

# The Protection Of Swans Down The Ages

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Swans are exotic birds and are regarded as such by many different cultures. They are the stuff of myths and legends. In Greece, Zeus, the King of the Gods turned himself into a swan in order to seduce Leda, a beautiful maiden. The Swan of Tuonela<sup>1</sup> can be found in the Kalevala epic of Finnish mythology. The hero of the epic must kill this sacred bird which swims round the Island of the Dead, but, before he can do so, he himself is shot with a poisoned arrow.<sup>2</sup> In Germany, the Swan Knight travelled in a boat drawn by a swan, which was attached to it by a chain fastened to a collar round its neck. Swans have inspired musicians, for example, Tchaikovsky composed music for the ballet “Swan Lake”, while Saint Saens included a swan in his “Carnival of Animals”. This became a cello solo and also, as “The Dying Swan” initially danced by the great Russian prima ballerina Anna Pavlov, a favourite ballet solo. Swans have also played an important role in history. When Henry V led his troops into the battle of Agincourt a swan

was pictured on his pennon,<sup>3</sup> and indeed, swans still feature on some coats of arms.<sup>4</sup>

Four species of swan, three of which have all-white plumage, can be found in Britain, the mute swan (*Cygnus olor*) which lives here all the year round, the whooper and Bewick swans, two migratory birds that only visit in winter and the non - native black swan (*Cygnus atratus*), imported from Australia as an ornamental bird. Swans are record breakers. The mute swan, which often weighs over 13 kilograms,<sup>5</sup> needs “a long clear runway across water to get airborne”,<sup>6</sup> then it flies beautifully and gracefully using its wingspan of over 2 metres across. It is the heaviest bird in Britain and also lays the largest egg.<sup>7</sup> The whooper swans that migrate to Britain come mainly from Iceland; they are the highest fliers and have been seen from aeroplanes flying at heights of 8,100 metres,<sup>8</sup> where the air is extremely cold.<sup>9</sup>

Because mute swans are Royal birds they have an additional strand of

protection, so it is essential to be able to distinguish them from the other white swans. This can be done in a number of ways. Most mute swans are to be found “on shallow lakes, slow rivers, marshes, wet meadows, and shallow coasts”<sup>10</sup> all the year round, unlike the migratory species, the wild swans<sup>11</sup> which “generally favour regular wintering grounds”.<sup>12</sup>

## Early Protection

Mute swans occupy a unique place in English law and have been protected since Norman times. Indeed, the custom of keeping swans goes back to before 1186<sup>13</sup> and by the end of the fifteenth century they were very common on the Thames in London, to the extent that “The secretary to the Venetian Ambassador wrote in 1496 – 1497 “it is a truly beautiful thing to behold one or two thousand tame swans upon the river Thames, as I, and also your Magnificence have seen”.<sup>14</sup> In other words, some wild swans had become “domesticated”.

<sup>1</sup> Which Sibelius set to music in his 1895 tone poem “Four Legends from the Kalevala”.

<sup>2</sup> See [http://en.wikipedia.org/wiki/The\\_Swan\\_of\\_Tuonela](http://en.wikipedia.org/wiki/The_Swan_of_Tuonela) accessed 31/03/2010.

<sup>3</sup> Henry’s mother was a Bohun, whose ancestors, the Bouillons from Normandy, claimed descent from the Knight of the Swan and whose badge was a white swan.

<sup>4</sup> A cob and pen, both nicked in the beak, stand as supporters on the arms of the Company of Vintners.

<sup>5</sup> Some 30 pounds weight.

<sup>6</sup> AA, RSPB The Complete Book of British Birds, 1995 edition, pp. 14 – 15.

<sup>7</sup> Ibid, p. 18.

<sup>8</sup> 27,000 feet.

<sup>9</sup> Ibid, p. 10.

<sup>10</sup> Ibid, p. 96.

<sup>11</sup> Bill Oddie’s Birds of Britain and Ireland, New Holland 1998, p. 25.

<sup>12</sup> Ibid. The whooper swans prefer the north and west of Britain while the main flocks of Bewicks are to be found on the Ouse Washes and at Slimbridge and Martin Mere.

<sup>13</sup> Ticehurst Norman The Mute Swan on the River Thames; see <http://www.theswansanctuary.org.uk/images/mute%20swan%20on%20river%20thames%20pl.jpg> Accessed 04/03/2010.

<sup>14</sup> <http://www.theswansanctuary.org.uk/images/medieval%20london%20pl.jpg> Accessed 04/03/2010.

By the thirteenth century, swans had become an important item of diet, bought and sold in the open markets in London, and records from the reign of Edward III show that “the price of a swan was 4 or 5 shillings, nearly ten times that of a goose or mallard, and three or four times that of a pheasant”.<sup>15</sup> Swans were a very valuable commodity.

Most of the records relating to the keeping of swans are linked to the river Thames and London. A mandate issued by Henry III to the Sergeant of Kennington refers to swans belonging to the King and to the Knights Hospitallers of Hampton, Middlesex, and also to the custom of dividing a brood of cygnets equally between the owners of the parent birds.<sup>16</sup> This was unique to swans, as with all other domestic animals the person owning the mother would keep all the offspring. So was the practice of marking the swans’ beaks so that their owners could be identified.

The swan was first given Royal status in the twelfth century and, since then, whenever a privately owned swan escaped, it became the property of the Crown. By 1378, the office of “Keeper of the King’s Swans” had been created, an office that exists to this day.<sup>17</sup> An early piece of legislation<sup>18</sup> stated that “all swans owned by those who pay less than 5 marks a year Freehold were forfeit to the King” because cygnets in particular were straying and being found by “yeomen and husbandmen and other persons of little

reputation” who were then putting their own marks on the birds.<sup>19</sup> The ancient custom of swan upping is still carried out once a year on the river Thames, as its purpose is to mark all cygnets with the same mark as their parents. Each owner had his/her own mark. Between 1450 and 1600 there were known to be as many as 630 different marks used,<sup>20</sup> but now the only owners are the Queen, the Worshipful Company of Dyers and the Worshipful Company of Vintners, and Royal swans are no longer marked.<sup>21</sup>

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The amount of legal protection given to swans in Elizabethan times is illuminating. For example: “Anyone driving away swans at breeding time, or stealing eggs, was liable to one year’s imprisonment plus a fine, at the pleasure of the Crown” and “any person carrying a swan hook, by which swans might be taken from the river, if not a swan herd nor accompanied by two swan herds was liable to a fine of two thirds of one pound”.<sup>22</sup> The Royal Exchequer also benefitted, as the right of marking was subject to a fine paid into its coffers. Because

swans were property, all actions were in trespass and the penalties could be severe. A statute from the reign of Henry VII determined that “he who steals the eggs of swans out of the nest shall be imprisoned for a year and a day and fined at the will of the King”, half the fine going to the King and half to the owner of the land where the eggs were taken.<sup>23</sup> The Case of Swans<sup>24</sup> gives details of another punishment although it is vague about the source.<sup>25</sup> However, where a lawfully marked swan was stolen from an open or common river, the same, or a different swan if that was not possible “should be hung in a house by the beak, and he who stole it should in recompense thereof be obliged to give the owner as much wheat as would cover all the swan, by putting and turning the wheat on the head of the swan, until the head of the swan be covered with the wheat”.

## The Case of Swans

The Case of Swans was decided in 1592 and although it was a very early case, it is still important today. It discussed property in living wild animals (*ferae naturae*), which it defined as not necessarily animals that are “savage by nature” but also included animals that “cannot be classed as domestic or tame”. Any person can claim property in any animal *fera* if they take, tame or reclaim them, “until they regain their natural liberty. Animals such as deer, swans and doves are the subjects of this qualified property,

<sup>15</sup>Ibid.

<sup>16</sup>See later.

<sup>17</sup>Although it is now known as the Keeper of the Royal Swans.

<sup>18</sup>“The Lawes, Orders and Customs for Swans”, dated 1482/3: see The Annual Taking Up and Marking of Thames Swans”, [Shttp://www.thamesweb.co.uk/swans/upping2.html](http://www.thamesweb.co.uk/swans/upping2.html) Accessed 04/03/2010. This Act was repealed by the Game Act 1831.

<sup>19</sup>Anno vicesimo secundo Edward IV, CAP. VI. An act concerning swans, see n. 14.

<sup>20</sup>Ibid. Each mark was granted by the King’s Swan Master and entered into a Registration book.

<sup>21</sup>Ibid. Queen Alexandra requested the marks be reduced as she was worried the birds would find the process painful, but it is not known when the practice ceased.

<sup>22</sup>Ibid.

<sup>23</sup>11 Hen. 7, c. 17 - Customs Act, 1495, repealed by statute 3 Geo. 4, c. 41 (1822).

<sup>24</sup>(1592) 7 Co. Rep. 15b; 77 E.R. 435; ALL ENGLAND LAW REPORTS REPRINT [1538 – 1774].

<sup>25</sup>“It had been said of old time...”.



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which is lost if they regain their natural liberty, and have not the intention to return”. So if any person took marked swans or swans in private waters, the owner could bring an action for trespass or conversion.<sup>26</sup>

The second part of the judgement set out the ownership of swans, including cygnets. “A swan is a royal fowl, and all swans the owner of which is not known belong to the Crown”. Furthermore, all lawfully marked swans swimming in an open or common river belonged to the owners of the marks, provided they were lawfully obtained by Royal grant or prescription. Where the swans were to be found on private water, they belonged to the owner of that water, and he could take them back if they escaped into an open river. However, if a swan fully regained its freedom, the officers of the Crown could seize it. Where there were cygnets and the parents belonged to different owners, their cygnets belonged to both owners in common.<sup>27</sup>

The case itself was an action in trespass brought by the Queen against two defendants who were accused of taking her swans. It makes fascinating reading as although the discussion is written in English, the pleadings are in Latin. The abbot of a monastery near Abbotsbury in Dorset<sup>28</sup> surrendered

the premises to King Henry VIII who, in 1543, granted them to Giles Strangways Esq. When he died, his cousin, another Giles Strangways, inherited them and he demised the disputed game of swans to the defendants for a year. The Court of Exchequer, by writ, directed the sheriff of Dorset “to seize all the white swans not marked” – he seized 400 by force.

In reaching their judgement, the Court relied on two earlier cases, both of which demonstrate the difficulties associated with determining ownership in the property of a valuable commodity such as swans when these birds are only semi-domesticated, more wild than tame. In the first of these cases,<sup>29</sup> the plaintiff sought the return of his swans which were swimming on his neighbour’s stretch of river. Although the defendant claimed he thought they were “strays”, he did return them. Four important points regarding the ownership of swans came out of this judgement, namely i) Everyone who has swans within his manor, his private waters, has a property in them ii) One may prescribe to have a game of swans within his manor iii) He who has such a game of swans may prescribe that his swans may swim within the manor of another and finally iv) A swan, unlike any other fowl, may be an Estray.

In the second case, as in the earlier case, the problem was that the birds were inclined to stray. The two plaintiffs, Lord Strange and Sir John

Charlton, alleged that three defendants had taken and carried away 40 cygnets causing them £10 damages – a fortune in the time of King Richard III. Of the two plaintiffs, one owned the cobs and the other the pens, which made them owners in common equally, and the swans swam on the river Thames in Buckingham. However, it seems from the case, that a number of pairs of these swans had nested on the defendants’ land and produced cygnets. This enabled one of the defendants to argue (successfully, I think) that, time out of mind, where this happened and the land was in the county of Buckingham, the person who had property of the swans should have two of the cygnets while he who had the land should have the third cygnet, which should be of less value than the other two. This was considered to be a good custom, because the owner of the land on which the swans nested had allowed them to stay there rather than driving them off. It also appeared that a man might allege a custom or prescribe in swans and cygnets.<sup>30</sup>

The same case also explained why swans were held in such high regard. This was because “the cock swan was an emblem or representation of an affectionate and true husband to his wife above all other fowls; he holds himself to one female only, and for this cause nature has conferred on him a gift beyond all others, that is, to die so joyfully that he sings sweetly when he dies...”.<sup>31</sup>

<sup>26</sup>See n. 24.

<sup>27</sup>Ibid.

<sup>28</sup>There is still a privately owned swan herd here, apart from her Majesty’s birds and those of the Worshipful Companies of Vintners and Dyers the only remaining one in the country. See “Battered birds waddle once more”, Vicky Liddell, The Daily Telegraph, Weekend, 9 January 2010.

<sup>29</sup>Recorded in the Year Book 7 Hen. 6. 27 8.

<sup>30</sup>Y.B. 2 Rich. 3, 15 n. And 16 A.

<sup>31</sup>Ibid. Though not in the case of a pair of Bewick swans who, in January 2010, arrived in Britain with new mates. See “Swans decided life was too short for fidelity”, The Times, 25 January 2010.

## Crimes against swans today

It has been shown therefore, that swans are special, and, because of this they have received a considerable amount of protection down the ages. However, despite the respect and sometimes reverence in which these birds are held, in modern times, a darker side has appeared. Swans now seem to attract vandals who see them as targets to be exploited, and although only a few people are involved, they perpetrate acts of the most appalling cruelty on these beautiful birds, cruelty that is rarely meted out to other wild birds.

“  
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Since it was passed in 1981, the Wildlife and Countryside Act has afforded the best protection for wild swans. Section 1 sets out a series of basic offences so that any person intentionally killing, injuring or taking any wild bird,<sup>32</sup> taking, damaging or destroying the nest of any wild bird,<sup>33</sup> or taking or destroying an egg of any wild bird<sup>34</sup> can be prosecuted. It is also an offence if any person has in his possession or control any live or dead wild bird<sup>35</sup> or an egg of a wild

bird.<sup>36</sup> However, because it is not always easy to produce sufficient evidence to establish the requisite intention required to secure a conviction in a prosecution brought under subsection (1), subsection (2) has been made an offence of strict liability. Furthermore, because both the whooper and Bewick swans are rare, they are listed in Schedule 1 and thus receive the enhanced protection this classification affords them.<sup>37</sup>

Perhaps because the birds are large and thus make an easy target, many swans are shot, by young men with air rifles. In the year 2000, Judith Smith, the County Bird Recorder for Greater Manchester, recorded 29 shooting incidents in which several birds died. After many years of studying mute swans, she observes that most of the birds she deals with are carrying pellets and that “this type of vandalism seems to be on the increase”.<sup>38</sup> She also gives details of a case that highlights the difficulties that can be experienced in obtaining sufficient evidence before a prosecution can even be considered.

There had been two similar incidents in which private property had been broken into. At one incident “13 bullets were pumped into 2 swans”. At the other, a car was seen, traced and an air weapon seized, but the pellets from the gun did not match up with those found in the birds.<sup>39</sup>

In another appalling incident, connected to two others,<sup>40</sup> the post mortem on a mute swan showed

that it had been shot 13 times with flat-tipped airgun pellets. The bird’s wounds were so severe that not even veterinary assistance could save its life. On examination, “nine airgun pellets were found in the bird’s head, three in its neck, and another had entered through the throat and travelled into the stomach”.<sup>41</sup>

Perhaps the most disturbing incident of this kind again resulted in an unsuccessful prosecution. This case began with a gruesome discovery and, in effect, ended in a farce. Some 29 swans, as well as a marsh harrier and a grey heron were found buried in a mass grave in Bedfordshire. The birds had all been shot in what appeared to have been a deliberate attempt to kill all the swans on a privately owned lake that was used for duck shooting. Eventually, three men were charged with shooting the birds, but the prosecution’s case hinged on a key bullet linking the seized weapon to the killing, and the Police managed to lose this bullet. With the forensic evidence gone, the defendants claimed, and were awarded, £44,000 costs.<sup>42</sup>

Some incidents are more heinous than others. In one particularly tragic case, Penrose, the 18 year old defendant, together with an accomplice, fired an air rifle through the window of a town centre hostel where he was staying. Hours later, he attacked a family of mute swans killing the cob, which he hid in a hedge, and seriously injuring the pen who was later found with blood pouring from her head, trying to

<sup>32</sup>Section 1 (1) (a).

<sup>33</sup>While that nest is in use or being built – section 1 (1) (b).

<sup>34</sup>Section 1 (1) (c).

<sup>35</sup>Or any part of, or anything derived from, such a bird – section 1 (2) (a).

<sup>36</sup>Or any part of such an egg – section 1 (2) (b).

<sup>37</sup>Section 1 (4) and (5), and as amended.

<sup>38</sup>See “Please don’t shoot the mute”, *Legal Eagle*, April 2001, No. 28.

<sup>39</sup>*Ibid.*

<sup>40</sup>In that all three occurred in the environs of Nottingham.

<sup>41</sup>“Swan shot 13 times”, *Legal Eagle*, June 2009, No. 58. There was insufficient evidence for a prosecution.

<sup>42</sup>See “Swans massacred”, *Legal Eagle*, February 2008, No. 54; and “Down the swanny”, *Legal Eagle*, June 2009, No. 58.

take care of her 4 cygnets. She too died. Penrose pleaded guilty to killing a wild bird, injuring a wild bird, having a loaded weapon in a public place and criminal damage. Both he and his accomplice were sent to prison, but the sentences were interesting in that, in each case, the offender had to serve half his sentence in the community.<sup>43</sup>

Although shooting incidents account for most of the serious crimes perpetrated against swans, there are other acts of seemingly mindless, sometimes unbelievable cruelty such as the incident that occurred just before Christmas 2003, in Exeter. Barnett, the defendant, watched by a crowd of horrified Christmas shoppers, enticed a mute swan to the bank of Exeter Quay, where he grabbed it by its neck which he proceeded to wring, smashed it onto the concrete path then hurled it into the river. He too was sentenced to prison. Despite the fact that he had mental health problems and had pleaded guilty to killing the bird. The court, taking a serious view of the situation, decided to impose a custodial sentence of three and a half months, “one of the toughest sentences we have seen for a crime of this type”.<sup>44</sup>

Other incidents perhaps stem rather more from a lack of care, although the results can be equally cruel. One such case was *R v Adams 2008*,<sup>45</sup> where the actions were similar to sheep worrying. The defendant, a dog walker, released 3 dogs into a site of special scientific interest<sup>46</sup> where they were seen chasing mute swans. Because this serious incident

occurred in January, in a site of national importance for its overwintering wildfowl and wading birds, Natural England was able to mount a successful prosecution against Adams, for recklessly disturbing fauna (the swans) within a site of special scientific interest. Mr. Adam’s irresponsible action, releasing his dogs rather than controlling them, cost him a fine of £250 together with £250 costs. This unusual prosecution, a legal first, could only be brought because the incident occurred in January, as the disturbance offence applies only to birds overwintering on the site, that is, between October and March.<sup>47</sup>

**“ shooting incidents account for most of the serious crimes perpetrated against swans ”**

The Public Order Act 1986 has even been used to obtain justice for swans. In yet another unusual case, Halsall, the defendant, who was jet-skiing on Conwy Marina “accelerated directly towards (a mute swan) striking it at speed and killing it”.<sup>48</sup> The bird, a cob, had been behaving somewhat aggressively towards craft entering or leaving the marina. There was insufficient evidence to show

intention on the defendant’s part deliberately to kill the bird, so a prosecution under the Wildlife and Countryside Act 1981, section 1 (1) (a) would have been unlikely to succeed. However, because they could produce a sufficient number of witnesses who had been distressed by the action, the Crown Prosecution Service decided to use the Public Order Act instead. Halsall was found guilty of causing harassment, alarm or distress, fined £600 and ordered to pay £350 costs.<sup>49</sup>

Help can sometimes come from unexpected sources with wildfowling acting as unofficial policeman for swans. In 1994/95, in two separate incidents on the same day in Wigtown Bay, a local farmer observed whooper swans being shot. Because he was secretary of his local wildfowling association, he reported both incidents to the police. In one of the cases, two Englishmen were each fined £1,000 because the swan they had shot had been found, partly buried. In the other case, because it was a French wildfowler who had shot the bird, he was arrested and imprisoned until he had paid the £1,000 fine. This distinction in the outcome of two almost identical cases neatly illustrates a quirk in the law at that time, in that in those days there were no powers of arrest and imprisonment under the Wildlife and Countryside Act 1981. The Frenchman was jailed, not because he had shot a swan, but because, as a foreign national, he might abscond before paying his fine.<sup>50</sup>

<sup>43</sup>See “Youths receive custody for shooting swans”, *Legal Eagle*, April 2004, No. 40.

<sup>44</sup>Part of a comment by one of the presiding magistrates. See “Prison for swan killer”, *Legal Eagle*, July 2004, No. 41.

<sup>45</sup>Unreported.

<sup>46</sup>The RSPB nature reserve at Copperhouse Pool, within the Hayle Estuary and Carrack Gladden SSSI.

<sup>47</sup>See “Dog walker prosecuted for bird disturbance in legal first”, *Legal Eagle*, June 2009, No. 58. The article includes a photograph of the horrific injuries suffered by one of the swans, which had to be humanely destroyed.

<sup>48</sup>See “Swan killed by jet skier”, *Legal Eagle*, May 2003, No. 36.

<sup>49</sup>*Ibid.*

<sup>50</sup>See “Wildfowling police illegal shooting”, *Legal Eagle*, Summer 1995, No. 6.

## The Public Order Act 1986 has even been used to obtain justice for swans.

Apart from people, swans also have a few natural enemies, animals such as the fox (*Vulpes vulpes*) which will take both birds and their eggs, and fish such as pike (*Esox lucius*) will sometimes eat young cygnets. Until the law was changed, some died as the result of lead poisoning from the weights used by fishermen<sup>51</sup> and others still suffer severe injuries even death as a result of becoming entangled in abandoned fishing lines or hooks. Like barn owls, they too are prone to road traffic accidents, many of which prove fatal and they can crash into electricity pylons when the loss of life can be considerable. Indeed in one particular incident, “more than 15 swans were killed in less than two weeks ...”. They had been feeding in fields and had crashed into the cables when they were taking off, because the warning deflectors had either broken or fallen off, a situation that was remedied once the power company was informed.<sup>52</sup>

In another, this time quite bizarre incident, involving a whooper swan that had also died after a collision with pylons, the recently appointed Master of the Queen’s Music, Sir Peter Maxwell Davies, had his house searched and was questioned under caution about the possible illegal possession of a dead bird. Apparently the police had arrived on Sanday, a tiny island in the Orkneys, to look at a vandalised gate when they spotted “the plucked carcass hanging in the composer’s garden”.

They returned with a warrant. Sir Peter, a keen environmentalist who had already reported his find to the RSPB, had been going to turn the swan’s breast into “a delicious terrine”.<sup>53</sup>

## Welfare of injured swans

**Injured swans, if they are lucky, end up in one of the many swan rescue and rehabilitation centres, including the national swan sanctuary in Shepperton, that are operating in Britain today.** Once again the relevant legislation governing the correct operation of these centres is to be found in the Wildlife and Countryside Act 1981, where section 4 (2) permits the taking of any wild bird provided it has “been disabled otherwise than by his unlawful act “and has been taken solely “for the purpose of tending it and releasing it when no longer disabled”.<sup>54</sup> Any wild bird can also be killed provided it is so seriously injured that there is no reasonable chance it will recover.<sup>55</sup> On rare occasions, where there is an injured parent bird, it may be necessary to take the whole family to the centre.<sup>56</sup> The Swan Sanctuary has published its own Code of Practice<sup>57</sup> which provides excellent guidance to anyone operating in this field.

## Royal birds – the prerogative right in swans.

**Although the Wild Creatures and Forest Laws Act 1971 abolished certain rights of the Crown to wild**

**creatures, it retained for Her Majesty the prerogative rights to swans and royal fish. However, there seems to be some uncertainty as to when exactly this right will be applied.** It is normally exercised on the river Thames where swan upping takes place, but legally, the right applies to all wild and unmarked swans on open water in the UK. This is important because, as property, offences against swans could be prosecuted under the Criminal Damage Act 1971 and although in practice it would rarely be used, it might offer an opportunity to get justice for a damaged swan in the occasional case where a prosecution under the Wildlife and Countryside Act 1981 would be unlikely to succeed.

There is existing correspondence<sup>58</sup> about a case in Somerset where two men were accused of throwing stones at a swan, injuring it. They were observed by fishermen who, although they overheard the men making comments about “swan bashing” and witnessed the vandalism, were reluctant to help the police, although one did provide a name which enabled an arrest to be made. There was therefore very little evidence on which to prosecute. The original summons, under the Protection of Animals Act 1911 section 1, was rejected by the Crown Prosecution Service as obviously incorrect because the swan was neither a domestic nor a captive animal. However, there was sufficient admission by the sole defendant to prove that he had committed a reckless act and although this would have been

<sup>51</sup>Control of Pollution (Angler’s Lead Weights) Regulations 1986 – the 1993 Amendment Regulations are not applicable.

<sup>52</sup>“Shocking death toll prompts urgent action”, RSPCA Animal Life, Spring 2009, p. 9. The action needed to be prompt because “there were many thousands of swans in the area at the time, driven south by the cold snap”.

<sup>53</sup><http://www.timesonline.co.uk/tol/news/uk/article431570.ece> Accessed 22/04/2010.

<sup>54</sup>Section 4 (2)(a).

<sup>55</sup>Section 4(2)(b) – provided the injuries were not inflicted by the euthaniser.

<sup>56</sup>A procedure that could only be carried out under license – section 16.

<sup>57</sup>[http://www.theswansanctuary.org.uk/code\\_of\\_practice.php](http://www.theswansanctuary.org.uk/code_of_practice.php) Accessed 04/03/2010.

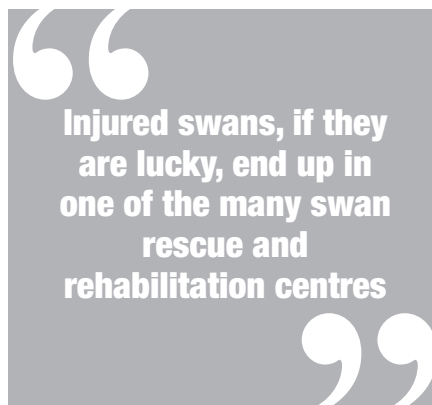
<sup>58</sup>Between the Crown Prosecution Service and Ms. Dot Beeson who founded and runs the national swan sanctuary at Shepperton.

insufficient to sustain a charge under the Wildlife and Countryside Act 1981 section 1 (1) (a), because that requires intention to be proved, it was enough to bring a prosecution under the Criminal Damage Act 1971 section 1.<sup>59</sup> The defendant was charged with causing “damage to property belonging to the Crown, namely a swan of value”. This was based on the Case of Swans 1592, which decided, inter alia, that the Crown owns all swans that cannot be positively identified as owned by anyone else.<sup>60</sup>

However, the fact that in practice “the Crown only normally exercises its prerogative... with regard to swans on the river Thames upstream as far as Oxford and its tributaries and some adjacent waters”,<sup>61</sup> has caused some uncertainty. It is quite clear that where a swan in these waters needs to be caught, rescued or ringed, this can only be undertaken with the permission of Her Majesty’s Swan Marker, and the Criminal Damage legislation can be used, where required, to protect these swans. But what about unmarked swans on other waters?

Take, for example, the case of the swan killed by the jet skier,<sup>62</sup> where there was insufficient evidence of intention to bring a prosecution under the Wildlife and Countryside Act 1981. Here, the Crown Prosecution Service were unconvinced by arguments that this swan did, in fact, belong to the Queen. They chose instead, to use the Public Order Act 1986, section 5, because there were fortunately sufficient witnesses prepared to

testify that they had been alarmed or distressed by the skier’s action.



But why is there this uncertainty when the Case of Swans makes it quite clear that the “swan is a Royal fowl, and all swans the owner of which is not known belong to the Crown”? Furthermore, the Wild Creatures and Forest Laws Act 1971, section 1 (1)(a) states specifically that Her Majesty retains her prerogative right to swans thus demolishing any argument that this swan was Welsh so would fall outside the right. However, this is probably not the case in Scotland. Colin Reid states that the Crown’s rights in swans only apply in England and Wales, and this by virtue of the Case of Swans,<sup>63</sup> and although the Scottish Society for Prevention of Cruelty to Animals consider that the swans at Holyrood belong to the Crown, possibly even wild mute swans too, there seem to be neither cases nor legislation to support this. In the Orkneys, yet another situation may pertain in that “a Norse right called Udal Law is still assumed to hold sway, possibly making swans the property of the people”.<sup>64</sup>

## Conclusion

Swans were originally protected because they were a valuable commodity, they made delicious eating, but they were also seen to be special, to be found in myths and legends, on coats of arms, to have their place in history. Some, the mute swans, still enjoy the protection of the Queen. Yet they can also be the victims of savage attacks, and they can be much misunderstood. Nothing changes, as a recent item from the Today programme indicates.<sup>65</sup> Now there appears to be an aggressive swan on the river Cam that has been attacking rowers, possibly because last year its cygnets were killed. There has been a suggestion that it should be killed because it is dangerous. At least, with all this publicity, a license can be applied for,<sup>66</sup> hopefully in good time to relocate the bird to a place safer both for it and the general public. This time perhaps, there will be a happy ending.

<sup>59</sup>“... or being reckless as to whether any such property would be destroyed or damaged ...”.

<sup>60</sup><http://www.theswansanctuary.org.uk/images/criminal%20damage%20case%20pl.jpg> Accessed 04/03/2010.

<sup>61</sup>See letter between the Head of Species Conservation (Defra) and the Joint Nature Conservation Committee, which refers to the earlier correspondence (n.60). See <http://www.theswansanctuary.org.uk/images/doe%20swan%20translocation%20code...> Accessed 04/03/2010.

<sup>62</sup>See earlier.

<sup>63</sup>Nature Conservation Law, Colin Reid, W.Green, 3rd edition, p. 17.

<sup>64</sup><http://news.bbc.co.uk/1/hi/scotland/4361079.stm> Accessed 22/04/2010.

<sup>65</sup>26 April 2010.

<sup>66</sup>Under Wildlife and Countryside Act 1981, section 16.