



Neutral Citation Number: [2022] EWHC 2452 (KB)

Case No: QB-2018-004705

IN THE HIGH COURT OF JUSTICE  
KING'S BENCH DIVISION

Royal Courts of Justice,  
Strand, London, WC2A 2LL

Date: 3 October 2022

**B e f o r e:**

**HER HONOUR JUDGE MELISSA CLARKE**  
**Sitting as a High Court Judge**

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**Between:**

**SOFIA SCHOULTZ**

**Claimant**

**- and -**

**(1) VICKI BALL**  
**(2) ROSEMARY GIBSON MILLER (T/A SURREY**  
**GRAZING)**  
**(3) PONNIAH SABESAN**

**Defendants**

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**Mr Jonathan Hand KC** (instructed by Moore Barlow) for the **Claimant**  
**Mr Nathan Tavares KC and Ms Harriet Jerram** (instructed by Clyde & Co) for the **First**  
**Defendant**

Hearing dates: 14, 15, 16 and 17 June 2022  
Draft sent to parties 12 September 2022  
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**Approved Judgment**

## **Her Honour Judge Melissa Clarke:**

### **A. Introduction**

1. At about 3.37 am on a dark winter morning on 16 December 2015, two 18 year old schoolfriends, Sofia Schoultz and Deema Al Hugail, were returning to Cobham after a night out in London when the red Vauxhall Zafira taxi in which they were rear-seat passengers collided with a loose horse on the southbound carriageway of the A3 near Esher. The Welsh Section C mare, who was called Lowri, was killed in the collision and her body landed through the roof of the taxi so that, broadly speaking, her head and forequarters penetrated the taxi cabin and her rear-quarters were hanging outside the taxi on the offside.
2. Ms Al Hugail was able to exit the taxi herself; she was shocked and confused but had escaped serious injury. The taxi driver Mr Ponniah Sabesan was assisted to leave the taxi by police who arrived promptly at the scene. Ms Schoultz, however, who had been sitting behind the driver's seat, was retrieved by the emergency services from under the body of the dead Lowri. She suffered a severe traumatic brain injury with left sided subdural subarachnoid haemorrhage; multiple fractures to the base of the skull, right ribs, C6/7 of the spinal vertebrae, left zygoma, orbital floor and left petrous temporal bone; and associated facial nerve injury and vestibulocochlear nerve injury. It is Ms Schoultz who brings this claim.
3. Lowri was one of two loose horses on the A3 that morning. The second was a Dutch Warmblood gelding called Mr Fox, or Fox. Before that morning, Fox and Lowri had been kept in a herd of about 24 retired horses on a fenced field at Stokesheath Farm, Oxshott by the Second Defendant Mrs Miller, who provided retirement livery services and traded as Surrey Grazing. Lowri was owned by the First Defendant, Ms Vicki Ball. Fox was owned by Ms Alice Hughes. Both paid Mrs Miller monthly fees to meet their animals' retirement needs.
4. At the time of the collision, Mr Sabesan was driving the taxi in either the nearside or the central of the three lanes of the southbound carriageway (this is a dispute I will need to resolve). Driving a short distance behind it, and in the outside lane, was Mr James Rayner in his BMW motorcar. Mr Rayner says that he saw what he assumed was a vehicle spinning in the road ahead of him, as he saw, firstly, brake lights illuminate and then a single headlight flashing in his direction. Very shortly after noticing that, he collided with Fox.
5. Fox's body was then struck in quick succession by a BMW motorcycle ridden by Andrew Torrie, and a Citroen van driven by Sam Wheeler in which were two front-seat passengers, Jason Meeks and Joe Chandler.
6. Lowri and Fox had been seen loose in the local area before they had entered the southbound A3 carriageway by two witnesses, Mr Matthew Callender and Mr David Bond. They are able to give some evidence about their route of travel and behaviour at the time they saw them.
7. The Claimant's claims against the Second Defendant and the Third Defendant have been resolved. Various Part 20 claims brought by the Defendants against each other

have also been resolved or otherwise disposed of. The Second and Third Defendants do not play any further part in these proceedings.

8. It is convenient to note here that criminal proceedings relating to the escape of Lowri and Fox were brought against the Second Defendant which resulted in her trial and conviction in Redhill Magistrates' Court on 11 January 2017 "Magistrates' Court Trial". In the trial bundle for these proceedings is a note of the evidence given at the Magistrates' Court Trial, produced by Mr Robert Dacre of 2 Hare Court who was instructed to attend the trial as an observer by the solicitors for the First Defendant.
9. The matter for my determination is a preliminary issue of liability: is Ms Vicki Ball, the owner of Lowri, liable under s2(2) Animals Act 1971 for Ms Schoultz's injuries sustained in that collision? Ms Schoultz says she is, and Ms Ball says that she is not.

## **B. Law**

10. The leading authority on section 2 of the Animals Act 1971 remains *Mirvahedy v Henley* [2003] 2 A.C. 491, in which the House of Lords upheld the judgment of the Court of Appeal, which in turn had carried out an extensive review of what Lady Justice Hale (as she then was) referred to at [1] of the Court of Appeal Judgment as "every known authority on that section in this and the High Court, together with the preceding Law Commission Report on Civil Liability for Animals (1967) (Law Com No 13) and the relevant parliamentary debates...".
11. The Animals Act 1971 provides, so far as is relevant:

### **Section 1: New provisions as to strict liability for damage done by animals.**

(1) The provisions of sections 2 to 5 of this Act replace—

- (a) the rules of the common law imposing a strict liability in tort for damage done by an animal on the ground that the animal is regarded as *ferae naturae* or that its vicious or mischievous propensities are known or presumed to be known;

...

(2) Expressions used in those sections shall be interpreted in accordance with the provisions of section 6 (as well as those of section 11) of this Act.

### **Section 2: Liability for damage done by dangerous animals.**

(1) Where any damage is caused by an animal which belongs to a dangerous species, any person who is a keeper of the animal is liable for the damage, except as otherwise provided by this Act.

(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.

### **Section 6: Interpretation of certain expressions used in sections 2 to 5.**

(1) The following provisions apply to the interpretation of sections 2 to 5 of this Act.

(2) A dangerous species is a species—

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

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

(3) Subject to subsection (4) of this section, a person is a keeper of an animal if—

(a) he owns the animal or has it in his possession; or

(b) he is the head of a household of which a member under the age of sixteen owns the animal or has it in his possession;

and if at any time an animal ceases to be owned by or to be in the possession of a person, any person who immediately before that time was a keeper thereof by virtue of the preceding provisions of this subsection continues to be a keeper of the animal until another person becomes a keeper thereof by virtue of those provisions.

12. The First Defendant admits that, by section 6(3)(a), as the owner of Lowri she is 'a keeper' of the horse for the purposes of sections 2 to 5 of the Act.
13. There is no dispute that, as a matter of law, a horse is not a dangerous species as defined in section 6(1), as it is commonly domesticated in this country, and so we are concerned with liability under section 2(2).
14. It is also a matter of law that liability under section 2(2) is strict, i.e. that the Claimant does not have to prove any fault on the part of the First Defendant as keeper, if it satisfies the Court on the balance of probabilities that each of the three conditions at section 2(2)(a), (b) and (c) are engaged, unless the circumstances fall within one of the exceptions to liability under section 2 contained in section 5 of the Act. It is common ground that none of those exceptions are engaged in this case.
15. In this case the Claimant relies on both limbs of section 2(2)(a). The burden of proof is on her to show *either* that the damage caused by Lowri was of a kind which the

horse, unless restrained, was likely to cause *or*, if caused by the horse, was likely to be severe. “Likely” in this context means “*reasonably to be expected*” per Lord Scott (obiter) in *Mirvahedy v Henley* at [95] to [97], confirmed by the Court of Appeal in *Turnbull v Warrener* [2012] PIQR P16 at [12].

16. The question of whether or not severe injury is likely/reasonably to be expected is a factual matter for determination by the court on the evidence before it. Neither the likelihood of injury, or 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 (*Lynch v Ed Walker Racing Ltd* [2017] EWHC 2484 (QB), Langstaff J at [24]). These are matters which must be considered prospectively, not assumed with the benefit of hindsight. In making that determination, the court is entitled to rely on equine expert evidence (*Lynch v Ed Walker* at [55], [62]).
17. The Claimant relies on the second limb only of section 2(2)(b), namely that the likelihood of the damage or of its being severe was due to characteristics of Lowri which are not normally found in horses except at particular times or in particular circumstances. It does not rely on the first limb, which is concerned with an animal that has characteristics not normally found in animals of that species and so are ‘abnormal’.
18. The House of Lords in *Mirvahedy v Henley* clarified that the second limb applies so as to provide strict liability for damage caused by an animal when its behaviour in the circumstances was not abnormal for an animal of that species in those circumstances. As Lord Nicholls put it at [43]:

*“Requirement (b) will be satisfied whenever the animal’s conduct was not characteristic of the species in the particular circumstances [i.e., the first limb of section 2(2)(b) will be met]. Requirement (b) will also be satisfied when the animal’s behaviour was characteristic of the species in those circumstances [i.e. the second limb will be met].” Lord Hobhouse described it thus: “It is true that there is an implicit assumption of fact in section 2(2) that domesticated animals are not normally dangerous. But the purpose of paragraph (b) is to make provision for those that are. It deals with two specific categories where that assumption of fact is falsified. The first is that of an animal which is possessed of a characteristic, not normally found in animals of the same species, which makes it dangerous. The second is an animal which, although belonging to a species which does not normally have dangerous characteristics, nevertheless had dangerous characteristics at particular times or in particular circumstances. The essence of those provisions is the falsification of the assumption, in the first because of the departure of the individual from the norm for its species, in the second because of the introduction of special factors.”*

19. In either case, however, the key issue which must be present for strict liability to attach to a keeper, is that the animal has a dangerous behavioural characteristic, although that may only be seen at particular times or in particular circumstances, and it is that dangerous characteristic which must be causative of damage (*Curtis v Betts, Mirvahedy v Henley* at [40] per Lord Nicholls:

*“Where an animal has dangerous propensities, the keeper is to be liable only for such damage as is due to those propensities.”*

20. Lord Nicholls at [40] - [42] of *Mirvahedy* noted the difficulty in identifying the type of dangerous characteristic which would not fall within either limb of section 2(2)(b), as Parliament must have intended there to be, since this sub-section was intended to limit the net of strict liability cast by section 2. He did so by setting out the point “well summarised by Judge O’Malley [the judge at first instance] in the present case”, who said

*“It is very hard to contemplate or define the characteristics that are not normally found in animals ‘except at particular times or in particular circumstances’. I am 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... Either the animal is proved to be an abnormal animal or to have abnormal characteristics or it has normal characteristics upon which the claimant can rely in the particular circumstances of the instant case. For, as it seems to me, all times and all circumstances can be said to be ‘particular’. One can always find particularity attaching to any time or to any circumstance.”*

21. Lord Nicholls went on:

*“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.”* However, despite this argument, he held at [44] that this was the correct interpretation, stating at [46] that it could not be “pressed too far.” He gave the following as an example: “Take a large and heavy domestic animal such as a mature cow. There is a real risk that if a cow happens to stumble and fall on to someone, any damage suffered will be severe. This would satisfy requirement (a). But a cow’s dangerousness in this regard may not fall within requirement (b). This dangerousness is due to a characteristic normally found in all cows at all times. The dangerousness results from their very size and weight. It is not due to a characteristic not normally found in cows “except at particular times or in particular circumstances”.

22. He also agreed with the Court of Appeal on the facts in *Mirvahedy*, saying “*Horses are large and heavy animals. But it was not this innate physical characteristic of the defendants’ horses which caused the road accident. The horses escaped because they were terrified. They were still not behaving ordinarily when they careered over the main road, crashing into vehicles rather than the other way about. Hale LJ [2002] QB 769, 776 concluded that it was precisely because they were behaving in this unusual way caused by their panic that the road accident took place. That conclusion, on the evidence, seems to me irrefutable and to be fatal to the case of Dr and Mrs Henley.*”
23. The Court of Appeal in *Curtis v Betts* [1990] 1 WLR 459 held that each part of subsection 2(2) should be examined in turn. However in *Clark v Bowl*, [2006] EWCA Civ 978, [2007] PIQR P12 the Lord Chief Justice (with whom the other members of the court agreed) described the requirements of section 2(2)(a) and 2(2)(b) as “*linked*” at [17]. He described that linkage at [14]:

*“The keeper of a domestic animal can only be liable under the first limb of s. 2(a) if it has caused damage in circumstances where, unless tethered, it was likely to cause that damage. 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 [the horse in that case] 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”.”.*

He held that because of the findings that horses in general, and Chance in particular, generally follow direction of their rider, and that nothing that the claimant driver who passed Chance on the road did was anything other than what a reasonably careful driver should have done, and the horses had given no sign of panic, that the circumstances could not be such that Chance was likely, unless tethered, to cause the damage which subsequently occurred. He held that the accident was an unlikely mischance for which no one was to blame and which attracted no liability under section 2 of the Act. Accordingly, the characteristic and circumstances defined in s.2(2)(b) have to be taken into consideration when considering the question in s.2(2)(a).

24. In relation to section 2(2)(c), the knowledge of the keeper or their servant which is required is knowledge of the characteristics of the animal that indicate a tendency to cause the damage or injury which in fact ensues, and knowledge that the species, as opposed to the particular animal, possess the relevant characteristic is sufficient (*Turnbull v Warrener* at [26]).)

### **C. The Parties’ cases**

25. The Claimant’s pleaded case is that:

- i) Ms Ball as owner of Lowri was a keeper of the horse for the purposes of the Animals Act 1971;
- ii) Ms Ball is strictly liable to the Claimant for the personal injury caused by Lowri pursuant to section 2(2) of the Animals Act 1971 because:
  - a) In circumstances where the horse displayed the characteristics described below it was reasonably to be expected that, unless restrained, the horse would cause personal injury. Alternatively if the horse caused personal injury, it was reasonably to be expected that such injury would be severe. Where a horse collides with a car as a result of being frightened/panicked and behaving unpredictably, it is reasonably to be expected that those travelling in the vehicle will suffer personal injury and/or that any personal injury which they suffer will be severe. Accordingly, the first and/or second limbs of section 2(2)(a) are satisfied.
  - b) The accident and the injuries suffered by the Claimant were caused by characteristics which are not normally found in horses except at particular times or in particular circumstances. It is within the normal range of behaviour for horses to behave unpredictably and to react with force in circumstances where they are frightened/panicked, including by running when they encounter a perceived threat. Both Lowri and Fox were frightened/panicked by adverse stimuli which they perceived as threatening, causing them to escape from the field and travel along the highway onto the A3 where Lowri collided with the vehicle. Accordingly, the second limb of section 2(2)(b) is satisfied.
  - c) The characteristics described above were known to the First Defendant and accordingly section 2(2)(c) is satisfied. The Claimant will rely as necessary on the fact that the First Defendant was an experienced keeper and handler of horses and as such would have been aware of the characteristics of horses described above.

26. The Defendants defend on the following pleaded grounds:

- i) The Claimant is put to proof that either limb of section 2(2)(a) is met. It contends that the likelihood of damage or of damage being severe was due to a high-speed collision between the vehicle and an animal the size and weight of the horse.
- ii) In respect of section 2(2)(b), the First Defendant denies that Lowri or Fox were showing any particular characteristic of dangerousness within the Act either at the time they left the field or at the time of impact. The First Defendant contends that the horses likely wandered out of the field where the fencing was down, rather than responding to any adverse stimulus.
- iii) In respect of section 2(2)(c), the First Defendant admits that: (a) it is within the normal range of behaviour for horses to behave unpredictably in circumstances where they are frightened/panicked, including by running when they encounter a perceived threat. This is also the evidence of all of the equine experts; and



(b) the First Defendant knew that it was within that normal range of behaviour. However, she denies that Lowri (and Fox) were behaving in this way at the relevant time. The First Defendant does not understand the meaning of “react with force” in the Defence at para 5(ii)(4) on p44: it has invited the Claimant to clarify the meaning of it but she has not done so and no admission has been made in that respect.

27. Mr Hand KC for the Claimant puts the case in his skeleton as follows: If the Court finds that Lowri was, on the balance of probability, behaving in a way that is normal for horses when they are frightened or panicked after the horse got onto the A3 (i.e. in the period immediately before the collision with the taxi), then liability under section 2(2) should be established against the First Defendant. I note, and Mr Tavares KC for the Defendant raised this in closing submissions, that wording shows a subtle move by the Claimant from the pleaded circumstances of horses being ‘frightened/panicked’ to horses being ‘frightened or panicked’, and I pressed Mr Hand to clarify his case. He accepted that horses can produce a range of fear responses when frightened, panic being one of them, but declined to concede the point that not all responses to fear would trigger liability under section 2 of the Act, saying, albeit without much conviction, that “*any level of fear*” would do.
28. I do not accept that submission and it is clear from the discussion of Lord Nicholls at paragraph 20 and 21 above, and a reading of *Mirvahedy* and other Animals Act cases, that it is not in accordance with the authorities.
29. As Lord Hobhouse of Woodborough put it at [69] of his majority judgment in *Mirvahedy*:
- “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)”*. (my emphases)
30. Lord Walker of Gestincote at [137] of *Mirvahedy* used similar language:
- [137] “Section 2(2) must therefore be treated as capable of applying (one way or another) to cases of horses straying onto a highway and causing an accident... Many of the epithets in the cases relating to dog-bites (such as fierce, ferocious and vicious) are not apposite to describe **a horse sent into a state of panic by some unknown cause**. But it cannot be doubted for that a riderless horse to be on the highway **in such a state** is a danger to other road users, even though it is (**in its state of panic**) acting in an entirely natural way.”* (my emphases).
31. In my judgment, in this case the burden is on the Claimant to show to the civil standard that Lowri was frightened to the point of panic, or terrified, or distressed by fear, or otherwise severely frightened, which was causative of unusual behaviour, and which was causative of the damage to the Claimant.

#### **D. Witnesses**

32. The Claimant has no memory of the accident to assist in determination of the preliminary issue and so provides no evidence herself. She relies on the following witnesses of fact, whose evidence is not disputed and so they did not come to court to give evidence:
- i) **Deema Al Hugail** (the other taxi passenger), **Jason Meeks** (a passenger in the van which hit the carcass of Fox) and **Nicola Clark**, (a driver who came across the scene shortly after the collisions). I have read their witness statements. Without meaning any disrespect at all, they are of little assistance to the matters I have to determine.
  - ii) **PC Rachel Wilcox**, who took a witness statement from **Mr Matthew Callender** on 10 February 2016 which is exhibited to her own witness statement. He was a passenger in a car which, he says, followed the horses for several miles along the B280 and A244 all the way to the junction with the A3. He phoned the police to report the loose horses when he was close to the junction of the A244 and the A3, and he saw them turning right on the roundabout heading towards the A3 up the exit slip road. Mr Callender was expected to attend at Mrs Miller's criminal trial at the Magistrates' Court on 11 January 2017 but did not appear, and his statement was read to the Court. He was invited to give a statement in these proceedings, but did not respond to that request. He is an entirely independent witness, and his statement to the police was signed with a statement of truth, but his evidence has not been tested in this court or any other and so I treat it with some caution. It is the best and only evidence we have of certain aspects of the horses' journey from field to collision, however.
33. The Claimant relies on the evidence of the following witnesses as hearsay:
- i) **Mrs Rosemary Miller**, the Second Defendant and her sister, **Ms Liz Earl** who worked for the Surrey Grazing livery business at the time of the index accident; and
  - ii) **Mr Ponniah Sabesan**, the taxi driver. He gave a witness statement dated 18 March 2020.
34. The Defendant relies on the following witnesses who came to court and gave live evidence:
- i) **Ms Vicki Ball**. She is the owner of Lowri and gave evidence about Lowri's life before retirement, her experiences, temperament and health, and also about her communications with Mrs Miller and Ms Earl around the time of the index accident. I found her to be a good witness who gave her evidence in a calm and straightforward manner without evasion or seeking to argue her own case. She presented to me as patently honest and reliable. Where her evidence conflicts with that of Mrs Miller or Ms Earl, I prefer her evidence.
  - ii) **PC Simon Ives** of Surrey Police (who has since retired so I will refer to him as PC Ives or Mr Ives depending on his status at the time I am discussing). He carried out a site visit to Stokesheath Farm in the afternoon of 16 December 2015 and gave a witness statement to Surrey Police. This is unsigned and

undated but he annexed it to his witness statement for the civil proceedings which was signed with a statement of truth dated 18 May 2020. He also gave evidence at the Magistrates' Court Trial. Mr Ives was cross-examined and re-examined before me. I found him to be a good witness who was careful to limit his evidence to his own knowledge. I have no concerns about his reliability or credibility. Where his evidence conflicts with that of Ms Miller and Ms Earl I prefer his evidence.

- iii) **Mr David Bond.** He was driving a car on the A244 just south of the roundabout with the A3 and saw the horses shortly before the collision occurred. He did not call the police that night, but after he heard about the collision he contacted the police to tell them what he saw a few days later. He gave a witness statement to Surrey Police on 15 January 2016 and this is exhibited to a witness statement made in these proceedings on 16 April 2020. Mr Bond came to court, was cross-examined and re-examined. Mr Bond gave evidence at the Magistrates' Court Trial and he takes issue with the accuracy of Mr Dacre's note with respect to some of his evidence. I will come back to that, but I accept what he has said under oath in this trial about what his true evidence is. Mr Bond was admirably open about the limits of his evidence, making clear that he doesn't know anything about horses to the extent that he was not able to distinguish between gaits. I have no doubt that he was a credible and reliable witness who did his best to assist the court so far as he was able.
- iv) **Mr James Rayner,** the driver of the BMW motorcar which collided with Fox shortly after the collision involving Lowri. Mr Rayner was interviewed at the scene between 5:16 and 5:24 am, less than two hours after the accident, and signed the interview record with a statement of truth. He provided a witness statement to the police on 14 January 2016, and made a further witness statement in these proceedings on 27 March 2020.
- v) Mr Rayner's evidence was subjected to some testing at trial and he very fairly accepted that some aspects of his recollection as set out in his witness statements could not be accurate. For example, his written evidence to police and in these proceedings was that he had seen a pony or horse standing in the carriageway immediately before impact, and could describe the direction it was facing and its colour, but when the transcript of his call to the emergency services was played to him, it was apparent that he did not know that he (and the Zafira) had hit horses. Throughout the call, which lasted 20 minutes or so, he referred to it/them throughout the 20 minute call as "*an animal*" or "*the animals*", at one point said, "*I think it was a deer or something*", and told the operator "*I couldn't see them or anything cause obviously its pitch black*".
- vi) When this was played back to him, he thought carefully and accepted that he did not find out that the animals were horses until after the collision. It was put to him by Mr Hand, without criticism, that his evidence that he had seen a horse was something he had reconstructed from information he had obtained later, and Mr Rayner very fairly stated, (along *Gestmin* lines) "*Yes, that's probably right, with the thoughts and things in my head, trying to process what I have seen...*". When Mr Hand put to him that it was not his actual

recollection, he said *“It’s what my brain could use to process what happened”*.

- vii) The Claimant submits that Mr Rayner’s account cannot safely be relied upon because it amounts to an unwitting or unconscious ex post facto reconstruction of what might have happened, carried out sub-consciously in an attempt to rationalise or make sense of the accident, rather than a reliable and accurate recollection of what actually happened. Mr Rayner, very fairly, accepted that, as I have recorded. I accept that he saw Fox and perceived him as a large animal (rather than the pony/horse he describes in his evidence) but in my judgment and without criticising Mr Rayner at all, I do not think any further detail in his evidence about that animal, whether it was still or moving, and the direction he perceived it to be facing, is reliable. As he said, he can only have seen it for a split second, he then had the shock of the collision, and the further shock of dealing with the aftermath, including, as is clear from the transcript of his call to the emergency services, of believing that the motorcyclist might be dead. Accordingly I do not take it into account.
- viii) That is not to say that I think all of Mr Rayner’s evidence was unreliable: for reasons that I will later explain, I think his recollection of what the Zafira was doing immediately before his collision with Fox is quite reliable. Despite the unreliability of some of his evidence due to the vagaries of human memory, I found Mr Rayner to be an honest witness and I am satisfied he was doing his very best to assist the Court. I am grateful to him for his evidence.

## **E. Expert Evidence**

### ***Collision Reconstruction Experts***

- 35. The collision reconstruction experts are Mr Craig Dawson for the Claimant whose report is dated 28 April 2021, Ms Victoria Evers for the First Defendant whose report is dated 6 May 2021 and Mr R Baker instructed for the Third Defendant whose report is dated 4 May 2021. Ms Evers responded to Part 35 questions on 28 May 2021, as did Mr Baker on 7 June 2021.
- 36. Ms Evers’ instructions were limited to the general reconstruction of the circumstances and chronology of the collisions. Mr Dawson and Mr Baker were instructed in relation to all aspects relevant to the case within their areas of expertise.
- 37. The experts were provided with a series of 75 photographs and laser scan survey data collected by members of the police collision investigation unit who attended the scene, and a further 38 photographs taken later. Those are in the trial bundle. They were not provided with, as the Police have confirmed that they do not have, a collision investigation report or scale plan drawing, or field notes.
- 38. The collision reconstruction experts produced a joint statement dated 9 July 2021.
- 39. In the opinion of Mr Dawson and Mr Baker, the damage profiles of the Zafira taxi and the Mr Rayner’s BMW motorcar do not allow the orientation or direction of travel of each horse at impact to be deduced other than to say that they were both upright when struck. They also agree that there is no physical evidence that assists with

understanding the pre-collision movement of the horses immediately before the positions at which they were struck.

40. Ms Evers disagrees. It is her opinion based upon the lack of significant lateral displacement of the horses post impact, that they did not have any significant lateral momentum pre-collision and were therefore unlikely to have been moving at any significant speed across the carriageway. She is also of the opinion, based upon the damage profiles and in particular the post-collision rest position of Lowri, that the most likely orientation of the horses at impact was perpendicular to the respective cars, with Lowri facing towards the nearside and Fox towards the offside. If this orientation is correct, it is her opinion that it would also rule out any significant longitudinal movement of either horse pre-impact. Accordingly, she opines, both horses were either stationary or moving slowly at impact. I will need to resolve this dispute.
41. There is no dispute that the Zafira came to rest after the collision in the nearside/lane one of the carriageway, and facing in its original direction of travel, nor that Mr Rayner's BMW after colliding with Fox rotated across the carriageway, impacted the nearside 'Armco' safety barrier with its nearside, and came to a rest facing in the opposite direction to its original direction of travel and in front of the Zafira. However, there is a dispute between the collision reconstruction experts about whether the Zafira taxi spun or rotated in the road after colliding with Lowri. Mr Dawson's opinion is that it is likely that after hitting Lowri, the Vauxhall also rotated in the road before coming to rest. Ms Evers and Mr Baker disagree. They both consider that the more likely scenario is that the Zafira rolled to a rest after the collision, following a broadly straight heading, although each for slightly different reasons. I will also need to resolve this matter.
42. I heard oral evidence from Mr Dawson and Ms Evers. In cross-examination by Ms Jerram, Mr Dawson accepted that in setting out the evidence which he considered in writing his report, he did not list the witness statement produced by Mr Sabesan for these civil proceedings, but only his statement to the police. He was unclear whether he had seen it before, but said that he assumed it had been in the bundle provided to him and accepted (a) that it was important and (b) he should have considered it. Nonetheless he said that Mr Sabesan's uncertainty meant that there was nothing he could draw from it to help his reconstruction. I accept that latter point.
43. Ms Jerram also put to Mr Dawson several inconsistencies between his summary of evidence in his report and the evidence itself. These included his recording that Mr Sabesan was driving in the middle lane of the A3 when his evidence was more equivocal and based on his usual practice rather than a specific recollection. Mr Dawson accepted he had been imprecise in some respects. In closing, Mr Tavares submitted that he showed a surprising lack of attention to detail and that he seemed wedded to certain ideas, including that the Zafira rotated after impact with Lowri in the face of significant evidence that it did not. I found Mr Dawson to be helpful so far as he went, but lacking somewhat in an ability to assess and synthesise different pieces of evidence to reach and explain justifiable opinions. For example, he gave very little evidence about what damage on the Zafira could tell us about the lateral movement, if any, of Lowri. It seems that after he realised he was unable to calculate the trajectory because of a lack of data about the landing point of the animal, he stopped there without properly considering the other evidence available to him.

44. Conversely I found Ms Eyers to be a good witness who had thought carefully about all the evidence available to her, reached logical conclusions, could justify them and the weight she had given to different pieces of evidence used to reach those conclusions, and overall, was impressive. Mr Hand submits that she was unsound, as she produced her opinion of what had happened in relation to the BMW and Fox with reference to her assessment of the collision with the Zafira and Lowri, whereas, he submits, these were separate collisions and should be approached that way. I understand his point, but I thought that Ms Eyers was careful to explain in cross-examination the extent to which she relied on evidence of the latter to reach conclusions on the former. In addition, what appeared to be the best evidence of the collision of the BMW and Fox required a finding of fact which she did not fall into the trap of making, namely whether Mr Rayner's evidence about the position of Fox before the impact was reliable. In fact, as I have not accepted Mr Rayner's evidence on this point, I have not needed to consider the BMW/Fox collision in any detail and have focussed on the collision with Lowri. I do not criticise the way she carried out her assessment of that collision.

### ***Equine Behavioural Experts***

45. The Claimant's expert is Professor John Eddison (retired), formerly of the School of Biological Sciences at the University of Plymouth, expert in Animal Behaviour. He wrote a report dated 7 July 2020 and answered Part 35 Questions raised by the First Defendant on 17 August 2020. The First Defendant's expert is Mr Charles William Selby Lane, expert in Equestrian Behaviour and Management. He wrote a report dated 24 June 2020 and answered Part 35 Questions raised by the Claimant on 29 July 2020. The Third Defendant's expert is Ms Nicola Stephens, Equestrian Expert. Her report is dated 30 June 2020.
46. The Equine Behavioural Experts produced a joint statement dated 8 October 2020. This is extremely detailed, and I will address such parts of it as I consider relevant to my necessary findings, and what follows from those findings, as I go through my judgment. Ms Stephens is *ad idem* with Mr Lane, and so I will focus on the evidence of Professor Eddison and Mr Lane, who are the two experts who gave oral evidence at trial.
47. I note here that the experts agree that horses are social, herd and flight animals; that within a herd they can form sub-groups which split up, drift off, move around and meet up; that horses remain active during hours of darkness, sleeping for very short periods in a 24-hour period, more at night than day; that if a horse perceives a stimulus as threatening or averse, it will seek to avoid it or escape from it; that a horse will actively seek grazing beyond the boundary of its field if the grass in the field is of poor quality or insufficient quantity and the grass outside the field is of better quality and/or greater quantity.
48. Mr Tavares notes that Professor Eddison is an academic with experience of farm animals generally, and in particular cattle, but with limited practical experience of horses, which were not the focus of his academic interest, as can be seen by his long list of academic publications, which do not include any on equine matters. Professor Eddison himself stated in cross-examination that he was not an equestrian and had limited experience of equestrian activities. Mr Tavares submits that his approach was academic and focused on physiological responses to averse stimuli, and the literature

he relies on relates to, *inter alia*, cumulative chronic stress leading to equine illness, which is not relevant to the matters that I have to consider, which relate to behavioural responses to acute stresses. I think this is fair comment. Mr Hand in closing accepted that the papers he relied on do not really assist. It is for me to determine what these horses were doing and how they were behaving in the circumstances of the night of the index accident, without entering into the realms of academic speculation.

49. There can be no doubt that Mr Lane has extensive practical experience of horses and horsemanship over his 40 year equestrian career: in the military (culminating in commanding The Kings Troop RHA); at the highest levels of British Eventing (including being Team Manager of the GB Three-Day Event Team during the Atlanta Olympics and when they became World and European Champions); as a riding instructor and equine lecturer. Mr Tavares described him as having experience in almost every circumstance in which horses find themselves which appears to be right, looking at his CV. He is well known as an equine expert in the Courts. Mr Hand accepts his long experience of dealing with horses, but submits that unlike Professor Eddison, Mr Lane does not have a strong academic background and objects to Mr Tavares suggestion that Professor Eddison is the weaker expert. I note that Mr Lane has a PGDip in Equine Science from the University College of Wales (Aberystwyth) but accept he comes from a different and more practically-focussed background to that of Professor Eddison. That is true but I do not consider it to undermine the quality of his evidence in this case. The two experts come from two different areas of expertise, but both have provided assistance to the Court. I generally prefer Mr Lane's evidence about the likely behaviour of Fox and Lowri honed from years of living and working around horses and with them, and taking into account what he knew about these particular horses from Ms Ball's evidence, to Professor Eddison's more academic and often theoretical approach but there is much in his theory which has helped me in understanding the behaviour of the horses in this case.

## **F. Chronology and factual evidence**

### *The horses*

50. At the time of the accident, Lowri was a 20 year old Welsh Section D mare. Ms Ball's evidence is that she had two previous owners, the first of whom had competed with Lowri at Pony Club level in cross country and also did hunting, and the second who had done basic Pony Club rally and camp with Lowri. Ms Ball originally kept Lowri at her home, which was a cottage with 10 acres of grazing land on a farm which ran along the A24. She kept Lowri in a stable in a cattle barn at the farm at night, and turned her out during the day, save in the summer when she was turned out 24 hours a day. Ms Ball said that meant that on dark winter mornings and evenings she was used to tractors coming in and out of the barn with headlights on and she never showed any signs of concern about that.
51. Ms Ball rode and competed on Lowri locally until around 2013 when the mare was retired because of a problem with her deep digital flexor tendons which caused her to be intermittently lame in both front legs. Lowri was fine in walk but came up lame on a circle and by the time she was retired, although she could hack out in walk, any more than this would cause her discomfort. Ms Ball describes Lowri in her younger days as having a forward-going but sensible temperament, and being gentle and responding well to commands. In oral evidence she described how she was very often

hacked on roads and in traffic, including on a route which required her to cross the A24, and she said she did not react to the presence or noise of cars or traffic any more than by cocking an ear. By the time she went to Surrey Grazing at the end of November 2015, Lowri was ready for a quieter time. Mrs Miller appears to accept this; she says that she preferred horses with a placid temperament who were able to integrate calmly with the herd, and that Lowri was exactly the type of horse suited to Stokesheath Farm. Lowri had been at Stokesheath Farm for only three weeks when the accident happened.

52. Fox, however, had been there for about 18 months at the time of the accident and was well-settled, according to Mrs Miller's written evidence. Fox was 16 years old and had damage to his front ligaments with compacted bone in both hocks so he was not agile, but was "field sound", as was Lowri. It seems likely, as Ms Ball stated in evidence, that Lowri's condition had been improved both by removing her shoes, and resting for three weeks at Stokesheath Farm, before the events of the early morning of 16 December 2015.

### *Stokesheath Farm*

53. Mrs Miller says that Stokesheath Farm consisted of about 62 acres split into two paddocks, fenced by half moon posts and two strands of galvanised barbed wire fencing. The farm is close to the A3 which, according to Mr Ives' oral evidence could be both seen and heard from the paddocks, but the horses could not get access to the A3 directly from the farm due to a fenced railway line which formed the northern boundary, and the A3 being raised up on a steep embankment with crash barriers and fencing.
54. Mrs Miller says that Surrey Grazing was set up in 2009 and her brother Andrew Miller (who farmed on a neighbouring Crown property) fenced the paddock with post and rail fencing, installed new gates and the stable and feed shed were added. She says that from 2009 there was a regular programme of fence maintenance using both farm staff and specialist fencing contractors for larger fencing projects. It is her evidence that posts were installed using hydraulic post rammers, never by hand. In an undated manuscript witness statement given to police at voluntary attendance at the police station after the accident she stated that the fence posts were put at least 1ft into the land.
55. Mrs Miller alleges the farm had previously been the victim of crime; in 2012 criminals came across the land to steal copper wire from the sub-station on the other side of the railway track, and broke through the fence to do so. In the past, she says, a number of items had been stolen from the farm.
56. Mrs Miller describes the system for checking the horses and boundaries on Stokesheath Farm. She says the checks were usually done by either herself or Ms Earl, or both together, once a day usually in the afternoon and that it took 20-30 minutes to walk the perimeter of the field. Her evidence, and that of her sister, about what checks were done the day before Lowri and Fox left the field, however, is inconsistent in different accounts and with each other. In her manuscript witness statement to police, Mrs Miller stated that "*On 15 December 2015 my staff carried out the usual daily checks of the land*". Her evidence in her civil witness statement is that both she and her sister carried out those checks, and that she often refers to her



sister as “*my staff*”. Ms Earl’s evidence is that *she* carried out those checks, and she exhibits what she says is a daily checks sheet for 15 December 2015 which shows Lowri and Fox marked as present. Ms Earl says she did not notice any fence damage during that check. The burden is on the Claimant to satisfy the Court that the fencing had been checked and was in good condition on 15 December 2015, and they have not called these witnesses so that these inconsistencies can be resolved.

*The morning of the accident on 16 December 2015*

57. There is no direct witness evidence of when Fox and Lowri left the field at Stokesheath Farm. The first reported sighting of them was by Mr Matthew Callender, who called the police at 03.32 to report two loose horses in the road. At that time he reported that he was travelling as a passenger in a car travelling on the A244 towards the A3 and had just passed the junction with Sandy Lane. Mr Callender gave a statement to the police on 10 February 2016, almost two months after the accident, in which he says he witnessed “*two loose and unridden horses walking towards the A3 immediately before the collision occurred*”. He said that he and his parents had been collected from home to travel to the airport in a car driven by a friend called Steve at around 3.00 or 3.10 am and first saw the two riderless horses “*a short time into our journey*” as they were travelling on the B280 Christchurch Road. Lowri and Fox were walking in the same direction. Ahead of him was a blue car which “*passed the horses and drove off*”. He says that Steve “*tried to overtake the horses to pass them but they sped up to a trot and so he stayed behind them*”. He described following the horses all the way to the junction with the A3, saying “*The horses did not appear to be acting irrationally but continued going straight ahead*”. He says he last saw the horses as they got to the roundabout at the A3 junction, at which point the horses went right on the roundabout as though to go up the exit slip road to join the A3 southbound, and he and his friend joined the A3 northbound.
58. The second reported sighting of them was by Mr David Bond. Mr Bond says he had come down the slip road of the A3 onto the A244 continuing southbound towards Leatherhead, and at about 100-150 yards from the A3 he saw a shadow of something on his right side which caused him to stop. He realised that the shadow was, in fact, two horses moving towards him about 10-20 yards ahead of him, followed by a car with its hazard lights on. He says the horses continued along the A244 towards the A3 followed by that car. It seems an inevitable conclusion, shared by both parties, that the car Mr Bond saw was that in which Mr Callender was a passenger.
59. In his statement to police, Mr Bond says:

*“I did not witness the collision but I did see the horses roaming freely on the A244 close to the A3 shortly before the collision...I saw a shadow of something on my right hand side. I thought that the movement might be a person and so I put my brakes hard on to stop, which I did. I could then see that it was not a person but two horses, one grey and one brown. They were coming from the right side of the road but I did not see exactly where they came from. They moved to the front of my car about 10 to 20 yards in front of me. They were moving quickly but not galloping. There was a car following the horses with its hazard lights on. The two horses passed the car on my*

*right hand side and continued along the road towards the A3 followed by the car”.*

60. In Mr Dacre’s note of evidence at the Magistrates’ Court Trial, Mr Bond is noted as saying in evidence-in-chief, *“I saw a car with its hazard warning lights on. That car was travelling in the opposite direction. I saw some movement because the road is not lit. I thought it was a person so I braked. It was two horses which came charging down the other side of the road. They were behind the car with the hazard lights and then they overtook him. I had to put my brakes on suddenly otherwise I would have hit the horses. One was gray and the other was brown”*. He is noted as describing the car with hazards in cross-examination as *“crawling – 8 to 10 miles an hour”* and when asked if he got the impression it was escorting or shadowing the horses said *“I don’t know whether they had anything to do with the horses. I don’t think it was keeping pace with them. I don’t think it was corralling them”*.
61. In his oral evidence to this court Mr Bond said that the note was not right, as he did not believe he had said that the horses had been behind [Mr Callender’s] car and overtook it. He said, *“I was on the left, driving along, and on the right hand side of a pretty narrow road, coming in the opposite direction were two horses”*. He explained that the two horses passed his car, followed by the car with the flashing hazard lights, but that *“the horses were always in front of the other car...I never saw them overtaking. They were always in front of the other car”*. He was quite clear on this point, and I accept his evidence. In oral evidence he agreed with Mr Hand’s statement that he put his brakes on, saying *“Yes, or I would have hit them. They came onto my side of the road, yes”* and agreed with Mr Hand’s question that they were *“...running or charging on your side of the road... and the last you saw of them was when they were charging down the A244 in the direction of the junction of the A3?”*.
62. In re-examination Mr Bond said that he had no experience of horses and did not know the difference between trotting and any other gait. When asked about the speed of the car behind, which he had estimated at 8-10mph, he said *“It wasn’t going quickly, as it was behind the horses. Whatever speed the horses were going, the car was keeping up with them, I suppose”*.
63. There is then no further direct witness evidence of the behaviour of the horses until very shortly before the collisions.
64. Ms Al Hugail was not able to provide any evidence about the circumstances of the accident as she thinks she had gone to sleep before it happened.
65. Mr Sabesan in his civil witness statement recalls that he was driving his taxi in the central lane of the A3 when the street lighting ended, and said that he tended to drive in the middle lane where there was no street lighting as it tended to give him better visibility. However in his witness statement to police made earlier, on 19 January 2016, he is less equivocal, *“I think I would have been driving in the middle lane on the A3... I usually drive in the middle lane so that I get to see better”*. However, Mr Rayner’s written evidence was that immediately before the collision Mr Sabesan’s taxi was in the nearside lane, and in cross-examination he said that he was 99% sure of this. I will come back to that.

66. In Mr Sabesan's witness statement to police he describes that he "*suddenly saw something brown or goldish coloured in the road in front of me. I think I braked and hit it but after that I don't remember anything else about the accident*". In his civil witness statement he says he "*vaguely*" recalled "*seeing something that looked like a large animal in the road right before the impact. I did not have sufficient time to react before the impact with the object. Following the accident I was informed the object was actually a horse. I cannot recall what direction the horse came from, whether it was from my left or right. I do not recall if the horse was running or standing in the road prior to the impact. I do not remember seeing any horses on the A3 prior to the accident.*" It is an oddity that on 22 March 2019, almost exactly a year earlier than the date of his civil witness statement, he was examined by his expert consultant orthopaedic surgeon Mr Peter H P Dyson FRCS who recorded, "*He remembers being aware of something suddenly jumping in front of his car, which he subsequently became aware was a horse which had escaped from a local paddock. He has no further memory of the incident itself*". However this is not the witness evidence of Mr Sabesan himself. I put greater weight on his two witness statements and find that Mr Sabesan cannot recollect, if he ever knew, whether or not Lowri was moving immediately before the impact.
67. Mr Rayner had been driving along the A3 from Tolworth. He was driving on the same side of the road as the Zafira taxi. Before the collision he was positioned in the outside lane. At that point, he says he saw the Vauxhall Zafira ahead of him on his side of the road in the nearside lane driving approximately 50mph, whilst he was driving approximately 70mph. In his police statement, he described seeing a single headlight flashing towards him around 200 yards ahead of him which he became transfixed on. He believed this to be the nearside light of the Vauxhall Zafira as it spun across the nearside and central lanes following impact with Lowri. He then looked in front of him to see what he initially described in his roadside interview as "*a horse just there in front of me*", in his police statement as "*a pony*", and then in his civil witness statement once again as "*a horse*" standing 15-20 yards in front across lane 3. In that witness statement Mr Rayner described Fox as appearing to have his head down as though he was grazing at the central reservation of the dual carriageway. He then hit Fox, causing the car to spin and hit a central barrier and then to stop on the hard shoulder.
68. I have already stated that in cross-examination Mr Rayner accepted that his memory of the animal he hit being a pony or horse cannot be correct, given what he said in his 999 call immediately after the accident, at 3.40am. Mr Rayner immediately accepted that he could not see the animal that he had collided with, and that is why he couldn't tell if it was a deer or something else.
69. In re-examination Mr Tavares asked Mr Rayner to now give the court his true recollection, but that is a difficult thing to do, once one acknowledges that one has an honestly-held but incorrect recollection. I am not sure how realistic it was to expect Mr Rayner to be able to extricate the true from the unreliable. Mr Rayner acknowledged that when he said, "*Right now it is quite hard going back over it. It happened so quickly that it is hard to pinpoint specific details*". After describing his drive, and having his attention drawn to what we now know was the Zafira colliding with Lowri ahead, he continued "*I glanced back to my lane. My headlamps picked up a large animal. The speed I was going doesn't allow me thinking time or reaction*

*time. I was in effect a passenger... I impacted the animal. The windscreen was obliterated. I can't see... There was an animal there*". Mr Tavares asked him if he could discern the head from the back of the animal, and he said that he could. I accept that he saw a large animal, we know from the 999 call that he thought it might have been a deer, but I do not think his recollection about what way it was facing and what was the head or the rear was reliable. I do not rely on it.

70. Shortly after Mr Rayner's collision, a blood transfusion motorcyclist driving a BMW motorcycle hit the debris from that collision. Nicola Clark was driving behind the motorcyclist. She had joined the A3 at the Tolworth roundabout. She was driving in the inside lane behind the motorcyclist but prior to the accident the motorcyclist had overtaken her and moved to the outside lane. She saw Mr Rayner's BMW and the Vauxhall Zafira ahead but did not say what lanes they were in and did not see either of the horses until after the collisions. The motorcycle then collided with the carcass of Fox.
71. After the collision involving the motorcyclist, a white Citroen van also collided with the debris. Jason Meeks was one of two passengers of the Citroen van. Mr Meeks saw the Vauxhall Zafira after it had stopped following the collision, with its headlights facing towards the Citroen van. He estimated that to be about 150 to 200 metres ahead, positioned between the hard shoulder and the first lane. The driver of the van moved to avoid collision with the Vauxhall Zafira, but struck the carcass of Fox in doing so.
72. Mr Rayner phoned the emergency services at 03.40am. The first police officer on the scene was PC Matthew Reynolds of Surrey police at 03.45am. In his witness statement made at 11am on the same day, 16 December 2015, he described the scene that he witnessed. So far as the red Zafira taxi was concerned, he said he saw it "*in lane 1 of 3 with a horse wedged on the roof of the car, with its body crushing the rear offside of the vehicle between the 'B' and 'C' pillar, its' hind legs dangling over the rear offside passenger door and its head in the boot of the vehicle*". He describes being told that there were two persons trapped in the car and says "*I have attempted to open the drivers door, however was unable to do so, due to the horse's hind legs. I have pushed the horse as much as I could as to open the door and have seen an Asian male sat in the drivers seat.*". He describes hearing the Claimant in the back of the car, realising that she was trapped under the horse, and awaiting the arrival of ambulances and fire brigade to rescue and provide emergency treatment to her.
73. The police scanned the horses for identification microchips, but did not find any. They did, however, find a metal tag with Ms Ball's name and phone number sewn on to the horse blanket that Lowri was wearing.

*After the accident, later on 16 December*

74. The police telephoned Ms Ball at 12.25pm to inform her that it appeared that a horse that died in a collision on the roads may have been Lowri. She says that she immediately telephoned Surrey Grazing and spoke to Liz Earl, who said she thought she had seen Lowri in the field that morning which, we now know, she cannot have done. It is Ms Ball's evidence in cross-examination that Ms Earl told her that she had done a check that morning. Ms Earl says she did not do a field check because at 10.30am she had gone to meet with the owners of two new horses to the farm, to get

them settled. Mrs Miller does not recall whether she had done a check that morning, but if she did do a check, she did not notice that Lowri and Fox were missing.

75. Even after the phone call from Ms Ball asking about Lowri, it does not appear that a check was promptly carried out. At 13:00 PC Simon Ives was tasked by Sergeant Ryan to attend at Stokesheath Farm to meet with Mrs Miller. He arrived there at 13.08, where he told her that there was a serious collision on the A3 south that morning involving two horses which police believed came from them. He asked to check the perimeter fencing, and for her to check if any horses were missing. They inspected the first paddock, going from the farm to alongside the B280, up to Limekiln Wood and along Birchwood Lane where all the fencing was in good order until they got to Birch Wood, where there was a section of fencing 6ft in length where the top strand of the barbed wire had been cut. It was a clean cut, not a break as the metal was shiny and not rusty and there were no signs of wire perishing. Behind this section of the fencing were bushes and undergrowth; it did not look as though the horses had gone through as there would have been fur on the fencing and the bushes. In his evidence to the Magistrates' Court, PC Ives accepted that an animal could have escaped at this point with no fur being left if it had jumped what remained of the fence, but it does not seem to be either party's case that this is likely to have happened. He took a photograph which is in the bundle.
76. PC Ives and Mrs Miller continued walking anticlockwise around the field, past the northern boundary fence separating the field from the railway. The rest of the fencing was in order until they got to the western corner where the railway line meets Stokesheath Road. Just past this corner they found an area of fencing where three half-moon fenceposts and the intact double strands of barbed wire were lying flat on the ground. He measured this downed length of fencing at 9.4m in length. There was a length of electric fencing attached to one of the posts, which Mrs Miller says she had put up to tape off the corner of the field to prevent the horses from getting trapped in a tight corner and which Mr Ives says appeared to him to be an attempt to patch up bad fencing.
77. He said:
- "I then checked the posts which were around 6ft in height and they were not damaged in any way... nor were the bottoms rotten which can sometimes happen after they have been exposed to moisture for some time. I then looked in the holes in which the posts had come out of and they only appeared to be 6-8 inches deep. This in my opinion is far from deep enough as if something pushed against it lightly there would be no resistance at all".*
- He also noted that he could *"clearly see hoof marks where horses had gone up the banking [on the far side of the fence] and out onto Stokesheath Road"*. He took further photographs which are in my bundle.
78. Both Mr Ives and Mrs Miller noted hoof marks where the horses had gone up the bank and out onto Stokesheath Road. Mrs Miller's evidence is that this is not something the horses would have done on their own, rather something they would have needed to be coerced to do. This is opinion evidence which she is not qualified to give as she is not an expert in this case and lacks independence. It also does not accord with the evidence of the equine experts.

79. By the fencing on the ground was an old WW2 pillbox next to the boundary of the farm. The front portion of a Mini car was rammed into it and there were beer cans and other detritus in the vicinity, including cigarette packets and a glue bottle. Mrs Miller in her manuscript statement to police says that her staff on inspecting the horses and paddock on the 15 December “*without a doubt would have noticed, recorded and acted upon any fences in disrepair and in particular the front part of a mini stuck in the entrance of the air raid shelter/gun turret*”. She described the car part and detritus as “*clear evidence of vandalism which could only have taken place on the evening/early hours of 15/16 December*”. Ms Earl, too, claims that these items had not been there the previous day. The pillbox was within a few yards of where the fence was lying on the ground. That spot is close to the bridge over the railway line which is accessible via Stokesheath Road South.
80. PC Ives then asked Mrs Miller if she could check and see if any horses were missing. Finally, she and Ms Earl did so together. She returned and said that, yes, Lowri and Fox did appear to be missing. In oral evidence he said that he advised Mrs Miller to put the horses in the far paddock until the fencing could be fixed, and this was done.
81. Ms Earl spoke to Ms Ball by telephone at 14:35pm, confirming that Lowri was missing from the field along with Fox.

### **G. Findings of fact**

*Where did Lowri and Fox leave the field?*

82. I am satisfied that it is more likely than not that Lowri and Fox left the field over the 9.4m run of downed fencing because there does not seem to be any other obvious spot from which they escaped, and there are clear hoofprints seen by Mrs Miller and PC Ives showing horses walking up the bank on the far side of the downed fencing. This also appears to be the working assumption of all of the equine experts, Mrs Miller and PC Ives. I accept Mr Ives’ oral evidence that that there was a clear path through the undergrowth, where those hoofprints were seen, to Stokesheath Lane beyond.

*What caused the fence to come down?*

83. I find that it is more likely than not that the 9.4 m run of fencing came down because it was inadequately installed and fell over, rather than it was pulled up by vandals, for several reasons:
- i) There were no obvious signs of human activity by vandalising trespassers in the field. PC Ives’ evidence, which I accept, is that there were no signs of trampling around the holes in which the fence posts had been installed; nor any obvious footprints or car tracks on the bank or in the field, although there are hoofprints going up the bank. The fenceposts and attached barbed wire were neatly laid out which in my view is more easily explained by them lying where they fell than being carefully pulled out and laid down by vandals - it is not clear why vandals would have taken such care;
  - ii) The Claimant has not satisfied me on the balance of probabilities that the Mini car part and detritus had only appeared since a field inspection the previous evening, and so is evidence of vandals present that night. I treat the conflicting

evidence of Mrs Miller and Ms Earl about who carried out a field inspection that with significant caution. On balance, I am not satisfied that their evidence that it was not there the previous evening is reliable: some of that detritus as photographed looks rather weathered to me and not new, particularly some of the crisp packets and cans; and I have seen what appears to be a marketing brochure for Surrey Grazing which contains a number of photographs including one of the pillbox in which the Mini part can clearly be seen, and another of Mrs Miller with a horse, captioned "Rosemary Miller and Fox". If the marketing brochure predates 16 December 2015 then it is evidence that the Mini part had not been left there on the night of 15/16 December. If it post-dates 16 December 2015 then: (a) it is odd that Mrs Miller should illustrate her brochure with a picture of a horse that had suffered a horrible death whilst in Mrs Miller's care; and (b) it casts doubt on Mrs Miller's evidence to the police that if the Mini part had been there at the time of an inspection on 15 December it would have been "*noticed, recorded and actioned*". Mrs Miller and Mrs Earl were not at court so their evidence could not be tested and they could not be asked about this document, which Mrs Miller disclosed. Nor could their evidence that a field inspection had been carried out at all be challenged. In closing, Mr Hand submitted that the First Defendant could have required them to attend, but the burden of proof is not on the First Defendant. It is the Claimant who puts forward vandals as a reason for the fence being downed and the horses leaving the field, and the Mini car part and detritus appearing on the night of 15/16 December as evidence in support of that theory, and the Claimant who has the burden of proving it to the civil standard.

- iii) Mrs Miller's evidence is that the small run of electric fencing by the downed fence was to fence off the corner of the field so that horses could not get trapped in it. However, PC Ives' evidence is that this run of fencing did not extend to the corner of the field. He has photographed the fencing and says that it did not extend significantly beyond what is seen in those photos, and not to the corner. I have seen a plan of the paddocks which are irregular in shape and contain a number of corners, and PC Ives also says that he saw no other electric fencing in any of the other corners, which might be expected if corners were considered to be a potential risk for horses. I accept his evidence. I also note his evidence that the electric fencing appeared to be there to bolster bad fencing, which appears to me to be the most likely explanation for it to be there and not in any other corner.
- iv) Ms Earl attaches several photos to her witness statement taken on 17 December 2015 after the fence posts had been replaced in their holes and were awaiting repair, and suggests that one of those photos shows a wetness to the base of one of the fence posts which suggests that it had previously been in the ground to a depth of 18". I am not satisfied on the balance of probabilities that what I can see is wetness, and that if it is, it comes from its previous installation in the ground, as I have photographs of the same fenceposts laid flat on the ground the previous day which do not show such marks, and PC Ives inspected the base of the posts for signs of rot due to dampness, noted they were not rotten and did not remark on such marks. Nor was he asked about them in cross-examination.

- v) I prefer Mr Ives' evidence that the fencing was inadequate because the posts were sunk an inadequate depth of 6-8", to Mrs Miller's evidence that they were sunk at least a foot or Ms Earl's conflicting evidence that they were sunk to 40-45cm/16-18" deep. Mr Ives in his witness statement explained that he knew about fencing as a farmer's son and in oral evidence explained that installing and maintaining fencing was one of his responsibilities as a boy growing up on a farm. He is an independent witness in relation to these proceedings, and Mrs Miller and Ms Earl are not; Mrs Miller was both subject to criminal proceedings and a defendant in these civil proceedings and I accept Mr Tavares submission that her evidence is likely to be self-serving. The First Defendant asserts that if the fence posts were sunk only 6-8", as I now find, that was inadequate and so it is likely that they could fall over by the action of weather or simply the weight of the fence itself.

*What was the behaviour of the horses when they left the field?*

84. I find that it is more likely than not that Lowri and Fox left the field because they wandered over the downed fence, rather than being chased or led from the field. There is no direct evidence about how and when Lowri and Fox left the field, but there is the absence of evidence:
- i) there are no deep hoofprints, marks of skidding or turning, or churned ground in the area of field by the downed fence, which we might expect to see if there had been any sort of attempts to evade capture, escape a threat or panicked wheeling-about by horses. The equine experts agree that it would be a difficult job for strangers to chase Fox and Lowri out of the field or catch them, because of the ample space they had to evade such efforts. They say that it would be likely that at least three people would be needed to drive them out or catch them. Further, I accept Mr Lane's evidence that the inclination of Fox and Lowri if perceiving danger or an adverse stimulus in this way would have been to return to the safety of the herd, unless the way was blocked. They do not appear to have done so and there is no physical evidence of such activity.
  - ii) I have already found that I cannot be satisfied that the Mini part and detritus around the pill-box appeared on the night of 15 December, and that it is more likely than not that the fencing fell over because it is inadequate. There is no other evidence to suggest the presence of vandals or trespassers that night.
85. Accordingly, although the Claimant's expert Professor Eddison is of the opinion that the horses probably escaped because of an aversive stimulus causing a flight response, upon considering the facts as I have found them carefully, I do not accept that opinion.
86. I have been asked to consider why Lowri and Fox would leave a field in which they had ample grazing, supplemental feed and the rest of their herd, to walk up a bank on which there was no grazing, to a tarmac road up at the top? All the equine experts agree that they could have wandered out, and Mr Lane opines that it is possible that they left because they smelt further grazing in the gardens and along the lane at the top of the bank. I accept that is the most likely answer on the evidence before me.

*Behaviour of horses when they left the field*



87. Accordingly, I am satisfied that it is more likely than not that Lowri and Fox were not frightened/panicked when they left the field, but were relaxed; wandered while grazing as the equine experts agree horses do; crossed the downed fence; and climbed the short bank on the other side attracted by something they could smell at the top.

*What caused the horses to move to the place where Mr Callender first saw them?*

88. There is no evidence of fact to assist me with what happened between the horses leaving the field and being seen by Mr Callender or, indeed, how much time elapsed between those two events. Mr Lane's evidence is that horses if left to their own devices may well travel 800m or so in several hours. These horses travelled a greater distance of some 3 to 3.5 miles to the spot where Mr Callender first saw them, but I do not know when they left the field. I think it is more likely than not that they did leave it under cover of darkness on the night of 15/16 December, and probably in night-time hours rather than earlier that dark winter evening, as nobody reported seeing them until Mr Callender. However, they could have been loose for more than several hours by then. I find it more likely than not that they continued to wander and graze down Stokesheath Road until they reached the B280, and then proceeded along it until they were seen by Mr Callender.
89. The question then is – what caused them to travel a significant distance down the B280? Professor Eddison was of the clear opinion in his report and oral evidence that in his opinion, Lowri and Fox would not have travelled that long distance unless they had been subject to one or more adverse stimuli that caused them to travel in order to escape from those adverse stimuli. I remind myself that he was of the opinion that the horses were panicked out of the field, which does not accord with my finding. However Mr Lane, too, agreed that some adverse stimulus was likely to have caused them to travel that distance, or they probably would not have gone so far. I accept that is likely to have been the case.
90. However, there is no evidence of what that adverse stimulus (or stimuli) was or were, what level of fear or response it/they provoked, or how long that lasted. Such an adverse stimulus could have been a car coming up behind them and herding or driving them forward as Mr Callender's car later did, or something could have spooked them – such as a plastic bag blowing in a hedge or an unfamiliar loud noise – which caused them to seek to escape the perceived threat.
91. The Claimant submits that it is more likely than not that whatever the adverse stimulus was, it would have frightened them and may have panicked them. I accept the former but in my view although the latter is possible, I cannot say it is probable as there is no evidence that justifies that finding. There is a wide range of possible fear responses arising from an unknown adverse stimulus, from the horses calmly moving away at a walk up to headlong panic. Without knowing what caused them to make that journey, or when, or how long it took them to cover the relevant distance, I cannot make a reliable finding. All that I do know, because I accept Mr Callender's evidence, is that when he first saw them, they were walking along the road.
92. Mr Lane and Ms Stephens share the opinion that this is evidence of calm behaviour. Professor Eddison disagrees, and says that a walking horse may be calm, but the fact that a horse is walking does not mean that a horse definitely is calm, and although it is not providing an outward manifestation by means of a behavioural response to a

complex physiological response to an adverse stimulus, Mr Callender was not in a position to, and could not be expected to comment on, any physiological processes which the horses might be experiencing, such as increase in respiration and heart-rate, increased body heat and sweating. I accept that, but this Court can only deal with the evidence which is before it, and it has no physiological evidence. It has snippets of witness evidence describing the animals' behaviour. In addition, section 2 of the Animals Act is concerned with 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 *which cause damage*, i.e. behavioural responses, not physiological processes such as increased heart-rate and sweating.

93. I further accept Professor Eddison's evidence that an animal that has been subjected to an adverse stimulus which it perceives as a threat, and to which it reacts, will remain mentally alert for a period afterwards, and the length of time that it does so will depend on subsequent stimulation it experiences as well as its character and previous lifetime experiences. I remind myself that Lowri was a horse with a long history of being ridden on roads, and who Ms Ball, who I found to be patently honest, described as being well used to traffic and pretty well unresponsive to it (I paraphrase). Of course I accept that she was not used to being free on roads, unriden and under no human control, at night; and that this in itself was likely to have caused her, and Fox, to be alert and probably more reactive to adverse stimuli.
94. However, I also note that after Mr Callender first saw these horses, his evidence is that they did not react to a blue car overtaking them but continued in a walk. I have no reason to doubt this evidence. Accordingly, I find that whatever caused them to travel down the B280, they were not frightened/panicked when Mr Callender first saw them, and whatever their level of fright previously experienced on their journey to that point, they had recovered sufficiently to allow that car to overtake them without seemingly, paying any attention to it. It was not until the car Mr Callender was in also tried to overtake them, he says, that they reacted by breaking into a trot. I accept this is a flight response. Mr Lane and Ms Stephens accept that this might be considered agitated behaviour, but not frightened/panicked, and caused by the presence of the car behind them. I accept that evidence.

*Behaviour of horses between B280 and A3 roundabout*

95. It is a pity that Mr Callender did not attend at the Magistrates' court to give evidence and has not responded to requests for witness evidence in these proceedings. No doubt if he had, he would have been asked to clarify the behaviour of the horses as the car he was in herded or drove them back down the B280 to the A3 roundabout, a distance of about 4 - 5 miles. Although he said in his statement to police that the horses were walking and broke into a trot when his car tried to overtake them, he did not say whether they maintained that trot during all or part of the journey or whether they returned to a walk or sped up to a canter or gallop. However, I am satisfied that it is unlikely that they broke into a canter or gallop at any point when he had sight of them because:
- i) Mr Callender appears to know the difference between horses' gaits and he did not mention that they cantered or galloped;

- ii) he also referred to the horses as not “*acting irrationally*” which suggests that their behaviour was steady and not surprising to him during that journey, as breaking into a canter or gallop may have been;
  - iii) although Mr Bond says that when he saw them, about 100-150 yards south of the A3 roundabout, they were going faster than a walk but “*not galloping*”, and told the Magistrates’ Court they were “*charging*”, he was clear in his oral evidence that he does not know anything about horses, and cannot tell the difference between horses’ gaits. I consider that such a person is unlikely to describe a cantering horse as “*not galloping*” as they may well perceive a canter as a gallop. I think it is more likely he was describing a trot;
  - iv) Mr Bond’s evidence that they were going about the speed of the car behind them which he described to the Magistrates as “*crawling*” at about 8-10 miles per hour, but that it was not “*corralling*” them, suggests that he thinks it was hanging back somewhat. He also suggested in re-examination by Mr Tavares that the horses were setting the pace: “*Whatever speed the horses were going, it [Mr Callender’s car] was keeping up with them, I suppose*”. Mr Hand submits that 8-10 miles an hour would suggest a cantering speed, rather than a trot, but estimating low speeds is not easy or, often, accurate, and for the reasons I have given I find it is more likely than not that they were trotting.
96. I further find that the horses had probably maintained that trot throughout the journey from when Mr Callender’s car fell in behind them, to where they were seen by Mr Bond, as Mr Callender did not report any other change in gait at this time.
97. Professor Eddison’s opinion is that the behaviour of the horses as reported by Mr Bond cannot be viewed in isolation from the context of the experience of the horses from their leaving the field, to that point near the A3. He states in the joint report that the experiences of the horses that night would have had a cumulative effect, giving rise to an elevated level of arousal, and any agitation has to be seen in that context. I accept that proposition, as did Mr Lane in oral evidence, which is supported by the literature and as was explained by the animal behaviour expert Mr Mills in *Mirvahedy*. However, I have not been able to make any positive finding that the events of that evening to this point had caused a fear response in the horses resulting in frightened/panicked behaviour, and I have found that if they had reached that level of fear at any point during their journey from the field to where they were seen by Mr Callender (which is mere speculation), their fear had subsided to a level where one car overtaking them did not cause any flight response, and a second car attempting to do so caused them only to break into a trot, to move away from the perceived threat in a controlled fashion.
98. I accept that they were then driven a long distance, in a trot, by Mr Callender’s car, in a flight response to that adverse stimulus. I accept Mr Bond’s evidence that it had its hazard lights on, and Professor Eddison’s evidence, supported by the literature, that such flashing lights, particularly at night-time, would also be perceived by the horses as a further potential danger or adverse stimulus. I did not understand Mr Lane to disagree with that. I also remind myself that although both horses were field sound, they had physical weaknesses and trotting this distance on tarmac (unshod, in the case of Lowri) was more work than either of them had done recently and could have

caused lameness to both animals. That is the context by which I must turn to consider what happened next.

99. Mr Hand submits Mr Bond's oral evidence that when the horses were coming towards him they were encroaching on his side of the road such that he had to brake to a halt or he would have hit them, is evidence of irrational behaviour by frightened horses. However Mr Bond's evidence is that they were 10 – 20 yards ahead of him when he stopped, which is outside the flight distance of 3-5m that Professor Eddison identifies in paragraph 3.2 of his report. Professor Eddison accepted in oral evidence in the context of the collision on the A3 that a car a greater distance away than the flight distance from a horse like Lowri or Fox would not be perceived as a threat by that horse, and I am satisfied that must equally apply here. Accordingly, I do not find that behaviour of encroaching onto the other side of a narrow road to be either irrational or indicative of a horse that was frightened/panicked. As Mr Lane said in cross-examination, if Mr Bond had kept driving closer, they would either have collided with him or returned onto the other side of the road. He stopped, but they did not collide with his stopped car (which would be irrational and indicate panicked behaviour, in my judgment). They moved away from it, back onto their side of the road, apparently without changing their gait, and passed it. Mr Callender specifically remarked that they did not act irrationally. I find it more likely than not that those were controlled actions and not frightened/panicked reactions by the horses.

*At the A3 roundabout*

100. The only direct evidence of the behaviour of the horses on the A3 roundabout comes from Mr Callender. He says "*the horses went right on the roundabout as though they would have gone up of [sic] the slip road*" but then he lost sight of them. Accordingly, it seems, he didn't see them actually enter the slip road. I note that at the start of his police witness statement he referred to witnessing "*two loose and unriden horses walking towards the A3 immediately before the collision occurred*".
101. I have accepted Mr Callender's evidence that they broke into a trot at the beginning of that part of their journey, and have found that it is likely that they continued into a trot at least until they were seen and passed by Mr Bond. It seems to me more likely than not that they continued trotting in front of the car to the A3 roundabout. However, at the A3 roundabout, the horses continued across and Mr Callender's car turned left. In doing so, the adverse stimulus or perceived threat that his car posed to the horses was removed from their 'flight zone'.
102. As Professor Eddison and Mr Lane agree, when an adverse stimulus which is causing horses to react by seeking to move away or escape that stimulus is removed, the horses will eventually slow down or stop their escape, but how long that takes depends on a number of factors, including the type of adverse stimulus, the level of fear experienced by the animal (which Professor Eddison in oral evidence said could range from really extreme to less extreme), the lifetime experience of the horse and whether it had opportunities to develop coping strategies to that sort of adverse stimulus or not, and infirmity. The experts in their joint report agree that there was no definitive answer as to the duration of any response of horses to an adverse stimulus, for these reasons.

103. However, I take Mr Callender's statement at face value, and think it is more likely than not that he described these horses as "*walking towards the A3 immediately before the collision occurred*" because that is what they were doing when he lost sight of them at the A3 roundabout. In my view, it is probable that if they had continued trotting until he lost sight of them even after his car had moved away to the left, so it was no longer behind them and 'herding' them, he would have described them as "*trotting towards the A3 immediately before the collision occurred*". It therefore appears that these horses recovered very quickly from the removal of the adverse stimulus in the form of the car Mr Callender was in, which suggests to me that they coped well with, and were not frightened/panicked by, their long journey in trot to the A3 roundabout driven by Mr Callender's car.

*On the A3 immediately before the collision.*

104. There is no evidence before me of the behaviour of the horses immediately after they reached the A3, save that they must have travelled a short distance southbound to the point at which the collisions occurred. Mr Hand in closing accepts there is a lacuna of evidence. I have found that Mr Sabesan recollects nothing of the behaviour of Lowri which can assist me and that Mr Rayner's evidence about Fox is only reliable to the extent that he saw what he perceived to be a large animal immediately before impact.

***Accident reconstruction experts***

105. I now turn to the collision reconstruction expert evidence to assist me in understanding the position and behaviour of the horses immediately before impact.
106. I find it convenient first to consider the question of whether the Zafira taxi rotated in the road after the collision before then going on to consider what findings I can make about the position and behaviour of the horses immediately before the collision. That is because the former is a factor which is relevant to my consideration of the latter.

*Did the Zafira taxi rotate in the road after the collision?*

107. Within the evidence available to the collision reconstruction experts are (i) photographs of vehicles taken after the collision, showing that the Zafira's offside headlight had been dislodged in the collision so that it was hanging by a wire; and (ii) a report of a police investigator noting that headlight was still working after the vehicle had been recovered.
108. Mr Dawson's opinion that the Zafira is more likely to have rotated in the road is based on: (i) the evidence of Mr Sabesan that he would likely have been travelling in the central lane; (ii) that Mr Rayner saw a vehicle spin in the road ahead of him as he saw the vehicle's headlight, and (iii) the presence of curved marks across the road including in the central lane, which he says are curved tyre marks indicative of a vehicle rotating in the roadway. However he does acknowledge in the joint report that it is possible that those marks may be attributed to Mr Rayner's BMW, and that the headlight Mr Rayner saw was the dislodged headlight on the Zafira taxi hanging loosely by a wire but still functioning, rather than a rotating vehicle. Mr Dawson accepted in cross-examination that if the Zafira had been in lane one before impact, then the curved tyre marks could not have been created by it, but said that they did not

lead to the ARCO barrier that all experts agree Mr Rayner's BMW struck. He described that as "*a definite conflict*".

109. Ms Evers' opinion is that the curved tyre marks are all attributable to Mr Rayner's BMW. Ms Evers takes into account the Zafira's straight-ahead orientation at rest in lane one, and Mr Rayner's evidence that the Zafira was in lane one before the collision, and the fact that the Zafira's offside headlight dislodged in the collision so that it was hanging by a wire. She considers that it is likely that what Mr Rayner saw was not a headlight from a rotating vehicle, but that headlight swinging loose and rotating from a wire on the Zafira travelling forwards.
110. Mr Baker's opinion is that there is no physical evidence to indicate that the Zafira spun, albeit he says that it is impossible to exclude the possibility. In relation to the curved marks, Mr Baker agrees with Mr Dawson that they do not align with the position at which Mr Rayner's BMW appears to have collided with the nearside ARMCO barrier. However his opinion is that there is insufficient detail in the police photographs to identify what made the marks, and says they could be body tissue scuffs, scuffs associated with a horse's hooves or collision debris, or scuffs produced by a car's tyres. He says that if the marks are body tissue scuffs associated with Fox, they must have been made after the collision between the BMW and Fox and therefore by a different vehicle such as a VW Golf which arrived at the scene shortly after the incident.
111. Having seen photographs of the dislodged Zafira headlight, and having heard Mr Rayner in re-examination being clear that he saw a single flash of light, I do consider that it is more likely than not that: (i) Mr Rayner's recollection of the single light is reliable (as any unconscious reconstruction would be more likely to result in a belief that he saw both headlights, because a single headlight is not easy to rationalise); and (ii) that what he saw was that headlight dangling and rotating on its wire.
112. In relation to the lane that the Zafira was in pre-collision, in re-examination Mr Rayner said that he was 99% sure it was in lane one. I also consider that this evidence is reliable, as his evidence about the single light seems to show that he has a clear and reliable memory of what he saw of the Zafira before his own collision. It seems to be understandable that it is not the Zafira collision which he has been subconsciously trying to rationalise, rather his own, which was the really shocking incident from his perspective.
113. Mr Hand in closing suggests that Mr Rayner's evidence of the Zafira is not reliable, pointing to his description in his statement to police that the single headlight he saw was the "nearside" headlight. He asked him in cross-examination how he had come to the conclusion that it was a nearside light, and Mr Rayner said that was a reasonable assumption on seeing the spin. He couldn't really explain it more than that. Accordingly, when further pressed, he accepted there was no way that he could tell if what he had seen flash was the nearside or offside headlight. I have found that it is likely he saw the dangling offside headlight. However on further thought about this after the trial, it seems to me that if Mr Rayner saw and described what he saw when, he assumed, the Zafira had spun and was facing him, then it is understandable that he described the single light he saw, by its position relative to the dark bulk of the car, as the nearside light. This point was not put to Mr Rayner or canvassed with counsel at the time, but it seems to me to be logically coherent. It is only if he had appreciated

(which he clearly did not) that the dark bulk of the car was actually facing away from him, and the light was swinging on a wire, that he could reliably have described it as an offside headlight. In my judgment his description of that single headlight as the “nearside light” (i.e. on the right side of the car as he looked at it) in circumstances where he misunderstood the direction in which the car was facing makes his evidence about the Zafira’s actions before and at the point of collision more reliable, not less.

114. For those reasons I prefer his evidence to that of Mr Sabesan, whose evidence seems to be based not on a clear recall, but on how he usually drove on the A3 in the dark. I find it is more likely than not that the Zafira was in lane one when it collided with Lowri.
115. Accordingly, as Mr Dawson accepted were I to make that finding, the Zafira did not cause those curved marks across lanes one and two. I think it is more likely than not that, as Ms Evers and Mr Baker suggest, the Zafira did not rotate but continued straight on in lane one until it came to a stop. This is supported, in my view, by: (i) the absence of any damage to the Zafira’s tyres (in contrast to the BMW, which did rotate and resulted in significant separation of the tyres from the wheel rims, and damage to tyres); (ii) by the fact that neither Mr Sabesan nor Ms Al Hugail state in evidence that the car went into a spin or rotated (and I note that Mr Rayner was aware of his rotation and mentioned it in his evidence); and (iii) by the inherent improbability (although not impossibility) of a car which rotated in an accident such as this coming to rest neatly in the same lane, facing the same direction as it was at the start of the rotation.
116. I note the conflict that Mr Dawson identified between the curved marks and the trajectory of Mr Rayner’s BMW. I do not need to make a finding about what caused those curved marks but consider that Mr Baker is likely to be correct that they were caused by something other than the BMW.

*What was the position and behaviour of the horses immediately before the collision?*

117. The experts have put together a plan of the collision site indicating the location of debris, road markings, and the resting position of the various vehicles post-collision. They agree that at the point of impact both horses were upright. They agree on the likely longitudinal position of Fox, in lane three, at the point of impact [from marks in the road] but do not agree on the likely longitudinal position of Lowri.
118. Mr Dawson in cross-examination by Ms Jerram considered a red fleck in the road at police object marker 7, and agreed that it was possible that it was a red fleck of paint from the Zafira taxi, although said he could not be sure. He said that it did not necessarily prove that was the point at which the Zafira had impacted Lowri, but it was physical evidence which might assist the Court. He agreed that if the Court made that finding, that would suggest that the horses were relatively close together.
119. Mr Dawson accepted that the severest damage to the Zafira was the dishing to the bonnet, windscreen and roof, and accepted that it was likely that the heaviest part of Lowri had struck the middle of the car, and agreed that it had caused “*damage straight back, including the roof peeled back*”. A few minutes later in answer to Ms Jerram’s question in cross-examination: “What we see is a straight line of damage down the centre of the car?” he said “Yes”.

120. Ms Jerram put it to him that a 400kg horse hitting a car at 50mph, making a straight line of damage down the centre line of the car, and ending up impaled on the roof of the car, suggests that there was little lateral movement in the horse at the time that it was hit. He said “*generally, I agree but here the pattern of damage to the vehicle is quite wide, from roofrail to roofrail... so it is difficult to deduce a precise angle*”. He said that the size of the horse makes a precise line of trajectory difficult to assess, as the damage is so wide. He then noted that the roof was peeled back more on one side to the other, not straight, with the damage intrusion at roof level being much greater on the offside.
121. Mr Dawson accepted that a dark stain of fluid on the Zafira’s rear passenger door was probably blood, which was consistent with the final resting position of Lowri as described by PC Reynolds, as having her hind legs between the ‘B’ and ‘C’ pillars, and that from PC Reynolds evidence, it appeared that the hind legs of the horse had been moved forwards to enable the driver and offside rear passenger doors to be opened to access the passengers. He said that he assumed the horse had been moved as little as possible to ensure that the horse did not fall further on Ms Schoultz. He also accepted there was little damage to the Zafira on the nearside.
122. His opinion is that the pattern of damage he saw could be achievable if the horse was broadly perpendicular to the car with its rear towards the centre of the road, as Ms Evers opines, or if it was positioned at 90 degrees with its head or rear impacting first. He said “*I cannot prefer one of these orientations significantly over another*”. Although he accepted that whether or not the Zafira spun post-impact did not have a direct bearing on his opinion, saying “*It is something to be considered, it can cast some more uncertainty*”, he said that if the Court found the Zafira did not spin (as I have now found), that would not support an opinion that the horses were stationary or moving only slowly.
123. Mr Dawson explained that he was not able to opine about the lateral movement of either Fox or Lowri pre-accident, as usually it was lateral post-impact displacement which was used to calculate the pre-impact momentum. In this case, he said, he had no accurate post-impact lateral displacement information of either collision, because the trajectory of Lowri had been cut short by being caught on top of the Zafira, and the resting position of Fox had been compromised by being hit by the motorcyclist and then collided and dragged by the Citroen van.
124. Ms Evers, however, disagrees that the direction or orientation of travel of the horses, and particularly Lowri, at impact cannot be reliably discerned from the physical evidence. In cross-examination she said that she was more certain about the orientation of Lowri with regards to the Zafira than with the BMW and Fox, because Fox was collided with by other vehicles a number of times after the initial collision, and the damage pattern is less clear. However I am really concerned with Lowri.
125. With regards to Lowri, Ms Evers says that she is able to form an opinion on the balance of probabilities based on the lack of significant lateral displacement and based on the post-collision resting position of Lowri on top of the Zafira. Her evidence is that if Lowri had any significant lateral momentum, the damage to the Zafira would not progress towards the rear in a straight line but would move from side to side, and she would expect to see a diagonal or sideways pattern of damage across the car, but she does not. She opined that this would even be the case if Lowri was walking across



the carriageway at the point of impact, because her large mass would provide a large momentum even at a slow velocity of movement (and if she was moving faster than a walk her momentum would be greater still). However if Lowri was walking centrally in lane 1 so that her body was parallel to the approaching Zafira, that would not give rise to lateral momentum and would not produce a diagonal pattern of damage. Ms Evers in cross-examination said that her opinion at paragraph 4.11 of her report that at impact Lowri was orientated “close to the perpendicular” of the Zafira (which at paragraph 4.14 she described at not less than 45 and not more than 135 degrees) was reached by taking into account:

- i) where Lowri had come to rest, near enough sideways on with her front legs over the side of the Zafira between B and C pillars
- ii) with her heaviest part (hindquarters) towards the centre offside where there is also severe bonnet damage showing a very definite point of impact in the much flatter section visible on the photographs;
- iii) with a clear line of damage backwards with very little sideways movement;
- iv) with the Zafira showing cracking on the bumper consistent with hitting the front legs of Lowri and denting, scuffing and parts missing on the wing, which in her opinion was caused by a direct impact rather than induced by damage to other parts of the vehicle;
- v) That if Lowri was parallel to the Zafira at impact, presenting a narrow profile, she did not consider that would be wide enough to cause the dent in the bonnet while still causing the scuffing on the wing of the car.

126. Ms Evers was asked about the way the roof of the Zafira had been ‘peeled back’ more on the offside than the nearside, and whether that showed a diagonal pattern of damage. She said that in her opinion it did not, rather it showed that it had been pushed up from the front offside which was where the main mass of Lowri was (being the direct damage), and that had caused the induced damage forcing it up at an angle on the other. I accept that evidence which appeared to me to be rational and obvious as she explained it with the aid of the photographs.

127. There was also some discussion about post-accident movement of Lowri’s body in the process of the emergency services getting the Claimant out of the vehicle. It is clear to me there has been some, not least because the photographs I and the accident reconstruction experts have seen show the rear driver-side door open and Lowri’s front legs slightly sticking out. I bear in mind the contemporaneous description by PC Reynolds of Lowri’s position before she was moved, and that the rear legs of Lowri were moved closer to towards the front of the car.

128. I accept Ms Evers view that if we imagine that rear door closing, Lowri’s body would be closer to perpendicular as I consider that fits with the bloodstain on that door. I bear in mind the weight of Lowri, Mr Dawson’s point that the emergency services would have been careful to move Lowri as little as necessary to open the door so the weight of the horse did not drop down on Ms Schultz, and Ms Evers’ statement in cross-examination that she had considered that Lowri’s position when photographed was slightly different to her position in which she came to rest when she formed her

opinion. I find that it is unlikely that the position of Lowri was moved significantly, but that it is more likely than not that her actual resting position strengthens Ms Evers opinion rather than weakens it.

129. I found Ms Evers' evidence more thoughtful, considered and convincing than that of Mr Dawson, taking into account in a more holistic way the full evidence available. In particular I consider that she properly considered and took into account what the pattern of damage would look like if Lowri was parallel to the car, and compared that to the actual damage, and properly distinguished between direct damage and induced damage, taking into account the non-symmetrical distribution of body weight of a horse, when reaching her conclusions as to what, in her opinion, the damage profile and rest position of Lowri could tell us, in ways that Mr Dawson did not. For those reasons I accept her opinions on these points and find that Lowri was more likely than not stationary or barely moving, and broadly perpendicular to the car, standing across Lane 1 of the carriageway, when the Zafira impacted her.
130. I note that there was a good deal of discussion about the position of Fox in relation to the BMW and what that could tell us about Lowri and the Zafira, but I do not find it necessary to consider these points to reach the conclusions I have drawn.
131. As I have found that Lowri was not panicked when she was walking towards the slip road to get onto the A3, and that she was more likely than not stationary or barely moving on the carriageway immediately before impact, and because there is no evidence before me of anything that happened between these two points to frighten or panic Lowri, I find that it is more likely than not that Lowri was stationary because she was calm and did not, at that time, perceive danger. There is no evidence which would justify a finding that Lowri was frightened/panicked and only momentarily still at the point of impact, in my judgment. Mr Hand submits that she might have been frightened by headlights from approaching traffic on the other side of the carriageway, but this is a horse that spent much of her life on a field by the side of the A27, and Ms Ball's evidence is that traffic didn't concern her. I consider that submission to be unlikely.
132. I am satisfied that it is more likely than not that Lowri was stationary immediately before the impact because she was tired, and she was exploring her environment calmly, but did not perceive the threat posed by the Zafira, travelling at around 50mph, until it was within 3-5m of her and in her 'flight zone', which was too late for her to react to it before it collided with her.

## **H. Application of law to the facts**

### *Section 2(2)(b)*

133. I will deal with this first, and shortly. Mr Hand in closing said that the Claimant's factual case was that the horses were running in circumstances where they were frightened and fleeing from a perceived threat, and that if these primary facts are accepted, section 2(2) is satisfied and liability is made out. I have not accepted those primary facts.
134. My findings about Lowri's behaviour on the night of the collision do not support the Claimant's pleaded case that Lowri acted unpredictably (and 'reacted with force') in

circumstances where she was frightened/panicked. I have not found that Lowri has a dangerous characteristic which was causative of damage. I have found that she and Fox wandered calmly out of the field; found their way (probably being driven or herded before a car) to where Mr Callender saw them walking calmly; that if they had been frightened before they had calmed down as he saw them being overtaken by another car without reacting; that the car he was in caused them to speed up to a trot and then herded or drove them at a trot to the roundabout; and when it drove away, they dropped down to a walk and walked onto the A3. I have found no evidence that they were frightened or terrified or panicked on the A3 and I have found that Lowri was standing still or barely moving when she was hit. I have made no finding that she was severely frightened to the point of panic at all. The highest I have found is that she was somewhat agitated while being driven in a trot by Mr Callender's car, but she recovered quickly when it was no longer behind her.

135. Accordingly I cannot find, as the Claimant asks me to find, that the likelihood of the damage to the Claimant, or of its being severe, was due to characteristics of Lowri which are not normally found in horses except at particular times or in particular circumstances. It was due to Lowri being a large and heavy animal who was standing on a dual carriageway where she should not have been standing. Section 2(2)(b) of the Animals Act is not made out, in my judgment, and that is fatal to the claim.
136. Given that, it is not necessary for me to consider 2(2)(a) or (c). In case it is of assistance, I would have found that both limbs of section 2(2)(a) had been met, and I note that section 2(2)(c) was the subject of admissions as set out in paragraph 26 (iii) above.

## **I. Conclusion**

137. Ms Vicki Ball as owner of Lowri is not liable under s2(2) Animals Act 1971 for the Claimant's injuries sustained in that collision, and the claim against her will be dismissed. My sympathies are with the Claimant for the very frightening accident and aftermath, and for the significant injuries she received in it, and I wish her all the best for the future.
138. I thank Mr Hand KC for the Claimant and Mr Tavares KC and Ms Jerram for the First Defendant for their succinct and well-structured oral and written arguments, their careful examination of witnesses and experts, their closing notes, and the assistance they have given the Court.