

Helmets, Damages, and Waivers

Milt Toby, JD

Mandatory helmet laws for riders, damages available to a successful plaintiff in equine litigation, and liability waivers were among the topics addressed during the first day of the 25th National Conference on Equine Law in Lexington, Ky. Presented by the University of Kentucky College of Law's Office of Continuing Education, the April 28-29 conference attracted more than 180 participants from 27 states and the Netherlands.

Any lingering doubts that horseback riding is a dangerous activity were swept away by statistics presented by Minnesota attorney Katherine C. Bloomquist: Riding ranks third in the number of concussions sustained by adults; head injuries are the most common injury sending riders to the hospital; head injuries account for almost two-thirds of deaths resulting from equestrian activities; a fall from two feet can cause permanent brain damage.

Despite the obvious danger of head trauma associated with riding and some statistical evidence that properly designed and fitted helmets can reduce that risk, laws mandating the use of riding helmets are surprisingly controversial. The first state law requiring helmet use by minors was not passed until 1999 in New York. Florida followed suit last year, and some municipalities have approved local helmet ordinances. Pending legislation in Maryland and Massachusetts has stalled.

Typical objections, according to Bloomquist, include rider concerns about the appearance and comfort of helmets, traditions associated with some breeds and events, potential conflicts between helmet laws and association rules mandating specific attire in competitions, and fears that requiring helmet use violates an individual's freedom of choice. Bloomquist recommends that riders only purchase helmets certified by the American Society for Testing and Materials (ASTM) and the Safety Equipment Institute (SEI), two private groups that test and rate helmets.

A horse's fair market value is the starting point for a determination of damages resulting from injuries to the animal, or in contract and breach of warranty cases. Because horses are considered personal property everywhere, state property laws frequently limit recovery by a successful plaintiff to the animal's fair market value, also called economic damages. Theodore R. Martin, an attorney from Lexington's Greenebaum, Doll & McDonald PLLC, explained that fair market value generally is based on the price a willing buyer would pay a willing seller on the open market, but that the value can go up or down depending on factors such as pedigree, past performance, produce record, and supply and demand. The fair market value of the winner of the Kentucky Derby, for example, will be much higher after the race than it was earlier in the day.

Other types of damages that may be available to a successful plaintiff include lost profits and non-economic damages, according to April L. Neihsl from Zausmer, Kaufman, August, Caldwell & Taylor PC in Farmington Hills, Mich. Far less common than typical economic damages, an award for lost profits may be possible if the plaintiff can prove that the horse's fair market value is not adequate compensation for

the loss of the animal. Even more problematic are damage awards for the sentimental value of a horse. Non-economic damages are not available in most states as a matter of public policy. When such damages are allowed by state law, the amount of the award may be so small that attorney fees would exceed the recovery.

Waivers of liability can be an important protection for the owners and operators of an equine facility. A waiver is a contract between a service provider (the owner of a boarding farm or riding stable, for example) and a horse owner or rider in which the customer assumes the risk of being injured while participating in the activity. Assumption of the risk can insulate a service provider from liability for a participant's personal injury.

Doyce and Mary Cotton, owners of Sport Risk Consulting in Statesboro, Ga., are the authors of *Waivers & Releases of Liability*, the seventh edition of which was released this year. They explained that courts in most states "probably" will enforce a well-drafted waiver of liability. A waiver can be valuable even in states where they generally are not enforced, Mary Cotton explained, because the document can be used as evidence that an injured plaintiff actually was aware of the risks associated with participation in the activity.

While the Cottons recommended that a waiver always should be used, they emphasized that a service provider's best defense is establishment of a comprehensive risk management policy to "avoid the risk."