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The Association of Lawyers for Animal Welfare

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Editor's note

A common theme in this edition of the Journal of Animal Welfare Law is balancing animal welfare against other concerns.

Gareth Spark reviews the case for introducing legal liability in a currently unprotected area which amongst other things sets property rights against animal protection. David Thomas discusses the findings of the Appellate Body of WTO and the challenge raised against the EU's prohibition on the trade in seal products based on such factors as economic and cultural rights. John Cranley describes the welfare implication of religious consumer freedom in relation to religious slaughter from a veterinary perspective.

In addition, there is a useful article from Alexander Stoll and others providing an introduction to veterinary forensic science and its value in animal cruelty prosecutions. Liz Tyson takes a critical look at the workings of the regulatory provisions regarding wild animals in circuses in the UK and Ireland. There is also a detailed case analysis by Barbara Bolton and my grateful thanks go to Daniel Brandon and Lauren Stone for providing further case material.

Jill Williams
Editor

Analysing the Arguments For and Against Legal Liability For Killing an Animal Without Proof of Unnecessary Suffering

Dr Gareth Spark[1]

1. Introduction

For over a century, the law has prohibited unreasonable infliction of unnecessary suffering on non-wild animals.[2] For example, section 1(1)(a) of the Protection of Animals Act 1911 rendered it a criminal offence to cause unnecessary suffering to a protected animal by 'wantonly or unreasonably doing or omitting to do any act'.[3] However, no animal protection legislation has ever explicitly rendered it an offence to kill a non-wild animal when it could not be proved that the animal suffered unnecessarily before death.[4] It is explained below that the cruelty offence under section 1(1)(a) of the 1911 Act was expressly held not to apply to killing an animal without proof that the animal suffered unnecessarily before death. Crucially, suffering did not include suffering loss of life; physical or mental suffering whilst the animal was alive was required before the offence could be committed. If a person engaged in actions which led to the death of an animal in circumstances in which it could not be proved that the animal suffered before death, she would not be guilty of the offence, no matter how wanton or unreasonable her actions might have been. Although it is explained below that property law principles can be utilised to render a person criminally and/or civilly liable for killing an animal belonging to another, without need for proof of suffering, they can have no effect against killing done by or with the consent of an animal's owner. The Animal Welfare Act 2006 (AWA) has repealed and replaced most of the 1911 Act, including the section 1 offences, and has even established a legal duty on those responsible for an animal to take reasonable steps to provide for the animal's needs. However, it is argued below that this Act has not rendered it an offence to kill an animal without proof of unnecessary suffering. Therefore, an owner remains free to kill, or authorise others to kill, her animals, for whatever reason she chooses; no one can be liable for killing a non-wild animal, for any reason, if the owner consents; liability can only attach if it is proved that the animal suffered before death.

> **no animal protection legislation has ever explicitly rendered it an offence to kill a non-wild animal**

This article first considers the extent to which the law protects non-wild animals' lives, by imposing sanctions for killing even when it is not proved that the animal suffered. The article then analyses whether a new

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[2] For the purposes of this article, 'non-wild animals' refers to animals of a commonly domesticated species, animals which are under the permanent or temporary control of some person and animals not living in a wild state. This mirrors the definition of 'protected animal' under Animal Welfare Act 2006, s 2.

[3] The offence applied to any animal 'which is tame or which has been or is being sufficiently tamed to serve some purpose for the use of man…[or] which is in captivity, or confinement, or which is maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement': Protection of Animals Act 1911, s 15.

[4] Conservation legislation, such as, e.g., the Wildlife and Countryside Act 1981, places limits on the killing of wild animals, but it does not apply to animals lawfully under human control and is primarily concerned with preserving species populations rather than with protecting individual animals. e.g., Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (OUP, 2001), 79; Robert Garner, *Political Animals* (MacMillan, 1998), 41.

offence[5] of unjustified killing, which would apply (i) without need for proof of suffering and (ii) to killing by an owner and one acting with an owner's consent, should be adopted. When killing will be (un)justified for these purposes is considered below.

Although the apparent incongruity of the law protecting animals from unnecessary suffering but not protecting them from unjustified killing has been noted by Radford,[6] and although there are a number of works considering animal welfare law, animal rights law and/or the ethical dimensions of animal protection and animal rights,[7] the issues addressed in this article have never been considered in depth. Nonetheless, it is contended that they are important issues to analyse, affecting both the protection the law affords animals and the question of how the law should balance people's rights and freedoms (particularly the rights and freedoms of owners of animals) with animal protection.

In addressing the degree to which the law protects animals' lives themselves, without need for proof of suffering, it is necessary to consider criminal and civil property law principles as well as animal protection legislation. After the current law has been analysed, whether the law should prohibit unjustified killing of animals, without the need for proof of suffering, is addressed. Before addressing either of these issues, it is important to consider the historical development of animal protection law in England, to determine how it reached the position of protecting animals from unnecessary suffering but not protecting them from even unjustified killing unless it could be proved that they suffered before death.

2. The Historical Development of Animal Protection Law

As Radford notes,[8] the historical attitude towards animals in Western society was based upon the concept of man's dominion over the lower creatures. Thomas explains that, 'in the early modern period…[f]or most persons beasts were outside the terms of moral reference.'[9] As legislation which would have had the effect of protecting animals began to be proposed, it was put forward for the purpose of protecting human society by maintaining public order and promoting the morals of man. For example, Bills introduced into Parliament in the early 1800s sought to prohibit animal-baiting and -fighting and to offer some basic general protection for animals. These measures were, however, primarily justified on the basis that animal-baiting and -fighting caused much

> **witnessing cruelty to animals tended to lower the morals of those involved and led to violence towards people**

public disorder and that inflicting and/or witnessing cruelty to animals tended to lower the morals of those involved and led to violence towards people.[10]

As scientific evidence began to establish that animals were capable of experiencing pleasure and pain, attitudes towards them began to develop; people began to be concerned to protect animals for the animals' sake, and arguments in favour of protection were based also upon animal sentience. These developments inevitably led to a focus on limiting people's freedom to inflict suffering on animals, even animals which they owned and which they had, thus, previously been free to treat as they wished.[11] As the law developed, it was recognised that limiting people's freedom to inflict suffering upon animals was not necessarily incompatible with man's dominion over the lower creatures. It was argued instead that such limitations were a recognition that the 'dominion [was] a moral trust'.[12] This reasoning implicitly accepted that people were entitled to use animals for their own purposes, but

[5] S 4 AWA imposes criminal liability for acting or failing to act so as to inflict unnecessary suffering on a protected animal, when one knew or should have known that this would be, or would be likely to be, the consequences of one's act/omission. S 9 AWA renders it a criminal offence unreasonably to fail to provide for the needs, according to good practice, of an animal for which one is responsible. It is argued below that, if liability for unjustified killing is to be imposed, it should require proof of intentional or reckless killing. A *mens rea* of intention or recklessness requires greater mental blameworthiness than (i) actual or constructive knowledge that one's actions are at least likely to cause the prohibited harm and (ii) an unreasonable failure. Moreover, the prohibited harm (death) is likely to be at least as severe as the harm of unnecessary suffering and deprivation of an animal's needs. (T Regan, *The Case for Animal Rights* (2nd edn., University of California Press, 2004), 100) argues that 'death is the ultimate harm…[but] it may not be the worst harm there is', as prolonged severe suffering can be a greater harm.) Therefore, it is contended that, if liability is to be imposed for unjustified killing, it should *prima facie* be criminal, to fit with the existing scheme of animal protection law and to reflect the seriousness of the *mens rea* and *actus reus*. (cf, Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 OJLS 207.)

[6] Radford (*supra* note 3), 243-244.

[7] See, e.g., *ibid*.; Gary Francione, *Animals, Property and the Law* (Temple University Press, 1995); Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus, 2000) and *Drawing the Line: Science and the Case for Animal Rights* (Perseus, 2002); Peter Singer, *Animal Liberation* (2nd edn., Pimlico, 1995); Regan (*supra* note 4).

[8] Radford (*supra* note 3), 15-95.

[9] Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500-1800* (Penguin, 1983), 148. For general discussion of modern thinking on ethical issues related to human treatment of animals, see, e.g., Lori Gruen, *Ethics and Animals: An Introduction* (CUP, 2011) and Regan, (*supra* note 4).

[10] Radford (*supra* note 3), 33-35. See also, Richard Martin, MP (HC Deb vol 12 col 657, 24 February 1825), William Smith, MP (HC Deb vol 12 col 1009, 11 March 1825) and Sir Francis Burdett, MP (HC Deb vol 12, col 1013, 11 March 1825). As Radford (*supra* note 3, e.g., pp 33-59) notes, those arguing in favour of the Bills were generally concerned to protect animals for the animals' sake but recognised that there was a need also to focus on human-centred benefits, to garner widespread support for the measures.

[11] See, e.g., Lord Erskine's Cruelty to Animals Bill, discussed by Radford (*supra* note 3, 35-38).

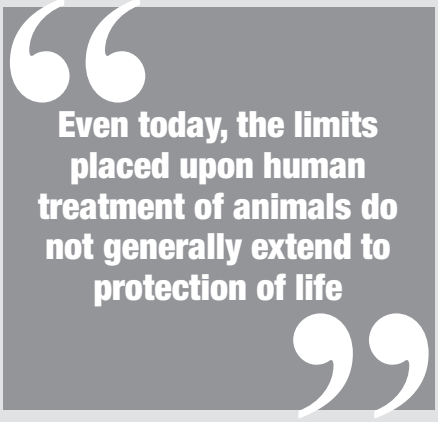
[12] HL Deb vol 14 col 554, 15 May 1809, per Lord Erskine.

that there should be limits to the negative consequences which could be inflicted upon animals in satisfying these purposes. As Lord Erskine put it, animals 'are created indeed for our use, but not for our abuse.'[13] Similarly, Richard Martin, MP, argued that animals 'were entitled, so far as was consistent with the use which was given to [men] over the brute creation to be treated with kindness and humanity.'[14]

The notion that people were free to use animals for their own purposes, with the role of the law being to impose limits on the negative consequences which could be inflicted upon animals in seeking to achieve these purposes, supports the idea that the law was not concerned with protecting animal life *per se*. For millennia, society had accepted the killing of animals for human goals; the law stepped in to regulate the treatment of animals during their lives, but it did not seek to prohibit killing itself. Even today, the limits placed upon human treatment of animals do not generally extend to protection of life *per se*. Millions of animals are killed annually for food, in scientific research, hunting or shooting, or for disease or pest control. There are important legal protections for such animals,[15] but the majority of society accepts that it is legitimate for animals to be used and killed for certain human purposes.[16]

The law's apparent lack of concern for killing itself is illustrated by the courts' interpretation of section 1(1)(a) of the Protection of Animals Act 1911. Case law in both England and Scotland established that killing an animal, without proof that one's actions caused the animal to suffer before death, did not satisfy the elements of this offence. In Scotland, the offence was embodied in section 1(1)(a) of the Protection of Animals Act (Scotland) 1912. The cruelty offences under the Scottish version of the Act were, however, identical to the English Act. In *Patchett v. Macdougall,* the defendant shot and killed a dog with a semi-automatic twelve-bore shotgun, and the Scottish High Court accepted 'that he did so wantonly and unreasonably' and that, if it had been proved that suffering had been caused to the dog, the defendant would have been guilty of the offence.[17] However, the sheriff who heard the case at first instance made no finding as to whether the dog had been killed instantly, without suffering, or had suffered before death. Therefore, the Court held that the offence had not been proved.

In the English case of *Isted v. CPS*,[18] the Divisional Court implicitly applied the same reasoning. In this case, the defendant shot and injured, but did not kill, a dog who had allegedly been worrying livestock kept by the defendant. At trial, the Justices convicted the defendant of the section 1(1)(a) offence under the 1911 Act but stated that, if 'the dog had been killed and had there been evidence to show that she had not suffered unnecessarily we would not have found the case proved'. The defendant argued that, if no offence would be committed if a person killed an animal outright, with no proof of suffering, it would be inappropriate to hold that an offence is committed if the animal does not die but experiences (potentially minor) suffering, when all other facts are identical. As such, he argued that the Justices' statement demonstrated that they had held that the action of shooting the dog to get it away from the livestock had been reasonably necessary and thus could not have amounted to wanton or unreasonable infliction of unnecessary suffering. The Court held that, whilst there was logical force to the argument that it might seem inconsistent to hold that the offence is not committed if an animal dies outright but is committed if the animal experiences minor suffering, the distinction was explicable if one accepted that loss of life did not itself amount to suffering for the purpose of the offence. Indeed, in *Patchett v. Macdougall,* Lord Wheatley expressly stated that '[t]he purpose of the statute generally is to protect animals from cruelty. The purpose of [section 1(1)(a)] is to prevent any unnecessary suffering to animals'. His Lordship then accepted the dictionary definition of suffering as '[t]he bearing or undergoing of pain' and rejected the argument that suffering loss of life would fall within the offence, asserting that 'the…purport of the Act [does not open] the door to that view'.[19]



It can be seen that, whether for the sake of animals or for human society,

[13] *ibid.*, c 555.

[14] HC Deb vol 10 col 487, 26 February 1824.

[15] See, e.g., the AWA, the Welfare of Farmed Animals (England) Regulations 2007 and the Animals (Scientific Procedures) Act 1986.

[16] cf, Francione (*supra* note 6).

[17] (1984) SLT 152.

[18] [1998] Crim LR 194.

[19] *Supra* note 16, 153.

the law has historically been concerned to protect animals from suffering which was deemed unnecessary, but it has not sought to protect animal lives themselves. Indeed, it has always been perfectly legal to kill an animal for a reason which society deems to be legitimate, such as farming, scientific research, hunting, shooting and disease and pest control, provided that the killing is performed in accordance with the particular rules regulating the relevant activity. The mere fact that society accepts as legitimate the killing of animals for certain human goals does not, however, suggest that animals' lives should not themselves be valued and protected by the law. The law did not (under the Protection of Animals Act 1911), and does not (under the AWA), actually prohibit causing suffering to animals; it prohibits (unreasonably) causing *unnecessary* suffering. Similarly, whilst the lawful large-scale killing of animals for farming, scientific research, hunting, shooting and disease and pest control establishes that the law does not universally protect animals' lives above human interests, these activities involve killing animals for human purposes which are deemed legitimate. The law could still prohibit killing animals in the absence of legitimate justification without departing from the fundamental notion that humans are entitled to use animals for our own ends. Indeed, Fudge suggests that, even in the early ethical considerations of animals, it was generally 'acceptable to kill animals for [human] use…, [but] animals [were] not to be…killed for no practical reason.'[20] Whilst the historical development of societal attitudes towards animals therefore explains the interpretation of the Protection of Animals Act 1911 adopted in *Patchett v. Macdougall* and *Isted v. CPS,* whether the position to which it led was, and remains, appropriate is a different question. If the defendant in *Patchett* had been found guilty, this could have been justified on the basis, not that killing an animal is prohibited *per se,* but on the basis that the court had found the defendant's conduct to be wanton and unreasonable, such that the killing was unjustified. Of course, as a matter of statutory interpretation, this would have required the court to hold that 'suffering' included suffering loss of life, and it is accepted that, given the development of animal protection law in the UK noted above, this probably would not have reflected the will of Parliament. The point is not that the cases wrongly established that killing without causing suffering did not amount to an offence under section 1(1)(a); as a matter of statutory interpretation, they can certainly be justified on this point.[21] However, it can also be argued that there would have been nothing, and still is not anything, inconsistent with the development of society's attitudes towards animals in holding that unjustifiably killing an animal, without causing suffering, is legally prohibited. This, of course, is not sufficient to establish that an offence of unjustified killing, without proof of suffering, *should* be adopted; much more is needed in order to analyse the legal, practical and moral dimensions of the debate. Nonetheless, the preceding analysis does establish that liability for unjustified killing itself would not require a fundamental shift in society's attitudes towards animals. Indeed, in the next section, it is explained that property law principles can be utilised to impose liability for killing an animal, without the consent of the animal's owner, regardless of suffering. This could be argued to demonstrate that the law is concerned to protect animal lives themselves. Yet it is contended below that the law's true concern in such cases is protection of an owner's property rights, not protection of an animal's life.

The law did not (under the Protection of Animals Act 1911), and does not (under the AWA), actually prohibit causing suffering to animals

3. Property-based Liability for Killing an Animal without Proof of Suffering

a) Introduction

Although the courts in *Patchett v. Macdougall* and *Isted v. CPS* held that killing an animal without causing suffering was not an offence under section 1(1)(a) of the Protection of Animals Act 1911 or Protection of Animals (Scotland) Act 1912, both courts stressed that this did not mean that, in such cases, a defendant cannot be guilty of a criminal offence. In Patchett, their Lordships suggested that the defendant would have been guilty of the Scottish Common Law offence of malicious mischief had he been charged with that offence. In Isted, although the defendant was guilty because the evidence established that the dog suffered, Brooke LJ stated that, had the defendant killed the dog outright, without proof of suffering, 'he would have been liable to be convicted of an

[20]Erica Fudge, 'Two Ethics: Killing Animals in the Past and the Present', in *Killing Animals* (University of Illinois Press, 2006), 109

[21]E.g., Radford (*supra* note 3), 244.

offence under Section 1(1) of the Criminal Damage Act 1971', subject to the potential defences under section 5 of that Act.[22] Indeed, the status of an animal as property ensures that, if a person kills another's animal, she will have committed an act of property damage/destruction, thereby potentially being criminally and civilly liable. As Garner notes, it has been suggested that, 'due, in particular, to their status as property, [animals'] interests are almost always overridden in favour of the promotion of human interests.'[23] Yet, in this instance, the status of animals as property[24] is capable of offering some legal protection.

First, the offence of criminal damage is considered. Thereafter, liability in tort, under the principles of conversion, negligence and trespass to goods, is analysed. Finally, the potential defence, under section 9 of the Animals Act 1971, to civil liability for killing or injuring a dog is discussed.

b) Criminal Damage

Section 1(1) of the Criminal Damage Act 1971 renders it an offence intentionally or recklessly to damage or destroy property belonging to another, without lawful excuse. Under section 10 of the Act, 'property' includes all tangible property. As it has for centuries been clear that animals can be property,[25] any animal which is owned by another clearly falls within the scope of the section 1(1) offence.[26] Therefore, if A intentionally or recklessly kills an animal belonging to B, she *prima facie* commits the section 1(1) offence, subject to the section 5 lawful excuse defences, regardless of whether it can be proved that the animal suffered.[27] A person has a lawful excuse, first, under section 5(2)(b) of the Act, if she destroyed or damaged property in order to protect property (or a right or interest in property) belonging to herself or another, honestly believing '(i) that the property, right or interest was in immediate need of protection; and (ii) that the means of protection…were…reasonable having regard to all the circumstances.' Second, under section 5(2)(a), if she damaged or destroyed the property honestly believing that she (i) had the consent of the person(s) she honestly believed was/were entitled to consent to the damage or destruction, or (ii) would have had such consent if the relevant person(s) had known of the circumstances.

Isted v. CPS illustrates what is probably the most common situation in which the former defence might apply to killing another's animal. In this case, the dog which was shot had allegedly been worrying livestock. If A intentionally or recklessly kills an animal belonging to B in order to protect livestock (or other property), she can argue that she destroyed B's property in order to protect other property. In order to succeed, she would have to prove that she honestly believed (i) that the livestock (or other property) was in immediate need of protection and (ii) that the actions she took which killed the animal were reasonable.

"if a person kills another's animal, she will have committed an act of property damage/destruction"

As for the latter defence, A would not be guilty of criminal damage if she killed B's animal honestly believing that B (or any person A honestly believed to be the owner or to have authority to consent on the owner's behalf) consented or would have consented to her actions. The section 1(1) offence therefore offers no protection for an animal if the owner(s) consent(s) to the killing, or even if the defendant honestly believed that he, she or they consented or would have consented. The offence can also only be committed by intentional or reckless damage or destruction of property *belonging to another;* if the sole owner of an animal kills the animal, she cannot be guilty of a section 1(1) offence. Accordingly, liability on the basis of criminal damage (or, as is explained further below, property law generally) offers very little, if any, protection for an animal against actions done by, or with the consent of, the owner. So far as property law is concerned, it is still largely true that 'the owner himself [can] treat [his animals] howsoever he please[s], and authorize his employees[28] likewise'.[29]

c) Tortious Liability

It is difficult to define the tort of conversion, but, broadly speaking, anyone who, without lawful justification,[30] intentionally does to property any act inconsistent with the rights of an owner, depriving

[22] *Supra* note 17, 195.

[23] Garner (*supra* note 3), 13. See, e.g., Francione (*supra* note 6).

[24] If an animal is not owned by someone, criminal or civil liability for property damage is not possible.

[25] E.g., *Blades v. Higgs* (1865) 11 ER 1474; Radford (*supra* note 3), 28-30.

[26] An animal of a wild species cannot amount to property for the purpose of the Act if living in a truly wild state and not at least 'in the course of being reduced into possession': Criminal Damage Act 1971, s.10(1)(a).

[27] E.g., Radford (*supra* note 3), 244.

[28] Or anyone else.

[29] Radford (*supra* note 3), 101.

[30] E.g., *Lancashire & Yorkshire Railway v. MacNicoll* [1918] All ER Rep 537, 539, per Lawrence J.

that owner of her dominion over the property, is liable under this tort.[31] It is abundantly clear that there is no need to prove intent to interfere, or actual or constructive knowledge that the actions will interfere, with the rights of another.[32] Taking another person's animal so as to deprive her of possession or use of the animal is clearly capable of amounting to conversion.[33] Likewise, killing another's animal must be capable of amounting to conversion, as the act is clearly inconsistent with the rights of the owner, effectively destroying, and depriving the owner of any possession or use, of the property as an animal. Therefore, if a person intentionally does to an animal belonging to another an act which kills that animal, without lawful justification[34] or the other's consent, she will be liable in conversion.

In negligence, A is liable if she unreasonably causes damage to B's person or property when it was reasonably foreseeable that her actions might cause such loss to a person of a class to which B belonged, there is sufficient proximity between A and B, and it is fair, just and reasonable for there to be a duty of care.[35] Therefore, if A engaged in unreasonable actions which killed B's animal, when it was reasonably foreseeable that her actions might injure or kill an animal belonging to another, she will *prima facie* be liable in negligence, subject to proximity and policy considerations. If it was reasonably foreseeable that A's actions might kill an animal belonging to another and those actions were unreasonable and directly caused the death of B's animal in a reasonably foreseeable way, lack of proximity and other policy considerations would not normally prevent liability. The notable potential exception to this is if A accidentally killed the animal whilst performing lawful actions in a place in which she had the right to perform those actions when the animal was not permitted to be there. In these circumstances, it could be argued that it would not be fair, just and reasonable for A to owe a duty to the animal's owner. For example, if (i) A was shooting (or performing any other actions) on land on which the animal killed was allowed to be, (ii) it was reasonably foreseeable that an animal belonging to another might be killed as a result of her actions, and (iii) those actions were deemed unreasonable, there would be no sound reason for the law not to accept a duty of care. A would be liable in negligence. Conversely, if A unreasonably killed B's animal whilst lawfully doing something on land on which the animal killed was not allowed to be, it could be argued that it would not be fair, just and reasonable to deem that she owed a duty of care to B, even if her actions were unreasonable and it was reasonably foreseeable that those actions might kill an animal belonging to another.

> **a person will be liable unless the damage 'may be judged utterly without his fault'**

A person will be liable in trespass to goods for any damage her actions cause to another's property if that damage was wilfully or negligently inflicted. Indeed, a person will be liable unless the damage 'may be judged utterly without his fault'.[36] It is contended that negligence, in this context, does not require *legal* negligence, with proof of a duty of care. It requires merely that the conduct which caused the damage was unreasonable. This would surely require it to be reasonably foreseeable that one's actions might cause damage to, or destruction of, property, but trespass to goods could apply where it would not be reasonably foreseeable that any person might suffer loss as a result of the damage, because, for example, it was not reasonably foreseeable that anyone might own, or have any interest in, the property. In the context of liability for killing animals, if A unreasonably killed B's animal but believed, and the reasonable person would have believed, that the animal was truly wild, owned by no one, there could be no liability in negligence, because it would not be reasonably foreseeable that A's actions might cause damage to any person. It is submitted that there could, however, be liability on the basis of trespass to goods in such circumstances.

As noted above, section 5 of the Criminal Damage Act 1971 exempts a person from liability in criminal damage if she proves that she

[31]E.g., *Kuwait Airlines v. Iraqi Airlines* [2002] 2 AC 883; [2002] UKHL 19.

[32]*ibid*.

[33]E.g., *Sorrell v. Paget* [1950] 1 KB 252. Francione (*supra* note 6), 61-62, cites the US case of *Fredeen v. Stride*, 525 P.2d 166 (Or. 1974), in which a veterinarian was liable for conversion on the basis of failing to comply with the owner's instruction to destroy a dog and instead rehoming the animal.

[34]Killing an animal to protect persons or property would surely be a lawful justification, by analogy with *Sorrell v. Paget* [1950] 1 KB 252.

[35]E.g., *Hayley v. London Electricity Board* [1965] AC 778, *Whippey v. Jones* [2009] EWCA Civ 452; The Wagon Mound (No.2) [1967] 1 AC 617; *Caparo Industries v. Dickman* [1990] 2 AC 605.

honestly, *but erroneously,* believed that the owner(s) had or would have consented to the property damage/destruction. *Actual* consent of the owner to the killing of her animal would likewise preclude liability in conversion, negligence or trespass to goods. However, an erroneous belief in such consent provides no defence to an action for conversion, it being irrelevant whether the defendant intended to interfere with the property rights of another.[37] Similarly, in *Morris v. Murray,* Stocker LJ suggested that the test in negligence of whether a claimant consented to the risk (for present purposes, the relevant risk is the risk of the animal being killed) is a subjective, not objective, one.[38] If this is correct, an erroneous belief that an owner consented to the killing of her animal will, even if reasonable, provide no defence to an action in negligence.[39] Although the issue has not been directly addressed in trespass to goods, it is submitted that there is no reason that the same rule should not apply. In these circumstances, tortious liability in conversion, negligence or trespass to goods for killing another's animal would be wider than liability for criminal damage.

d) Section 9 of the Animals Act 1971

Section 9 of the Animals Act 1971 provides a potential defence in any civil proceedings brought against a person for killing a dog. In order for the defence to apply, the defendant must prove that she (i) killed the dog 'for the protection of any livestock' which belonged to her or a person under whose authority she acted, or was on land which belonged to her or a person under whose authority she acted,[40] and (ii) that she reported the killing to the police within forty-eight hours. However, it is not enough for the defendant to prove that the dog was in the vicinity of the livestock; she must prove that she honestly and reasonably believed that 'the dog [was] worrying or [was] about to worry the livestock and there [were] no other reasonable means of ending or preventing the worrying' or that 'the dog ha[d] been worrying livestock, ha[d] not left the vicinity and [was] not under the control of any person and there [were] no practicable means of ascertaining to whom it belong[ed].'

Section 9 of the Animals Act has a specific, narrow focus, applicable only to killing dogs for the protection of livestock

The essential purpose of this defence is similar to that of section 5(2)(b) of the Criminal Damage Act 1971. Section 9 of the Animals Act has a specific, narrow focus, applicable only to killing dogs for the protection of livestock to which the defendant has some close connection, whereas section 5(2)(b) of the Criminal Damage Act applies to killing any animal for the purpose of protecting any property. However, broadly speaking, both provisions delineate circumstances in which it is deemed legitimate to kill an animal in defence of property. Whether or not one believes that the standards of these defences are appropriate, it surely must be accepted that killing an animal in defence of another animal (or, in extreme cases, perhaps even inanimate property) can in certain circumstances be justified.

On the other hand, the section 5(2)(a) Criminal Damage Act defence of consent of the owner of the property damaged or destroyed (ie, for present purposes, consent of the owner of the animal killed) is more contentious in its very rationale (as it applies to animals), giving the owner unfettered discretion to authorise the killing of her animal. This defence highlights an important limitation in the scope of protection that property-based liability can afford to animals. As a matter of property law, consent of the owner(s) to any damage to, or destruction of, property provides an absolute defence. Moreover, provided that the actions do not amount to arson, endanger the life or property of another person,[41] cause a nuisance or otherwise infringe civil or criminal law, the owner of property retains complete freedom to damage or destroy it.[42]

In summary, property-based liability affords some protection to animals' lives, without proof of suffering, but this protection works only against people not acting with the consent of the owner; it offers no protection against the owner or those acting with the owner's consent. Therefore, unless the AWA has changed the law, 'the owner [of an animal] retains complete discretion to decide for

[36] *Weaver v. Ward* (1616) Hobart 134; 80 ER 284, 284; cited with approval by the Court of Appeal in *National Coal Board v. JE Evans* [1951] 2 All ER 310.

[37] E.g., *Lancashire & Yorkshire Railway v. MacNicoll* [1918] All ER Rep 537; *Caxton Publishing v. Sutherland Publishing* [1939] AC 178, 202, per Lord Porter; *Marfani & Co. v. Midland Bank* [1968] 1 WLR 956, 970, per Diplock LJ; *Douglas Valley Finance Co. v. S. Hughes (Hirers) Ltd* [1969] 1 QB 738, 752; *Kuwait Airlines v. Iraqi Airlines* [2002] 2 AC 883; [2002] UKHL 19, at [424].

[38] [1992] 2 QB 6, 28-29.

[39] If A accidentally kills B's animal, the fact that B consented to her animal being involved in the activity which led to the death, when subjectively appreciating the risk of death, would surely be sufficient to establish the defence of *volenti non fit injuria*.

[40] The defence does not apply if the livestock is on land occupied by the owner of the dog or land on which the presence of the dog was authorised by the occupier.

[41] Criminal Damage Act 1971, s 1(2) and (3).

[42] Francione (*supra* note 6), 44, notes that, insofar as property law is concerned, '[i]t has never been seriously questioned that the owners of animals can kill their animals with complete impunity'.

himself whether it should live or die';[43] people are free to kill, or authorise others to kill, their animals, for whatever reason they choose, provided that the killing does not cause the animal to suffer unnecessarily.

4. Is Killing an Animal without Causing Suffering an Offence under the Animal Welfare Act 2006?

The AWA does not explicitly render it an offence to kill an animal. Indeed, the Act only expressly deals with killing (i) by providing that the general offences under sections 4 and 9 (explained below) do not extend to 'destruction of an animal in an appropriate and humane manner',[44] and (ii) by providing various powers to inspectors to destroy, and courts to order the destruction of, animals, primarily in the interests of animal welfare.[45] Moreover, none of the debates, committee reports, government responses or oral or written evidence from interested parties, nor the explanatory notes to the Act,[46] expressly deals with whether killing itself, without proof of suffering, can be an offence under the Act.

Section 4(1) AWA replaces section 1(1)(a) of the Protection of Animals Act 1911 and renders it an offence to act or fail to act so as to cause a protected animal[47] to suffer unnecessarily, when the defendant knew or ought reasonably to have known that her act or omission would, or would likely, have that effect. It can be seen that section 4 explicitly requires proof of unnecessary suffering. Although the Crown Court in *Gray v. RSPCA* stated that the old case law (ie, that relating to the offences of cruelty under the 1911 Act) is no longer relevant,[48] it is contended that, if Parliament had intended loss of life itself to amount to suffering, contrary to the precedent established by *Patchett v. Macdougall* and *Isted v. CPS,* it would have made this expressly clear, which it did not.[49] Indeed, section 62(1) AWA states that '"suffering" means physical or mental suffering', with no reference to loss of life. It therefore seems impossible persuasively to argue that killing, without proof of physical or mental suffering beyond loss of life, can amount to an offence under section 4(1).

Section 9 AWA renders it an offence for a person unreasonably to fail to take such steps as are necessary 'to ensure that the needs of an animal for which he is responsible [[50]] are met to the extent required by good practice'. This provision does not require proof of suffering, and its elements could perhaps be interpreted to criminalise unreasonable (ie, unjustified) killing without proof of suffering, as it is strongly arguable that an animal's needs could, for the purpose of section 9, include the need for life.[51]

AWA states that '"suffering" means physical or mental suffering', with no reference to loss of life

Indeed, the explanatory notes to the Act state that section 9(4) 'clarifies that the killing of an animal is not in itself inconsistent with the [section 9(1)] duty to ensure [the animal's] welfare, *if done in an appropriate and humane manner*'.[52] This suggests that killing can be inconsistent with the welfare duty in other circumstances, which might not require proof of suffering. However, it is contended that interpreting section 9 to cover killing without proof of suffering would be strained and courts are unlikely to interpret it in this way[53] given the absence of reference, in any of the debates, reports, and other materials noted above, which preceded adoption of the AWA, (i) to whether killing itself can amount to an offence under the Act, and (ii) to the case law established by *Patchett v. Macdougall* and *Isted v. CPS.*

Even if section 9 were to be interpreted as criminalising

[43] Radford (*supra* note 3), 102.

[44] AWA, ss 4(4) and 9(4).

[45] E.g., *ibid.,* ss 18, 20, 33, 35, 37 and 38.

[46] E.g., 'Animal Welfare Act 2006 – Explanatory Notes' at http://www.legislation.gov.uk/ukpga/2006/45/resources, accessed 11th December 2014); DEFRA, 'Launch of the Draft Animal Welfare Bill', Cm 6252 (2004); House of Commons Environment, Food and Rural Affairs Committee, 'The Draft Animal Welfare Bill – First Report of Session 2004-2005', Volumes I and II, HC 52-I and 52-II (2004); 'The Draft Animal Welfare Bill – Government Reply to the Committee's Report', HC 385 (2005); House of Commons Library, 'The Animal Welfare Bill – Bill No. 58 of 2005-06' RP 05/87 (2005); House of Commons Environment, Food and Rural Affairs Committee, 'The Draft Animal Welfare Bill', HC 683 (2005); House of Lords Library, 'The Animal Welfare Bill – HL Bill No. 88 of 2005-06', LLN 2006/003 (2006).

[47] A 'protected animal' is any vertebrate other than man, not in its foetal or embryonic form, which is (i) of a kind commonly domesticated in the British Islands, (ii) under the permanent or temporary control of man, or (iii) not living in a wild state: AWA, ss 1 and 2.

[48] Aylesbury Crown Court, unreported, 6th May 2010.

[49] 'The Animal Welfare Act 2006 – Explanatory Notes' (*supra* note 45) state that AWA, s 4, 'is intended to replicate the protection provided by the 1911 Act, but to simplify and update the legislation.'

[50] A person is responsible for an animal if she (i) owns, (ii) is in permanent or temporary charge of, or (iii) has actual care and control of a child under the age of 16 who is responsible for, the animal: AWA, s 3.

[51] A person is responsible for an animal if she (i) owns, (ii) is in permanent or temporary charge of, or (iii) has actual care and control of a child under the age of 16 who is responsible for, the animal: AWA, s 3.

[52] A person is responsible for an animal if she (i) owns, (ii) is in permanent or temporary charge of, or (iii) has actual care and control of a child under the age of 16 who is responsible for, the animal: AWA, s 3.

[53] If an unreasonable failure to provide for the needs of an animal according to good practice leads to death, the s 9 offence could be committed, just as infliction of unnecessary suffering which leads to death can amount to a s 4 offence. The point is that unreasonable killing is not *itself* caught by s 9.

unreasonable killing without proof of suffering, it applies only to one who is responsible for an animal. Under section 3, a person is responsible for an animal if she (i) owns, (ii) is in permanent or temporary charge of, or (iii) has actual care and control of a child under sixteen who is responsible for, the animal. It seems difficult to argue that a defendant in a similar situation to that which arose in *Patchett v. Macdougall* or *Isted v. CPS* could be in charge of the animal she killed, unless the animal was confined at the time.[54] Therefore, although a new offence based upon section 9 AWA could close one lacuna in the law, rendering an owner potentially liable for unreasonably killing (and perhaps for unreasonably authorising the killing of) her animal, it would not address the issue highlighted by the facts of the two cases. Property-based liability would remain the only way to deal with such situations unless reform extended liability beyond those responsible for an animal. Of course, the combination of section 9 AWA and property-based liability could arguably cover all unjustified killing, but it is submitted that it would be inappropriate for two different regimes to apply. For example, the maximum sentence under section 9 AWA is six months' imprisonment and/or a level five fine, whereas the maximum sentence under section 1(1) Criminal Damage Act 1971 is ten years' imprisonment. Moreover, an offence under section 9 AWA could be committed by any unreasonable act or omission, whereas section 1(1) Criminal Damage Act 1971 requires intent or recklessness as to damage or destruction of property. Whilst the different standards of *mens rea* could arguably (i) be justified on the basis that responsibility for an animal imposes stricter duties on a person, and (ii) themselves justify the different maximum sentences, the fact that there has been no discussion of these issues adds further weight to the suggestion that Parliament did not intend section 9 AWA to criminalise killing without proof of suffering.

5. Should the Law Prohibit Unjustified Killing without Proof of Suffering?

a) Introduction

It has been demonstrated that animal protection law in England does not include liability for unjustifiably killing a non-wild animal without proof of suffering. Property law principles provide some protection for animals' lives in these circumstances, because a person might be guilty of criminal damage and/or can be civilly liable for conversion, negligence or trespass to goods when she intentionally, recklessly or negligently kills an animal belonging to another. Yet none of these principles protects an animal from the actions of the animal's owner, genuine consent of the owner negates the possibility of any property-based liability, and an honest (even if unreasonable) belief that the owner (or one with authority to consent on her behalf) consented or would have consented to the killing precludes liability for criminal damage. There is, therefore, a significant lacuna in the law, leaving owners free to kill, or authorise the killing of, their animals, for any reason they desire; whatever the reason(s) for killing the animal, or having it killed, no liability can attach unless it can be proved that the animal suffered in the process of killing. Whether the law should fill this gap by establishing a new offence of unjustified killing will now be analysed.

In this regard, it is important to consider when killing an animal will be unjustified, to define the scope of potential liability which is being assessed. As a preliminary point, it is contended that any new offence should apply only to intentional or reckless killing. The problem in the current law is that owners are free to kill, or to authorise others to kill, their animals, for whatever reason they choose. It is submitted that negligent killing itself does not have the distinctive blameworthiness to justify imposing criminal liability.[55] Nevertheless, if the offence applied only to intentional killing, a person could escape liability by proving that she intended to injure, rather than kill, the animal. If unnecessary suffering before death could be proved, the defendant would be guilty of the section 4 AWA offence on such facts, but her actions would not be caught by the new offence if intentional killing were required. If,

owners are free to kill, or to authorise others to kill, their animals, for whatever reason they choose

[54] In *Patchett*, the dog was 'tied up and in a pen' at the time of being shot (*supra* note 16, 153). The report does not state whether it was the defendant who confined the dog. If so, he would arguably have been in charge of, and thus responsible for, the dog, had AWA, s 3 been in force.

[55] Criminal liability generally does not attach to "mere" as opposed to "gross" negligence: *R v.. Adomako* [1995] 1 AC 171.

however, the defendant foresaw the risk of killing, even though she intended only to injure the animal,[56] and, in the circumstances known to her, her actions were unreasonable, reckless killing would be established.[57] Adopting intention and recklessness as the alternative *mens rea* elements of the offence ensure that liability cannot attach unless there is subjective advertence of the risk of death. This is important in establishing the defendant's conduct as sufficiently blameworthy to justify imposing criminal liability.

It is submitted that any new offence should expressly exclude killing which is the consequence of lawful performance of an activity which (when lawfully performed) routinely leads to the death of an animal and which is already subject to express legal regulation, namely, farming, scientific research, hunting and shooting, and disease and pest control. That is to say, killing in such circumstances should not be deemed unjustified for the purposes of the offence. Whilst some might argue that killing an animal for any purpose not essential to survival is not morally different from, for example, the killing of the dog in *Patchett v. Macdougall*, activities which are subject to express legal regulation are viewed as legally legitimate (if performed in accordance with that legal regulation), and any killing which is the routine consequence of lawful performance of such activities therefore cannot be *legally* unjustified.[58] Exclusion of these kinds of activities from the scope of any new offence is, therefore, a necessary step in seeking to define what amounts to *unjustified* killing. It is, however, not sufficient to define unjustified killing, and it is contended that killing an animal will also not be unjustified when the killing is done (i) to relieve suffering in the animal's best interests (that is, when the animal is in such a state of suffering that it is better for it to be killed than to continue to live), or (ii) in defence of a person or other animal. These exceptions all require further analysis. For example, by what standard is it decided whether an animal's suffering is such that it is in that animal's best interests to be killed, and when must a proper veterinary method be used? Similarly, how is it decided whether the person or other animal was in sufficient need of protection to justify the killing? In all cases, where does the burden of proof lie? These issues are addressed below. The crucial point is that, for present purposes, unjustified killing is any intentional or reckless killing of an animal which is not (i) the consequence of lawful performance of disease or pest control, hunting, shooting, farming or scientific research, (ii) performed in the animal's best interests, to relieve suffering, or (iii) done in defence of a person or other animal. Therefore, the issue to be analysed is whether the law should impose liability on a person who kills an animal in such circumstances even if it cannot be proved that the animal suffered.

> **imposing liability for unjustified killing would be in line with legal developments, in England and at EU level**

b) The Legal Position

It is contended that imposing liability for unjustified killing would be in line with legal developments, in England and at EU level, which establish significant concern for animal welfare and the value of animals' lives. For example, article 13 of the Treaty on the Functioning of the European Union expressly recognises that 'animals are sentient beings' and obliges the Union and Member States to 'pay full regard to the welfare requirements of animals' when 'formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies'. Whilst the article requires animal welfare to be balanced with the need to respect 'the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage', it establishes animal welfare as a central concern of the EU. Nonetheless, the Commission notes that '[n]o EU legislation exists on the welfare of pets'[59] and asserts that it is 'the enormous economic activity that drives the treatment of animals in the European Union',[60] suggesting that financial concerns can override animal welfare. Indeed, it cannot be sensibly claimed that article 13 directly supports an offence of

[56] Reckless killing could cover situations where the defendant did not even intend to injure the animal. However, if the defendant is criminally reckless, then she must have subjectively foreseen the risk of killing the animal by her actions and have unreasonably performed those actions in any event (*R v. G* [2004] 1 AC 1034; [2003] UKHL 50). This will ensure that truly accidental killing (e.g., running over an animal with one's car when one did not subjectively appreciate the risk of this and/or did not act unreasonably in driving as one did) will not be caught by the offence.

[57] *R v. G ibid*.

[58] The moral dimension to when killing is unjustified is considered below.

[59] 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015' COM (2012) 6 final, 3.

[60] *ibid*., 4.

unjustified killing without proof of suffering. The article does, though, represent an important symbolic recognition that animals' interests must be seriously considered. As the Commission states, '[a]nimal welfare is a societal concern that appeals to a wide public. Treatment of animals relates to ethics and is part of the Union's set of values.'[61] Van der Schyff also notes that article 13 'distinguish[es] animals from mere corporeal things.'[62] Whilst this does not change animals' status as property, it recognises that they are not to be treated purely as property, with no interests of their own to be considered in law.

The ban on fur farming, implemented in England by the Fur Farming (Prohibition) Act 2000, clearly establishes that society and the law values animals' lives above human pleasures in this regard. This directly supports the underlying rationale of a proposed offence of unjustifiably killing an animal, albeit in a limited area. Although debate preceding adoption of the Act demonstrates that the welfare of fur-farmed animals whilst alive was a significant concern,[63] the very act of killing animals solely or primarily for their fur was deemed unjustifiable and thus banned. In short, it was determined that, regardless of suffering and overall welfare, animals should not be killed for their fur. The ban is an example of a prohibition on killing an animal for a reason which is deemed unjustified.

The development in animal protection law which perhaps provides the greatest support for a new unjustified killing offence is section 9 AWA. It has been argued above that section 9 cannot properly be interpreted to criminalise killing without proof of suffering, and it might be thought that the fact that Parliament did not address this issue when fundamentally updating animal protection law in England suggests that it was not deemed an issue of significant importance. However, the fundamental change which section 9 AWA did introduce, the duty on those responsible for an animal to take reasonable steps to provide for the animal's welfare, itself supports establishing liability for unjustified killing. It is surely inconsistent to say that a person has a positive legal welfare duty to an animal if she can escape that duty by killing the animal for no legitimate reason provided that it cannot be proved that the animal suffered unnecessarily. For the law to allow this would effectively be to hold that the section 9 welfare duty is ultimately concerned only with prevention, or at least minimising the risk, of suffering, rather than with overall welfare. On its terms, section 9 could be viewed as ultimately being concerned with avoidance of suffering, allowing the law to intervene when an animal is being treated in such a way as is *likely,* if it continues, to lead to suffering, without the need for proof of actual suffering.[64] On this interpretation, the provision would still be a positive development in animal protection law in England, which, prior to the AWA, required proof of actual unnecessary suffering, unless it was proved that

the very act of killing animals solely or primarily for their fur was deemed unjustifiable and thus banned

an owner (or some other person in charge or control of the animal) abandoned an animal[65] in circumstances likely to lead to unnecessary suffering.[66] However, on this interpretation, section 9 would not be a true welfare duty,[67] because animal welfare is about far more than avoidance of suffering; it is about the full range of negative *and positive* experiences an animal can have.[68] To kill an animal is to end any chance that animal has of ever again experiencing any pleasures and is thus one of the most significant anti-welfare acts possible, unless done in the animals' best interests. For the law to allow unjustified killing by a person responsible for an animal, or to allow such a person to authorise unjustified killing of the animal, would, therefore, be to abrogate any true welfare duty which section 9 AWA provides. Conversely, to establish liability for unjustified killing would go hand-in-hand with the provision. Indeed, as Sweeney states, prohibiting unjustified killing of an animal other than in her best interests 'would preserve the legal duty of care [created by section 9 AWA] with the animals' welfare in remaining alive…and [would accord] with the aim of the AWA'.[69]

Unlike section 9, section 4 AWA is directly concerned with prevention of suffering, requiring proof that an animal suffered unnecessarily. It has

[61] *ibid.,* 10.

[62] Gerhard van der Schyff, 'Ritual Slaughter and Religious Freedom in a Multilevel Europe: The Wider Importance of the Dutch Case' (2014) 3 *OX J Law Religion* 76, 99.

[63] E.g., HC Deb vol 326 col 1331-33, 5 March 1999. See, in particular, Patrick Nicholls, MP, HC Deb vol 326 col 1340-48, 5 March 1999.

[64] Unreasonable failure to provide for the needs of animal according to good practice is likely eventually to lead to suffering.

[65] In *Hunt v. Duckering* [1994] Crim LR 678, it was held that abandonment required the defendant to have 'relinquished, or wholly disregarded, or given up his duty to care for the [animal]', rather than simply that he had left, and failed adequately to provide for the needs of, the animal (679, per Evans LJ).

[66] Abandonment of Animals Act 1960, s 1.

[67] Although AWA, s 9 does not use the word 'welfare', it is entitled 'Duty of person responsible for animal to ensure welfare' and 'Animal Welfare Act 2006 – Explanatory Notes' refer to it as '[t]he welfare offence' (*supra* note 45, at [48]).

[68] E.g., Micahel C. Appleby et al (eds), *Animal Welfare* (2nd edn., CABI, 2011).

[69] Noel Sweeney, *Animals-in-Law* (Alibi, 2013), 14.

> **an animal's status as property should not render its life extinguishable, without justification, at the hands of its owner**

been explained above how attitudes towards animals developed to reach the position that animal protection law was concerned to regulate the treatment of animals during their lives but was not concerned with their death, provided that death did not entail any unnecessary suffering. Section 4 AWA could be seen as the modern encapsulation of this view. Nonetheless, it is contended that the desire of the courts in *Patchett v. Macdougall* and *Isted v. CPS* to note that property law principles could be used to protect the lives of animals unreasonably killed without the consent of their owners, in circumstances in which it could not be proved that they suffered unnecessarily, highlights the fact that, in modern times, it seems inappropriate for the law to protect animals during their lives but not to be concerned with animals' deaths (beyond ensuring that no unnecessary suffering is occasioned when they are killed). Alternatively, one might argue that the true concern in cases such as *Patchett* and *Isted* is protection of property rights, not protection of animals' lives. It must, therefore, be considered whether the law should interfere with an owner's property rights by removing her right to kill, or authorise killing of, her animal even when the animal does not suffer.

Before adoption of animal protection legislation, a person could treat her animal as she wished, because that animal was her property.[70] However, well over a century ago, the law recognised that an animal's status as property should not prevent it from being protected from unnecessary suffering at the hands of its owner and that inflicting unnecessary suffering on another's animal was not merely an issue of property damage. Furthermore, with adoption of the AWA, the law went further, recognising that an animal's property status should ensure that at least its owner has a legal duty to provide for its welfare. Surely, it is a natural progression to recognise that an animal's status as property should not render its life extinguishable, without justification, at the hands of its owner, as long as suffering is not caused. To insist on an owner's property rights automatically trumping the value of an animal's life when they no longer entitle an owner to inflict unnecessary suffering on the animal, and actually impose a welfare duty on the owner, is to pose a rather strange conundrum.[71]

It is contended that the above analysis establishes that the law is *ready* for a new offence of unjustified killing,[72] because such an offence would be in keeping with important developments in animal protection law. In particular, the law recognises that animals, whilst capable of being owned, are more than mere items of property: it recognises that animals have interests of their own to be protected and that these interests can outweigh an owner's property rights; it recognises that animals can have positive and negative experiences and that those responsible for an animal should have a duty to take reasonable steps to provide for the animal's needs. Yet when it comes to liability for killing, without proof of suffering, an animal is treated merely as property, with liability attaching only to protect an owner's property rights and not extending to killing by or with the consent of the owner. It is submitted that this creates tension and conflict in the law. However, the above analysis is not sufficient to establish that the law *should* establish a new offence of unjustified killing. It is important to consider also, first, the ethical dimension to the debate, and, second, an important potential practical objection to a new offence.

c) The Moral Position

Analysis of whether there should be a new offence of unjustified killing has so far centred around legal arguments. However, one cannot escape the moral dimension of this issue. Indeed, Harrop suggests that 'animal welfare law…[is] founded on moral…assumptions'.[73] It is submitted that, although

legal and moral duties are distinct[74] *…[because] a legal duty can legitimately be amoral, and it is perfectly acceptable to have no legal duty where there is a moral duty…, it can be equally appropriate for a moral duty to form the basis of a*

[70]E.g., Radford (*supra* note 3), 28-30.

[71]As Deborah Rook ('Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law' (2014) 28 Int J Law Policy Family 177, 179) notes, '[t]he legal status of…animals [may be] that of property, but they constitute a unique type of property; animals are living and sentient property and this is the crucial factor' in the law's treatment of them.

[72]Interestingly, a number of American states and Australian territories criminalise unjustified killing, without the need for proof of suffering. E.g.,, Florida (F.S.A, § 828.12), Illinois (Humane Care for Animals Act, § 302), New York (N.Y. Rev. Stat. ch. 682, § 26 (1881)), California (CA Penal § 597), New South Wales (Prevention of Cruelty to Animals Act 1979, ss 4 and 5). However, other jurisdictions criminalise killing only if the animal suffers in the process of being killed. E.g., South Australia (Animal Welfare Act 1985, s 13), Western Australia (Animal Welfare Act 2002, s 19), Northern Territory (Animal Welfare Act, s 9), Queensland (Animal Care and Protection Act 2001, s 18).

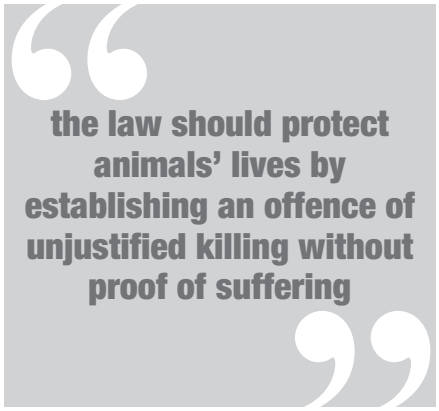
[73]Stuart Harrop, 'The Dynamics of Wild Animal Welfare Law' (1997) 9 JEL 287, 289. See also Kimberley K. Smith, 'Governing Animals: Animal Welfare and the Liberal State' (OUP, 2012), 83

[74]Regan (*supra* note 4), 267-71.

legal duty, or the absence of a moral duty to form the basis of the absence of a legal duty'.[75]

In short, 'morality is not enough to make law, but it is a relevant consideration.'[76]

There are a number of important works considering the ethical implications of treatment of animals, arguing, for example, for (i) moral rights for animals,[77] (ii) a change in the property status of animals,[78] or (iii) utilitarian-based equal respect for the interests of animals.[79] The arguments put forward in these works consider much more general and far-reaching ethical questions than the one considered here, which is simply whether the law should protect animals' lives by establishing an offence of unjustified killing without proof of suffering. However, the arguments advanced by the authors of the works cited clearly support the moral basis of a new offence. For example, Regan characterises as 'seriously deficient' the view 'that so long as animals are put to death painlessly, so long as they do not suffer as they die, we should have no moral objection.'[80] Similarly, Francione's central objection to the law's treatment of animals is that the property status of animals ensures that human interests will always trump animal interests. Establishing liability for unjustified killing of an animal, including by, or with the consent of, the owner, obviously addresses this objection, in one area of the law. For Singer, whether killing is unjustified would be determined on a utilitarian balance (with commensurate human and animal interests counting equally), but, if it were not justified, he would object to the killing.



It is accepted that ethical arguments in favour of animal rights/animal liberation are extremely contentious, and the grounds for adopting a new offence should not be based solely, or even mainly, on them. However, as already noted, consideration of whether the law should impose liability for unjustifiably killing an animal has far narrower implications than consideration of whether animals have extensive moral rights, whether their status as property should be changed, or whether their interests should count equally with human interests. That is to say, the moral arguments made by the authors cited above support a new offence of unjustified killing, but support for the offence does not necessitate acceptance of the general moral theories put forward by those authors. Consideration of the full extent of those arguments is outside the scope of this article; it is only the ethical basis of a new offence of unjustified killing, without proof of suffering, which is relevant for present purposes.

It is contended that, if a new offence is adopted, it should extend only to those animals which fall within the section 1 AWA definition of 'animal': *viz.*, any vertebrate other than man, not in its foetal or embryonic form. Adopting this definition would ensure that the offence extends only to those animals which scientific evidence has established are sentient, capable of having both positive and negative experiences.[81] Animals which are capable of positive experiences have an inherent interest[82] in not having their lives, and thus their chances of future positive experiences, ended. The question then becomes whether people should have a legal duty to respect that interest and thus be prohibited from killing such animals without legitimate justification, whether or not the animal suffers.

Section 9 AWA imposes a positive obligation on one responsible for an animal to take reasonable steps to provide for that animal's needs, according to good practice. The provision does not expressly state that an animal's needs include the need for positive experiences, but it is entitled 'Duty of person

[75]Gareth Spark, 'Protecting Wild Animals from Unnecessary Suffering' (2014) 26 JEL 473, 479.

[76]*ibid*.

[77]Regan (*supra* note 4).

[78]Francione (*supra* note 6).

[79]Singer (*supra* note 6).

[80]Regan (*supra* note 4), 99. Regan limited his argument for moral rights for animals to normal mammalian animals a year or older, based on the availability at the time of scientific evidence as to the capacities of animals.

[81]'Animal Welfare Act 2006 – Explanatory Notes' (*supra* note 45), at [11]. AWA, ss 1(3) and (4), give the Secretary of State power to extend the definition of 'animal' to include invertebrates, from any stage of their development, and vertebrates in their foetal or embryonic form, if she 'is satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering'.

[82]It is contended that sentience, the ability to have positive and negative experiences, is enough to establish an animal's *interest* in maximising positive, and minimising negative, experiences. The ability actively to pursue choices consciously designed to maximise positive experiences should not be a prerequisite; 'interest' is not here being used to refer to a conscious choice but, instead, to what can reasonably be determined, on an objective basis, to be best for the animal.

> **Killing in an animal's best interests is clearly morally distinct from killing an animal at the whim of another**

responsible for animal to ensure *welfare*', the explanatory notes to the AWA refer to it as '[t]he *welfare* offence',[83] and it is abundantly clear that animal welfare is equally concerned with animals' positive and negative experiences.[84] Moreover, the non-exhaustive list of indicative needs referred to in section 9(2) AWA includes specific needs which animal welfare science has established are equally concerned with ensuring the possibility of positive experiences as with avoiding negative experiences.[85] Therefore, the law already imposes, albeit only on one responsible for the animal, a duty to take reasonable steps to provide an animal with everything it needs, according to good practice, in order to be able to have positive experiences.

It is not suggested that a person who is not responsible for an animal should have any duty to act so as provide that animal with positive experiences. Prohibition of unjustified killing would impose merely a negative duty not intentionally or recklessly to kill an animal, without justification, so as to end that animal's chances of positive experiences. It is accepted that such a duty would effectively be to ascribe a limited, qualified moral right to certain animals (a right not to be intentionally or recklessly killed by a person without justification), but it is contended that it is appropriate to grant such a right to a class of animals which scientific evidence has firmly established are sentient: if a sentient animal's chances of future pleasure are to be intentionally or recklessly taken from it, there should be a legitimate justification for this. If this argument is accepted, it then becomes necessary to analyse the moral validity of the definition of when killing will be legally justified.

It must be remembered that killing will not be unjustified if it is (i) the consequence of lawful hunting, shooting, farming, scientific research or disease or pest control, (ii) performed to relieve suffering in the animal's best interests (as explained above), or (iii) undertaken to protect a person or other animal. Analysing the final two exclusions first, how the law determines whether an animal's suffering is sufficiently severe to justify ending the animal's life, or whether the risk to a person or other animal is serious enough to justify the killing, is vital in analysing the morality of these exceptions. It is submitted that killing should not be deemed legally unjustified if done in the honest belief that it was (i) in the animal's best interests because the animal was suffering to such an extent that it was better for it to killed than to continue to suffer, or (ii) reasonable and necessary in order to protect a person or other animal from death or serious injury. It is contended that, in these circumstances, the rationale of the final two exclusions can fit with the moral arguments outlined above. In principle, there is nothing morally inconsistent with a general duty not unjustifiably to kill an animal in allowing killing in the animal's best interests or in defence of another. Killing in an animal's best interests is clearly morally distinct from killing an animal at the whim of another. Similarly, although the final exclusion would involve killing an animal in the interests of another, this can much more readily be morally justified when done to protect the health and/or life of another living being.

On the other hand, killing animals for scientific research, food, hunting, shooting or disease or pest control is arguably in a different moral category. Killing animals in scientific research which actually provides some direct health benefit to humans or animals can be seen as morally similar to killing in defence of the health or life of a person or other animal. However, even though there are tight regulations on scientific research involving animals,[86] proposed research need not promise even the likelihood of direct benefits to human or animal health.[87] Similarly, it might once have been necessary for human (or animal) health to eat animals, but it no longer is, so killing animals for food cannot be said to be commensurate with killing in order to protect the health or life of a person (or animal). Killing animals for disease control is primarily concerned with protecting human and/or animal health,[88] and killing for pest control[89] will often have this as its primary concern. Conversely, although killing animals in the lawful performance of hunting or shooting arguably might provide some benefits to human and/or animal health,[90] the primary purpose of such activities is often human pleasure. It could, therefore, be argued that universal exclusion of killing as a consequence of lawful

[83] 'Animal Welfare Act 2006 – Explanatory Notes' (*supra* note 45), at [48] (emphasis added).

[84] Appleby et al (*supra* note 67).

[85] *ibid*.

[86] E.g., Animals (Scientific Procedures) Act 1986, especially ss 5B and 5C.

[87] E.g., *ibid*.

[88] E.g., Animal Health Act 1981.

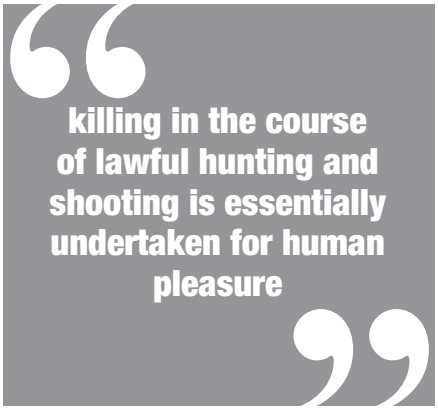
[89] E.g., Protection of Animals Act 1911, s 8, and AWA, s 7.

[90] E.g., it might stop the spread of disease or help to manage sustainable wild populations.

performance of hunting, shooting, farming, scientific research or disease or pest control, rather than exclusion only in pursuit of protection of human or animal health, conflicts with the moral basis of a potential new offence. That is to say, it could be contended that it is arbitrary to deem killing as a consequence of lawful performance of these activities as necessarily amounting to killing for a legitimate purpose and thus as legally justified but to deem all other intentional or reckless killing legally unjustified and thus as an offence. This argument could then be extended to undermine a new offence, as it could be suggested that permitting these universal exceptions, regardless of the activities' individual moral bases, is hypocritical. Yet, if it is accepted that a new offence is legally and morally justified but felt that these exclusions conflict with its moral basis, the problem lies in the exceptions, not in the offence. Indeed, to accept the appropriateness of a new offence if these exclusions do not exist but not to accept it because of the exclusions is to accept the need for the offence but to object because it does not go far enough.

As such, it is contended that the (im)morality of the exclusions does not call into question the morality of the offence, unless it can be established that there are activities morally equivalent to the exclusions which are nonetheless caught by the offence. For example, it could be argued that killing in the course of lawful hunting and shooting is essentially undertaken for human pleasure, and that, if this is deemed legitimate, any killing for human pleasure should be equally legitimate. It is, however, undoubtedly true that, no matter how controversial it might be, lawful hunting and shooting has a deep cultural heritage and can thus arguably be distinguished from killing performed purely for the killer's pleasure. Certainly, killing in lawful performance of scientific research, farming, and disease and pest control is morally distinct from killing for pleasure. Similarly, killing simply to escape one's responsibility for an animal, or, say, to ease boredom, is morally distinct from killing as a consequence of one of the exclusions.

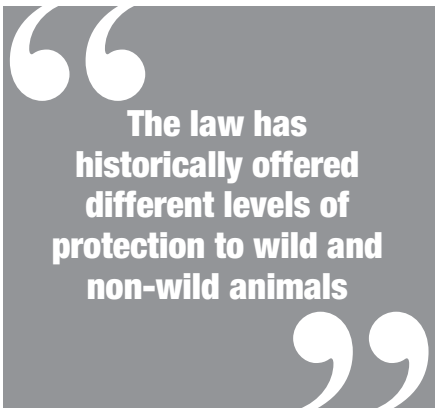
It is accepted that, if a person kills an animal for food, or in performance of shooting, hunting, scientific research or disease or pest control, but outside of the legal regulation of these activities, this can be argued not to be morally distinct from killing in the course of lawful performance of one of the activities. Such actions would fall outside the express legal regulation, and thus outside of the legal protection, of such activities and can thus appropriately be treated as *legally* distinct. They would, though, undoubtedly be morally similar to lawful performance of one of the activities, if genuinely done for a similar purpose. A comparable potential conflict exists in the current law, as section 4(3)(b) AWA states that 'whether the conduct which caused the suffering was in compliance with any relevant enactment or any relevant provisions of a licence or code of practice issued under an enactment' is relevant in determining whether that suffering is unnecessary. Similarly, section 9(3) AWA states that, in applying the section 9 offence, 'it is relevant to have regard…[to] any lawful purpose for which the animal is kept, and…any lawful activity undertaken in relation to the animal.' Therefore, particular actions could amount to an offence under section 4 or 9 AWA in certain circumstances, but identical actions might not be an offence if performed as part of lawful performance of some expressly legally regulated activity. Sections 4(3) and 9(3) give the court discretion to take lawful performance of a legally regulated activity into account, rather than automatically excluding such from the scope of the offences. It is contended that, under a potential new offence of unjustified killing, an absolute exclusion for lawful performance of hunting, shooting, farming, scientific research and disease and pest control would be preferable, for the avoidance of doubt. However, if it is felt that the potential for arbitrary distinctions in the exclusions give rise to cause for concern, a similar approach to that which exists in the current law could be taken under the new offence in respect of activities undertaken for the same purpose as, but outside the scope of, one of the exclusions. That is to say, if the defendant proves that she killed the animal for food or in performance of shooting, hunting, or disease or pest control, but not subject to the legal regulations governing such activities, this could be a relevant factor for the court to consider when determining whether the killing was unjustified.



It will be noticed that the section 2 AWA definition of 'protected

animal'[91] has not been adopted, such that the new offence would apply equally to wild animals. This raises the important question of whether it is appropriate to provide wild and non-wild animals with the same level of protection from unjustified killing. *Prima facie,* if a wild animal is sentient, the argument made above with regards to preservation of an animal's interests in having positive experiences applies equally to the wild animal. It is therefore contended that, ethically, sentient wild animals should be equally protected from unjustified killing. Whether such a change in the law would be appropriate in practice is another issue.

The law has historically offered different levels of protection to wild and non-wild animals. For example, it is an offence to act or fail to act so as to cause a protected animal to suffer unnecessarily when the defendant knew or should have known that her actions would, or would likely, have that effect.[92] However, the law does not offer wild animals the same level of protection from unnecessary suffering: it is only an offence if one 'mutilates, kicks, beats, nails or otherwise impales, stabs, burns, stones, crushes, drowns, drags or asphyxiates any wild mammal with intent to inflict unnecessary suffering'.[93] Conversely, the law has traditionally offered, in one sense, greater protection to the lives of wild animals than to non-wild animals, as wildlife protection legislation renders it an offence to kill various wild animals in certain circumstances without the need for proof that the animal suffered.[94] If a new offence of unjustified killing extended to wild animals, it would change this trend of bifurcation in the levels of protection afforded to wild and non-wild animals. It could also lead to the possibility of duplicate offences, as a person who killed a wild animal could potentially be liable under the new offence and wildlife protection legislation. Furthermore, certain invertebrate wild animals are protected from killing under wildlife protection legislation,[95] so extending the new offence only to vertebrate wild animals would create a distinction in the levels of protection for wild animals which is not currently found in wildlife protection law. Whilst it is maintained that, ethically, it is appropriate to offer sentient wild animals the same level of protection from unjustified killing as non-wild sentient animals, the practical effect on wildlife protection law must be considered. Nonetheless, if it is felt that wild animals should be excluded from the scope of a new offence, this would not undermine the arguments in favour of protection for non-wild animals, and it could be done by adopting the section 2 AWA definition of 'protected animal'.



d) A Potential Practical Objection

If it is accepted that the law is ready for a new offence of unjustified killing, it must be considered whether an owner should be liable for having her animal killed other than in the animal's best interests *if she ensures that the animal is killed by a proper veterinary method performed by a qualified vet* (hereinafter, 'a proper veterinary method'): ie, whether such killing should be legally unjustified. This issue is vital in determining, not merely the practical scope of liability for killing an animal without proof of suffering, but the very rationale of such liability. If an owner can lawfully decide to have her animal killed for any reason she chooses, provided that a proper veterinary method is used, the law cannot be said truly to be concerned to protect animals' lives. Rather, the law would be concerned to minimise the risk of suffering when an animal is killed. If this were the case, it would be inappropriate to render a person liable for killing an animal other than by a proper veterinary method when it could not be proved that the animal suffered.

Yet it is possible that prohibiting the act of proper veterinary destruction for any reason other than an animal's best interests would actually have negative consequences for animal welfare. On the one hand, it can be argued that a person should only be able lawfully to have an animal she owns killed in the animal's best interests,[96] because she should not be able escape legal responsibility to that animal by killing it. On the other hand, it can be argued that, if owners cannot lawfully humanely kill unwanted animals, such animals might be kept by people who do not have the will or resources to care for them properly, abandoned, or taken in by animal shelters which might not

[91] Any animal which is (i) commonly domesticated in the British Isles, (ii) under the permanent or temporary control of man, or (iii) not living in a wild state.

[92] AWA, s 4.

[93] Wild Mammals (Protection) Act 1996, s 1.

[94] E.g., Wildlife and Countryside Act 1981, Deer Act 1991, Protection of Badgers Act 1992, and Conservation of Habitats and Species Regulations 2010.

[95] E.g., Wildlife and Countryside Act 1981, s 9 and sch 5.

[96] Or for some other justified reason, as explained above.

be able to cope with the extra numbers of animals for which they would have to care. All of these circumstances might lead to significant suffering.[97]

It is accepted that there is no easy solution to this issue. As the law currently stands, there has never been any suggestion that an owner deciding to have her animal killed by a proper veterinary method can be an offence. Indeed, it seems that the sections 4(4) and 9(4) AWA exclusions of 'destruction in an appropriate and humane manner' were intended to cover killing by a proper veterinary method, whatever the reason for the killing. Certainly, none of the reports, debates, or other materials noted above which preceded adoption of the AWA suggested that the Act would criminalise such conduct. Nonetheless, it is contended that, if it is believed that prohibiting proper veterinary destruction other than in an animal's best interests would cause significant problems in practice, leading to more animals being subjected to poor standards of welfare at the hands of owners who do not care for them properly, or abandoned, the appropriate response would be to enforce more robustly the existing laws which already criminalise this behaviour, such as section 9 AWA (and section 4, if it is proved that the animal suffered unnecessarily). Only if there is compelling evidence to establish that this is not feasible or would not work, and that animal welfare would be significantly adversely affected without an exclusion for proper veterinary destruction other than in an animal's best interests, should such an exception be permitted.

6. How would a New Offence work?
If a new offence of unjustifiably killing an animal, without proof of suffering, is to be adopted, it is necessary to consider how it would work. First, it has already been noted that the offence should apply the section 1 AWA definition of 'animal' outlined above. Second, the offence would apply equally to unjustified killing by an owner or a non-owner, as it has been argued that the law should not be primarily concerned with protection of property rights when dealing with the killing of animals,[98] in the same way that it is not primarily concerned with such when dealing with unnecessary suffering and promotion of welfare.[99] Third, it should also be an offence for an owner to authorise the unjustified killing of an animal she owns, so that owners cannot escape liability by having someone else kill their animals. This would reflect a similar purpose to that behind section 4(2) AWA, by which a person responsible for an animal is liable if another inflicts unnecessary suffering on that animal and she permitted or unreasonably failed to prevent this. Fourth, it has been argued above that intent and recklessness should be the alternative *mens rea* elements of the offence.

Therefore, if the prosecution proves that a person intentionally or recklessly killed (or, being the owner, authorised the killing of) an animal other than by a proper veterinary method, after a qualified vet had certified that the killing was in the animal's best interests, that person should *prima facie* be guilty of an offence. As the offence would be concerned with *unjustified* killing (as defined above), first, if the defendant raises evidence which might reasonably suggest that she killed the animal in lawful performance of hunting, shooting, farming, scientific research or disease or pest control, the prosecution should have to prove that this was not the case. Second, the offence should include two affirmative defences. The first defence should apply if the defendant proves that she killed the animal honestly believing that the action was reasonable and necessary in order to protect a person or other animal from death or serious injury. The second defence should apply if the defendant proves that she killed the animal in an emergency situation, to relieve the animal's suffering. It is submitted that the wording of section 18(4) AWA should be utilised to delineate this defence. That provision empowers an inspector or constable to kill an animal without veterinary certification 'if it appears to him…(a) that the condition of the animal is such that there is no reasonable alternative to destroying it, and (b) that the need for action is such that it is not reasonably practicable to wait for a veterinary

"it should also be an offence for an owner to authorise the unjustified killing of an animal she owns"

[97] For discussion of the killing of unwanted animals by shelters, see Clare Palmer, 'Killing Animals in Shelters', in *Killing Animals* (University of Illinois Press, 2006), 170-187.

[98] An owner's property interests would be protected by the Powers of Criminal Courts (Sentencing) Act 2000, ss 130 and 131, which give the court power to award compensation to a person who suffers loss as a consequence of a crime.

[99] If the new offence applies also to killing by a non-owner, there would be a possibility of overlap with the Criminal Damage Act 1971. This could be resolved by amending the 1971 Act to clarify that it does not apply to killing another person's animal, to ensure that there is a single regime to deal with unjustified killing. A similar potential conflict exists between criminal damage and AWA, s 4, as intentionally or recklessly injuring another's animal could be an offence under s 4, if it caused unnecessary suffering, and an offence of property damage under Criminal Damage Act 1971, s 1. However, this has apparently not caused problems, as there have been no reported cases in which the potential conflict has been noted.

> **if a new offence is to be adopted, there must be consultation on the appropriate maximum sentence**

surgeon.' These conditions could be adapted for present purposes, such that no offence would be committed if the defendant killed the animal in the honest belief that the two conditions referred to in section 18(4) were satisfied.[100]

It is contended that the maximum sentence for the new offence should be greater than that applicable to section 4 AWA (six months' imprisonment and/or a £20,000 fine).[101] First, the *mens rea* element of the new offence is more serious, intent or recklessness as to killing, rather than an act or omission done with actual or constructive knowledge that it would, or would likely, cause an animal to suffer. Second, the harm inflicted under the new offence (death) will normally be more serious. Beyond this, if a new offence is to be adopted, there must be consultation on the appropriate maximum sentence. It is tentatively suggested that the offence could perhaps be triable either way, with a maximum sentence of a year's imprisonment and/or an unlimited fine if tried on indictment and a maximum sentence of six months' imprisonment and/or an unlimited fine if tried summarily.

It is submitted that, if the arguments in favour of the proposed new offence of unjustified killing are not accepted, it is worth considering an alternative offence which would increase practical protection for animals' lives but would be based upon prophylactic protection from unnecessary suffering. The biggest practical objection to the proposed offence is, as noted, likely to be the problems which could be caused by criminalising killing an animal by a proper veterinary method other than in the animal's best interests. Yet to allow such killing would undermine the very rationale of the proposed offence, as it would suggest that the law's true concern is to minimise the risk of suffering.

If it is felt that potential practical problems warrant an exception for proper veterinary destruction, for a reason other than an animal's best interests, an alternative offence, reversing the burden of proof with regard to suffering, could be adopted. This offence would require the prosecution to prove that the defendant intentionally or recklessly killed an animal other than by a proper veterinary method, with the defendant being guilty unless she can prove on a balance of probabilities that (i) the animal did not suffer, (ii) she killed the animal for emergency relief of suffering (as explained above), or (iii) she honestly believed that the killing was reasonable and necessary to protect a person or other animal (as explained above). Such an offence would cover cases like *Patchett v. Macdougall* and cases in which an animal is killed by, or with the consent of, the owner but suffering cannot be proved, without extending the law's concern beyond the desire to minimise the risk of unnecessary suffering.

7. Conclusion

Patchett v. Macdougall and *Isted v. CPS* highlighted a potential gap in animal protection law, with it being an offence unreasonably to inflict unnecessary suffering on animal but not an offence unjustifiably to kill an animal if it could not be proved that the animal suffered before death. The AWA has, since these cases were decided, updated animal protection law, placing a legal duty on anyone responsible for an animal to take reasonable steps to provide for its needs. However, it has been argued that the AWA has not changed the law as to killing without proof of suffering. Moreover, although the judges in *Patchett* and *Isted* noted that property-based liability fills this gap to a degree, analysis of property law concepts highlighted another significant gap, because neither the owner(s), nor one who kills an animal with the consent of the owner(s), can be liable on the basis of property principles. As such, it has been suggested that a new offence of unjustifiably killing an animal, without need for proof of suffering, should be created, applying equally to owners and non-owners. It has been argued that this new offence would fit with developments in animal protection law and is morally and practically justified. Furthermore, the elements of the offence have been outlined.

[100] The second condition should be adapted to make it clear that the defendant must prove that she believed it was not reasonably practicable to wait for, *or to wait to take the animal to,* a veterinary surgeon.

[101] AWA, s 32. S 85(1) Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into effect on 12th March 2015 and has the effect of rendering unlimited any fine of £5,000 or more which can be imposed on summary conviction.

The Trade in Seal Products and the WTO

David Thomas[1]

The World Trade Organisation (WTO) promotes the principle of global free trade. Member countries agree not to erect barriers to the import and sale (collectively, 'marketing') of products from other members. If they do, the exporting member can impose retaliatory measures.

There are exceptions to the free trade principle and whether they apply to animal welfare is of central importance, given the global nature of animal exploitation and the international trade in resulting products. Politicians can be reluctant to legislate for improved welfare if they cannot prevent home markets being flooded with cheap imports produced with worse welfare.

In May 2014, the Appellate Body (AB) of the World Trade Organisation (WTO), on appeal from the Disputes Settlement Panel (the Panel), gave its landmark ruling in the challenge brought by Canada and Norway to the prohibition on the trade in seal products in the European Union (EU).[2] The prohibition was introduced, in August 2010, by the European Parliament and the Council of Ministers via Regulation (EC) 1007/2009 (the seal products regulation) and Commission Regulation (EU) No 737/2010 (the implementing regulation). The two pieces of legislation are together known as the 'EU seal regime'.

The regime builds on the prohibition on the EU trade of the skins and products from harp and hooded seal pups introduced by Council Directive 83/129/EEC.[3] In addition, Directive 92/43/EEC (the habitats directive) prohibits certain methods of killing and capture of seals in protected areas in the EU.

The two principal WTO agreements at issue in the Canada/Norway challenge were the General Agreement on Tariffs and Trade (GATT) and the Agreement on the Technical Barriers to Trade (the TBT agreement).[4] There is an explicit public morals exception under GATT, in Article XX(a), and an implicit one under Article 2.2 of the TBT agreement.

Whether concerns about animal welfare can constitute public morals under GATT has been the subject of lengthy debate. When a marketing ban for cosmetics tested on animals was mooted around the turn of the century, the European Commission (the Commission) was firm in its view that Article XX(a) was not available for animal welfare, and it was supported by many member states, including the UK. Part of the debate was whether a measure prohibiting the import of goods produced by a cruel method had extraterritorial effect, by seeking to impose values on other WTO members – WTO case law disapproved of extraterritoriality. However, campaigners argued that the EU would not be seeking to change production (or testing) methods in other countries but rather to protect the moral sensibilities of its own citizens by banning the import of cruelly-produced goods.

The regime builds on the prohibition on the EU trade of the skins and products from harp and hooded seal pups

[1] Solicitor and Part-Time Judge

[2] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* AB-2014-1 and AB-2014-2. There were two appeals, one brought by Canada and the other by Norway, with cross-appeals by the EU

[3] Extended by Commission Directive 85/444/EEC

[4] Article 4.2 of the Agreement on Agriculture also featured to some extent at the Panel

> **around 900,000 seals are hunted each year, with Canada, Greenland and Namibia accounting for some 60% of those killed**

The objective was inward – not outward – looking.[5]

The Parliament and Council of Ministers eventually agreed that a properly targeted ban could be WTO-compliant. That political precedent established, the EU has since invoked Article XX(a) on other occasions, for example when banning the import of cat and dog fur.

However, the trade in seal products was always likely to be the principal battleground for animal welfare under the WTO, given Canada's determination to protect the economic interests and cultural traditions of certain communities.

The WTO challenge was not the first to the EU seal regime. In 2011, Inuit organisations and individuals sought to argue that the regime was invalid under EU law. However, the Court of Justice of the European Communities (CJEU) held[6] that the applicants did not have standing to bring the case (the EU rules on standing are incredibly restrictive).

There are currently 161 members of the WTO. This includes all EU member states, although the EU deals with disputes on their behalf.

The trade

According to the Commission, around 900,000 seals are hunted each year, with Canada, Greenland and Namibia accounting for some 60% of those killed. Russia and Norway are other participants. Around one third of the world trade formerly either passed through or ended up in the EU. In Canada, there are some 6,000 hunters, mainly in Newfoundland.

Prior to the introduction of the seal products regulation, several EU member states had banned or were considering banning the trade in seal products (especially seal skins). The regulation, although motivated by animal welfare, has as its formal aim the harmonisation of laws in the EU. The consensus was that regulation needed to be at EU rather than member state level.[7]

In the appeal, the EU argued that, as a result of the ban, there had been a 'precipitous reduction in the number of [Canadian] seals hunted', with statistics showing a decline in Canada's seal exports.[8]

The welfare concerns

There is widespread revulsion at the manner in which seals are hunted and killed. The Commission, after obtaining expert evidence and discussions with the sealing nations, eventually came to the conclusion that the methods are *inherently* cruel, given the inhospitable conditions in which the hunts take place. Canada and other sealing countries disagreed, but the EU's view was that improvements in the methods of killing, such as those promised, could only be largely cosmetic.[9] Labelling and other harmonising measures would not address the welfare concerns, either.[10]

The seal products regulation

The seal products regulation is short and straightforward. With effect from 20 August 2010, it prohibits the 'placing on the [EU] market' of seal products. The prohibition applies whether the products originate within the EU (there have traditionally been limited seal hunts in Finland, Sweden and Scotland) or elsewhere.

There are, however, three exceptions:

- Seal products which come from 'hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence' (the IC exception)
- The import of seal products where they are for personal use (the personal use exception)
- Seal products, marketed on a non-commercial basis, which are the by-product of hunting regulated by national law and conducted for the sole purpose of the sustainable management of marine resources (the MRM exception)

[5] In its report (para 5.173), the AB, noting that the preamble to the seals regulation recited that it was designed to address seal hunting 'within and outside the Community', left open the question of extra-territoriality, given that (perhaps surprisingly) the parties had not addressed it.

[6] Case C-583/11 P *Inuit Tapiriit Kanatami and others v Parliament and Council* (3 October 2013). The Court ruled that the seal products regulation was a 'legislative act' (as opposed to a 'regulatory act') within what is now Article 263 of the Treaty on the Functioning of the European Union and that the applicants were unable to show that the regulation was of 'individual concern' to them – it applied indiscriminately to any trader falling within its scope and was not directed specifically at the applicants. The CJEU upheld the decision of the General Court: Case T-18/10 *Inuit Tapiriit Kanatami and others v Parliament and Council* (6 September 2011)

[7] Recital (21). EU regulation could be done without breaching the principle of subsidiarity

[8] See para 5.245 of the AB report

[9] Recital (11) of the seal products regulation says: *'Although it might be possible to kill and skin seals in such a way as to avoid unnecessary pain, distress, fear or other forms of suffering, given the conditions in which seal hunting occurs, consistent verification and control of hunters' compliance with animal welfare requirements is not feasible in practice or, at least, is very difficult to achieve in an effective way, as concluded by the European Food Safety Authority on 6 December 2007'*

[10] See recital (12)

> **an absolute ban on an activity can be easier to defend than one which represents a compromise between different interests**

The exceptions were the EU's attempt to balance animal welfare against other concerns. As with other social reform legislation, however, the exceptions have enabled opponents to claim that the legislation creates arbitrary distinctions. The numerous exemptions in the Hunting Act 2004 have enabled proponents of hunting with dogs to run similar arguments. The irony is that legislation which contains an absolute ban on an activity can be easier to defend than one which represents a compromise between different interests. So it has proved with the seal products regulation, at least with regard to GATT.

The IC exception dominated the appeal before the AB.

The implementing regulation
The implementing regulation fleshes out conditions for compliance. For example, to qualify under the IC exception, an attesting document, issued by a recognised body, is required to show that (i) the seal product originates from a hunt conducted by Inuit or other indigenous communities with a tradition of seal hunting; (ii) the products of the hunt are at least partly used, consumed or processed within the communities according to their traditions; and (iii) the hunts contribute to the subsistence of the communities.

The relevant member state is ultimately responsible for checking the authenticity and accuracy of an attesting document.

The roles of the Panel and the AB
Under the WTO system, the Panel is the primary decision-maker. Under Article 11 of the Dispute Settlement Understanding, it has to consider the arguments of the parties and make an objective assessment of the evidence.[11] The AB will only interfere with its findings in the circumstances the High Court will step in on judicial review, and so the Panel has discretion as to which parts of the evidence to focus on and what weight to give it and so forth.

The Appellate Body Report
The AB report, given on 22 May 2014, runs to 208 pages, closely-typed, tightly-reasoned, exhaustively-referenced. A light read it is not. These are the main findings.[12]

TBT agreement
In the words of the WTO website, '[t]he [TBT] Agreement aims to ensure that technical regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade... Technical regulations and standards may vary from country to country, posing a challenge for producers and exporters. The TBT Agreement strongly encourages the use of international standards and aims to create a predictable trading environment through its transparency requirements'.

Article 2.1 obliges WTO members not to discriminate against imported products through technical regulations. Article 2.2 sets out a non-exhaustive list of exceptions, including the protection of human health, animal life and health and the environment, providing that the least trade-restrictive measure is taken. Unlike GATT, there is no *explicit* exception for public morals but caselaw has accepted that they can be a legitimate objective (as indeed the Panel accepted in the present case).[13]

Annex 1.1 defines 'technical regulations' as:

'Document which lays down product characteristics or their related processes and production methods, including any applicable administrative provisions, with which

> **The relevant member state is ultimately responsible for checking the authenticity and accuracy of an attesting document**

[11]Para 5.288 of the AB report

[12]The Panel had given its ruling on 25 November 2013: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* T/DS400/R (Canada) and WTDS401/R (Norway). It decided that (i) the EU seal regime was a 'technical regulation' within Annex 1.1 to the TBT agreement (because it lays down 'product characteristics'); (ii) the IC and MRM exceptions violated Article 2.1 because they accorded imported seal products less favourable treatment than that accorded to like domestic and other foreign products and the less favourable treatment did not stem exclusively from legitimate regulatory distinctions; (iii) however, Article 2.2 of the TBT agreement was not violated because the EU seal regime fulfilled the objective of addressing public moral concerns, and no alternative measure was shown to make an equivalent or greater contribution to that objective; (iv) the IC exception breached Article 1:1 of GATT (the most-favoured nation rule) because an advantage accorded to seal products originating in Greenland was not accorded to like products originating in Canada (Greenland's WTO status is anomalous: it is not a member, nor is it a member state of the EU, but it has links with Denmark, which is a member of both institutions); (v) the MRM exception fell foul of Article III.4 of GATT (the like products rule) because it accorded imported seal products treatment less favourable than that accorded to domestic seal products: (vi) the three exceptions in the EU seal products regulation did not breach Article XI of GATT (general elimination of quantitative restrictions); and (vii) Article XX(a) (the public morals exception) provisionally applied but could not save the IC and MRM exceptions because they were arbitrarily and unjustifiably discriminatory, within the chapeau to Article XX.

[13]The Panel noted that the second recital of the TBT agreement says that one of the objectives of the agreement is to further the objectives of GATT (including, therefore, the protection of public morals).

> **if WTO member X gives trading advantages to member Y, it must give the same advantages to member Z**

compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a product, process or production method' (emphasis added).

The AB ruled in EC-Asbestos[14] (where France banned asbestos-containing products from Canada) that 'product characteristics' included definable features, qualities, attributes or other distinguishing marks of a product.[15] The Panel, drawing on this decision, decided that the EU seal regime also involved product characteristics. The AB disagreed,[16] noting (perhaps surprisingly):

'… it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it establishes the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. We view this as the main feature of the measure. That being so, we do not consider that the measure as a whole lays down product characteristics. This is not changed by the fact that the administrative provisions under the EU seal regime may "apply" to products containing seal [a reference to the phrase "any applicable administrative provisions" in the definition of "technical regulation"]'

The AB could have gone on to consider whether the regime laid down 'related processes and production methods', another part of the definition of 'technical regulation'. However, it felt it was not in a position to make a ruling about this, given the way the case had proceeded.

The lawfulness or otherwise of the seal regime would be determined under GATT, in particular Articles 1.1 and III.4 and the Article XX(a) exception.

Article 1:1 GATT
This is the so called 'most-favoured nation treatment' rule. Article 1:1 reads (insofar as relevant):

'… with respect to all rules and formalities in connection with importation and exportation … any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members'.

In other words, if WTO member X gives trading advantages to member Y, it must give the same advantages to member Z. The argument by Canada and Norway was that the EU in practice gave preferential treatment to Greenland because most seal hunters in Greenland, as Inuits, could take advantage of the IC exception, whereas most seal hunters in Canada and Norway, as non-Inuits, could not.

The AB agreed: what mattered was simply that there was competitive disadvantage.[17] Commentators have suggested that the AB's broad approach means that a great many laws will *prima facie* breach Article 1.1.[18]

Article III:4 GATT
Article III.4 GATT provides:

'The products of the territory of an Member imported into the territory of any other Member shall be

> **The argument by Canada and Norway was that the EU in practice gave preferential treatment to Greenland**

[14] *European Communities – Measures affecting asbestos and asbestos-containing products* WT/DS135/AB/R (5 April 2001)

[15] Para 67

[16] Para 5.1.2.3.4. This is, it seems, the first time that the AB has found a measure not to constitute a technical regulation

[17] In *US – Clove Cigarettes* WT/DS406/AB/R (adopted 4 April 2012), the AB had held that a disadvantageous competitive position for imported products was not contrary to the TBT agreement if that stemmed exclusively from a legitimate regulatory distinction. The EU argued that the same approach should be taken under Article 1 (and Article III.4) of GATT but the AB disagreed: with GATT measures, all that mattered was whether there was a competitive disadvantage. There was here between hunters in Greenland and those in other countries.

[18] For example, in *Sealing the Deal: The WTO's Appellate Body Report in EC – Seal Products* American Society of International Law Volume 18 issue 12 by Rob Howse, Joanna Langille and Katie Sykes (4 June 2014) http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products, the authors argue: *'Does the AB really mean that every regulation that results in different market opportunities for products from different countries, regardless of the reason for the regulation and no matter how incidental that effect, is a prima facie violation of GATT and has to be justified under Article XX? Very few legislative or regulatory distinctions between products would not fail that test: safety, environmental and health rules, for example, are quite likely to have a different impact on goods manufactured in different places. The logical implication is that a large universe of laws and regulations is now prima facie illegal under WTO law. That outcome seems extreme and hard to reconcile with the intent and text of GATT'* They do make the point, however, that the AB says that a violation of Article III.4 requires a 'genuine relationship' between the measure in question and any adverse effect on competitive opportunities for imported products.

accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use …'

So, Article III.4 deals specifically with imports.[19]

The EU did not appeal the Panel's finding that the MRM exception breached Article III.4 (on the basis that it accorded less favourable treatment to Canadian and Norwegian seal products than to domestic seal products).

The exception in Article XX(a) GATT

Because the EU seal regime *prima facie* breached Articles 1.1 and III.4 of GATT, it could only be saved if one of the exceptions in Article XX applied, in particular Article XX(a) (public morals).

Article XX opens with the so-called 'chapeau':

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures …'

Paragraph (a) then follows on: 'necessary to protect public morals'.

Case law says that one must first consider whether the measure in question is provisionally justified as 'necessary to protect public morals' and then move onto the chapeau. Both limbs must be satisfied.

Necessary to protect public morals

The Panel had adopted its definition of 'public morals' in *US-Gambling:*[20] 'standards of right and wrong conduct maintained by or on behalf of a community or nation'. It had also said that, because public morals vary, a WTO member should be 'given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values'. It acknowledged that public moral concerns with regard to animal welfare were 'an important value or interest'.[21] The AB appeared to accept all this.

The AB explained that one had, first, to identify the objective of the EU seal regime and, second, consider whether the regime was necessary to further that objective or whether some other method, less trade-restrictive, could have been chosen.

The EU argued that the seal regime reflected a standard of animal welfarism, pursuant to which 'humans ought not to inflict suffering upon animals without a sufficient justification'.[22] However, it also maintained that the subsistence of Inuit and other indigenous communities and the preservation of their cultural identify 'provide benefits to humans which, from a moral point of view, outweigh the risk of suffering inflicted upon seals

"public moral concerns with regard to animal welfare were 'an important value or interest'"

as a result of the hunts conducted by those communities'. The Panel nevertheless decided that seal welfare was the main objective of the EU seal regime, with the Inuit and other interests being 'accommodated' as well.

The AB said[23] that a necessity analysis involves weighing and balancing a series of factors, including the importance of the identified objective, the contribution the measure makes to that objective and its trade-restrictiveness (which involves consideration of alternative means of achieving the objective).[24] The burden of proving necessity lies on a responding party (the EU here), although a complaining party must identify any relevant alternative measures.[25]

The Panel had noted that there has to be a 'genuine relationship of ends and means between the objective pursued and the measure at issue'.[26] However, the AB ruled that it was not necessary for the contribution of the measure to the objective in question to be material.[27] It was sufficient that, as the Panel had properly found, the EU seal regime was 'capable of and

[19]There is then an exception for internal transportation charges based exclusively on economic factors and not the national origin of the product

[20]Para 6.465 of *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/25

[21]Para 7.632, referring to its report in *China – Publications and Audiovisual Products* para 7.817

[22]Para 5.143 of the AB decision

[23]Para 5.169

[24]See *Korea Various Measures on Beef* para 164: *US – Gambling* para 306; *Brazil – Retreated Tyres* para 182

[25]*US – Gambling* paras 309-311

[26]Panel report para 7.635, referring to the AB report in *Brazil – Retreated Tyres* paras 150-151

[27]Para 5.216 of the AB report

does make some contribution' to its objective.[28] Similarly, the Panel was entitled to conclude, on the evidence, that a reduction in exports to the EU would result in a reduction in the number of seals killed (and therefore inhumanely killed).[29] And, it was entitled to reject Canada's argument that the EU seal regime would lead to worse seal welfare (the argument was that IC and MRM hunts would be given a boost and those hunts lead to a higher rates of inhumanely killed seals compared to commercial hunts).

The AB rejected Canada's further argument that the EU was inconsistent because it tolerated animal suffering, in slaughterhouses and wildlife hunts, similar to that involved in seal hunting.[30] The argument was wrongly predicated on a need to identify the precise content of a risk to public morals: unlike Article XX(b) (public and animal health and life), paragraph (a) did not require an analysis of risk. More prosaically, the AB thought that policy-makers do not have to be perfectly consistent.[31]

Reasonable availability of alternative measures

Part of the necessity test involves considering whether the identified objective could have been achieved with a less trade-restrictive measure. An alternative measure may not be reasonably available where it is 'merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties'.[32] Cost to, or practical difficulties for, industry might also be relevant, especially if they could affect its ability or willingness to comply with the requirements of the alternative measure.[33] The alternative measure must achieve the desired level of protection.

The principal alternative measure identified by Canada and Norway comprised EU market access for seal products where higher animal welfare standards were met, with certification and labelling schemes. The Panel accepted that would be less trade-restrictive, but ruled that hunters would have difficulty meeting higher animal welfare standards in light of the physical conditions in which seal hunts take place, and might not be willing to anyway.[34] An attempt to conform might result in more seals killed, and therefore more inhumanely killed seals.[35]

The AB decided that the Panel was entitled to reach these conclusions on the evidence, and rejected the complainants' argument that the Panel had assessed the alternative measure against *complete* fulfilment of the objective of protection of the morals of EU citizens instead of against the *actual* contribution the EU seal regime made (taking into account the exceptions).

> **a reduction in exports to the EU would result in a reduction in the number of seals killed**

The chapeau

The function of the chapeau is to prevent abuse of the exceptions.[36] To qualify, a measure must not be protectionist in intent or effect. The burden of proof rests on the party invoking the exception (the EU in the present case),[37] and is heavier than showing that an exception provisionally applies.[38]

Although there may be overlap, the fact that a measure has been found to be discriminatory under one of the substantive GATT provisions (such as Article 1.1 or III.4) does not mean that it constitutes unjustifiable or arbitrary discrimination under the chapeau - otherwise, the chapeau could never be satisfied. Because the focus is on the application of a measure, as well as intent, one has to consider '[its] design, architecture, and revealing structure' in order to establish whether it passes.[39]

The AB said[40] that one of the most important factors is whether the discrimination can be reconciled with, or is rationally related to, the policy objective (public morals in the present case).

After closely examining the exceptions permitted by the EU seal regime, and in particular the IC

[28]Para 5.228

[29]Para 5.247

[30]Para 5.198

[31]Paras 5.200 and 5.201

[32]AB report in *Brazil – Retreaded Tyres* para 156 (quoting AB report *US – Gambling* para 308).

[33]Para 5.277 of the AB report in the present case

[34]Para 7.496 and footnote 798

[35]Paras *7.480, 7.496 and 7.498*

[36]AB report para 5.297

[37]AB report in US – *Gasoline* pp 22-23

[38]AB report in US – *Gasoline* p23

[39]Para 5.302 of the AB report. The measure at issue in *US – Shrimp* failed in part because of a 'rigid and unbending requirement' that countries exporting shrimp to the US had to adopt a regulatory programme which was essentially the same as the US programme and because the US negotiated seriously with only some WTO members over the protection and conservation of sea turtles in relation to shrimp harvesting.

[40]Para 5.306

exception, the AB agreed with the Panel that the regime fell foul of the chapeau, for these reasons:[41]

- The EU had failed to show how its approach to seal products from IC hunts could be reconciled with its approach to those from commercial hunts, given that the welfare issues were the same
- There was considerable ambiguity in the subsistence and partial use criteria of the IC exception
- The EU had not made comparable efforts to facilitate access of Canadian Inuits to the IC exception as it had with respect to Greenlandic Inuits.

As a result, the EU could not rely on Article XX(a).

What happens now
The EU has to address the problems identified with the chapeau, and the parties have agreed that it may have until October this year to do so. Provided it does so, the seal regime can remain in place.

In February 2015, the Commission published a Proposal to amend the seal regime.[42] It removes the MRM exception and adds a condition to the IC exception that 'the hunt is conducted in a manner which reduces pain, distress, fear or other forms of suffering of the animals hunted to the extent possible taking into consideration the traditional way of life and the subsistence needs of the community'. The amendment also stipulates that an IC hunt must not be conducted primarily for commercial reasons and empowers the Commission to introduce a measure to limit the quantity of products which can be placed on the

> **An attempt to conform might result in more seals killed, and therefore more inhumanely killed seals**

EU market if there are indications, such as the quantity of seal products marketed, that a hunt is conducted primarily for commercial reasons.

If the Proposal is adopted by the EU legislature and accepted by the WTO, the effect will, therefore, actually be to strengthen the welfare aspects of the seal regime.

Conclusion
The EU won the central point of principle that the seal regime was provisionally justified under Article XX(a). That is key for maintaining the general ban on seal imports (and therefore undermining the financial viability of seal hunts) and, more generally, hugely important for animal welfare in the context of international trade.

That in turn may embolden the CJEU to allow greater reliance on the similar public morals exception in Article 36 TFEU for animal welfare reasons and may also be important for the other free trade agreements which are mushrooming.

The message is clear: the principles of free trade need not be a reason to trample over animal welfare.

[41] Summarised in para 5.338

[42] 2015/0028 (COD): http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/proposal.pdf

Veterinary Forensic Pathology and Animal Welfare; an Introduction and the Post Mortem Examination

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One aspect of the veterinary profession which is often overlooked when considering animal welfare is the science of pathology. In this article we discuss the varied, often little-known, applications of veterinary forensic pathology, its application to animal welfare, and present an overview of the post mortem examination.

Veterinary Forensic Pathology

While the veterinarian can comment on the treatment of the live animal, the specialist forensic veterinary pathologist is able to comment on any disease or lesions in both the live and dead animal.

> **to become a qualified veterinary pathologist in the UK, the candidate must first complete their 5 to 6 year veterinary degree**

DiMaio and DiMaio [4] introduce the definition and aims of forensic pathology as follows:

Forensic pathology is the branch of medicine that applies the principles and knowledge of the medical sciences to the many legal issues within the field of law... The medical examiner provides the expert testimony if the case goes to trial. Although all veterinary surgeons are trained to perform a basic post mortem examination, a forensic examination should always be performed by someone with additional postgraduate training and experience in veterinary pathology. This will prevent the court being misled by inexperienced interpretation of findings.

Typically, to become a qualified veterinary pathologist in the UK, the candidate must first complete their 5 to 6 year veterinary degree and become a member of the Royal College of Veterinary Surgeons (MRCVS), before completing an approved postgraduate pathology training programme (such as a Residency, lasting 3 to 4 years) and undertake appropriate professional examinations. These might include one or a combination of the following: the Fellowship Examinations of the Royal College of Pathologists (FRCPath)[5], the Diploma of the European College of Veterinary Pathologists (DipECVP)[6], and/or the American College of Veterinary Pathologists (DipACVP)[7].

Applications to Animal Welfare

Forensic pathology includes, but is not limited to, the investigation of dog attacks, animal sexual abuse, traumatic wounds to animals at scenes of homicide or other crimes, fires, neglected animals, and illegal hunting.

Recent developments, for example the amendments to the Dangerous Dogs Act in 2014[8], have already resulted in an increased case load. The amendment now makes it an offence to permit a dog on your own property to attack anyone. Our department[9] performed the post mortem examination of a dog in a case which became the first

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[4] VJ DiMaio and D DiMaio, Forensic Pathology (2nd edn, CRC Press 2001), Foreword

[5] http://www.rcpath.org/training-education/specialty-training/veterinary-pathology (accessed 13 April 2015)

[6] http://www.ecvpath.org/residency-training/ (accessed 13 April 2015)

[7] http://www.acvp.org/residents/Exam.cfm (accessed 13 April 2015)

[8] Dangerous Dogs Act 1991, amended 2014 http://www.nawt.org.uk/advice/changes-dangerous-dogs-act-advice-owners (accessed 13 April 2015)

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prosecution since the amendment to the Act came into force. Unfortunately, due to these amendments to the Act happening so recently, we are not permitted to divulge details of these cases whilst they are ongoing, however in future they may be useful to discuss in detail.

In the case of Gray & Ors v. Royal Society for the Prevention of Cruelty to Animals (RSPCA)[10] over 100 sick, dead, diseased and malnourished horses and ponies from a farm in Amersham in Buckinghamshire were seized by the RSPCA on the allegation of animal cruelty contrary to sections 4 and 9 of the Animal Welfare Act 2006[11]. The defendants were tried and convicted. Appealing their convictions in Aylesbury Crown Court, only two of the eleven appeals were dismissed.

At Aylesbury, the prosecution's expert witness, reporting the post mortem findings, was highly praised by Judge Tyrer[12]:

''[The RSPCA's expert] was another outstanding witness. His grasp was total; his expertise was as abundant as it was obvious. We have no hesitation in accepting what he said to us. He destroyed the contrary arguments… Their [the appelant's professional witnesses] evidence cannot begin to compete with the vast array of other better argued and better researched evidence that we have heard. To us they have both attempted to open new avenues of exculpation as old ones ceased to be tenable. They lost their objectivity and impartiality in the process. We are entirely satisfied that we must reject their efforts and we do so.''

successful identification of signs of abuse can result in prosecution and prevent repeat offences

By the time a cadaver reaches the pathologist, intervention is too late for that individual animal, but successful identification of signs of abuse can result in prosecution and prevent repeat offences, or even raise concerns of domestic violence or child abuse in some cases[13].

In cases of neglect or underlying health problems in groups of animals, such as herds, the pathologist's report on an individual animal can identify and result in resolution of the problem for the remainder of the group. For example, if a number of calves start dying in a herd, post mortem examination can elucidate the cause of death and provide the veterinary surgeon with a diagnosis (e.g. pneumonia) for choice of appropriate treatment and changes in management in that herd to prevent further deaths.

In all cases it is important to separate findings caused by natural disease from those due to abuse, however it may be that natural disease caused unnecessary suffering as a result of the animal's caretaker failing to seek veterinary attention. An example would be allowing a large tumour on the jaw to grow to the point it prevents the animal eating without seeking veterinary attention.

The Post Mortem Examination[14]
Post mortem refers to the time after death, ante mortem refers to the time before death, and agonal refers to the time immediately surrounding death (pre-mortem should not be used synonymously to ante mortem as it refers to a business strategy in which one analyses the reasons for a business project failing. The term is often mistakenly used in medical television series!)

The information obtained from a post mortem examination (PME) or necropsy varies according to the specifics of each case. It is of utmost importance to know why the PME is being performed to ensure appropriate samples are taken at the time of the examination and to ensure the instructions to the pathologist are addressed in the final report.

PME can ascertain cause of death, approximate post mortem interval (time since death), whether the animal was likely to have suffered, facilitate collection of trace and ballistics evidence (in co-operation with relevant Scenes of Crime Officers or other suitably qualified professionals), collection of samples for toxicological and microbiological analyses, document injuries or presence of underlying disease, or evidence of previous disease or trauma, and assist in collection of measurements for dog breed experts.

Questions often asked of us include: Were wounds caused by trauma, non-accidental injury or fighting? Are there signs of neglect? Is there evidence of sexual abuse? The

[10][2010] EW Misc 8 (EWCC) http://www.bailii.org/ew/cases/Misc/2010/8.html (accessed 09 April 2015)

[11]Animal Welfare Act 2006 s. 4 and s. 9 http://www.legislation.gov.uk/ukpga/2006/45/contents (accessed 13 April 2015)

[12][2010] EW Misc 8 (EWCC) http://www.bailii.org/ew/cases/Misc/2010/8.html Page 78 and 125 (accessed 09 April 2015)

[13]http://www.thelinksgroup.org.uk/site/understanding.htm (accessed 14 April 2015)

[14]The post mortem examination may also be called the necropsy or autopsy.

pathologist, who is an expert in diagnosis, is able to address whether an underlying disease is present and whether it contributes to, or confuses interpretation of, other lesions. Likewise, the pathologist can identify changes caused by artefacts of storage, such as freezing of the cadaver, and decomposition.
There is no single correct method to perform a PME. However, the pathologist should approach each case in a consistent manner to ensure all body systems and organs are examined and the appropriate samples are taken.

During the PME, the pathologist keeps notes of normal, incidental and abnormal findings. Sometimes questions can be answered following this examination alone. However, microscopic examination of the samples of fixed tissues (called histopathology), together with results from other testing (such as microbiology) can provide additional information in many cases. This information typically includes identification of disease processes not visible to the naked eye, and identifying the presence of microorganisms which might have contributed to the disease or lesion in the animal. These findings are all interpreted and presented in a written report by the pathologist when all examination and testing is complete, together with photographs, and any information provided to the pathologist regarding clinical history and circumstances surrounding the case.

During the PME, the pathologist keeps notes of normal, incidental and abnormal findings

The approach to the post mortem examination, from receipt of the animal to completion of the report and giving evidence in court, as performed by the authors and colleagues is typically as follows.

The duty pathologist will receive communication that an animal for post mortem examination is to be delivered to the department. At this time there may be no additional information, but can sometimes include detailed clinical history or circumstances of death in advance of the arrival of the animal.

Regardless of the information received in advance of arrival, a member of the pathology staff will converse with the RSPCA or Police officer responsible for the case or responsible for the body (as a piece of evidence) to establish the events leading to death and the reason for the post mortem examination in the same way as a solicitor will take instruction from his client.

It is important to note at this juncture, that the pathologist's role in a case involving animal cruelty or neglect is to advise the court. Regardless of whether he is engaged on behalf of prosecution or defence, his/her evidence is impartial and is simply a statement of fact and opinion drawn from his/her expertise.

Chain of custody/evidence is the sequential documentation demonstrating the seizure, custody, control, transfer, analysis, and disposition of evidence. In order to maintain the critical chain of

The duty pathologist will receive communication that an animal for post mortem examination is to be delivered

evidence the submitting officer will receive a receipt which includes the RSPCA log number or Police reference number, the Officer's name and contact details, details of the wrappings, including tag numbers if present, and signatures from both the person delivering the cadaver and the person receiving the cadaver on behalf of the pathology department.

The cadaver is assigned a unique reference number and then placed in secure refrigerated storage if the post mortem is not going to occur immediately upon receipt. A case file, with the unique identifier, is assembled to document cadaver receipt, hold notes from the client briefing, details of storage and imaging, hold notes of the examination, communications, and any other materials from a case. Ultimately this file will contain the final report and a CD of images upon completion.

If the cadaver is received frozen then it will be placed in a secure location for defrosting. Before the cadaver is removed from its wrappings the material received is photographed and recorded. If radiography, including computed tomography (CT scanning), is indicated then the cadaver remains in its wrappings and remains in sight of the pathologist or forensic technician for the entirety of the imaging process.

As the cadaver is unwrapped, notes are taken of any items which may accompany the cadaver within the wrappings. Also worthy of note are presence of fluids (for example blood

and other discharges), invertebrates, including parasites (for example fleas and flea dirt), and/or flies and fly larvae. These are collected, documented and stored as appropriate. The presence of parasites might be contributory to disease, or neglect, and larvae may be useful in estimating the time since death.

Photographs are taken throughout the process as a visual record to support the documentation, and to present the material in court. When photographs are taken a scale with the unique identifier is placed in the field of the image in the plane of the area of interest. Photographs of the cadaver from each side are taken before the examination is started. In subsequent photographs the area of interest is photographed in context with the rest of the cadaver to assist the reader of the report, then a close-up is taken for detail. Scale bar(s) are placed in the appropriate plane of the image to allow measurements to be taken from the photograph at a later date if necessary.

The cadaver is weighed, measured and the exterior examined initially. Quality of the hair coat, claws or hooves, presence of parasites, state of decomposition, lesions such as lacerations, puncture wounds and bruises, prominence of bones, discharges from orifices or wounds, fractures, amongst other changes are recorded. Samples may also be taken and logged at this stage by Scene of Crime Officers (SOCOs) for further analysis, for example swabs from the mouth, feet and orifices for DNA. All these samples are recorded by the SOCO in an evidence log to maintain chain of custody when the samples move to another lab for analysis. Other measurements may also be taken at this stage, for example breed experts may assess parameters for identification of banned breeds.

The veterinary post mortem, unlike the human equivalent, is not cosmetic. The dissection is extensive to allow examination of everything without fear of compromising the aesthetics of the cadaver, which is often disposed of by cremation when the case is closed (and with written permission from the responsible Officer).

Upon completion of the external examination, with the animal on its back (or on its side in the case of horses and cattle) the limbs are reflected away from the body and the cadaver is skinned in its entirety. The presence of a hair coat often obscures bruises and other lesions, however, once skinned, the inner surface of the skin may reveal these in both the skin and often subcutaneous tissues. These are photographed and documented. The amount of subcutaneous fat is recorded as absent, scant, minimal, moderate or abundant as appropriate, and the cadaver is examined for signs of skeletal muscle atrophy (wasting). Lymph nodes are examined and sampled if abnormal.

> **the abdominal cavity is opened by a midline incision and the abdominal contents are examined**

The oral cavity is examined, including the teeth. Next the abdominal cavity is opened by a midline incision and the abdominal contents are examined. The positions of the organs are checked; the presence of fluid (such as blood, adhesions, pus, intestinal contents or ascites) is measured and recorded. A small stab-incision of the diaphragm is made to ensure that negative pressure is present within the thorax (the absence of negative pressure may indicate air has managed to get into the chest cavity by some other means, including trauma).

The thorax is opened by cutting along the ribs, to expose the contents. Similar to the abdominal cavity, the contents of the thorax are examined for presence of fluids, adhesions, or foreign material. The hyoid bones (small bones in the neck which may be damaged during compression of the neck) are examined. The tongue is separated from the floor of the mouth and reflected towards the chest, whilst cutting along the roof of the neck. This allows the tongue, wind-pipe (trachea) and food-pipe (oesophagus) to be removed together with the lungs and heart. A cut at the diaphragm frees these structures, and this group of organs is called the ‘pluck’.

The duct between the gall bladder and intestine is tested by gently squeezing the gall bladder and checking that bile moves into the intestine. The spleen, liver and adrenal glands are each removed whole. The stomach and intestines are removed together, followed by the urinary bladder and kidneys, connected via the ureters. The reproductive tract is removed (if the animal hasn’t been neutered) at this point too. At no point are the organs opened before removal from the

The brain is removed by sawing through the skull. If necessary, the spinal cord is removed by sawing through the vertebrae

cadaver. They are laid out on clean boards for photographing and description of the external surfaces in the notes. Then each set of organs is opened and examined.

The brain is removed by sawing through the skull. If necessary, the spinal cord is removed by sawing through the vertebrae. Nervous tissue must be fixed in formalin before it can be cut due to its soft consistency. Fixing causes the brain and spinal cord tissue to become firm and thus easier to section for examination, and may take up to a week in larger animals. The eyes may be removed and fixed for further examination too.

Each organ system is then examined in turn, the external appearance described and then opened for examination and description of the interior. A section of each tissue is then placed in formalin for fixation.

The respiratory tract is opened, along the trachea and down into the lungs. A note is made of the contents (if any) of the larynx, trachea and lungs. When sections of lung are taken for fixation, the pathologist observes whether the tissue floats or sinks in the formalin, to give an indication of aeration of the tissue. The skull may be opened further to examine the nasal cavity if indicated. The thymus is examined if present (this organ regresses with age, thus is largest in young animals).

The sac around the heart, the pericardium, is removed and any fluid contents measured and described. The heart is weighed to provide a weight as a percentage of body weight. Then the heart is opened to examine each of the chambers and valves. Measurements are taken of the wall thickness of each chamber, to provide a ratio for interpretation.

The oesophagus, stomach and intestines are opened along their length. Stomach contents may be kept for further analysis. This might include toxicological or DNA analysis in cases of dog attacks for example. Further samples may be taken for microbiological, virological, and parasitological analyses where indicated. The surface is then rinsed to allow observation of the lining of the tract. Representative sections are then fixed in formalin.

The liver and spleen are cut into partial thickness slices to allow examination of the inside of these dense organs for lesions which may not be visible from the surface. Samples of these organs are taken for fixation, together with the adrenal glands and any lymph nodes which appear abnormal. The capsule of the kidneys is removed and then the kidneys are bisected to examine the architecture. A sample of urine may be kept for further analysis. Sections of kidney and bladder are taken for fixation.

Other samples which may be taken include fat and frozen sections of organs for toxicological analysis or advanced microbiological techniques (such as PCR for specific pathogens) and culture. Swabs may be taken for microbiological analysis, and these can be performed in a sterile manner by searing the outside of the organ of interest, making an incision with a sterile scalpel blade, then inserting a sterile swab. This ensures that contamination from the post mortem room does not affect the culture results.

Following the post mortem examination, the pathologist writes a report of all the findings. This systematic dissection ensures nothing is missed. Suspicious findings might include bruising in cases with no reported history of blunt force trauma (e.g. from a kick), and with no signs of diseases which might predispose to excessive bleeding (e.g. blood clotting defects). Another example of a suspicious lesion is failure of lung tissue to float which might indicate the air spaces (alveoli) no longer contain air. This may have many causes: they may never have inflated (in stillborn animals), have collapsed due to rupture, be filled with blood, be filled with inflammatory cells (in some cases of pneumonia), contain fluid (from heart failure or drowning for example), and any number of other reasons too!

The interim report is often called the gross report. The samples which have been fixed in formalin are left for 24 hours to ensure complete fixation. Then the pathologist selects representative samples of these tissues for histological processing, which involves embedding the tissue in wax blocks for sectioning. These

Suspicious findings might include bruising in cases with no reported history of blunt force trauma (e.g. from a kick)

very thin sections are cut with a microtome, melted onto glass slides, stained, and then examined microscopically. This is called histopathology. All the sections are stained with a standard staining protocol with haematoxylin and eosin. Additional stains are available to the pathologist to highlight different microscopic structures and chemical components of tissues. Advanced staining using antibodies can be used to label specific microbes or molecular components of tissues and is called immunohistochemistry. This may assist with identification of tumours and pathogens.

When the slides have been examined by the pathologist and any additional tests completed, the pathologist adds the findings to the report. This takes around four weeks from the date of the post mortem examination to complete. The report includes an interpretation and summary of the case. The details of the pathology report will be discussed further in a future article.

The final report, together with a CD of the images from the post mortem examination, is sent to the client. In some cases the final report will be exhibited in court. There are cases in which a further statement from the pathologist is necessary, and the pathologist may be requested to attend court as an expert witness. For example, new circumstances may have come to light which may raise further questions or alter the interpretation of the findings.

The remains from the PME are kept frozen until the case is closed and written permission has been received from the responsible officer to either dispose of the remains, or arrange collection of the remains for storage elsewhere. The glass slides, fixed tissue embedded in paraffin, photographs and case file are kept indefinitely.

Conclusion

Veterinary pathology is the study of disease and underpins all of veterinary medicine. Veterinary forensic pathology is sometimes overlooked in animal welfare cases but the forensic post mortem examination can be a powerful tool in providing evidence in such situations. Forensic post mortems are not a routine procedure in first opinion practice and must be performed by suitably qualified persons if their findings are to be valid in court. The veterinary pathologist uses their expertise to address a number of questions which are often central to the case.

About the authors

Alexander Stoll became a member of the Royal College of Veterinary Surgeons in 2013, after obtaining a Bachelor of Veterinary Medicine from the Royal Veterinary College (RVC). During this degree he undertook an intercalated honours degree in Veterinary Pathology. He is currently in the final year of his postgraduate specialist pathology training (Residency) in Veterinary Anatomic Pathology at the RVC and has completed the first part of his examinations for obtaining Fellowship of the Royal College of Pathologists and the first part of his examinations towards becoming a Diplomate of the American College of Veterinary Pathologists. He is also undertaking examinations for the Diploma in Forensic Medical Sciences, regulated by the Society of Apothecaries. He is an Associate of the Royal College of Pathologists, Member of the Royal Society of Biology, Member of the Royal Society for Public Health, Member of the British Veterinary and Forensic Law Association and a new member of the Association of Lawyers for Animal Welfare.

The glass slides, fixed tissue embedded in paraffin, photographs and case file are kept indefinitely

Gwen Fraser is a science graduate and experienced forensic pathology technician responsible for the administration of forensic cases and correlation of supporting evidence and maintaining the evidential chain. Currently studying for the LLB part-time and is a member of ALAW.

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> **The veterinary pathologist uses their expertise to address a number of questions which are often central to the case**

Glossary

Agonal – around the time of death

Ante mortem – before death

Autopsy – examination and dissection of a dead body

Biochemistry – analysis of body fluids for their chemical composition

Biopsy – sample of tissue taken from a living body for microscopic examination

Cytology – examination of individual cells under the microscope

Electron microscopy – use of an electron microscope (which uses electrons instead of light) to view structures smaller than individual cells, also called ultrastructural examination

Fixing – immersion of tissue in a fixative (typically formalin) to preserve it for further examination

Gastrointestinal tract – the digestive tract

Gross – visible to the naked eye

Haematology – examination and analysis of the blood

Histopathology – examination of thin slices of organs under the microscope

Macroscopic – visible to the naked eye

Microbiology – the growth, in a lab, of bacteria, fungus or virus from swabs or tissue taken from a body or object to identify the species of bacteria, fungus or virus present in the sample

Microscopic – visible with the use of a light microscope

Necropsy – examination and dissection of a dead body

PCR – polymerase chain reaction; laboratory technique to amplify DNA samples for comparison or analysis

Post mortem – after death

Post mortem examination – examination and dissection of a dead body

Post mortem interval – the time between death and examination of the body

Responsible Officer – the RSPCA or Police officer in charge of the case, or given responsibility for the animals body as a piece of evidence

Toxicology – the analysis of body fluids, tissues or the contents of the digestive tract for identification of toxin

Case Summary: The Nonhuman Rights Project, Inc.

Barbara Bolton[1]

In a widely reported preliminary decision issued on 20 April 2015, in the case of *The People of the State of New York ex rel. The Nonhuman Rights Project, Inc., on behalf of Hercules and Leo v. State University of New York a/k/a Stony Brook University,* Justice Jaffe of the Supreme Court of the State of New York granted "an order to show case and writ of habeas corpus," in relation to chimpanzees, Hercules and Leo.

The order required Stony Brook University to demonstrate a legal basis for the detention of Hercules and Leo, who they have held at their laboratory since 2010, and to explain to the court why it should not order their release. Hercules and Leo were three years old when they arrived at Stoney Brook, and eight by the time of the hearing. They spend most of their time in solitary confinement, and the remainder of the time being used as research subjects.

"They spend most of their time in solitary confinement, and the remainder of the time being used as research subjects"

The preliminary decision understandably attracted a great deal of international publicity, as this was the first decision of its kind, the first time the captors of non-human animals have been required to justify the detention of living beings, classed as property under the law. The decision raised the hopes of animal rights advocates across the world.

However, on 29 July 2015 Justice Barbara Jaffe gave her decision denying the petition and dismissing the case. She decided that she was bound by prior decisions of the New York Supreme Court, Appellate Division, which held that chimpanzees do not qualify for habeas corpus relief, as only legal persons qualify and it would be inappropriate to accord chimpanzees the status of legal personhood given that they are not capable of bearing legal responsibilities. This is the social contract theory and a familiar argument advanced against animal rights. Justice Jaffe's decision is being appealed, as are the decisions of the New York Court of Appeals.

Justice Jaffe essentially found that she was bound to dismiss the Nonhuman Rights Project's ("NhRP") applications on behalf of chimpanzees unless and until their legal personhood is recognised through legislation or by a higher court. In her discussion of the issues, however, she also made some very enlightened comments, which offer hope to those advocating for the rights of animals.

"The similarities between chimpanzees and humans inspire the empathy felt for a beloved pet. Efforts to extend legal rights to chimpanzees are therefore understandable; some day they may even succeed. Courts, however, are slow to embrace change, and occasionally seem reluctant to engage in broader, more inclusive interpretations of the law, if only to the modest extent of affording them greater consideration. As Justice Kennedy aptly observed in Lawrence v Texas, albeit in a different context, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress…The pace may now be accelerating."

In citing the Supreme Court's 2003 decision in Lawrence v Texas, which found a Texas state law criminalising

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“to refuse non-human animals rights because they have not previously been accorded rights is circular”

gay sex to be unconstitutional, Justice Jaffe recognised that the struggle for the rights of animals is properly viewed within the realm of the other equality and justice movements of our time, sitting alongside the struggle against discrimination based on race, sex and sexual orientation. Justice Jaffe recognised that to refuse non-human animals rights because they have not previously been accorded rights is circular and:

“If rights were defined by who exercised them in the past then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”

While the decision at the State Supreme Court level was not a resounding victory, the very fact that a court in New York heard a reasoned legal debate on the question whether non-human animals should be treated as legal persons is a highly significant achievement in itself. That the petition was not met with instinctive ridicule, that instead Justice Jaffe heard full arguments and gave a full, considered opinion, is considerable progress.

The struggle against speciesism has made it into the court room. This equality movement has not yet had its *Somerset v Stewart*[2] or its *Brown v Board of Education*[3], but it is hopefully only a matter of time.

Background

In March 2015 NhPR filed their petition for a common law writ of habeas corpus granting bodily liberty to Hercules and Leo with the New York State Supreme Court in New York. They referred to Article 70 of the New York Civil Practice Law and Rules (“CPLR”) in relation to the procedural aspects of habeas corpus, which provides that:

“A person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf……. may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance.

A judge authorized to issue writs of habeas corpus having evidence, in a judicial proceeding before him, that any person is so detained shall, on his own initiative, issue a writ of habeas corpus for the relief of that person.”

NhRP argued that Hercules and Leo are “persons” qualifying for a common law writ of habeas corpus, and they sought an order (a) requiring Stony Brook to justify their detention of Hercules and Leo and (b) requiring their immediate release.

Anticipating that, as in previous cases, the court may well reject the application without much consideration, NhRP pointed out that the court did not need to determine that Hercules and Leo were “persons”

“that instead Justice Jaffe heard full arguments and gave a full, considered opinion, is considerable progress”

in order to issue the order to show cause and writ of habeas corpus. The court could issue the order, requiring Stony Brook to show case, and then consider the arguments in full before making a determination.

On 20 April 2015 Justice Jaffe issued an “Order to Show Cause & Writ of Habeas Corpus” ordering Stony Brook to show cause why the order sought by NhRP should not be granted. This was an historic decision in and of itself, as no judge had ever issued “an order to show case and writ of habeas corpus” in relation to a non-human animal.

Announcements were quickly made and the international animal rights community was understandably excited by the news. However, the detail of the order was lost in translation and it was widely misreported that Justice Jaffe had determined that two chimpanzees were legal persons. Perhaps in response, Justice Jaffe quickly amended her order, striking the words “writ of habeas corpus,” and leaving only “an order to show cause”. Justice Jaffe later confirmed in her decision that in doing so she had been mindful of NhRP’s assertion that she need not make a determination about personhood to grant the preliminary order. Issuing the order had indicated only that she wished to have an opportunity to hear both sides in full before determining such important questions. Oral argument was heard on 27 May 2015.

Habeas Corpus

The writ of habeas corpus is a discretionary writ issued by a court directed to the person holding the detained individual, requiring them to produce the person to the court and demonstrate a lawful basis for

[2] English Kings Bench decision of 1772 granting freedom to a Virginian slave.

[3] US Supreme Court decision ending racial segregation in public schools.

detaining them. In this case NhRP did not request that Hercules and Leo be brought into the court room. It is easy to imagine the media furore that would have ensued had they done so, and how that would have distracted from the legal arguments (not to mention the stress for Hercules and Leo).

Literally "habeas corpus" means "you may have the body." It has its roots in English common law, where it developed into a right to have a judge assess the lawfulness of detention. The 1215 Magna Carta stated that no one could be imprisoned unlawfully and in 1679 the right was included in an English Act of Parliament, which is still in force today in England and Wales.[3]

In the case of *Somerset v Stewart* (1772) Lofft 1, the Court of the King's Bench (England) granted habeas corpus relief to a slave from Virginia who had been brought to the UK by his owner, where he escaped and was then recaptured. In granting his release the court found that his right to liberty outweighed any proprietorial interest of the slave-owner.

Over 200 years later, NhRP argued that it was time to extend this to cover Hercules and Leo.

The main arguments

NhRP on behalf of Hercules and Leo

NhRP argued that Hercules and Leo are not legally detained. They did not challenge the conditions in which Hercules and Leo are kept, complain about their welfare, nor assert that Stony Brook is violating any federal, state or local law. They were not making a welfare argument, but an argument based on fundamental rights. The following is a summary of the main points.

The very purpose of a writ of habeas corpus is to protect autonomy and self-determination. The extensive affidavit evidence lodged, from psychologists, zoologists, anthropologists and primatologists, demonstrates that Hercules and Leo are autonomous and self-determining beings. Each expert attested "to the complex cognitive abilities of chimpanzees," highlighting that "humans and chimpanzees share almost 99 percent of their DNA, chimpanzees are more closely related to human beings than they are to gorillas," and emphasising their brain structure, communication skills, self-awareness, empathy and social life.

The scientific information obtained over the past fifty years, and especially the past twenty demonstrates that Hercules and Leo are *"autonomous self-determining beings who possess those complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty."*

"These include, but are not limited to, their autonomy, self-determination, self-consciousness, awareness of the past, anticipation of the future, ability to make choices and plan, empathy, ability to engage in mental time travel, and capacity to suffer the pain of imprisonment."

As they are autonomous and self-determining they are legal persons entitled to fundamental rights and their detention is an unlawful deprivation of their fundamental common law right to bodily liberty and bodily integrity.

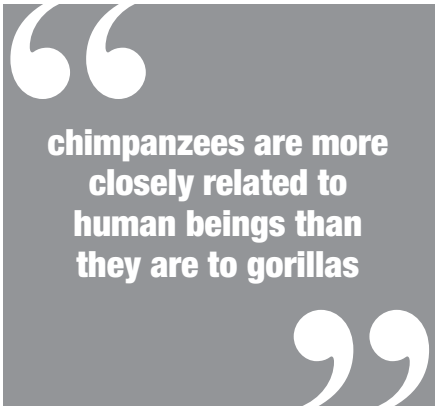
It is also discriminatory:
"Autonomy is a supreme common law value that trumps even the State's interest in life itself; and is therefore protected as a fundamental right that may be vindicated through a common law writ of habeas corpus. New York common law equality forbids discrimination founded upon unreasonable means or unjust ends, and protects Hercules and Leo's common law right to bodily liberty free from unjust discrimination. Hercules and Leo's common law classification as "legal things" rather than legal persons, rests upon the illegitimate end of enslaving them. Simultaneously it classifies Hercules and Leo by the single trait of their being a chimpanzee, and then denies them the capacity to have a legal right. This discrimination is so fundamentally inequitable it violates basic common law equity."

Essentially, the law is speciesist.

Encouraging the court to assist in the development of the law, NhRP argued that:

"The Court of Appeals has long rejected the claim that "change ….should come from the Legislature, not the courts."

"New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with



[3] This statute has no application in Scotland, where other legislative provisions apply.

> **slaves were not considered persons and women were not persons for many purposes until the twentieth century**

present day standards of wisdom and justice rather than "with some outworn and antiquated rule of the past."

Personhood is a developing legal concept. At one time slaves were not considered persons and women were not persons for many purposes until the twentieth century. What is a person is a matter of public policy and the determining factor in attributing personhood is "whether justice demands that they count in law." Whether or not they were able to bear duties and responsibilities is not determinative.

NhRP argued against the social contract approach, which says that to be a "person" you must be able to bear responsibilities. Pointing out that the cases the Appellate Division had relied on for this proposition were inapposite, they noted that the writ of habeas corpus has always been applied to persons who are not part of the "social contract", such as aliens and in the Guantanamo cases. They argued that only "claim rights" have a correlative duty, and what they sought was not a claim right but an "immunity right" (also known as a "liberty right"), which correlates not with a duty but with a disability:

"One need not be able to bear duties or responsibilities to possess these fundamental rights to bodily liberty, freedom from enslavement, and free speech."

For example, *Roe v Wade* established that women have an immunity-right to privacy and against interference by the state with a decision to have an abortion within a certain period of time, whereas this did not give women a claim right to require the state to aid them in securing an abortion. Hercules and Leo's ability to bear duties or responsibilities was therefore entirely irrelevant to whether or not they had the right to liberty.

They were careful to make it clear to the court that they were putting forward a very narrow argument in terms of the rights that Hercules and Leo would have as legal persons. It is not the case, they said, that if you're a person for one part of the law you're a person for all parts. They were seeking recognition of personhood only in relation to the common law writ of habeas corpus and the right to bodily integrity.

NrHP sought the immediate release of Hercules and Leo to Save the Chimps, a premier chimpanzee sanctuary in South Florida, and cited authority in support of release to a facility being a competent remedy in a writ of habeas corpus, for example where a five year old child was released into custody.

Anticipating the slippery slope argument, NrHP argued that the scientific evidence presented only applies to cognitively complex, autonomous animals, specifically great apes, elephants, and certain species of whales and dolphins. Granting relief would not lead inevitably to the release of all animals.

Anticipating the State's reliance on previous decisions of the New York Supreme Court, Appellate Division, NhRP argued that the Appellate Division had erred in relying on the absence of any prior authority for animal rights as a basis for finding that animals had no rights, as the dearth of precedent was only reflective of the fact that this was the first time anyone had sought habeas corpus relief for nonhuman animals.

NhRP also distinguished the cases of *Cetacean Community v Bush* (1004) (where the federal court in the 9th circuit had held that cetaceans are not "persons" entitled to sue in terms of the Federal Endangered Species Act), *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc v Sea World Parks & Entertainment* (2012) (where the federal district court found that the prohibition against slavery in the 14th amendment does not apply to non-humans), and *Citizens to End Animal Suffering & Exploitation Inc v New England Aquarium* (1993) (where the federal district court found that a dolphin was not a "person" within the meaning of the Federal Administrative Procedures Act). These were all decisions turning on the interpretation of "person" in terms of a particular statute or Constitutional Amendment and not in relation to habeas corpus relief.

NhRP also argued that the Justice Jaffe was not bound by the decisions of the Appellate Division as they had not been decisions reflective of settled

> **the writ of habeas corpus has always been applied to persons who are not part of the "social contract"**

principles of law. They were decisions on novel applications and were subject to appeal, where the appeals had real prospects of success given the Affidavits lodged by habeas corpus experts who are of the opinion that the Appellate Division had fundamentally misunderstood habeas corpus and personhood.

The Attorney General of the State of New York on behalf of the Respondents

The State put up a number of procedural arguments, including that NhRP had no standing to bring the petition on behalf of Hercules and Leo, as they had no significant relationship with them. The NhRP response was that the CPLR did not set any specifications as to who could appear on behalf of a restrained person, it said only "one acting on his behalf". They cited a number of slavery related cases where committees and societies advocating for change represented individual slaves in bringing habeas corpus petitions. Justice Jaffe agreed with NhRP finding that they did have legal standing to bring the petition. She also rejected a number of other procedural arguments made by the State.

The following is a summary of the main substantive arguments by the State.

The State's main argument in opposing the Petition was that the question whether chimpanzees should be treated as legal persons had already been decided by a higher court and Justice Jaffe was bound to follow that decision.

The New York Supreme Court, Appellate Division, Third Department had held in the NhRP case on behalf of the chimpanzee Tommy (the *Lavery* case), that "a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." The State argued that Justice Jaffe was required to follow that binding authority.

They argued that even if the *Lavery* decision was not binding on Justice Jaffe, she ought to apply the reasoning adopted by the Appellate Division as it was "compelling and clearly demonstrates the inappropriateness of extending habeas corpus to nonhuman animals." They referred to the recognition in the *Lavery* decision that:

"animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law."

They adopted the Third Department's use of the social contract theory of rights, arguing that duties and rights are correlative, *"a chimpanzee has no duties or obligations under the law, and it cannot be held legally accountable for any of its actions,"* and *"it is this inability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights – such as the fundamental rights to liberty protected by the writ of habeas corpus – that have been afforded to human beings."*

They argued the decision in *Lavery* was consistent with the Supreme Court's refusal to extend the legal rights afforded by the US Constitution to nonhuman animals, as in the case of *Tilikim v Sea World,* where the Supreme Court held that orcas are not entitled to the constitutional protection from slavery.

Acknowledging that "person" is not a synonym for "human being", the State argued that previous court decisions established that:

"not all humans are persons for the purpose of establishing legal rights, such as a human foetus, but all persons are human beings or associations of human beings," and

"If there is to be an expansion of animal rights to include rights now afforded only to human beings that is for the legislature to determine."

"a chimpanzee has no duties or obligations under the law, and it cannot be held legally accountable for any of its actions"

They argued against the NhRP assertion that the characteristics of autonomy and self-determination qualify "an entity" (as the State put it) for personhood and so habeas corpus relief, noting that there is no authority for that proposition and no explanation was given by NhRP for why those are the defining characteristics. They cited academics who criticize animal rights theory, such as Richard Cupp:

"rights provided to legal persons 'all share a common theme in their ultimate focus on humanity and human interests… [and] [a]ssigning rights to animals would represent a dramatic and harmful departure from the established focus of rights and responsibilities on humans'"...

"there is simply no precedent anywhere of a non-human animal getting the kind of rights they are

> **progress can involve a combination of public opinion, legislative change, and court test-cases**

talking about. The exceptions that do exist to legal personhood being assigned to somebody who's not human, in every instance that they have cited, it's something that in some way relates to human interest."

The State made the slippery slope argument, that any extension of the writ to non-human animals could "set a precedent for the release of other animals held in captivity, whether housed at a zoo, in an educational institution, on a farm, or owned as a domesticated pet." Critically, they argued, NhRP did not define the limits of the personhood they argued for, and this would:

"in all likelihood open the floodgates to similar requests for relief. The consequences of this are worth considering. Animals in zoos, particularly primates, throughout the State could be released. And there is no reason to think that these new rights would be limited to primates. If a pig, another intelligent animal, for example, is found to be 'autonomous and self-determining' will the tens of millions of pigs on farms throughout the country be subject to habeas corpus relief or other legal rights? Would cattle, farm animals or even pet dogs be subject to such relief? Granting the petition here could jeopardize zoos, aquariums, and even the country's farming and livestock industry."

Finally, noting that NhRP admitted that habeas relief would not result in Hercules and Leo being released completely the State argued that all they sought was a change of conditions which showed that habeas relief was not appropriate. They pointed out that New York Supreme Court, Appellate Division, Forth Department (in the *Presti* decision, in relation to the chimpanzee Kiko) had held that the attempt to transfer a chimpanzee to a sanctuary was an impermissible use of habeas corpus, which could only be used to seek the release of a person, and not merely a change in the conditions of confinement. They argued that this decision was also binding precedent.

The hearing lasted two hours, at the conclusion of which Justice Jaffe thanked both sides for an "extremely interesting and well argued" proceeding.

Decision of Justice Jaffe

Justice Jaffe agreed with the State that she was bound to follow the Third Department's decision that a chimpanzee is not a legal person. She did not, however, clearly state that she agreed with their reasoning. Indeed, much of what Justice Jaffe said indicated a significant degree of support for the NhRP's Petition.

Justice Jaffe found that:

"As the Third Department noted in ...Lavery, the lack of precedent does not end the inquiry into whether habeas corpus relief may be extended to chimpanzees…," and

"Legal personhood is not necessarily synonymous with being human."

In considering whether or not habeas corpus could apply to chimpanzees Justice Jaffe noted:

"the concept of legal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly since the inception of the United States. Not very long ago, only Caucasian male, property-owning citizens were entitled to the full panoply of legal rights under the United States Constitution. Tragically, until the passage of the Thirteenth Amendment of the Constitution, African American slaves were bought, sold, and otherwise treated as property, with few, if any, rights. Married women were once considered the property of their husbands, and before marriage were often considered family property, denied the full array of rights accorded to their fathers, brothers, uncles, and male cousins."

Rejecting the State's argument that fact that rights had not previously been accorded to nonhuman animals as a sufficient basis for rejecting the Petition, she quoted from a US Supreme Court decision on same-sex marriage:

"If rights were defined by who exercised them in the past then received practices could serve as their own continued justification and new groups could not invoke rights once denied."

But neither did she accept that the fact that some who were formerly denied rights now had them necessarily supported the claim made for Hercules and Leo; that was a matter that was yet to be decided:

"The past mistreatment of humans, whether slaves, women, indigenous people or others, as property, does not, however, serve as a legal predicate or appropriate analogy for extending to nonhumans the status of legal personhood. Rather, the parameters of legal personhood have long been and will continue to be discussed and debated by legal theorists, commentators, and courts, and will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under

the law, asking, in effect, who counts under the law."

"State trial courts must follow a higher court's existing precedent 'even though they may disagree….'"

"I am bound by Lavery…….Even were I not bound by the Third Department in Lavery, the issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided, if not by the Legislature, then by the Court of Appeals, given its role in setting state policy."

Commentary

It is important to see the NhRP cases as part of a wider movement for animal rights. We know from other rights movements that progress can involve a combination of public opinion, legislative change, and court test-cases. The Fourteenth Amendment to the US Constitution codified the right of all US citizens to equal protection of the law in 1868, but it was not until the Supreme Court's decision in *Brown v Board of Education* in 1954 that state segregation of schools on the basis of race was held to be unconstitutional. Although the NhRP cases have so far been unsuccessful, the order to show cause and the hearing having taken place will have an impact beyond the case of Hercules and Leo itself. It will form part of the wider movement for the recognition of the sentience of animals, the importance of avoiding the infliction of unnecessary suffering on sentient beings (whatever their species), and the development of animal rights.

This raises the question, given that the habeas corpus principles relied upon in these cases have their roots in English law, where are our equivalent test cases in the UK? Where is the UK version of the NhRP? Are there barriers to this kind of activist litigation in the UK? That is perhaps a topic for discussion.

There may be a troubling side to the arguments advanced by NhRP; is their argument one that inherently perpetuates speciesism?

NhRP expressly argues against the slippery slope argument, saying that they are not seeking rights for all animals, only those species possessing the characteristics they argue are determinative of personhood, autonomy, self-determination, and complex cognitive abilities." NhRP's argument is eminently logical. If Hercules and Leo have many of the essential characteristics of human beings then it is discriminatory and a violation of the principle of equality to deny them the writ of habeas corpus. However, it also means that petitions based on habeas corpus can only be made on behalf of a limited number of species (at least unless and until we have more evidence of the self-determination and autonomy characteristics of other species). The only species NhRP referred to in its submissions as potentially having the autonomy and self-determination required for the right to liberty were chimpanzees, orang-utans, guerrillas, elephants, orcas and dolphins. If the NhRP is successful the line delineating those sentient beings accorded rights and those accorded none will move, but there will still be a line.

Is the demonstration of self-determination and autonomy a legitimate basis on which to base personhood? Does justice only demand that those with autonomy and self-determination count? This is not our approach to young children, the severely mentally disabled, those with dementia, the insane, or those who are fully dependent upon others. They are all considered legal persons although they do not have autonomy or self-determination, and although their cognitive abilities may be limited.

What of the other billions of animals used for our pleasure and entertainment? Is it any less odious to inflict pain and suffering on those species of non-human animal because we are not able to demonstrate that they have the capacity to do mathematics or use sign-language? Is it appropriate to draw a line based on intelligence and similarity to humans? Non-human animals communicate in ways humans do not understand; they have skills and abilities that humans do not; that we do not recognise those skills does not affect their value. Applying a human-centric approach to the assessment of intelligence or value is inherently speciesist.

In terms of morality, which underpins much of the law, is it not their capacity to suffer that truly matters? If a living being is capable of feeling pain and of suffering, is it not right that we be called upon to put forward some lawful basis for their detention? Whether the being is a chimpanzee, an orca, a dolphin, an elephant, a cow, a pig or a chicken, what moral difference does it make? Why should one be a legal person and the other pure property?

Of course, NhRP may well be adopting a pragmatic approach,

petitions based on habeas corpus can only be made on behalf of a limited number of species

understanding that advances can be made incrementally through legal arguments that may be imperfect in terms of addressing the wider problem and that if we can achieve actual legal personhood for some animals that will be monumental, and will necessarily have an effect on the general perception of animals and rights, hopefully leading people to ask themselves the questions above, and perhaps leading to a more general application of rights for animals.

Our knowledge and understanding of the cognitive abilities of other non-human animals, such as pigs, has advanced greatly over recent years, so that we are more likely to soon be able to demonstrate some of the characteristics relied upon by NhRP. For example, neuroscientist Lori Marino of Emory University and the NhRP issued a press release in June this year referring to a research paper in the International Journal of Comparative Psychology and noting:

"We have shown that pigs share a number of cognitive capacities with other highly intelligent species such as dogs, chimpanzees, elephants, dolphins, and even humans…there is good scientific evidence to suggest that we need to rethink our overall relationship with them."

The findings include that pigs have excellent long-term memories, are

understanding of the cognitive abilities of other non-human animals, such as pigs, has advanced greatly over recent years

it is increasingly recognised that the use of chimpanzees is outdated

able at mazes and other tests, follow symbolic language, live in complex social communities, learn from one another, cooperate with one another, can manipulate a joy-stick to move an on-screen cursor and exhibit empathy. If this is an indication of the direction the NhRP is headed in then it is very heartening.

However, it is one thing to take on a very small (although wealthy) industry that uses animals in experiments, where it is increasingly recognised that the use of chimpanzees is outdated, it is quite another to challenge the abuse and killing of animals by the vast majority of the western population (albeit paying others to do the killing). Advancing the rights of non-human species habitually abused and killed for the sake of our taste-buds presents some monumental challenges. I hope NrHP does not shy away from those challenges. Someone must speak for the voiceless and the NrHP has a credible and persuasive voice.

I for one would welcome the world described by the Attorney General in his legal argument (quoted above), where all animals including pigs and cows could be granted habeas corpus relief. The argument the AG made against this is pernicious, but also familiar. That fundamental rights ought to be refused because to grant them would affect the property rights or enjoyment of others would not be (and has not been) tolerated in response to any other equal rights claim, whether on the basis of race, religion, sex, or sexual orientation; the *Somerset v Stewart* decision being directly on point. To apply it here is no less odious.

All animals are Hercules and Leo.

The People of the State of New York ex rel. The Nonhuman Rights Project, Inc., on behalf of Hercules and Leo v. State University of New York a/k/a Stony Brook University

Proceedings under Article 70 of the CPLR for a Writ of Habeas Corpus

"The arc of the moral universe is long, but it bends towards justice." (Theodore Parker and Martin Luther King).

Case Reports

Protection for animals under EU law does not stop at the outer border of the EU

The decision
A landmark decision by the Court of Justice of the European Union ("EUCJ") in the case of *Zuchtvieh-Export GmbH v Stadt Kempten* (c-424/13) on 23 April 2015 held that EU law providing for minimum standards of welfare in the transportation of livestock extends to livestock that are transported to non-EU countries.

The law
Council Regulation (EC) No 1/2005 ("the Regulation") provides detailed provisions governing the protection of animals (namely pigs, sheep, cattle, goats and horses) during transport. The Regulation includes rules requiring a journey log to evidence the obligations contained in the Regulation, including, the number and length of rest periods, the provision of food and water, and when animals should be unloaded. The Regulation is based on the principle that animals must not be transported in a way likely to cause injury or undue suffering.

The facts
The case arose when German authorities refused to allow an export company to export live cattle to Uzbekistan. The cattle were due to be travelling for ten days through four counties with only two opportunities for them to be unloaded from the vehicle and given a 24 hour rest. The journey between the two rests was planned to take 146 hours. The German authorities were not satisfied that the Regulation was being complied with. The CJEU held that the requirements pertaining to the journey log and the powers conferred on a member state of the place of departure to require changes to the journey apply to those stages of the journey that take place outside the EU. The CJEU considered *"that it is not sufficient for the organiser of the journey to claim that the provisions of the applicable legislation in the third countries through which the journey passes and the applicable international conventions in those countries pays will be complied with for the stages of the journey outside the European Union."* In short, it is not enough to pay lip service to the Regulation.

The CJEU also held that a journey log must be submitted by the organiser of the journey which must include the necessary information on watering and feeding intervals, journey times and resting periods for those stages of the journey within the EU and outside the EU. Checks must also be carried out to ensure the journey log is "realistic" and complies with the Regulation. However, the court also conceded that *"the authority has a certain margin of discretion allowing it to take due account of uncertainties involved in a long journey, part of which is to take place in the territory of third countries."*, for example where *"the law or administrative practice of a third country... precludes full compliance with the technical rules of that regulation."*

Ultimately this decision means that member states are now legally obligated to refuse to permit export journeys where the export is not able to evidence that they will comply with the Regulation.

Live export across the EU
The export of livestock from the EU to Turkey, the Middle East and North Africa is an ever growing trade. Every

> **animals must not be transported in a way likely to cause injury or undue suffering**

> **pigs to Russia, Ukraine and Moldova, cattle to Lebanon, Israel, Libya, Algeria and Tunisia and sheep to Libya and Jordan**

year it is estimated that roughly 3 million sheep, cattle and pigs are transported out of the EU for slaughter or fattening in other countries. These journeys are frequently long, for example the export of bulls from Latvia to Iraq is a journey of over 4,600 km and of the 60,000 heifers transported to Russia every year, some are transported to as far as Siberia, a distance of over 6,000km.

The most common exports from the EU are pigs to Russia, Ukraine and Moldova, cattle to Lebanon, Israel, Libya, Algeria and Tunisia and sheep to Libya and Jordan.

The EU parliament has voted[1] in favour of limiting journey times for animals being transported for fattening or slaughter but the Commission has failed to support this change[2].

The decision of the EUCJ is to be welcomed, it means that, at least while this trade continues, livestock are not without some protection when they leave EU borders. However, it remains to be seen how well enforced the Regulation will be outside of the EU, particularly where levels of enforcement of the Regulation within the EU are sporadic. Other issues involved in the trade of live animals outside the EU also need addressing, particularly slaughter of the livestock once they reach their destinations. Often such slaughter is in abattoirs whose standards fall well below those of the EU.

Daniel Brandon

RSPB v Secretary of State for the Environment, Food and Rural Affairs [2015] EWCA Civ 227

The appeal related to the dismissal of the RSPB's claim for judicial review of the decision of the Secretary of State to direct Natural England to consent to the culling of two species of gull in a special protection area. An aeronautical company operating a military aircraft manufacturing and research facility on a nearby site had sought consent for the culling of 1700 pairs of lesser black-backed gulls and 500 pairs of herring gulls, as a means of reducing the risk of bird strikes by the aircraft. Natural England initially refused to consent to the balance of the cull, however, following a public inquiry, the Secretary of State directed to consent to a total culling of 752 pairs of lesser black-backed gulls and 500 pairs of herring gulls. In making the decision, the Secretary of State was obliged to comply with Directive 92/43 Art 6, of which subsection (3) states *'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public'*. He therefore concluded that the cull would not adversely impact upon the integrity of the area.

The Court allowed the appeal, holding that the secretary of state had a mistaken interpretation of the conservation objectives for the gulls. The objective was to *'maintain the populations of the qualifying features'* which had to be read in accordance with the overriding objective of *'avoiding deterioration of the habitats or significant disturbance of the qualifying features'*. The essence of these objectives is contrary to the act of deliberately reducing the population of the gulls by a significant amount. Furthermore, the 2011 objectives provided that the habitats be maintained in 'favourable conditions', and this did not allow for a deliberate reduction of the population of a species to the bottom end of the naturally fluctuating range, along with further reductions to prevent the population rising above that point. In the light of these objectives, it was held that the secretary of state's decision to direct Natural England to consent to the cull was fatally flawed.

[1] European Parliament resolution of 12 December 2012 on the protection of animals during transport (2012/2031(INI))

[2] Commission response to text adopted in plenary SP(2013)175

R (on the application of BUAV) v Secretary of State for the Home Department [2015] EWHC 864
The case concerned an application by an animal welfare organisation for a judicial review claim on the process by which the secretary of state licensed experiments on animals under the Animals (Scientific Procedures) Act 1986. This application followed the licensing of neuroscience experiments conducted upon awake macaque monkeys at Newcastle University, which involved surgical devices being inserted into their brains, eyes and ears which had the effect of immobilising their heads when awake and recording any movement. To force the monkeys to comply they would be deprived of water, and they would be killed after spending several years on the programme, which had no direct application to human or animal welfare. Despite the harmful nature of the research, the application for a licence stated that the monkeys would suffer no distress during the course of the programme. The claimant organisation asserted that, where the application was incorrect regarding the level of suffering which the animals would face, the secretary of state must inform the applicant that a licence could not be granted until they had acknowledged the suffering, and that failure in providing this information is contrary to s.5A(4) of the Act.

> **the application for a licence stated that the monkeys would suffer no distress during the course of the programme**

The Court refused the application for judicial review, stating that any attempt by the court to supplement the act would encroach on the functions of the legislature. In addition, the court did not possess the expertise to successfully draft a programme in this area of law which would address any difficulties which may arise. Instead, it will remain the case that the secretary of state should consider each application for a licence individually and remain within the lawful margins of appreciation when making a decision, regardless of whether it is agreed with or not.

R (on the application of RSPCA) v Colchester Magistrates Court [2015] EWHC 1418
The local authority obtained a warrant under the Environmental Protection Act 1990 to enter the premises of the owner of 44 dogs and investigate a nuisance, following complaints regarding noise and odour emanating from the premises. The authority was refused the same application under the Animal Welfare Act 2006 and the Breeding of Dogs Act 1991. The execution of the warrant was attended by two local authority officers, along with RSPCA and police officers, which led to charges against the owner of the premises under the Animal Welfare Act, based upon the poor conditions the dogs were kept in. At trial the judge stated that the search had only been granted under the EPA to establish a nuisance, and therefore using the search to justify a conviction under the AWA was a misuse of that warrant under the Police and Criminal Evidence Act 1984 Code B para.6.9. The RSPCA argued that, following *R (on the application of Hicks) v Commissioner of Police of the Metropolis [2012] EWHC 1947 (Admin), [2012] A.C.D. 102,* despite the dominant purpose of the search being for nuisance, they still possessed authority to investigate any other matters once inside the premises.

> **The bill follows declines of bat populations through habitat loss and seeks to safeguard these vulnerable species**

The court held that once the search had ended, there was no longer any authority to remain on the premises. The fact that the vet was called at a later time and had not completed his assessment by the time the search ended meant that the necessary conditions under the Animal Welfare Act 2006 s.18(9) had not been established. Therefore, the local authority had acted in breach of PACE and any evidence relating to the conditions the dogs were kept in was not admissible at trial.

Bat Habitats Regulation Bill 2015
The Bat Habitats Regulation Bill had its first reading in the House of Commons on the 6th July 2015. The bill aims to enhance the protection afforded to bat habitats in non-built environments, by the use of local bat surveys being undertaken prior to the commencement of any construction work. The occupier of the building will then need to provide a bat box or artificial roost for any bats in the vicinity. The bill follows declines of bat populations through habitat loss and seeks to safeguard these vulnerable species without disrupting the economic needs of the people.

Lauren Stone

The tragic story of the Chipperfield big cats makes a compelling case for UK- and Ireland-wide circus ban

Liz Tyson[1]

Thomas Chipperfield calls himself the "only big cat trainer in Britain"[2]**.** The group of big cats that he owns (currently comprised of three tigers and two lions) have been used in circus shows during the touring season, which usually runs from around Easter to October, for a number of years. The big cats live in cages within a purpose-built lorry (or "beastwagon"). The lorry is divided into three sections, with two tigers in one cage, two lions in another and one tiger in another. When not travelling, the big cats share use of an "exercise pen" which is used on a rotational basis. It is not known what percentage of the animals' day is spent locked into the indoor cages and what percentage is spent in the exercise pen.

With the exception of the time spent in the circus ring during performance and training, these restricted and restrictive spaces comprise these animals' entire world.

Existing laws in all countries within the British Isles appear to suggest that the keeping of these five big cats in these conditions is acceptable. In the opinion of many major animal welfare groups and the main British veterinary group, however, the keeping of these five big cats in these conditions is wholly unacceptable.

In an opinion piece published in the Times on November 11th 2014, Thomas Chipperfield stated:

"It's fantastic that, for the past two years, circuses with wild animals have been regulated by a licensing and inspection system that makes the way we work completely transparent. That should be the way forward for every country"[3].

Despite frequent references to "Britain" in the article, the licensing and inspection regime to which Mr Chipperfield alludes to is only in place in England[4].

Indeed, during the two and a half years that the licensing regime has now been in place in England, Mr Chipperfield's big cat act was only in England (and thus regulated by the licensing regime) for little more than 12 months. With his lions and tigers, Mr Chipperfield has travelled in the last 30 months years to every country in the British Isles.

Republic of Ireland

In spring 2013, Chipperfield's big cats were used in performances in Duffy's Circus, a business based in the Republic of Ireland but which travels to Northern Ireland during its touring season. At the time that the big cats were in the Republic, there were no specific regulations in place which sought to protect their welfare. The country's main animal welfare legislation was the outdated Protection of Animals (Amendment) Act 1965. This act sought to outlaw specific instances of cruelty to animals but made no provision for the protection and promotion of their welfare. Since March 2014, the more modern Animal Health and Welfare Act 2013 has been in force which now places an obligation on those responsible for animals to provide for their welfare. Even so, no provisions exist within the new statute to outlaw the use of wild animals in circuses.

"With his lions and tigers, Mr Chipperfield has travelled in the last 30 months years to every country in the British Isles"

[1] LLB (Hons) AFOCAE
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[2] Thomas, C. (2014). If they ban circus lions, pet cats will be next. The Times. [online] Available at: http://www.thetimes.co.uk/tto/opinion/columnists/article4263736.ece [Accessed 19 May 2015].

[3] *Ibid*

[4] The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012

Northern Ireland
By summer 2013, the big cats left the circus part-way through the season and moved into Northern Ireland (a move which requires no special permissions). As in the south, there are no specific regulations to protect animals in circuses but Northern Ireland does have a modern overarching animal welfare statute; the Welfare of Animals Act 2011. Again, however, nothing in this legislation specifically forbids the keeping of five large carnivores on the back of a lorry, nor their use in a circus.

Whilst in Northern Ireland, the big cats were held at a steelworks and, according to press reports[5], visitors would come to see the animals being fed daily. It appeared that the animals were no longer part of a circus and yet they remained on display to the public. At this point, two pieces of legislation might have served to regulate the keeping of the animals.

The Zoo Licensing Regulations (Northern Ireland) 2003 apply to animals on display to the public for more than seven days a year, but only as part of a "permanent establishment". Given the temporary nature of the big cats' accommodation, and their stay on the site, it is likely that this legislation was not applicable.

On the other hand, the Dangerous Wild Animals Act 1976, which applies to any relevant animals kept in situations other than a zoo or a circus, did appear relevant.

Upon raising enquiries with the Northern Ireland Environment Agency, however, an animal charity was informed that a Dangerous Wild Animals Licence was not needed as the animals were "currently part of a circus"[6]. When it was queried how it could be considered that a steelworks was a circus, it was confirmed by the council that the animals were deemed to be part of "Jollies Circus". It is assumed that this was referencing Peter Jolly's Circus, which is based in England.

At this point, Peter Jolly's Circus was not licensed to use big cats in performances and was, operating in a different country. The local authority appears to have decided that Chipperfield was exempt from compliance with the law in Northern Ireland on the basis that his keeping of the animals would potentially be regulated at some point in the future by another law in England. If it had concluded that a Dangerous Wild Animals Act 1976 licence was required, and Chipperfield had failed to apply for one, the authorities had the power to seize the animals without compensation. Instead, the animals remained unlicensed before being moved once again, this time to England.

the animals were no longer part of a circus and yet they remained on display to the public

England and Wales
In England, the cats joined Jolly's Circus. They could not be kept by the circus without being added to the licence issued under the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012. Upon arrival, the animals and their accommodation were therefore inspected, the relevant paperwork completed and the amendment to the licence granted by DEFRA.

In Wales, much like Scotland and Northern Ireland, no specific regulation of the use of animals in circuses exists

During the year, the cats toured with the circus to Wales where licensing obligations simply dropped away as the business crossed the border. In Wales, much like Scotland and Northern Ireland, no specific regulation of the use of animals in circuses exists.

Part of the English licensing system involves a commitment on the part of the circus to provide lifelong care and retirement plans for every licensed animal. The plan for the big cats was outlined when they joined Jolly's circus in August 2013 and had to be approved by DEFRA inspectors during the application process.

But the big cats belong to Mr Chipperfield and not Peter Jolly's Circus. A retirement plan signed off by DEFRA as part of the licensing process was shown to be meaningless when Mr Chipperfield left the circus in late 2014 and moved the animals across the Scottish border to Fraserburgh, Aberdeenshire.

Scotland
No longer part of Jolly's circus and no longer claiming any affiliation with any other circus (whether in Scotland or otherwise), Mr

[5] Ballymoneytimes.co.uk, (2013). The circus comes to Dunaghy with four tigers and two lions. [online] Available at: http://www.ballymoneytimes.co.uk/news/local-news/the-circus-comes-to-dunaghy-with-four-tigers-and-two-lions-1-5288299 [Accessed 19 May 2015].

[6] Correspondence between the Captive Animals Protection Society (CAPS) and Northern Ireland Environment Agency.

Chipperfield did apply for and receive a Dangerous Wild Animals Licence from Aberdeenshire Council.

A zoo or a circus?

Unlike the Northern Irish zoo regulations, the definition of "zoo" in England, Wales and Scotland refers to an "establishment", rather than a "permanent establishment", which exhibits wild animals for more than seven days a year. According to press reports[7] and information gathered by animal protection NGOs, visitors attended the site upon the big cats' arrival in 2014 on a daily basis to see the animals. As such, it seemed reasonable to assume that the site would fall within the definition of a zoo, require licensing as a zoo and be obligated to comply with associated zoo standards.

However, the local council informed representatives from an animal charity that visitors were not being "encouraged" to visit the site and therefore a zoo licence is not applicable. There is no element of the legislation which requires visitors to be "encouraged" to visit a zoo for the Act to apply; the establishment simply needs to be a zoo to which "members of the public have access" for seven days a year or more[8]. Given that the cats were held on private land and photographs appeared in press showing crowds of people in front of the cats' cage, it seemed clear members of the public had access to the animals (regardless of whether the council believe the visitors have been "encouraged" or otherwise). As such, the council was asked to revisit the decision that a zoo licence was not required but no response on the matter was ever received.

> **Only by creating a UK and Ireland-wide ban on the use of wild animals in circuses will these animals be adequately protected**

At the time of writing, Mr Chipperfield has made public his intention to show the cats in performances in Scotland during 2015 but, due to reported problems with council permissions, it is unclear if the show will go ahead.

Discussion

Big cats used in travelling circuses share the same genetic traits and behavioural needs as their counterparts living in their natural habitats; habitats which could not be further removed from a cage on a farm in Scotland. It is a widely-held belief among professionals, experts and members of the public that the welfare needs of these complex wild animals simply cannot be met in this unchallenging, unnatural and impoverished environment.

Setting this view aside for a moment and considering the way in which the animals are protected by law throughout the UK and Ireland; rather than the regulated and "completely transparent" system described so favourably by Mr Chipperfield in the national press late last year, regulation of the use of wild animals in circuses in the UK and Ireland appears at best to be lacking and, at worst, completely ineffective. If a circus trainer can simply drive the animals a few hours north or west from England, or hop on a ferry to Ireland, and in doing so shrug off his or her legal obligations under the licensing regime described as "robust" by DEFRA, then that regime holds little to no power over licensees; and therefore affords little to no protection to the animals.

It is clear that a joined-up approach between all countries of the British Isles on this matter is not only sensible and the best use of parliamentary time, but absolutely necessary if it is not to render action in one or more countries within the region ineffective. Only by creating a UK and Ireland-wide ban on the use of wild animals in circuses will these animals be adequately protected.

The system as it stands is failing the animals. It is the firm belief of organisations such as the Born Free Foundation, One Kind, the ISPCA and the Captive Animals' Protection Society that action needs to be taken across England, Scotland, Wales, Northern Ireland and the Republic of Ireland if we are serious about ending, rather than simply displacing, wild animal suffering in circuses.

Many thanks to Libby Anderson (One Kind), Chris Draper (Born Free Foundation), Andrew Kelly (Irish Society for the Prevention of Cruelty to Animals) and staff from the Captive Animals' Protection Society for their valuable input into this article.

[7] Pressandjournal.co.uk, (2015). [online] Available at: https://www.pressandjournal.co.uk/fp/news/north-east/384859/circus-over-arrival-of-big-cats-to-north-east/ [Accessed 19 May 2015].

[8] Zoo Licensing Act 1981, s.1

Fear and Anger: Protection of the welfare of non-stunned animals at slaughter afforded by Council Regulation (EC) No. 1099/2009

John J Cranley[1]

Biographical note

As a child I watched the shooting of frightened neighing racehorses, with fractured long bones, to prevent further suffering. Then as a veterinary student, I was acquainted with a colonial veterinarian, who declined on principle, to accept his official role in non-stunned slaughter of mature cattle because of the pain he witnessed whilst the animals died. I spent 25 years in medical research covering a wide spectrum from neural science/ foetal sheep research, equine parasitic diseases, transplant surgery models in pigs, animal models of vision research, applied physiology/ traumatology, anaesthetics and many other areas of science relating to man and other animals. Five years ago I was confronted by calves undergoing slaughter without stunning, I had not fully appreciated the prolongation of consciousness or the ordeal that calves had to endure. I contacted Professor Neville Gregory Royal Veterinary College, who is the major expert in welfare of animals during killing, he encouraged my work into welfare at slaughter. While stunned slaughter was well researched, there were and are gaps in the research of religious non-stunned slaughter, because of the reluctance of the religious authorities to accept scientific method to assess the welfare of animals undergoing this process. I have endeavoured to record what I have witnessed over decades, as an official veterinarian, particularly over the past five years, to ascertain the degree and nature of the ordeal that farm animals experience during non-stunned slaughter.

> **Stunning is the main means of protecting animal welfare at slaughter by rendering each animal unconscious**

Animal welfare at the time of slaughter

Animal welfare is described as a community value[2]. Stunning is the main means of protecting animal welfare at slaughter by rendering each animal unconscious, thereby removing their fear, pain and anger prior to death. Council Regulation (EC) 1099/2009 on the protection of animals at the time of killing ("PATOK") has been operational from 1st of January 2013. PATOK has been binding in its entirety and directly applicable in all Member States.[3] Under Article 3(1)[4] animals shall be spared any avoidable pain, distress or suffering. Article 4(1)[5] requires that all animals killed in slaughterhouses are stunned before bleeding so as to die without recovering consciousness or sensibility.

An exemption to the requirement to stun is granted for slaughter by a religious rite in abattoirs under Article 4(4) of PATOK. The right to practice non-stunned religious slaughter is mainly exercised in the context of Judaism and Islam guided by their respective religious authorities[6]. The Halal Food Authority prefer non-stunning, whereas Jewish Law requires non-stunning for meat to be deemed kosher, however both will only accept death by bleeding.[7] A stun to kill using a captive bolt or a percussive stun or lethal electric stun, is rejected as the animal will have been killed by the stunning method. Where Muslim

[1] MVB, MSc, MA, OV, MRCVS

[2] Protocols annexed to the Treaty establishing the European Community – Protocol (No. 33) on protection and welfare of animals (1997) accessed at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12006E/PRO/33 August 2015

[3] Council Regulation (EC) No. 1099/2009 Article 30

[4] Council Regulation (EC)No. 1099/2009

[5] Council Regulation (EC) No. 1099/2009 (PATOK). Article 4(1)Animals shall only be killed after stunning in accordance with the methods set out in Annex L

[6] Muslim religious authorities e.g. Halal Food Authority and Jewish Religious Authorities Rabbinical London Board (Beth Din).

[7] Deuteronomy 14:21 "You shall not eat anything, which dies of itself"

religious authorities have agreed with pre-incision stunning, they require all stunned animals to be rendered unconscious but capable of full recovery meaning a non-lethal stun.

Non-lethal stunning using higher frequencies up to twenty times higher than most lethal stunning (1,000 Hertz, 220 Volts, and 200 milliamps) in broiler chickens, is proposed by Wotton et al,[8] as a method of stunning acceptable to some Muslim religious authorities and also which comes within the stunning parameters set down in PATOK. The animal welfare advantage of non-lethal stunning, is that it creates a full epileptiform[9] seizure, which releases aspartate[10] and glutamate[11] within the brain, with altered brain waves, disrupting the processing of fear and pain, in effect producing electrical narcosis (absence of consciousness) and insensibility.

However, increasing numbers of the Muslim community are rejecting non-lethal electric stunning preferring non-stunned slaughter[12]. Some Jewish religious authorities[13] tolerate stunning of cattle by captive bolt after the throat incision is made ("post cut stun"). This avoids having to wait for each bovine to die from bleeding, thus allowing greater throughput. This has welfare benefits for the conscious dying cattle, as their ordeal is terminated once the captive bolt shot obliterates the cortex of the brain. In religious slaughter the religious authorities from both Judaism and Islam insist that each animal dies by loss of blood (exsanguination) due to the severing the carotid arteries and adjacent vessels, nerve and muscles of the neck whilst leaving the spinal column intact.

While PATOK does not set boundaries to the suffering which non-stunned animals may endure, however it allows each country to apply stricter national animal welfare rules, if they so wish. This may be a pragmatic compromise to obtain the agreement of 28 countries, however it justifies the non-stunned position, allowing non-stunned advocates to claim discrimination, where any additional national rules are enforced by citing the basic default position.

Article 26[14] does not prevent Member States from maintaining or introducing, any national rules to give greater protection than PATOK. Member states were required, before 1st of January 2013, to inform the Commission about which national rules they wished to apply under Article 26 (c) regarding the slaughtering and related operations under the non-stunned exemption in Article4(4) to ameliorate or even ban it. The proposed new Welfare at time of killing regulation (WATOK 2014) for England was withdrawn prior to implementation by the Government on 19th May 2014. The Animal Welfare Act 2006 is applicable, but has limited application to non-stunned slaughter, as it authorised by the HRA 1998 as a religious entitlement.

Stunning

An explanation of types of stunning to insensibility used during slaughter, may illustrate the depth of the welfare deficit witnessed when the animal remains conscious and sensible whilst dying.

"increasing numbers of the Muslim community are rejecting non-lethal electric stunning preferring non-stunned slaughter"

Killing by destroying the frontal cortex of the brain, using a captive bolt or a free bullet, produces death within milliseconds. On the other hand electrical stunning using electrical tongs applied across the cranium in cattle, sheep, turkeys and chickens produce a stun compliant with PATOK *minima*, producing unconsciousness which must be followed rapidly by bleeding to avoid any return of conscious awareness. At significantly higher amperages, a stun to kill may be achieved producing instantaneous death by electrocution.

Electrical stunning is similar in many ways to anaesthesia, producing a disruption of higher brain processing with the interruption of consciousness. Assessment of the efficacy and duration of electrical narcosis or absence of consciousness requires clinical experience. In non-stunned slaughter the animals are required to be fully conscious when the incision is made to the neck until loss of consciousness and finally death as a result of exsanguination. Killing by the use of electric stunning would not be acceptable, as each animal must die from exsanguination. Some Muslims may accept a reversible (non-lethal stun) but ultimately death must be due to blood loss.

The Effect of the Incision in Non-Stunned and Stunned Animals

The awareness of the immediate differences between stunned and non-

[8] Wooton S B, Zhang X, McKinsty J, Velarde A and Knowles T G (2014) The effect of the required current/frequency combinations (EC 1099/2009) on the incidence of cardiac arrest in boilers stunned for the halal market. Peer J.Pre Prints 1-10 24th February 2014 accessed at doi,irg,/10,10.7287/peerj,preprints25 sy 1.

[9] Epileptic seizure type reaction.

[10] Aspartate is a neurotransmitter which increases within the brain during an epileptic seizure.

[11] Glutamate is a neurotransmitter which increases within the brain during an epileptic seizure.

[12] Shebana Mahmood M.P. Birmingham Ladywood (Lab) 2015 House of Commons, BVA sponsored debate on Non-stunned Slaughter 23 February 2015 – Hansard.

[13] UK Rabbinical Commission

[14] Article 26 Council Regulation (EC)1099/2009

stunned slaughter particularly in birds, such as aversive or fear type behaviour starting 8 to 10 seconds post incision, is unlike any response of a stunned or anaesthetised animal. Aversive behaviour and the aggressive behaviour, which follows require processing within the limbic system, the location of emotion within the brain, indicating a high risk of consciousness or sensibility.

The cone[15] is a traditional method of restraining non-stunned poultry. The birds are protected from external damage from protruding corners encountered on some moving lines where the birds are suspended by foot shackles which can be uncomfortable or even painful. Where their heads were visible, birds exhibited fear or anger type behaviour[16]. This commenced after a 5 second lapse post incision, with an aversive reaction to any threat such as a hand in its sightline. After 15 seconds this had altered to a pecking behaviour attacking objects. This subsided by 50 seconds before death in all but 10% of birds, after 60 seconds, angry behaviour was still obvious. At 90 seconds the intermittent remnants of anger was present in 5% of birds.

Angry bird behaviour was reported by Lehrman[17] discussing earlier studies of fear in birds. Goodson et al[18] proved that anger in birds was mediated by Vasoactive Intestinal Poly Peptide (VIP) from the Anterior Hypothalmus, and Adrenal Axis[19]. This anger may be similar to human emotions processed in the Amygdala within the Limbic system, equivalent to the Arcopallium of bird. Much brain processing involves reacting to perceived threat.

The cutting of the throat structures including the carotids, the trachea, jugulars and, the vagus nerve in non-stunned animals on occasions was followed by nystagmus, at 5 seconds post incision in sheep, but rarely seen in cattle.[20] Nystagmus is a quivering of the eyeball which may indicate an epileptiform incident induced by the incision, this may be the equivalent of a Petit Mal[21] or transient episode unlike a full epileptiform seizure or Grand Mal[22] with large glutamate and aspartate surges within the brain, which one sees in electrical narcosis which is similar to a tonic[23] epileptic seizure attack where the sufferer remembers little, with complete disruption of normal brain waves and processing.

> **Where bleeding is slow or blocked there is a risk of resurgence of consciousness and sensibility**

In non-stunned sheep, either where nystagmus was observed or not, a partial traverse of the eyeball by the third eyelid[24] occurred, indicating possible epileptiform activity, less intense than the full traverse described above, which accompanied electrical narcosis. The duration of the epileptiform activity was 15 seconds, after which there was a strong resurgence of CNS reflex activity with or without sensibility or consciousness[25].

Possible Reasons for the Resurgence of Consciousness and Sensibility

Where bleeding is slow or blocked there is a risk of resurgence of consciousness and sensibility. In non-stunned calves, the severed carotids elastically retract and frequently seal, stopping blood loss allowing survival for over 6 minutes. I have witnessed a non-stunned calf standing for over 5 minutes after its throat had been severed[26]. This indicated hypo-thalamic activity, whereby the brain co-ordinates posture, with a marked risk of sensibility.

Hoisting or hanging animals upside down by a hind leg, a practice favoured by religious authorities as a method of removing all blood from a carcase rapidly,[27] poses a risk for resurgence of CNS (brain stem) reflexes and consciousness. Gregory et al[28] found that cattle undergoing non-stunned slaughter collapsed (due to insufficient blood supply and

[15] A cone is a tapering cone shaped metal device through which the head of the bird protrude in over 85% of cases.

[16] Cranley J and Butterworth A (2015) Bird behaviour intrinsic to non-stunned versus stunned killing systems. New paper drafted pre submitted

[17] Lehrman DS (1953) Konrad Lorenz's Theory of Instinctive Behaviours, The Quarterly Review of Biology, Vol. 20 No. 4 (Dec 1953)pp 337-363 University of Chicago Press

[18] Goodson JL, Kelly AM, Kingsbury MA and Thompson RR (2012) A aggression specific cell type in the anterior hypothalamus of finch's. Proceedings of the Natural Academy of Sciences; 109 No 34 13847-13852 2, doi: 10.1073/pnas 1207995109

[19] Vasoactive Intestinal polypeptide (VIP) is a chemical messenger which was originally discovered in the intestine of animals, however it was subsequently discovered that it conveyed messages from the Anterior Hypothalamus of the brain to the Adrenal Gland.(Axis).VIP was recently proved to be the means by which anger was transmitted from the Anterior Hypothalamus in the limbic system (emotional seat of a birds brain called the Arcopallium. This is similar to the Amygdala of humans where fear and anger are processed (see Goodson et al 2012).

[20] Cranley 2014 Onset of Death after non-stun slaughter Veterinary Record 2014,175:357-358 doi:10.1136/vr.g6115

[21] Petit Mal is a transient mild CNS episode unlike a

[22] Grand Mal which is a full epileptiform seizure similar to seizure seen during tonic phase of electric narcosis.

[23] Tonic epileptic type seizure following electrical stunning which lasts for less than 20 seconds, where the throat is severed within the first six seconds of the tonic seizure, an additional seizure will ensue which allows blood loss to kill the animal before the epileptic fit wears off,risking recovery.

[24] The Third eyelid is very prominent in birds, for example, where it wipes the eye of dust continually, during stunned slaughter it vibrates rapidly when checked for the presence of a corneal reflex, it can be felt.

blood pressure in the brain) to the floor. On reaching the floor they frequently had an increase of blood pressure sufficient to allow the animals to wake up and stand up. Where the head was below the heart, with or without inversion, blood supply of brain is restored. This risk occurred either in inverted hoisted animals stunned awaiting an incision or non-stunned animals incised, bleeding, considered to be unconscious prior to hoisting.

In Article 15(2)[29] hind limb hoisting or inverted restraint of bovines is prohibited by PATOK, except in the case of non-stunned cattle killed under Article 4(4)[30], providing head movements are restricted. The inverted restraint of a conscious bovine lying on its back, while its throat is cut, places it at risk of asphyxiation (choking) from blood entering its open trachea and lungs.[31]

Such an animal welfare debacle, may be avoided when or if England re-adopts specific national rules to reassert the use of the upright restraint system. Currently, we are in the default position with EC Regulation 1099/2009 (PATOK), which permits the use of inverted restraint , without the additional animal welfare protections contained in Welfare At Slaughter and Killing Regulatons (WASK 1995), which only permitted upright slaughter of non-stunned cattle.

The fear response was seen frequently in cattle slaughter with rage against restraint in aroused animals awaiting stunning

The EFSA[32] Toolbox from EC Regulation 1099/2009 (PATOK) Guidance (2013)[33], on the assessment of animals in restraint using clinical CNS (brain stem) reflex testing. Restraint is a requirement of EC Regulation 1099/2009 (PATOK). It is for the protection of the slaughterers in the presence of unrestrained cattle, who may attack the slaughterer whilst they are being killed.[34] It is important to have an animal restrained to avoid poor cutting. It is harder to justify the fear and terror, which one has witnessed, induced in bulls whilst fighting restraint. The fear response was seen frequently in cattle slaughter with rage against restraint in aroused animals awaiting stunning.

The EFSA Toolbox is essential for testing levels of stunning at key stage 1 and defining death at key stage 2. The systematic checking of reflexes (corneal, palpebral or pupillary), as required by Article 5(2)[35], in conscious restrained animals whilst dying, may trigger resurgence of consciousness, fear, pain and anger because of stimulation and arousal.[36] Animal welfare may be protected by non-intrusive surveillance of the restrained animals, until it is completely limp within restraint.

Significance of Behaviours

The evidence for the consciousness and sensibility during non-stunned slaughter, comes from the behaviours displayed by dying animals after the religious incision. In particular, where, these behaviours are not elicited in response to a CNS reflex test, but appear as spontaneous prolonged higher brain coordinated activity. Behaviours are very complicated neural processes much more so than CNS reflexes which do not impinge on consciousness. Behaviours are controlled from the higher conscious brain. The angry bird behaviour is seated in the arcopallium of the chicken's brain. The rising of the recumbent calf, and postural activity to stand, require involvement of thalamic processing[37] the raising of the head of non-stunned bleeding calves, sheep and birds in a righting movement may also involve a postural drive. Drifting in and out of the remnants of angry bird type behaviour, without provocation may indicate a flight response[38].

On the other hand, CNS reflexes are indicative of brain stem activity,

[25]Clonic phase is a recovery period where the animal's legs paddle after the Tonic spasm. Clonic moving coincides with depolarising of the brain wave activity. The depolarisation period is a time of depression of brain activity where animals do not show a righting reflex or postural struggle to stand up right. Hypothalamic processing is disrupted as indicated by the altered brain waves. Where a delayed severing of the throat is carried out during the clonic phase i.e. before 20 seconds post electric stun, there appears to be an additional epileptiform seizure, indicated by a tonic stiffening of the body followed within 5 seconds by a traverse of the third eyelid of the eyeball which lasts 15 seconds.

[26]Cranley. J.2011) Sensibility during slaughter without stunning in cattle. 168- 437-438.Veterinary Record.

[27]Cranley.J.(2014) Onset of death after non-stun slaughter 175(14):357- Veterinary Record

[28]Gregory .N.G.(2011) Plenary Address. Humane Slaughter Association Centenary International Symposium.Portsmouth, 1st July 2011.

[29]Article 15.2 EC Regulation 1099/2009 Protection of animals at time of killing (PATOK).

[30]Article 4.4 EC Regulation 1099/2009 Protection of animals at time of killing (PATOK).

[31]The problems of inverted hoisting resurgence have been ignored. I raised the issue during the Public Consultation September 2013 and again at the AHAW 78th Plenary Meeting 22-23rd October 2013. In addition I published this work Cranley J. Slaughtering lambs without stunning (2012) doi:10.1136/vr.e 1703 Veterinary Record Google Scholar. It was submitted it to EFSA Technical Report Supporting Publication 2013; EN-530 Public Consultation (September 2013)Report on the Draft Guidance on Stunning Studies Assessment Criteria. Private Institute 2. 3.2.3. pages 19-20.

[32]European Food Safety Authority (EFSA) Parma, Italy.Directorate General SANCO to the EU Commission.

[33]Article 27.3.EC Regulation 1099/2009 No later than 8 December 2013, the Commission shall submit to the European Parliament and to the Council a report on animal welfare aspects of water bath stunning of birds. This coincided with EFSA Guidance on Poultry Slaughter Welfare.

[34]In the preamble, to EC Regulation 1099/2009, "whereas" Section 13, discusses the risk of danger to human beings from injury or death from dying animals being reduced by the use of restraint.

[35]Article 5(2) EC Regulation 1099/2009 (PATOK) states persons responsible for non-stunned slaughter shall carry out systematic checks to ensure animals are unconscious before release from restraint, and no signs of life prior to processing. Such checks may trigger fear or anger behaviour in conscious or resurgent animals.

which is proof of life but not consciousness. They are important because their absence is the legal criteria[39] laid down for defining death. The presence of CNS reflexes in animals, before consciousness re-appears, may be the first warning of malfunction in a stunning system.

Welfare implications

The protection of animal welfare under PATOK, is at risk when an animal undergoing non-lethal stunned slaughter is exposed to the resurgence of consciousness and sensibility in the following ways: by delay in incising its carotids, failing to cut both carotids, by cutting the jugulars only (using faulty technique), incorrect electrical stunning parameters, short or incorrect application of the tongs to the cranium, and by increasing the brain's blood supply by inverted hoisting of the animal, all render the protection of animal welfare to be less than adequate. These risks, which are witnessed continually would be better assessed by neural scientific analysis, where practicable.

The welfare of a conscious animal in non stunned slaughter, from incision to death, is reduced to dependence upon the sharpness of the knife, the accuracy of incision, cutting both carotids and the skill of the slaughterer to avoid prolongation of consciousness and protection from intrusion whilst dying.

The most proficient slaughterers working on slow lines, take care to inspect the animals before they slaughter, if they are worried about a bird in terms of suitability i.e. if it has any black feathers it will be rejected. This should be handed over to a secular slaughterer who must stun it and then slaughter it. The problem comes where a religious incision is made during which the knife touches bone or is blunted or the throat cut uncovers a feather in the windpipe, this means the animal is rejected. The slaughterer by his training, is concerned about his knife being damaged,[40] also about preventing the rejected animal being passed as kosher. His rejections have to be observed, in order that a conscious bleeding religiously rejected animal is stunned, and not left to die un-stunned which would breach PATOK in relation to cattle, birds and sheep.[41]

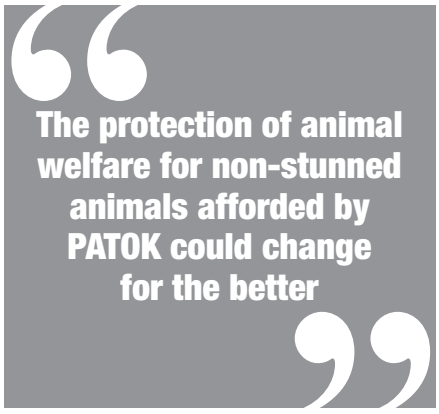
Rejections are part of religious slaughter. Whole or part of consignments may be rejected on certain occasions, such as in birds where there is a problem of tendon snapping or in cattle where only the forequarters are accepted and the remainder has to be sold to a secular market. The animal welfare implication of a high percentage of rejections, is that replacement animals may have to experience the non-stunned ordeal to fulfil the order.

The severing of the throat including the trachea and vagus[42] nerve may prevent vocalisation. One contemplates, if non-stunned animals were able to vocalise, their plight would be difficult to ignore. One considers a theoretical possibility that pain, fear, anger and frustration can engender an autonomic storm[43] type response involving the adrenal chemical messengers relayed to the hypothalamus and heart and target organs.

If Electro-Encephalograhic (EEG) studies of non-stunned slaughter were allowed[44] in order to establish the precise risk to animal welfare and to compare it with slaughter following stunning, much objective comparative information might ensue. Whilst EEG studies may be less informative than one would like, nonetheless it may provide data about the type, size and quality of the brain waves. In the case of non-stunned cattle dying at bottom of a restraint pen, the animals could be assessed for the absence of brain waves using an electrical cap type instrument, thereby protecting the animal from arousal and reducing the danger to the Animal Welfare Officer carrying out these procedures.

What can be done?

The protection of animal welfare for non-stunned animals afforded by PATOK could change for the better, if pressure is brought to bear on how it is performed. The greater the scientific analysis brought to bear on the risks of consciousness the better the evidence for adjustments, to be



[36]Adams DB and Sheridan AD (2008) Specifying the risks to animal welfare associated with livestock slaughter without induce insensibility. Animal Welfare Branch, Product Integrity, Animal and Plant Health Division, Australian Department of Agriculture, Fisheries and Forestry. 1-100

[37]Gregory N.G.(1998) Animal Welfare CABI Wallingford Oxon. 65-85. Physiology of Fear and Anger at Slaughter Hypothalamic Activity in the Higher Centers of the Brain and Consciousness.

[38]Gregory N.G. (1998). Animal Welfare CABI Wallingford Oxon. 65-85. Physiology of Fear and Anger at Slaughter. The intermittent un-provoked wing flapping during non-stunned slaughter may indicate fear followed by a flight behaviour.

[39]EC Regulation 1099/2009 (PATOK) animals must be restrained until all signs of consciousness disappear.

[40]Article 7(2)(f) EC Regulation 1099/2009 Bleeding of live animals.

[41]Article 4(1). All animals will be stunned and remain stunned until death ensues.

put in place in order to ameliorate suffering. The period of consciousness, the number of animals, which experience prolonged consciousness, the awareness of fear waxing and waning, the struggle against restraint, the arousal of consciousness by intrusive assessments, the speed of killing, the total numbers of animals being processed, all add to the sum total of animal suffering to be endured.

The labelling of non-stunned meat will allow the consumer to make an informed choice of the welfare at slaughter of their meat source. There is a probability that some Halal customers will demand more non-stunned meat. This has already happened, as the number of non-stunned sheep slaughtered in the UK has increased from 1.6 million sheep in 2011 to 2.5 million sheep in 2013 reported by the FSA[45]. The total of the additional non-stunned slaughter of UK sheep, with the extra intrinsic suffering entailed, is an animal welfare issue to be addressed by all who care about such matters.

Increased cattle and poultry suffering, entailed by similar non-stunned percentage increases, within the UK are an inevitable price to be paid by the animals, for the rights of religious consumers to utilise their right to consume animals slaughtered without stunning guaranteed by the Human Rights Act (1998). Supporters of non-stunning may ignore the cost to the animals concerned. Others who care about the suffering of farm animals, may

“in Germany the exemption from stunning, is based on the needs of the religious communities”

point out, that in Germany the exemption from stunning, is based on the needs of the religious communities who have to obtain an official licence for a specific number of animals to undergo non-stunned slaughter. Licensing may avoid persons taking advantage of the religious non-stunning exemption from the requirement to stun for pecuniary reasons alone.

Accurate scientific assessment of the degree of “necessary suffering” and its physiology[46] may re-define what constitutes “unnecessary suffering” in the context of non-stunned slaughter. The fear and anger responses shown by conscious animals, if fully understood, may redefine the conscious ordeal of the non-stunned animals, as torment rather than necessary suffering. The current risk from the intrinsic inefficiency of exsanguination by carotid severance, bleeding from jugulars rather than the carotids, coupled with poor technique, exacerbated by prolongation of sensibility, may combine to produce a risk of lamentable welfare.

The precautionary principle should be respected, as we are currently unable to fully quantify the suffering of non-stunned animals at slaughter. Prolonged sensibility has been found, in what were considered to be vegetative states in human beings, who upon awakening from their catatonic state remember/ recall the pain and fear. We should treat all sentient creatures with true respect, to avoid such risks to their welfare.

The clinical observations one has made in relation to non stunned slaughter over many years have lead to a better appreciation of true risk of sensibility and poor animal welfare. While it is not difficult to see the welfare problems with non-stunned slaughter, it must be acknowledged that there are problems with inadequate stunning, hoisting and resurgence which also produce poor welfare. Candour is essential for meaningful dialogue, to avoid discrediting each other in the stunning versus non-stunning debate. If the dialogue could reach a point where both sides agreed on the extent of the problems, then we may be in a better position to obtain agreement on how to improve welfare at slaughter in general.

One hopes, EU legislators, in the future will be more aware of the risks to animal welfare at slaughter, before the killing becomes so rapid, resulting in suffering being sanitised in a blurred dash for ever faster killing, both stunned and non-stunned. The evidence of the risk to the welfare of animals at slaughter, may come from the clinical observations of the ordeal of stunned and non-stunned slaughter by official veterinarians, trying to unravel the significance of their findings, in terms of the risk of each animal’s suffering.

[42]Shair H.N, Smith J.A.& Welch . Marta.G. Cutting the vagus nerve below the diaphragm prevents maternal, potentiation of infant rat vocalization, Developmental Psychobiology Volume 54, Issue 1, pages 70-76. January 2012.

[43]Adams D.B. & Sheridan A.D.(2008) Specifying the risks to animal welfare associated livestock slaughter without induced insensibility. Animal Welfare, brand, product integrity Animals and Plant Division, . Australian Government Department of Agriculture, Fisheries and Forestry Australia. Autonomic storm.in excited animals.

[44]The collection of data by application of a device would not be acceptable, as it may be considered to damage the religious purity of the meticulous act of religious worship, much as when the supervised trainees incise any animal it is always rejected.as being unfit.

[45]Times Newspaper 30th January 2015 Headline and Editorial concerning the percentage increase of non stunned slaughter in numbers of Cattle Sheep and Poultry between two surveys by the FSA (UK) in 2011 and 2013 non-stunned slaughter reported 2015.

[46]Baldwin BA and Bell ER (1963) Blood flow in the carotid and vertebral arteries of the sheep and calf. Journal of Physiology 167 448-462

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What is ALAW?

ALAW is an organisation of lawyers interested in animal protection law. We see our role as pioneering a better legal framework for animals and ensuring that the existing law is applied properly.

We believe that lawyers should, as well as interpreting laws, ask questions about the philosophy underlying them: they have always played a central role in law reform. There is also a real need to educate professionals and the public alike about the law.

Animal cruelty does not, of course, recognise national boundaries and we are building up a network of lawyers who are interested in animal protection in many different countries.

What ALAW will do?

ALAW will:

- take part in consultations and monitor developments in Parliament and in European and other relevant international organisations,
- highlight areas of animal welfare law in need of reform,
- disseminate information about animal welfare law, including through articles, conferences, training and encouraging the establishment of tertiary courses,
- through its members provide advice to NGOs and take appropriate test cases,
- provide support and information exchange for lawyers engaged in animal protection law.

Who can be a member?

Solicitors, trainee solicitors, legal executives, barristers, pupil barristers, judges and legal academics are eligible to join and will receive regular issues of the *Journal of Animal Welfare Law*. Other interested parties can become subscribers to the *Journal* and receive information about conferences and training courses.

How can you help?

Apart from animal protection law itself, expertise in many other areas is important - for example, public law, civil liberties, environmental health, planning law, freedom of information, civil litigation, media law, company law and charity law.

In addition, lawyers have well-developed general skills such as advocacy and drafting which are useful in many ways. Help with training and contributions to the *Journal* are also welcome.