

The Welfare of badgers is the law suitable for purpose?

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Badger baiting, although outlawed in 1835¹, still continues to this day. It involves extreme cruelty. Badgers are disabled in various ways then dogs are pitted against them. Often bets are laid. Even severely disabled, the badger can inflict serious damage to dogs and the fights result in terrible injuries to both animals. Badgers that have been removed from their setts before baiting are classified as “captive animals” and, as such, would be protected under the Protection of Animals Act 1911.² However, many more badgers are baited in situ, that is, at the sett where they have been dug and it was not until 1973 that the first law was passed to deal with this problem. As loopholes have become apparent, new laws have been passed to fill the gaps. This article will examine both legislation and cases to determine the adequacy of the protection they provide to badgers.

The Protection of Badgers Act 1973 was basic legislation, prescribing a number of offences relating to the wilful killing, injuring or taking of a badger³ and, significantly, offences relating to the cruel treatment of the

animal⁴. However, it was unfortunate that when the Wildlife and Countryside Act 1981 was passed, the animals hardly benefitted. This is because badgers are not rare, so do not qualify for inclusion in Schedule 5 which provides maximum protection for both species and their homes. Instead, the badger is listed in Schedule 6 which protects those animals from being killed or taken by certain methods.⁵

Prosecutions, particularly successful ones, continued to be rare, so when the Wildlife and Countryside Act was amended in 1985, it solved a major evidential problem by reversing the burden of proof. Now, provided the prosecution can establish reasonable evidence that the defendant has attempted to kill/take/injure a badger, it is up to him (or her) to show that this was not his intention.⁶ A similar reversal applies where the defendant is charged with digging for a badger,⁷ the onus in both cases, being the lighter civil burden.

It is quite remarkable for the home of one particular animal to be the sole subject matter of an Act of Parliament, yet this is the case with

badger setts. Although a sett is part of the target matter of badger diggers and baiters, the Wildlife and Countryside Act 1981 can offer no protection because badgers are only listed in Schedule 6. So, in 1991, the Badger Act was passed, making it an offence to interfere with a badger sett. And while the Bill was progressing through Parliament, a video was shown to interested MPs and Lordships. Filmed by an investigative journalist who, undercover, had managed to infiltrate gangs of diggers and baiters, it showed not only the horrendous cruelty which badgers were subjected to, but also the crucial role dogs played in the “sport”. These dogs also needed protection. A second Bill, which became the Badgers (Further Protection) Act 1991, and which set out the powers a court has where a dog has been used or was present at the commission of an offence, was tacked onto the Badger Bill and both were passed together.⁸

The Badger Acts were then consolidated into the Protection of Badgers Act 1992. Since then, other important amendments have been made, particularly in the Natural

¹By the Cruelty to Animals Act 1835, <http://cc.bingj.com/cache.aspx?q=en-GB&setlang=en-GB&W=739f3170,bf9d9cf> [Accessed 1 October 2009].

²And now the Animal Welfare Act 2006. The terminology has changed, so that, under the new legislation, they would come within the category of “protected animals”, that is: not living in a wild state,

or, under the control of man.

³See now the Protection of Badgers Act (POBA) 1992, section 1.

⁴Ibid, section 2.

⁵Wildlife and Countryside Act (WCA) 1981, section 11.

⁶POBA 1992, section 1(2).

⁷Ibid, section 2(2).

⁸Now POBA 1992, sections 3 and 13.

Environment and Rural Communities Act 2006, which have made it easier to enforce the law, and this is essential if the legislation is to properly fulfil its function.⁹ However, only if the incidence of badger digging and baiting has decreased, can the legislation be considered successful.

Unfortunately, badger crime tends to take place in remote locations, thus there has always been a problem even detecting it. In many instances, the police have been alerted by the public, as in the early case of *RSPCA v Brooks*,¹⁰ where they arrived at the crime scene to find stopped up holes in a badger sett, signs of considerable digging, an abandoned spade and evidence of badger baiting. Sometimes it is purely by chance. In *R v Mackin*,¹¹ while the police were searching the defendant's lorry, which had been stopped as part of an anti-terrorism operation, they found a pregnant badger with a broken leg, tied in a sack that was hidden in the rear of the vehicle. This resulted in the first prosecution under the Protection of Badgers Act 1992, section 4 of illegally transporting a live badger. It was successful.

Even when the crime has been detected, it is often difficult to find sufficient evidence to secure a conviction. Once apprehended, the most common defence put forward by the accused is that they were after foxes or rabbits, both lawful pursuits which have a commonality of paraphernalia, such as spades and camouflage nets. Even similar dogs are used. Long dogs, for example, "are required to chase after rabbits, but can also be set onto badgers that bolt or flee from the sett".¹² However,

the presence of badger tongs can only be sinister, and, on rare occasions, the police may strike lucky and find a badger corpse, video evidence or maps indicating where setts are.

More often, evidence is almost non-existent, and it was this fact that, in 1997, led to the first case to use DNA testing. In *R v Shaw, Pettipiere, Holland and Wragg*,¹³ the defendants were found guilty of ill-treating and killing a badger, interfering with a badger sett and digging for a badger. They claimed that the bloodstains on a knife, two bags and an oversuit came from a fox, not from the body of an adult male badger found, still warm, in a shallow grave nearby. However, because they had left the sett before the police arrived, they had to be linked to the crime. Forensic evidence established this, by showing that the DNA in the bloodstains was all from the dead badger.

Lamping and snaring are also legal methods of pest control, and again, both have been abused to kill badgers. Lamping involves the use of a bright light to dazzle the target animal, which is then shot. It is used very successfully to control fox numbers. However, it is one of the methods of killing and taking animals that is specifically forbidden with regard to animals listed in Schedule 6 of the Wildlife and Countryside Act 1981, as the badger is.¹⁴ Unfortunately, because badgers use well-trodden paths, they are easy to lamp, and, in an early case, an Olympic medal winner was found guilty of this crime.¹⁵ Like lamping, snares are also a very popular method of controlling foxes and rabbits, although only the free-running ones can be used and even then their use is

strictly controlled.¹⁶ Unfortunately, despite this, some horrific cases, such as *R v Harmson*,¹⁷ do occur. This crime, which occurred in Scotland, was discovered as the result of another investigation. Several animals were found dead or decomposing in snares. They included two badgers, two roe deer, several foxes and a rabbit. The defendant, a gamekeeper, was found guilty of setting a snare to catch badgers and failing to check his snares. This time, it was the procedure of the court that was significant. Officers from the Royal Society for the Protection of Birds gave vital evidence at the trial, which, the defence argued, should be inadmissible because the RSPB did not obtain permission from the landowner to be on the estate. However, this argument was not accepted by the Sheriff who "stated that this kind of crime is so serious that it is in the public interest for the RSPB to give evidence".

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Reasonable evidence must be produced for the burden of proof to be reversed and, initially, this means showing that the sett is an active badgers' sett. Even this is not straightforward and requires a high level of expertise. In *R v Parkes and three others*,¹⁸ the police arrived at a possible dig/bait to find two dogs

⁹The provisions include powers of entry onto premises and increased time limits for bringing cases; the Serious and Organised Crime Act 2005 provides new powers of arrest.

¹⁰1992, unreported. Another man was also charged but the case against him was discontinued through lack of evidence.

¹¹1997, unreported. He was also found guilty of a cruelty offence under the Protection of Animals Act 1911 because the badger was captive.

¹²B. Martin, "Protecting badger setts after the Green case" [2003] J.P.L., pp. 1105-1106.

¹³1997, *The Independent*, 20 September 1997, p. 6; *The Guardian*, 20 September 1997, p. 12; *Legal Eagle*, Winter

1998, No. 19.

¹⁴WCA. 1981, section 11(2)(c)(iii).

¹⁵*R v Dyson* 1995, unreported.

¹⁶WCA. 1981, section 11(2)(a) makes it illegal to use snares to catch badgers.

¹⁷2005. See *Legal Eagle*, April 2006, No. 48.

¹⁸2004, unreported.

emerging from a sett. The defendant claimed he was rabbiting and he had thought the sett inactive. It needed an expert to prove to the court's satisfaction that this was not so. He showed that badgers were present because there were spoil heaps with badger prints on, near the sett, and there was badger hair on a barbed wire fence nearby. An earlier case, *Green and others v DPP*,¹⁹ challenged the exact definition of a sett. The facts were complicated by the complexities of the sett itself. The men were observed and the police alerted only to discover that the hole they had dug had not broken through into either a tunnel or a chamber. As usual, the men claimed to be after rabbits. One of the rare cases to go to appeal, this time, by way of case stated, the judges in the Divisional Court decided that a badger sett does not include the surface above the tunnels and chambers. The men were found not guilty.²⁰

The Natural Environment and Rural Communities Act 2006 strengthened enforcement procedures. Schedule 5 extended the provisions of the Wildlife and Countryside Act 1981 section 19(3) to, *inter alia*, the Protection of Badgers Act 1992,²¹ so that now, provided there are reasonable grounds for suspecting that an offence has been committed, a search warrant can be granted to any constable, with, or without other persons, to enter and search land to obtain evidence of the crime. This contributed to the successful outcome of "Operation Newark", when the accused pleaded guilty to two offences of interfering with badger setts. The search warrants had enabled covert surveillance to be undertaken, as a result of which, all the entrances to

two setts were found to have been filled with soil, and two men with spades were arrested when they were observed digging into one of them.²²

The cases still continue to be illuminating. In a recent one, *R v Paddock* 2007²³, the defendant only admitted at his trial that he had killed a badger, claiming that it had happened on humane grounds, after "his dogs had accidentally caught it whilst he was out rabbiting. This was despite him denying any involvement with badgers at three previous interviews." Yet the evidence was considerable. It consisted, *inter alia*, of "two dogs, both exhibiting old injuries consistent with coming into contact with badgers", as well as video footage on his mobile phone, showing his "two dogs attacking a badger at night whilst he illuminated the scene with a torch".²⁴ Paddock's voice was heard encouraging the dogs to kill the badger and DNA testing showed badger blood on one of the knives.²⁵ In 2005, the RSPCA commissioned Wildlife DNA Services Ltd. to set up a data base for storing badger DNA, a very positive development for the collation of evidence.²⁶

The final case in this section will describe a most curious set of incidents. They started in November 2000, when two plastic pop bottles that had been left at the site of a badger sett that had been interfered with were DNA tested. The remains of a deer carcass were found nearby. In February 2002, the defendant was found guilty of poaching with dogs. In December 2002, he was found guilty of possessing Ecstasy tablets in a nightclub and his DNA was registered. In January 2003, a hit came back. The DNA was identical to that

on the pop bottles. Unfortunately, no action could be taken as the time limit for bringing a prosecution in the badger case had expired.²⁷



Badger legislation is distinctive. Unlike most wildlife legislation whose primary purpose is conservation, badger law is concerned with the welfare of these animals, to protect them from cruelty, from the horrific "sport" of badger baiting. Indeed, that two separate Acts of Parliament should be passed in the same year, 1991,²⁸ to protect the same single species, even though it was in urgent need, is unique and likely to remain so.

Furthermore, both Acts started life as Private Members' Bills, as did the 1973 Act, which itself revolutionised the protection of wild badgers by recognising this could only be achieved by legislation. Most Private Members' Bills are doomed to failure unless they have Government help. This is what happened when the Bill that sought to reverse the burden of proof was incorporated into the Government's own Bill that became the Wildlife and Countryside (Amendment) Act 1985. The fact that the other Bills were passed without such incorporation testifies to the depth of affection felt for these animals both by Members of Parliament and their Lordships, as do

¹⁹ [2001] En. L.R. 15.

²⁰ See n. 12, pp. 1098-1108, for a discussion of the implications of this case.

²¹ As well as the Destructive Imported Animals Act 1932, the Conservation of Seals Act 1970 and the Deer Act 1991.

²² See Legal Eagle, February 2008, No. 54.

²³ Unreported.

²⁴ Which could be contrary to WCA. 1981, section 11 (2)(c)(ii), the torch possibly being used as a device to illuminate a target.

²⁵ See Legal Eagle, No. 55, June 2008.

²⁶ See Legal Eagle, No. 44, March 2005. Minerology and palynology have also proved to be invaluable tools.

They, respectively, analyse and match samples of soil and samples of pollen, leaves, grass etc..

²⁷ See Legal Eagle, No. 35.

²⁸ The Badger Act and the Badger (Further Protection) Act.

the debates in Hansard. This was particularly in evidence in the discussion round the contentious definition of a badger “sett“, which had to offer as much protection as possible to the badgers while, at the same time, continue to permit essential activities such as pest control. It is encouraging to read how much agreement there was on the opposing sides and how much goodwill was extended to the animals.²⁹

Yet despite all this, there is, as far as badgers are concerned, a fatal flaw. The Protection of Badgers Act 1992 section 6 sets out the general exceptions, which include “doing anything which is authorised under the Animals (Scientific Procedures) Act 1986“.³⁰ The problem is bovine tuberculosis (bTB) and the fact that the badger has been demonised as its main transmitter to cattle has already led to some thousands of badgers being killed over the past thirty years, many of which were healthy animals.

In an attempt to discover whether culling badgers in infected areas would be an effective and sustainable management tool, DEFRA undertook the Random Badger Culling Trial (RBCT), and, although the results were confusing and inconclusive, it did highlight a new factor. This is the “perturbation hypothesis“, whereby survivors of stable badger groups that have experienced culling no longer stay within their territories but wander haphazardly, possibly spreading infection.³¹ There is no doubt that

bTB is a disaster, to the cattle, the farmers, and to the tax payer,³² as well as to the badgers, yet it is an illuminating fact that “the proportion of 11,000 badgers that were killed in the RBCT that carried bTB“ was only 11%.³³ Furthermore, Professor John Bourne, who chairs the Independent Scientific Group on Cattle TB, admitted that localised culling would not control TB in cattle and was likely to make it worse.³⁴

There is continual pressure on the Government from both farmers and vets for widespread culling of badgers in the infected areas. However, when DEFRA “put the matter out to consultation, the response was an overwhelming 96% of the participants opposed to a cull“ (although, using a different approach, this was reduced to 50%).³⁵ Despite this, and its denial in 2006 of any immediate plans to cull badgers,³⁶ the Welsh Assembly has now decided to go ahead with a trial badger cull.³⁷ It will take place in Pembrokeshire, and the area is to be defined by the natural boundaries of the river Teifi and the Presili Hills in an attempt to reduce the perturbation effect.³⁸ But even a trial cull operating with natural boundaries would surely not produce a valid result, as most killing grounds would lack such features. Furthermore, new badgers can easily move into culled areas that are suitable habitats. This carries the potential of further dangers, as it could result in healthy badgers

possibly moving into infected setts and themselves then developing the disease.³⁹

This article has shown badgers to be assailed on many fronts. Badger baiting still continues. Road traffic accidents account for many deaths, and the Welsh Assembly proposes a massive cull. Despite this, there are grounds for hope. Where badger crime is detected, prosecutions are becoming more successful and the new Hunting Act 2004 has severely restricted the ability of a defendant successfully to claim that he was “only after foxes“. To satisfy the legislative requirements,⁴⁰ the defendant must carry written evidence of permission from the landowner for his presence on the land for that purpose. Furthermore, the land itself must be land that is shot over and the defendant must only use one dog,⁴¹ to flush the fox out for the waiting guns.⁴² These requirements are not readily satisfiable by potential diggers and baiters. Some Highway Authorities now alert drivers to the possibility of badgers on the road by erecting “badger crossing“ signs.⁴³ What is most encouraging is that DEFRA is proposing, in the summer of 2010, to start six trials in the West Midlands, vaccinating badgers with the BCG vaccine to see whether bTB levels in cattle are reduced, and although these badgers will have to be injected, research is being carried out on a possible oral vaccine.⁴⁴

²⁹ See n. 12, pp. 1099-1102.

³⁰ POBA, 1992, section 6(d). The appropriate licenses are then granted under section 10(2).

³¹ B. Martin, “Managing wild animals“, *Journal of Animal Welfare Law*, January 2007, pp. 14-15. In fact, this resulted in the reactive cull being halted: “Minister announces the suspension of badger culling in reactive areas of the randomised badger culling trial“, <http://www.defra.gov.uk/news/2003/0311046.htm> [Accessed 14 November 2003].

³² “Vaccine to tackle badger TB“, *BBC. Wildlife*, September 2009, Vol. 27, No. 10, p.41. An estimated £80 million was spent in 2007-2008.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ See n. 31, p. 15.

³⁶ Jeff Ball, “Government reassesses controls needed to stop TB“, *Wildlife & Countryside*, April 2006, issue 17, p. 27.

³⁷ “Welsh badger cull slammed“, *BBC. Wildlife*, June 2009, Vol. 27, No. 6, p. 41. This is because, in 2008, there was a 52% rise in the number of cattle killed due to bTB, more than 12,000 cattle, with “the compensation bill ... expected to reach £23.5 million in 2009“.

³⁸ *Ibid.*

³⁹ When opponents of badger culling took direct action against badger trapping, they were found guilty of criminal damage – see *R v Cresswell* [2006] EWHC. 3379 (Admin).

⁴⁰ See Schedule 1, which sets out the details that apply to hunting that is exempt. Section 2 prescribes the use of dogs below ground to protect birds for shooting.

⁴¹ Subsection (3)(a)(ii).

⁴² Subsection (5)(b).

⁴³ There is such a sign on the A6003 near Corby.

⁴⁴ See n. 32.