The Animals (Scientific Procedures) Act 1986 under the microscope

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An exemplary regulatory scheme?

On paper the Animals (Scientific Procedures) Act 1986 ("the Act"), which governs the controversial area of animal experimentation, looks impressive. It appears to permit only those experiments on animals that are absolutely necessary. In 2002 a report of the House of Lords Select Committee on Animals in Scientific Procedures referred to the Act as "the tightest system of regulation in the world".[69] This article puts the Act under the microscope to examine whether it is as stringent in its protection of animals as its wording suggests or whether its words offer a hollow promise of protection to laboratory animals.

A licensing system

The statutory regime consists of a licensing system whereby anyone carrying out an experimental procedure on a protected animal, i.e. a non-human vertebrate, which may have the effect of causing that animal pain, suffering, distress or lasting harm, must first obtain certain licences from the Home Secretary. A project licence must be obtained which authorises the research and personal licences are required for each individual involved in the experiments. In addition, the place in which the experiments are conducted must be certified as a designated establishment.

The cost-benefit assessment

Section 5 of the Act incorporates a utilitarian cost-benefit assessment so that a project licence cannot be granted unless the likely benefit to be derived from the experiment outweighs the likely costs, in terms of animal suffering. In assessing benefit, section 5(3) sets out a list of permissible purposes, for example, the "advancement of knowledge in biological or behavioural sciences"; but these are sufficiently wide to encompass a whole array of purposes. The benefit to be derived from the experiment still needs to be quantified in some way. It is not enough that the experiment satisfies one of the permissible purposes. How does one quantify potential benefit that may or may not be discovered in the course of scientific research? Clearly this is a very difficult test to apply in practice and one wonders how exactly the Home Secretary assesses benefit for the purposes of the utilitarian calculation.

Assessing the benefits

In the context of medical research Drs C.R. and J.S. Greek have compiled a large list of examples of experiments which, they submit, demonstrate that the use of the animal model is detrimental to humans. Their book *Sacred Cows and Golden Geese: The Human Cost of Experiments on Animals*[70] provides many such examples. Not only can the animal model fail to predict the toxic effects of drugs (for example, Zimeldine caused a paralyzing illness in humans), but reliance on the animal model can also lead to potentially useful drugs being needlessly abandoned. Penicillin provides a powerful illustration of this. Fleming tested penicillin on rabbits but it did not work so he temporarily gave up his research. Later, in desperation, he administered penicillin to a sick person who subsequently recovered. Fleming later admitted "[h]ow fortunate we didn't have these animal tests in the 1940s, for penicillin would probably never have been granted a licence, and possibly the whole field of antibiotics might never have been realised."[71] It is unlikely that the Home Secretary looks at the wider picture of the efficacy of the animal model when assessing benefit, but rather concentrates on the specified predicted benefits of a particular project as stated by the applicants. Nevertheless, this legislation begs the wider question of the extent to which the animal model in medical research benefits (or harms?) humans and it is appropriate for those implementing the legislation, and their lawyers, to grapple with this difficult issue.

Assessing the costs

Leaving aside the difficulty of assessing the benefit of the experiment, the "cost" part of the equation proves to be equally problematic. The Home Secretary must weigh up the adverse effects of the

[68] Fellow of the Oxford Centre for Animal Ethics (www.oxfordanimalethics.com).
[69] "Animals in Scientific Procedures", July 2002, Chapter 1.15, see www.publications.parliament.uk/pa/ ld200102/ ldselect/ldanimal/150/15001.htm.
[70] Continuum, 2002.
[71] Ibid, p.73.

experiment in terms of potential animal suffering. To this end the licence applicant relies on a system for categorising severity of animal suffering. This classification system is not mentioned at all in the Act, but instead is detailed in guidance notes.[72] Severity is classified as mild, moderate, substantial or unclassified. The project as a whole is given a severity *band* and this reflects the likely suffering of the *average* animal used in the project. Thus it is based on the overall cumulative suffering of all the animals concerned. Each separate protocol (procedure) within the project is given a severity *limit* which indicates the maximum level of suffering that an individual animal *may* suffer. This represents the worse case scenario for a single animal. The nature of the severity band of a project i.e. the cumulative suffering of all, means that it can hide the fact that a number of substantial procedures will be carried out on animals for the purposes of that project. This raises the difficulty that "a project containing ten mild protocols, each involving 10,000 animals, and one substantial protocol involving fifty animals, could well be classified as mild".[73] On this basis, an experiment could include acute toxicity tests on fifty monkeys resulting in prolonged pain but nevertheless the project may only be classified as "mild".

A 2004 report by the Boyd Group and the RSPCA[74] recognised the need for a severity categorisation system but stated that there were significant difficulties with the current system. It highlights the difficulties faced by licence applicants due to the inadequate guidance provided by the Home Office on how to decide which category to apply. It recommends that more examples and case studies be provided to illustrate the different categories. It also suggests that the use of the word "moderate" is too comfortable a term for many of the adverse effects that it encapsulates with the consequent risk of downplaying the animal suffering involved.

Categorising severity in practice

This area of the law recently came under scrutiny in the context of a judicial review case which arose out of an undercover investigation by the British Union for the Abolition of Vivisection (BUAV) concerning experiments on marmoset monkeys at Cambridge University.[75] The purpose of the experiments was to research into the functioning of the human brain and illnesses affecting it such as Parkinson's disease. The experiments involved inducing strokes or brain damage in the marmosets, for example, by cutting or sucking out parts of the brain or by injecting toxins. In the applications for the project licences, these adverse effects on the marmosets were categorised as moderate. The BUAV argued that these had been miscategorised and that they should have been classified as substantial. In the High Court Mitting J agreed with the BUAV that the chief inspector was wrong not to categorise some of the procedures as substantial. The Home Office had adopted a "relative approach" in which the Cambridge experiments were compared to other experiments that caused more suffering and therefore relatively speaking the Cambridge ones were less painful and could not be in the same category as the others. The BUAV argued that the baseline for comparison should be the animal's usual state of health. The Court of Appeal also rejected the "relative approach". What this case highlights is how inadequately the "substantial" category has been implemented in practice in the past. If the Home Office has been using as its comparator the worst possible suffering of an animal rather than its usual state of well-being, then many procedures will have been incorrectly classified as moderate. The implications of this are two-fold: the licence applications did not get the additional level of scrutiny from the Animal Procedures Committee[76] which they should have done and the public have been misinformed about the number of substantial experiments taking place over the years.

Is death an adverse effect?

One interesting issue that arose from this case in the High Court was the question of whether the death of an animal was an "adverse effect" and therefore relevant to the question of cost in the cost-benefit assessment. The current policy is that the death of

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[72] Guidance on the Operation of the Animals (Scientific Procedures) Act 1986, 2000.
[73] "Categorising the severity of scientific procedures on animals", a report by the Boyd Group and the RSPCA, July 2004, p.2, see www.boydgroup.demon.co.uk/ severity_report.pdf.
[74] See footnote 73.

[75] *R(BUAV)* v *Secretary of State for the Home Department* [2007] EWHC 1964 (Admin) and, on appeal, *Secretary of State for the Home Department* v *Campaign to End All Animal Experiments (trading as BUAV)* [2008] EWCA Civ 417. See Thomas, D., "BUAV wins important judicial review", *Journal of Animal Welfare Law*, December 2007, p. 1, and Thomas, D., "Court of Appeal ruling in BUAV judicial review", *Journal of Animal Welfare Law*, Summer/Autumn 2008, p. 1.
[76] A statutory advisory committee.

an animal is not considered an adverse effect under section 5(4). The BUAV contended that this approach was wrong and that the Home Secretary ought to take into account the deaths of animals. This issue potentially raised a fascinating philosophical question: if an animal is painlessly killed does it suffer any loss? Does its death result in any adverse effect? A number of eminent philosophers have tackled this question including Peter Singer and Tom Regan. Clearly when a human dies their life plan is frustrated, they can no longer pursue their wants and desires for the future. In addition, the death of a human usually causes others to suffer loss and grief. What follows from the painless death of an animal? Marmosets are intelligent primates with complex social lives – do they have wants and desires? Do they grieve the loss of their companions? These are difficult issues that would have been extremely challenging to decide in court. It was therefore unsurprising that the lawyers brushed these questions aside by a simple reliance on semantics. Section 5(4) refers to "adverse effects" which was accepted as synonymous with the words "pain, suffering, distress or lasting harm" (section 2(1)). The Court accepted that death was a grievous harm to a living animal; however, it could not be defined as a "*lasting* harm". Mitting J agreed with the Home Office interpretation that "killing is the means by which adverse effects are to be terminated. Accordingly, killing cannot itself be an adverse effect".[77]

Significantly, Mitting J did however accept that death was a relevant factor in the setting of a severity limit of a procedure. This approach conflicted with that taken by the Home Office. The Home Office approach has been that where a procedure anticipates the premature killing of an animal because of adverse effects it is experiencing, that is legally irrelevant to the assessment of a severity limit. The Court of Appeal also rejected the Home Office's approach. Whilst this is a step in the right direction, it is unfortunate that the death of an animal is not considered as a cost in the cost-benefit assessment.

The availability of non-animal alternatives

Section 5(5) of the Act requires that the Home Secretary be satisfied that the purpose of the programme "cannot be achieved satisfactorily by any other reasonably practicable method not entailing the use of protected animals". Therefore the availability of non-animal alternatives is an integral part of the protection afforded to animals under the Act. The Home Secretary must always be satisfied that the use of animal experiments is absolutely necessary in each individual case and that there is no other "reasonably practicable" alternative. It is perplexing how this clear and stringent test did not prevent the use of animals in testing cosmetic products for 10 years until the ban in 1997. At a time when a number of companies, such as The Body Shop, were producing cosmetics without animal testing, the Home Secretary was still granting licences for the testing of cosmetics on animals in the UK. Why did the availability of the alternative non-animal methods not prevent the grant of licences for cosmetics testing? Do the words "*reasonably practicable*" allow the use of alternative non-animal methods to be ignored if other factors (perhaps company profits?) are involved?

A recent BUAV report entitled "Creatures of habit: animals in recreational drug research"[78] indicates that licences are still being granted in instances where alternative non-animal methods of research are available. This seriously challenges the ability of section 5(5) to achieve what it purports to achieve, i.e., the limitation of experiments on animals to those instances where it is absolutely necessary. For example, in one experiment at Cambridge University rats were used to investigate the addictive nature of cocaine.[79] The procedure involved surgically inserting a catheter into the jugular vein of the rats and conditioning them, by the use of electric shocks to their feet, to be frightened of loud sounds. The research discovered that the addicted rats would still seek more cocaine even when it was associated with electric shocks. Clinical observation of human patients has already established the addictive nature of cocaine and it is difficult to see in what way the above experiment added to our current knowledge.

Conclusion

The stringent tests in section 5 of the Act in theory set a high threshold of protection for laboratory animals, suggesting that only those experiments that are absolutely necessary will receive licences. Only those experiments that offer considerable benefits

[77] Paragraph 53.

[78] Taylor, K., 2007.

[79] Ibid, p. 5.

(since these benefits must outweigh the animal suffering) and for which no non-animal alternatives exist will be granted a licence to proceed. Unfortunately, on closer inspection, how the Act works in practice offers a bleaker picture. The cost-benefit assessment, which looks so promising on paper, is difficult to implement. The benefit is limited to the projected optimism of the researchers rather than the wider picture of the efficacy of the animal model. The costs are difficult to quantify and the severity classification scheme needs to be modernised. The obligation to use non-animal alternatives appears to have little weighting in practice. The UK boasts an exemplary regulatory system on paper but the author argues that its practical implementation does not approach its potential.

The criminalisation of the possession of extreme pornographic images of bestiality: the Criminal Justice and Immigration Act 2008

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The new Criminal Justice and Immigration Act 2008 ("CJIA") covers a wide range of areas of criminal law as well as immigration issues. It also contains new provisions on the possession of extreme pornographic material depicting scenes of violence and abuse, necrophilia and sexual acts with animals. The provisions on possession of an extreme pornographic image are found in section 63(1). To fall within section 63(1) an image would need to be both pornographic, that is, "of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal" (section 63(3)) and extreme. Extreme images include: "a person performing an act of intercourse or oral sex with an animal (whether dead or alive)", if a reasonable person looking at the image would think that any such person or animal was real" (section 63(7)).

The offence applies to still or moving images and to data capable of being converted to an image and to offline and mobile phone material. The maximum penalty for possession of extreme pornographic images of bestiality will be 2 years imprisonment (section 67).

Defences for accidental possession, unsolicited material and legitimate reasons for possession are stipulated in section 65 with the burden of proof lying on the defence. Proceedings may only be brought with the consent of the Director of Public Prosecutions (section 63(10)). No date has yet been fixed for entry into force of these provisions, but it is expected to be early 2009.

These provisions have been introduced to address the tide of extreme pornography on the Internet with which the Obscene Publications Act 1959 ("OPA") is ill-equipped to deal. The new provisions are much broader than those of the OPA because mere possession is sufficient for an offence to be committed, whereas under the OPA it is necessary for an obscene article to be published and distributed and obscenity is defined in terms of the tendency to deprave and corrupt those persons who are likely to read, see or hear such material.

Although the provisions on violence in the CJIA have generated considerable debate, the use of animals and corpses has received less attention. The use of animals clearly raises animal welfare issues insofar as it entails exploitation of and assaults on animals and treating them without respect. While such use of animals does not raise the issue of consent to harm which has preoccupied the criminal law since *R* v *Brown*,[80] and which has been considered by the Law Commission in its consultation papers on consent in the criminal law,[81] nonetheless the use of animals in pornography is clearly still problematic because it is degrading to animals, as well as to humans. Consent is an irrelevant issue just as it would be in relation to necrophilia. Even if a person made a living will giving consent to their body being used for sexual purposes after their death and for this to be recorded, such consent would not make that activity either lawful or non-degrading. Animal pornography again emphasises the use of animals as a means to an end, in this case the sexual gratification of humans, and reinforces their subordinate status, even if that gratification is achieved voyeuristically.

The exploitation of animals in pornography is not covered by the Animal Welfare Act 2006 or its predecessor, the Protection of Animals Act 1911. However bestiality has of course long been a

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[80] *R* v *Brown, Laskey, Jaggard and others* [1993] 2 All ER 75, [1994] 1 AC 212.

[81] "Consent and offences against the person", Law Commission, 1994, "Consent in the criminal law", Law Commission, 1995.