observations some of which have wider applicability than just this case.

327. The parties have a duty to help the Court further the overriding objective which includes:

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

328. As accepted on behalf of the Defendant this was at the outset a relatively straightforward personal injury claim. It was issued with a limitation of £100,000 (which ultimately proved to be realistic) and at no stage did the Claimant's full valuation exceed £500,000 (the Claimant's case in the schedule taken at its highest was £391,756 plus general damages interest).

329. As with several of the cases cited to me this one should have been issued in the County Court (and I am somewhat surprised that it was not transferred by the Court acting of its own motion given the limitation on value of £100,000 and CPR PD7 paragraph 2). It is the wrong approach to consider a personal injury action of such a value as being "at the lower end of the High Court jurisdiction" so that it is axiomatically justifies issue in the High Court without adequate consideration being given to issue in the appropriate County Court. Such an approach fails to further the overriding objective. Cases involving sums less than £500,000 involving a range of causes of action are routinely heard in the County Court**.** The problem is not limited

to personal injury claims. The London Circuit Commercial Court (LCCC) issued a practice note on 5th February 2024 setting out that

> "In Section B.7(b) of the current edition of the Circuit Commercial Court Guide, practitioners were informed that the current practice of the LCCC is to transfer claims with a financial value of less than £500,000 or the foreign currency equivalent (exclusive of interest and costs) to an appropriate County Court unless retention is justified by reason of the factors set out in CPR r. 30.3(2). Notwithstanding that indication, practitioners have continued to attempt to issue claims in the LCCC with a value of less than £500,000 even though none of the factors set out in CPR r. 30.3(2) justify either issue in or retention of the case by the LCCC, and defendants to such actions have not themselves raised the issue of transfer with the court, but often issued their own applications.

The note warned that it intended to "*firmly apply*" the practice of transferring claims that are started there and have a value of less than £500,0000 to an appropriate county court (unless retention is justified because of the factors set out in the Civil Procedure Rules, rule 30.3(2).

330. In every personal injury (and clinical negligence case) with a realistic valuation which is below £500,000 very careful consideration should be given as to CPR PD 7A paragraph 2, whether issue in the High Court is justified. If a claim below this value is issued in the High Court consideration should ordinarily be given by the Court at the earliest practicable opportunity to whether transfer to a County Court is appropriate. Indeed as I stated in **Jennings** [2023] EWHC 2037 personal injury cases of under £1million may be suitable for transfer to the County Court.

331. In this case there were no factors justifying issue in the High Court.

332. Even if issue in the High Court had been justified then the claim should have been issued in Cardiff District Registry. No adequate reason has been put forward why the claim was issued in the Royal Courts of Justice. Indeed the Claimant's solicitor seems never to have considered the prospect of issue in the local District Registry. I reject without hesitation the suggestion that compared to the Royal Courts of Justice the administration of a multi-track claim in the County Court or a regional High Court Centre (the staff and Judges usually being the same) is "comparatively woeful". I shall repeat what I stated in **Jennings**

> "46. A potential rationale advanced by Mr Knifton for the issuing of higher value claims in London is that the Masters have relevant expertise for personal injury/clinical negligence claims and this is not, or at least not necessarily, the case when such a case is managed in a regional centre. I have also previously been given an explanation that it is more likely to achieve Judicial continuity and a trial (if appropriate) before a High Court Judge. These arguments, to the extent that they ever had validity, belong in the past. As long ago as December 2015 Lord Justice Briggs, as he then was, set out the principle that no case is too big to be resolved in the regions in his Civil Courts Structure Review; Interim (December 2015) and Final report (July 2016). All the main regional centres have resident Designated Civil Judges,

> experienced District Judges some well versed in personal injury/clinical negligence litigation (and solicitors based in a city with a regional centre should ensure that are aware of whether there are Judges with relevant expertise at that centre) and six are appeals centres from the County Court with visiting High Court Judges before whom appropriate trials can be listed. Many High Court claims, and the present case is a paradigm, are unlikely to be of such value that they are unsuitable for hearing by a Deputy High Court Judge (it should be borne in mind that personal injury claims of a value under £1million may be suitable for transfer to the County Court). As I indicated during submissions it is my experience that a Claimant could even end up in the position of having his case heard at the Royal Courts of Justice by one of the section 9 Judges based in the relevant court centre where the claim should have been issued.
>
> 47. As for Judicial continuity Judges based at or visiting the Royal Courts of Justice do not ordinarily case manage higher value personal injury/clinical negligence claims through to a trial which they will conduct. However this can and does happen in regional centres (and can be requested, as can listing a CCMC before a salaried and/or specialist District Judge). Also given the large number of cases (and the high percentage which settle) it is often, if not usually the case, that it is not possible to ensure that a personal injury or clinical negligence conducted at the Royal Courts of Justice has its pre-trial review before the trial Judge. Again, this can be achieved in a regional centre.
>
> 48. Issuing a personal injury or clinical negligence case in London which has its natural home in Birmingham, Manchester, Leeds, Bristol etc also creates unnecessary practical difficulties. In the present case the Master faced the wholly unnecessary issue of how to deal with a site visit without the appropriate local knowledge. Whether such a visit can take place can have a significant impact at the CCMC stage as the extent to which photographs and/or a video of the accident scene are necessary may depend upon the Judge's ability to visit the scene (without undue loss of court time) and /or local knowledge. A Judge in the relevant regional centre is also likely to have been knowledge of other matters which may impact on costs budgeting and to be able to set a fixed trial date at the CCMC hearing which can be of very considerable help to those who will need to attend (including experts yet to be instructed).
>
> 49. Finally, but by no means an unimportant consideration, the need to attend a trial in London also often, if not usually, increases stress and inconvenience for parties and witnesses (in some clinical negligence cases impacting on the ability of clinicians to do other work within a day) and increases costs."

333. If this case had been issued in the Cardiff District Registry it would in all likelihood have been managed (at least in part) and tried by the Designated Civil Judge. It is noteworthy that the case of **Koetsier** [2023] EWHC 2483 concerning a fall from a horse (and a case where the Claimant was tragically rendered tetraplegic; so of a

very much greater potential value that this case) was heard by the Designated Civil Judge for Wales sitting in the Swansea District Registry.

334. It is wrong to suggest that facilities for remote evidence are better in the Royal Courts of Justice than many or not most large regional centres. Further, it is also incorrect that this case proceeded smoothly using facilities for remote evidence. It was very difficult to hear some witnesses e.g. Gemma Stead due to the type of issues that frequently affect witnesses giving evidence remotely with the advocates "having to do the best we can". The starting point remains that witness should ordinarily attend at trials (unless being conducted wholly remotely) in person to give evidence. A case such as this with such obvious and strong ties to the Cardiff area should have been issued and heard in Cardiff. All of the witnesses were based near Cardiff, none of the four experts were based in London; three were based in Wales/West County. It seems clear to me that consideration was largely (if not solely) given to convenience of solicitors and Counsel. This is not an ordinarily reasonable approach to conducting litigation.

335. The reasonableness of instructing solicitors in London as opposed to solicitors in another part of the country has long been an issue within disputes as to costs (see generally **Wraith-v-Sheffield Forgemasters** [1998] 1 All ER 82 and **Sullivan -v-Co-op** [1999] 2 Costs LR 158). Litigants are entitled to engage any lawyer they choose, but the question of where the claim should be issued, managed and heard (and indeed the reasonableness of the decision not to instruct local solicitors in the context of the recovery of costs) is to be judged objectively.

336. The choice of a solicitor based in London should not, without more; ordinarily justify a case which would otherwise clearly proceed in a District Registry, proceeding in London.

337. Turning to the issues to be determined at the trial the Court must further the overriding objective by actively managing cases which includes identifying the issues at an early stage and deciding the order in which issues are to be resolved so as to ensure that the trial proceeds quickly and efficiently (CPR 1.4(b) and (d) and (l)).

338. It seems clear that the parties failed to adequately consider whether liability should be determined as a preliminary issue before the first Costs and Case Management Hearing (which is the appropriate time for the issue to be determined). The likely savings in terms of costs and the greater speed with which the issue of liability could have been determined were both considerable and obvious. As I have stated it was the approach adopted in each one of the Animals Act cases cited to me. Any party who does not give consideration to whether liability (or other discrete issues) could be determined as a preliminary issue (or if the issue is raised by another party does not give that party's reasoning due consideration) is failing to further the overriding objective and may be liable to criticism by the Court and potentially face adverse costs consequences. Here liability should have been identified as a preliminary issue before the first hearing (when there would have been no suggestion of quantum credibility issues having any potential relevance to liability issues).

339. In any event when considering if liability could be tried as a preliminary issue careful and realistic scrutiny should have been given to whether any quantum issues could

potentially have an impact on the determination of liability with an overarching consideration being proportionality. No cross over in terms of credibility between liability and quantum issues/fundamental dishonesty was suggested to me at any stage.

340. Even as late as July 2023 the existing trial date could have been used to determine liability as a preliminary issue saving very considerable costs expenditure, court and judicial time and resources and in the process ensuring that the matter was heard more than a year earlier than it was.

341. The result of this case progressing as full trial of all issues in the Royal Courts of Justice has been wasted costs, disproportionate use of High Court Judge and Court resources and an inability for witnesses to easily attend trial.