The Michigan Equine Activity Liability Act

Are We Galloping in Circles?

By Julie I. Fershtman

The days of transportation by horse and buggy are long behind us, but horse-related activities remain popular. There are 9.2 million horses in the United States, and 2 million people own horses.[1] A 2006 survey reported Michigan's horse population was 155,000.[2] Horses, by their nature, present risks because they are large, powerful, unpredictable animals that act on instinct. Indeed, a horse with no dangerous or aggressive history nevertheless has the potential to hurt anyone who is riding, driving, handling, or near it. Significant numbers of people, in fact, are hurt from horse-related activities. Last year, for example, 66,543 people visited hospital emergency rooms after sustaining horseback-riding-related injuries.[3] And injuries bring the possibility of litigation.

Forty-six states[4] have laws that in various ways limit or control liabilities in their equine industries. Michigan's Equine Activity Liability Act[5] (Equine Act) is among them. Though these laws differ, most of them share common characteristics and state that qualifying defendants should not be liable if an "equine activity participant" sustained injury, death, or damage from an "inherent risk" of equine-related activities, subject to enumerated exceptions. Michigan's Equine Act includes four exceptions, including providing faulty tack or equipment,[6] providing an equine and "failing to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity,"[7] and "dangerous latent conditions" of land where an equine activity takes place "for which warning signs are not conspicuously posted."[8] Most of the 46 equine activity liability laws provide similar exceptions, but Michigan's fourth Equine Act exception departs substantially from the trend. It applies when a qualifying defendant "[c]ommits a *negligent act or omission* that constitutes a proximate cause of the injury, death, or damage."[9]

In the 18 years that followed passage of the Equine Act, both the legal profession and the equine industry have debated the existence and purpose of the "negligence" exception. Some accept that an immunity law can be saddled with an exception for negligence—which was a common-law liability standard before the act's passage[10]—and assume that claims resulting from an inherent risk as opposed to negligence will be handled consistently. Some believe the negligence exception appropriately preserves recourse for human error. Some insist that the act intended only to abolish common-law strict liability.[11] Others, like this author, believe the act's negligence exception has been interpreted to improperly swallow up its immunities. This article explores whether the time has come for Michigan to join the majority of states and eliminate the negligence exception.

FAST FACTS

At common law, an ordinary negligence standard typically applied to liabilities for equine-related activities. Almost 20 years ago, Michigan's Equine Activity Liability Act took effect to limit or control liabilities in these activities.

Although Michigan is one of 46 states with equine activity liability legislation, its statute includes an exception for a "negligent act or omission that constitutes a proximate cause of the injury, death or damage."

Disagreement has arisen over whether Michigan should join the majority of states nationwide whose equine activity liability acts contain no "negligence" exception.

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Legislative History

The Equine Act had no negligence exception when introduced in the Michigan legislature in 1993 as HB 5006.[12] In its place, by comparison, was an exception for "an act of omission that constitutes *willful or wanton disregard* for the safety of the participant, and that act of omission was a proximate cause of the injury or death."[13] HB 5006 also included a fifth exception, removed from the bill before its enactment, which allowed liability for intentionally caused injuries.[14] After HB 5006 passed the House of Representatives, it proceeded to the Senate where a substitute bill deleted its "willful or wanton" exception and replaced it with an exception for a "*negligent* act or omission that constitutes a proximate cause of the injury, death, or damage." That version became the Michigan Equine Activity Liability Act, which took effect in 1995. A recent legislative analysis report suggests this negligence exception separates Michigan's Equine Act from most others nationwide; of the 46 state equine liability laws, 27 have exceptions for "willful and wanton misconduct,"[15] but Michigan is among only five states with a negligence exception.[16]

A Review of Relevant Sections of the Equine Act: The Promise of Immunities

Section 3 of the Equine Act promises liability limitations when an "equine activity participant" sustains injury from an "inherent risk of equine activity." More specifically, Section 3 provides:

> Except as otherwise provided in section 5 [the law's list of exceptions, discussed below], an equine activity sponsor, an equine professional, or another person is not liable for an injury to or the death of a participant or property damage resulting from an inherent risk of an equine activity. Except as otherwise provided in section 5, a participant or participant's representative shall not make a claim for, or recover, civil damages from an equine activity sponsor, an equine professional, or another person for injury to or the death of the participant or property damage resulting from an inherent risk of an equine activity.[17]

The Court of Appeals in *Amburgey v Sauder*[18] explained the legislative intent of the act's immunities this way: "By providing that a class of persons is not bound or obligated with regard to an

injury and by expressly disallowing claims under enumerated circumstances, the Legislature intended to grant immunity to qualifying defendants."[19] It added that "[i]t is evident that the Legislature enacted the legislation to curb litigation…."[20]

In addition, Section 2 of the act provides important definitions including "equine" (a "horse, pony, mule, donkey, or hinny"),[21] "engage in an equine activity," "equine activity sponsor," "equine professional," and "inherent risk of an equine activity." Section 4 excludes regulated horse race meetings and provides that "two persons may agree in writing to a waiver of liability beyond the provisions of this act and such waiver shall be valid and binding by its terms."[22] Section 6 requires "equine professionals" to post warning signs with specified language and to repeat this warning language in their contracts.

Caselaw Interpreting the Equine Act

Courts have addressed the Equine Act's negligence exception. In *Amburgey,* the plaintiff was invited to watch a friend take a riding lesson at the defendant's stable and helped groom the horse afterward. Later, she walked down a barn aisle when a horse named Justin lunged its head from a stall door and bit her. Her lawsuit pled strict liability, but the trial court held that the Equine Act barred this claim. Affirming dismissal, the Michigan Court of Appeals noted that the plaintiff qualified as an "equine activity participant" and her injuries resulted from an "inherent risk of an equine activity."[23] It stated that "if a participant's injuries result from an inherent risk of an equine activity, the participant may not make a claim for damages against an equine professional."[24] The court suggested the act was intended to protect people from risks that fall outside of an equine's normal behavior:

> It is clear that the risks immunized by the EALA include more than those flowing from an equine's normal or anticipated behavior. Thus, whether [the horse] was acting normally when plaintiff was injured is not determinative of whether the risk leading to plaintiff's injury is included within the scope of the EALA. The statute recognizes that an equine may behave in a way that will result in injury and that equines may have unpredictable reactions to diverse circumstances—precisely one of the guiding motivations for limiting the liability of equine professionals.[25]

Although the plaintiff sought leave to amend to add a negligence claim in response to the dispositive motion, the trial court denied it and the appellate court affirmed. Neither court addressed the viability of a negligence claim on the merits.

Even passengers being led on a horse have been denied claims because of inherent risk. In *Mounts v Van Beest,*[26] an unpublished decision, the plaintiff rode a defendant's horse with no saddle or bridle while a co-defendant led the horse using a long lead rope. The horse bucked and the plaintiff fell. Both the trial and appellate courts agreed the plaintiff was a "passenger on an equine" who was subject to the Equine Act, and both courts recognized that a horse bucking constituted an "inherent risk of an equine activity." Although the plaintiff's complaint included several negligence claims and claims under the Equine Act's exceptions, the trial court dismissed the case and the appellate court affirmed. Its opinion stated, in part, that the Equine Act "bars negligence suits based on the theory that a person in a position to control a horse has a special duty to prevent it from acting in a manner that may result in injury to a passenger…."[27]

Courts have dismissed claims when a release was signed. *Cole v Ladbroke Racing Michigan, Incorporated*[28] did not address the negligence exception, but negligence claims were pled. The plaintiff in this case was a licensed exercise rider of thoroughbred racehorses who fell during a ride when a horse was spooked by a kite or piece of plastic in a nearby tree. The Michigan Court of Appeals dismissed the case based on the Acknowledgment and Assumption of Risk form the plaintiff signed before the incident.

Another release was at issue in *Terrill v Stacy.*[29] The plaintiff was thrown from a horse at the defendant's facility when the horse suddenly bolted and a bit broke. She alleged, among other things, that the stable violated the Equine Act's "faulty tack or equipment" exception and that the stable negligently failed to inspect the bit. The trial and appellate courts found that the release barred her claims[30] and that leave to amend to add a gross negligence claim was properly denied.[31]

Gardner v Simon[32] was a federal court case applying the Equine Act. The defendant allowed the plaintiff to ride a horse named Nick, but the horse reared and fell over. Although the defendant's motion for summary judgment argued that an "inherent risk of equine activity" caused the plaintiff's injuries and the case should be dismissed on that basis, the court denied the motion because the plaintiff asserted claims under the act's negligence exception, and evidence existed that the defendant negligently failed to warn that the horse had a known history of throwing other riders and rearing while being ridden.

More recently, *Beattie v Mickalich*[33] addressed the interplay between the Equine Act's immunity provisions and the scope of its

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negligence exception. In *Beattie,* the plaintiff was injured while helping the defendant saddle a horse named Whiskey that was described as "green broke," but the horse allegedly reared up and injured her. The lawsuit alleged claims under the act's negligence exception. The trial court dismissed the case based on the act, and the Michigan Court of Appeals affirmed. In doing so, it reconciled the act's list of exceptions in Section 5 with the immunities in Section 3 and suggested that the negligence exception was not intended to swallow up the immunities. As to whether claims under the act's negligence exception could be viable, the Court held that this could occur only if the action or omission involves something other than inherently risky equine activity.

A divided Michigan Supreme Court reversed. The majority held that the Equine Act did not abolish negligence claims against horse owners, and a plaintiff has no obligation to plead a claim in avoidance of the act's negligence exception. Justice Young, joined by Justices Weaver and Corrigan, wrote a separate opinion concurring in part and dissenting in part, which appears to recognize the act's circularity in simultaneously granting qualified immunities yet eviscerating them through a negligence exception. Justice Young questioned whether the Equine Act was enacted purely to eliminate strict liability.[34] He also wrote, in part, that it should allow negligence claims involving a negligent act or omission beyond the inherently risky equine activity:

> I agree with the Court of Appeals that MCL 691.1665(d) [the "negligence" exception] cannot be construed as broadly allowing general negligence claims without completely eviscerating the entire concept of limited liability under the [Equine Act]. MCL 691.1665 must be read in conjunction with MCL 691.1663 to give effect to the act as a whole. Giving effect to both provisions, the Court of Appeals correctly interpreted the exception of MCL 691.1665(d) as involving "human error" "not within the gamut of 'inherent[ly] risk[y]…equine activity.'"[35]

Justice Markman, joined by Justice Kelly, wrote a separate opinion concurring with the majority and responding to the dissent. He wrote that the Equine Act's immunities cannot be read "too broadly":

> It is uncontested that plaintiff was a "participant" "engage[d] in an equine activity" when she was injured. The issue is whether plaintiff's claim fits within the "negligent act or omission that is a proximate cause of the injury" exception of the [Equine Act]. The Court of Appeals correctly held that the [Equine Act] does not provide blanket immunity to a horse owner. However, I believe that it read the immunity that [Equine Act] does provide too broadly.[36]

The divided Supreme Court in *Beattie* reflects the differing interpretations and opinions involving the scope of the Equine Act's immunities and its negligence exception. In this author's opinion, the act's negligence exception should be eliminated and replaced with a "willful *and* wanton" or "willful *or* wanton" exception, as HB 5006 originally proposed 20 years ago, for four reasons.

First, this amendment would put Michigan in line with approximately 27 state equine acts[37] that have "willful/wanton" exceptions instead of "negligence" exceptions, including Ohio,[38] Illinois,[39] Wisconsin,[40] Massachusetts,[41] and Colorado.[42]

Second, an amendment of this type would not create an unduly stringent liability standard; robust litigation exists in other states with willful/wanton misconduct exceptions in their equine acts.[43]

Third, this amendment would not disturb the Michigan Equine Act's three other exceptions of faulty tack or equipment, providing an equine and "failing to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity," and "dangerous latent conditions of land."[44] The "reasonable and prudent efforts" exception generates much of the equine liability litigation nationwide.[45]

Fourth, this amendment would offer meaningful protection to Michigan's equine industry.[46]

Conclusion

Disagreements remain concerning whether the current Equine Act is unduly circular—neutering promised immunities—and no

consensus has been reached over the need for reform. Since 2003 and earlier this year,[47] bills were introduced in the Michigan legislature to eliminate the Michigan Equine Act's "negligence" exception and replace it with a "willful/wanton" exception comparable to HB 5006 when first introduced. The Michigan Association for Justice and the State Bar of Michigan Negligence Law Section have opposed these efforts, however. Debate is certain to continue. ■

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ENDNOTES

1. American Horse Council Foundation, The Economic Impact of the Horse Industry on the United States (Deloitte Touche: 2005), p 10.
2. USDA, 2007 Michigan Equine Survey, available at <http://www.nass.usda.gov/Statistics_by_State/Michigan/Publications/Michigan_Rotational_Surveys/equine07/equine.pdf> (accessed November 9, 2013).
3. US Consumer Product Safety Commission, National Electronic Injury Surveillance System Data Highlights—2012, available at <http://www.cpsc.gov/Global/Neiss_prod/2012NeissDataHighlights.pdf> (accessed November 9, 2013).
4. As of July 2013, all states except California, Maryland, Nevada, and New York have enacted some form of an equine activity liability statute. All of them differ but many share common characteristics.
5. MCL 691.1661 *et seq.*
6. MCL 691.1665(a).
7. MCL 691.1665(b).
8. MCL 691.1665(c).
9. MCL 691.1665(d) (emphasis added). This article refers to this as the "negligence exception."
10. In this author's opinion, the liability standard involving horses before the Equine Act's enactment included theories of strict liability or negligence. See, for example, *Trager v Thor,* 445 Mich 95, 105–106; 516 NW2d 69 (1994) ("In assessing whether duty exists in a *negligence* action of this type, it is necessary to keep in mind the normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which the defendant has knowledge.").
11. Lundberg, *A Horse With No Blame,* Michigan Lawyers Weekly, May 3, 2010, vol 24, no 25, pp 1, 20.
12. HB 5006.
13. HB 5006, § 4(d).
14. HB 5006, § 4(e).
15. HB 5006, § 4(e).
16. House Legislative Analysis, HB 4126, March 5, 2013.
17. MCL 691.1663.
18. *Amburgey v Sauder,* 238 Mich App 228; 605 NW2d 84 (2000).
19. *Id.* at 233.
20. *Id.* at 246, citing House Legislative Analysis, HB 5006, December 21, 1994.
21. MCL 691.1662(b).
22. MCL 691.1664 and MCL 691.1664(2).
23. *Amburgey,* 238 Mich App at 246. Interestingly, the plaintiff in *Amburgey* sued for strict liability, but the trial court held that such claims were rendered obsolete by the Equine Act and dismissed the claims, denying plaintiff leave to amend to add a "negligence claim." The Court of Appeals did not disturb that ruling.
24. *Id.* at 233.
25. *Id.* at 237.
26. *Mounts v Van Beeste,* unpublished opinion per curiam of the Court of Appeals, issued August 3, 2004 (Docket No. 243155). This author represented a defendant in that case.
27. *Id.* at *8.
28. *Cole v Ladbroke Racing Michigan, Inc,* 241 Mich App 1; 614 NW2d 169 (2000).
29. *Terrill v Stacy,* unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 265638). As noted in footnote 18, *supra,* MCL 691.1664(2) provides that people can execute waivers of Equine Act claims.
30. In it, plaintiff agreed to "release and forever discharge [defendants]…from any and all claims and demands of every kind, nature and character…." *Id.* at *2.
31. *Id.* at *8.
32. *Gardner v Simon,* 445 F Supp 2d 786 (WD Mich, 2006).
33. *Beattie v Mickalich,* 486 Mich 1060; 784 NW2d 38 (2010).
34. *Id.* at 1064 (Young, J, concurring in part and dissenting in part).
35. *Id.* at 1063–1064.
36. *Id.* at 1061 (Markman, J, concurring).
37. Legislative Analysis, HB 4126, March 5, 2013, p 2.
38. Ohio's Equine Act states that immunities "from tort or other civil liability" are forfeited in circumstances that include, among other things, "An act or omission of an equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person constitutes a *willful or wanton disregard for the safety of an equine activity participant* and proximately causes the harm involved." Oh Rev Code Ann § 2305.321(B)(2)(d).
39. An exception within the Illinois Equine Act provides that liability is not limited if the defendant "commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission caused the injury." 745 Ill Comp Stat 47/20(b)(4).
40. Wisconsin's Equine Act states that immunities do not apply if the person seeking them "(d) acts in a willful or wanton disregard for the safety of the person." Wisc Stat § 895.481(3)(d).
41. The exception within the Massachusetts Equine Act states that immunities would effectively be forfeited if the defendant "commits an act of omission that constitutes willful or wanton disregard for the safety of the participant, and that act of omission caused the injury…." Mass Gen Laws ch 128 § 2D (c)(3).
42. The exception within Colorado's Equine Act, Colo Rev Stat § 13-21-119, applies if the defendant "[c]ommits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission caused the injury…."
43. See, e.g., *Teles v Big Rock Stables,* LP, 419 F Supp 2d 1003 (ED Tenn, 2006) (holding that the plaintiff's claims could proceed under the Tennessee Equine Act's alleged "willful and wanton misconduct" exception); *Johnson v Smith,* 88 SW3d 729 (Tex App, 2002) (holding that issues of fact existed involving plaintiff's claims under the "willful and wanton misconduct" exception of the Texas Equine Act); *Svacha v Waldens Creek Saddle Club,* 60 SW3d 851 (Tenn App, 2001); *Adams v Hare,* 536 SE2d 284 (Ga App, 2000); *Vilhauer v Horsemens' Sports, Inc,* 598 NW2d 525 (SD, 1999) (South Dakota Supreme Court held that its Equine Act allowed litigation for "willful and wanton disregard"); *Faul v Trahan,* 718 So2d 1081 (La App, 1998); *B & B Livery, Inc v Riehl,* 960 P2d 134 (Colo, 1998) (holding that claims of "willful and wanton/gross negligence" could not be released away); *Swartzentruber v Wee-K Corp,* 690 NE2d 941 (Ohio App, 1997) (a pre-Ohio Equine Act case, the court held that a release could not bar claims of "willful, wanton, and malicious misconduct.").
44. MCL 691.1665(a)–(c).
45. See, e.g., *Loftin v Lee,* 341 SW3d 352 (Tex, 2011); *Pinto v Revere-Saugus Riding Academy, Inc,* 907 NE2d 259 (Mass App, 2009); *Lawson v Dutch Heritage Farms, Inc,* 502 F Supp 2d 698 (ND Ohio, 2007); *Barritt v Lowe,* 669 NW2d 189 (Wisc App, 2003); *Fielder v Academy Riding Stables,* 49 P3d 349 (Colo App, 2002).
46. The court in *Amburgey* discussed, in part, the need to protect Michigan's equine industry through equine activity liability legislation and stated that "according to a 1993 article in the *Detroit Free Press,* insurance carriers stopped writing policies for horse rental operations from 1985 to 1988." *Amburgey,* 238 Mich App at 245.
47. SB 779; SB 738; HB 4867; HB 4126.