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The angels took my racehorse away: Can spectators bring a claim for psychiatric injury following an equestrian death on the track?

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Abstract

While horse racing is one of the oldest of all sports, death and injury is an inherent risk for both the jockeys and the horses that take part. In Britain alone, there have been 816 on-course horse fatalities caused predominantly through collision with fences and/or the over-exhaustion of the horses. Not only do these incidents have distressing consequences for the horse, its owner and any trainers, but seeing this happen whilst watching the event could cause torment and sadness to the spectators. This paper will explore whether a claim can be made for psychiatric injuries following a horse and/or jockey becoming injured during the race, and what implications this might have.

Keywords: Horse-racing, Psychological Trauma, Event Management, Spectators, Negligence, Companion Animals

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INTRODUCTION

Horse racing is one of the oldest of all sports and over the centuries its underlying concept hasn't undergone much change from when it was first introduced by the Egyptians, Ancient Greeks and Syrians in 4500 BC.¹ The sport continued to grow even during the two World Wars and with televised races revitalising the public's interest, in 2009, 5.7million people attended the races.² The fact that many of the races are broadcast free-to-air has further increased its popularity and today it is the second most televised sport, after football. Within England, perhaps the most famous and prestigious of the annual races is the Grand National (a 4 mile handicap steeplechase over 30 fences) held every April at the Aintree racecourse.³ The race typically boasts crowds in excess of 70,000 people, with a TV audience comprising a further 10 million viewers.⁴

Many animal rights charities however campaign against the sport as they feel it causes unnecessary suffering and pain to the animals and to those spectators who witness such cruelty. Indeed, death and injury within the sport is very common and since March 2007, in Britain there have been 816 on-course horse fatalities caused predominantly through collision with fences and/or the over-exhaustion of the horses.⁵ The Grand National itself is infamous for the deaths and injuries caused to horses and 35 to date are known to have lost their lives.⁶ Not only do these incidents have distressing consequences for the horse, its owner and any trainers, but seeing this happen whilst watching the event could cause torment and sadness to the spectators. This paper will explore whether a claim can be made for psychiatric injuries following a horse and/or jockey becoming injured during the race, and what implications this might have.

RELATIONSHIPS

Before any claim of psychiatric injury can be made, it must first be established that a duty of care is owed to the spectator.⁷ While this will be comparatively easy to evidence for lawful spectators and visitors using the premises for the purpose for which they entered and are permitted to be there,⁸ it may be an insurmountable hurdle for spectators not directly present at the scene but witnessing the event through other media or at a later time. As the classic case of *Alcock & others v. Chief*

¹ The Editors of Encyclopaedia Britannica, 'Horse Racing- Sport' (Encyclopaedia Britannica 2015) [<http://www.britannica.com/EBchecked/topic/272329/horse-racing>]

² Great British Racing, 'The history of Great British racing' [<http://www.greatbritishracing.com/the-history-of-great-british-racing>]; Marcus Armytage, 'Racing is the second biggest spectator sport' *The Telegraph* (14th January 2010)

³ 'Grand National, Grand National 2015' [<http://www.grand-national.net>]

⁴ They're Off, 'Grand National 2015' [<http://www.grand-national2015.co.uk>]

⁵ 'Grand National horse race cruelty' [<http://www.animla-rights-action.com/grand-national-horse-race.html#horseracingfacts>]

⁶ Animal Aid, 'Animal Aid- Grand National briefing sheet' [<http://www.animalaid.org.uk/images/pdf/factfiles/GrandNational.pdf>]

⁷ *Caparo Industries Plc v. Dickman* [1990] 2 AC 605

⁸ Richard Rowe, 'The civil liability of stadium owners and event organisers to spectators from risks inherent in sport' SGSA (October 2014)

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*Constable of South Yorkshire*⁹ held, for reasons of public policy, only those claimants who were sufficiently proximate to the injuries suffered were entitled to claim, notwithstanding that other notifications of an incident could give rise to anxiety or distress. The current formulation of the test distinguishes between two types of victim: *primary* (those involved directly with the incident or within a zone of physical danger)¹⁰ and *secondary* (those not directly involved with the incident, who nonetheless witness injuries or damage). Due to the more restrictive proximity tests imposed, it is the latter group that this paper will concentrate on.

Following *Alcock*, in order to make a successful claim for psychiatric loss, secondary victims will need to satisfy four tests: that a close tie of 'love and affection' with the victim can be evidenced, that the event was witnessed with the claimant's unaided senses, that the shock was sudden, and that the claimant was proximate to the incident in both time and space.

While it would be comparatively easy for a family member to evidence a close tie of love and affection with an injured jockey (indeed there is an automatic presumption in the case of a parent, child or spouse),¹¹ other relatives and friends are required to provide evidence of the quality of their relationship:

"Cases involving less close relatives should be very carefully scrutinised. That, however is not to say they must necessarily be excluded... I do not consider that it would be profitable to try and define who such others might be or to draw a dividing line between one degree of relationship and another. To draw such a line would necessarily be arbitrary and lacking in logic. In my view the proper approach is to examine each case on its own facts in order to see whether the claimant has established so close a relationship of love and affection to the victim as might reasonably be expected in the case of spouses, parents and children."¹²

Although a spectator may have a quasi-relationship of affectation / adoration with their athlete-idol, the problem for any claimant to overcome is the distance of the relationship between these spectators and the player himself. For example, while there was a sudden outpouring of grief when the Tottenham Hotspur player, Fabrice Muamba collapsed on the pitch in 2012 and spectators and players alike were offered support and assistance from the club:

"It was eerie coming out of the ground. No one was saying anything. There was hush, a silence. No one could quite believe it. It was terrible."¹³

Of itself, mere distress is not enough to trigger a psychiatric loss claim. Instead there needs to be an appreciation of a sudden or shocking event. With one or two exceptions,¹⁴ this would therefore

⁹ *Alcock & others v. Chief Constable of South Yorkshire* [1992] AC 310

¹⁰ *White v. Chief Constable of South Yorkshire* [1998] 3 WLR 1509; *Page v. Smith* [1996] 1 AC 155

¹¹ *McLoughlin v. O'Brian* [1983] 1 AC 410, 422 (Lord Wilberforce)

¹² Lord Justice Nolan cited in: *Alcock & others v. Chief Constable of South Yorkshire* [1992] AC 310, 422 (Lord Jauncey)

¹³ Cass Jones & Amy Lawrence, 'Shocked fans leave in silence after Fabrice Muamba's collapse on pitch' *The Guardian* (17th March 2012); 'Fabrice Muamba: Tottenham offer support after players witness collapse', *The Guardian* (19th March 2012)

¹⁴ *Sion v. Hampstead Health Authority* [1994] 5 Med LR 170

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exclude claims based on events that have occurred over a period of time. A spectator of horse racing would not therefore be able to claim that they had been caused distress after witnessing several horses fall over during the day in separate races.

Indeed, ordinary emotions such as grief, sorrow, fear, panic or terror cannot amount to a psychiatric illness.¹⁵ As in *Brice v. Brown*,¹⁶ there is an expectation that the general public have the necessary 'phlegm and fortitude' and will not suffer nervous shock after seeing the aftermath of an accident. A spectator of horse racing who knows that they are abnormally sensitive to seeing horses and jockeys get injured, should not therefore put themselves in a position where they could witness such a tragic event causing them to react in a way which is not reasonably foreseeable. So for example when Tony Moore (the Chairman of 'Fight against animal cruelty' in Europe) stated in newspapers after an incident at the 2012 Grand National that:

"After the demo I was watching the race on TV but when I saw the first black screen go up my heart sank."¹⁷

This would not amount to sufficient psychiatric trauma.

HORSE WHISPERING

A similar but more interesting question would be whether a spectator could claim for witnessing the death of a horse? To the author's knowledge, this specific example has yet to be litigated. Although there is some authority in the United States concerning the status of animals, this is focussed more on companion animals or pets. One line of reasoning holds that a pet is merely considered to be the personal property (chattel) of its owner and as such it is not possible to allow claimants to recover damages for emotional suffering resulting from the death of such an animal in case it leads to an increase in litigation and further claims regarding 'mere property'.¹⁸ The alternative, and we would submit, better analysis follows the Canadian principles that companion animals have a value that goes beyond their status as items of property.¹⁹ As such, injuries or death to a companion animal can also reflect emotional trauma and mental distress.²⁰ Such an approach

¹⁵ *McLoughlin v. O'Brian* [1983] 1 AC 410 (HL);

¹⁶ *Brice v. Brown* [1984] 1 ALL ER 997; *Hinz v Berry* [1970] 2 QB 40; *Hicks v Chief Constable of South Yorkshire* [1992] ALL ER 65

¹⁷ Martin Delgado, 'Another national tragedy: Despite public outcry after last year's carnage at Aintree, two more horses die at notorious jump- including the gold cup winner' *The Daily Mail* (14th April 2012)

¹⁸ Peter Harthan, 'Damage to Chattels – No room for sentiment' 7HS Blog (29th October 2013) (online) [<http://7hs.co.uk/blog/detail/damage-to-chattels-no-room-for-sentiment>]; Animal legal & historical centre, 'Man's best friend: property or family member? An examination of the legal classification of companion animals and its impact on damages recoverable for their wrongful death or injury' [<https://www.animallaw.info/article/mans-best-friend-proeprty-or-family-member-examination-legal-classification-companion>]

¹⁹ Jessica Dellow, 'Valuing Companion Animals: Alternatives to Market Value' [2008] 17 *Dalhousie Journal of Legal Studies* 175; Camilla Turner, 'Crufts dog death: two more competitors taken ill', *The Telegraph*, (9th March 2015)

²⁰ Nadine Watters, Ronald Ruff & Christina Weyer Jamora, 'Can a Posttraumatic Stress Disorder be Caused by a Traumatic Injury to a Companion Pet?' (2013) 5(3) *International Journal of Psychological Studies* 182; Melissa Hunt, Hind Al-Awadi & Megan Johnson,

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would be consistent with the long-standing principles laid down in *Attia v. British Gas plc*.²¹ Even if animals are considered the property of a claimant, as long as ownership (and/ or control) can be demonstrated, there would seem to be no barrier for claims for psychiatric injury following damage to an item of property²² (or in this instance, a racehorse). The only issue would be related to valuing the cost of any recovery, however given that racehorses are often highly prized, ironically their commercial replacement value may actually exceed any personal value or sentiment.

PROXIMITY & PERCEPTION

The remaining hurdles to overcome are that the claimant must prove that they witnessed the sudden shocking event with their own unaided senses through their presence at the scene of the accident or its immediate aftermath.²³ While technological advances have meant that it is now possible to view, perceive and experience events (in real time) which are occurring elsewhere, it is worth noting that the 'media filter rule' set out in *Alcock*,²⁴ would exclude nervous shock claims that arise from a victim witnessing a tragic event through these media channels, rather than with their own unaided senses. Although broadcasters are able to televise such major events, the Broadcasting code prevents them from focussing on individuals in distress. This code however will not provide a civil remedy for damages, and even should it be argued that their footage causes psychiatric injury, they may not be liable.²⁵ Indeed, at a race in 2011 when two horses fell breaking their necks and backs, the race ground and television crews took extra precautions when dealing with the matter in order to prevent claims from anybody watching. The television crew stayed with the front runners of the race, with no focus on the horses that had fell, and event organisers hastily covered them with a green tarpaulin and got them off the field as quickly as possible in order to remove them from the public eye and mask the distressing reality of the sport from the spectators.²⁶ Spectators at the ground meeting the other criteria however would still be able to claim. Interestingly, following obiter comments from Lord Justice Nolan,²⁷ there is also a slim

'Psychological Sequelae of Pet Loss Following Hurricane Katrina' (2008) 21(2) *Anthrozoos*: a multidisciplinary journal on the interactions of people & animals 109

²¹ *Attia v. British Gas plc* [1988] QB 304(CA)

²² The Law Commission, 'Liability for Psychiatric Illness' (December 1997, Consultation Paper #137) [7.30] [http://lawcommission.justice.gov.uk/docs/lc249_liability_for_psychiatric_illness.pdf]; Scottish Law Commission, 'Discussion Paper on Damages for Psychiatric Injury' (August 2002, Discussion Paper #120) [3.36](5)

²³ V.H.Harpwood, *Modern Tort Law*, (7th edition, Routledge Cavendish, 2009) 47; Nottingham Law School, 'Proximity, psychiatric injury and the primary/secondary tortfeasor dichotomy: rethinking liability for nervous shock in the information age' (2014) Nottingham Law Journal 23

²⁴ *Alcock & others v. Chief Constable of South Yorkshire* [1992] AC 310

²⁵ Jenny Kennedy, David Marshall and Rehanna Azib, *Litigating Psychiatric Injury Claims*, (1st edition, Bloomsbury Professional, 2012)

²⁶ PetaUK, 'Horse racing: gambling on animals' lives' [<http://www.peta.org.uk/issues/animals-are-not-ours-to-use-for-entertainment/horse-racing/>]; See also the still images in the media from an incident at Burghley: Chris Logan, 'The Horrific moment that a horse crushes its rider in the water jump at Burghley' *The Telegraph* (5th September 2004) (online) [<http://www.telegraph.co.uk/news/uknews/1471005/The-horrific-moment-that-a-horse-crushes-its-rider-in-the-water-jump-at-Burghley.html>]

²⁷ Cited with approval in *Alcock & others v. Chief Constable of South Yorkshire* [1992] AC 310, 405 (Lord Ackner)

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possibility that viewers of a fixed live camera transmitting a simultaneous broadcast could also bring a claim, however this would be much harder to prove.

CONCLUSIONS

Spectators are entitled to assume that any participants of the race will exercise a reasonable degree of care and skill and they consent to the risks which are inherent in the nature of the sport.²⁸ If the psychiatric injury is caused by something that is a natural occurrence of horse racing then the claimant will not be successful, as was seen in *Woolridge v. Sumner*.²⁹ If however an injury to a jockey or racehorse can be traced to the negligence of an event organiser, official or participant, and a spectator suffers a psychological trauma as a direct result, this paper would argue that there should be no barriers (beyond the traditional control tests) to recovery.

A race-horse may at present only amount to property rather than a person, but spectators can still mourn their loss....

²⁸ Sue Hodge, *Tort Law* (3rd edition, Routledge, 2011) 105

²⁹ *Woolridge v. Sumner* [1963] 2 QB 43

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