

FARMED ANIMALS

Stephen Forster reviews the adequacy of current criminal law around dog attacks on farmed animals

INVERTEBRATES

Dr Deborah Rook, Dr Debbie Legge & Dr Heather Browning make the case for extending legal protections to sentient invertebrates used in food production

HUNTING

A-LAW Essay Competition winner, Daniel Clark, explores how hunting laws could be reformed to better protect the interests of wild animals



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EDITOR'S NOTE

The end of the year is always a time to reflect on the work of the UK Centre for Animal Law (A-LAW). It has been a busy and productive year for A-LAW which has hosted a series of important seminars and workshops bringing together leading academics, lawyers and campaigners from around the world to share their knowledge, ideas and experience. We have continued our important legal and policy work, supporting animal advocacy groups and providing legal expertise in key policy areas.

Looking forward to next year from 29th -30th May 2024 A-LAW and the Animals, Nature and Society Research Cluster based in the Centre for Human Rights at Birmingham City University will jointly host the 4th UK Animal Law Conference.

More about this exciting event in our next issue but in the meantime, we want to hear from you if you would like to present a paper around the conference theme of *Innovating Toward a Better Legal Future for Animals*.

Finally, we want to thank all our supporters, volunteers and contributors for making the work of A-LAW possible.

All greetings of the season,

The editor and trustees of A-LAW

Criminal Liability for Dogs Attacking Livestock under the Dogs (Protection of Livestock) Act 1953: A Worrying Time for Farmers?

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Abstract

In *Dickson v Procurator Fiscal Stirling* [2013] HCJAC 157 Lady Smith, sitting in the High Court of Judiciary, with vivid clarity noted that "the public interest in ensuring that livestock being reared by farmers are protected and the risk of dogs injuring or killing such livestock, have been concerns of Parliament for many years", and that it is not only the financial loss suffered by the farmer, it is an essential food supply and thus "of fundamental concern in any society." Yet despite a protracted 2-year delay, the Government has suddenly decided to withdraw its flagship Animal Welfare (Kept Animals) Bill 2023¹ that would not only have benefited farmers by strengthening the existing law, but also addressed the escalation of a livestock worrying problem².

Given this disappointing news, the main purpose of the article is therefore to provide a comprehensive review of the current law and in particular what impact this is having on livestock farmers, who at the moment are inadequately protected by the criminal law against a growing social menace.

Introduction

The pandemic had undoubtedly created a greater influx of people into the countryside, national parks³ and beauty hotspots to enjoy

these majestic surroundings. The well-being and economic benefits of visiting the countryside are obvious⁴ but, with an increase in dog ownership⁵, it is no coincidence according to the National Sheep Association survey in March 2023 that farmers are seeing a significant increase in dogs attacking or worrying their grazing livestock during the vital spring and summer months⁶, although the number of recorded complaints to the police is not known⁷.

According to the National Farmers Union (NFU) Mutual Insurance, in 2020 during the height of the pandemic there was a 10% increase in claims, costing around £1.3 million in liability⁸. This has continued to steadily raise to £1.8 million in 2022. Putting aside the financial loss from a dog attacking livestock, there is also the distress and emotional impact of having to deal with any aftermath and in some cases the savagery of an attack, sadly also highlighted by the

1949, Rural tourism (europa.eu), Far from the madding crowd: rural breaks boom as wary avoid coast | Hospitality industry | The Guardian- More people than ever visit the natural environment - Natural England (blog.gov.uk).

4 New survey shows visiting British farmland benefits mental health – NFUonline, How has lockdown changed our relationship with nature? – Office for National Statistics

5 Morgan et al, Human-dog relations during the COVID 19 pandemic: booming dog adoption during social isolation (2020) 155 Humanities & Social Sciences Communications 1.

6 See Hansard "Livestock Worrying: Sussex" 17 April 2018 vol 639 in which George Eustice noted an increase in cases. Sheep worrying - a growing concern | Rural Insurance Group Urgent action needed to halt helpless acceptance of sheep worrying by dogs | News | National Sheep Association,

7 Recorded incidents are a matter for individual police forces and are not according to DEFRA collated centrally see Hansard "Livestock: Dogs" questioned tabled by Tim Loughton -4 June 2020

8 Dog attacks on livestock – the true cost – NFUonline see also www.nfumutual/media-centre (29 March 2021).

1 The Bill suffered significant delay principally due to anarchic government.

2 Sheep worrying - a growing concern | Rural Insurance Group Urgent action needed to halt helpless acceptance of sheep worrying by dogs | News | National Sheep Association

3 National Parks & Access to the Countryside Act



National Sheep Association (NSA) 2021 survey⁹. As stated in *R(Association of Mest Suppliers) v DEFRA* [2017] EWHC 1961 sheep are prey type animal and therefore instinctively flock together with the desire “to remain in a group, and move away from external influences” such as the presence of a dog will create a heightened level of stress and a risk of injury, especially if in an enclosure. It is only right therefore that farmers should be able to rely on the criminal law to punish and deter such attacks.

Livestock and Access to Land

⁹ Only recently Kent Police Rural Task Force reported a shocking incident in which 27 ewes some pregnant had been killed by a dog in Sittingbourne on Boxing Day, describing it the worst case they had seen (20 December 2022-www.kent.police.uk/news). Similarly, Cheshire Police reported another shocking incident in Lymm on 3 April 2022, which led to 16 sheep and lambs being attacked, 8 of which died-see Cheshire Police Rural Crime Team Facebook page. Equally, West Mercia Police and the Malvern Hills Trust have reported an increase in sheep worrying in which dogs and grazing sheep are often in close proximity.

According to DEFRA, there are currently 5.1 million cattle/calves and 14.9 million sheep/lambs resident in England, an increase of 2%¹⁰, whilst in Scotland there are 1.72 million cattle/calves and 6.83 million sheep/lambs¹¹. Cutting across the Country is 140,000 miles of public rights of way, excluding unofficial access and pathways not listed or identified on a definitive map, it is inevitable therefore that dogs will come into contact with livestock¹².

Under Part III of the Wildlife & Countryside Act 1981, each Local Authority is under a duty not only to keep, but continuously review, its definitive map of public rights of way¹³. The maps

¹⁰ Farming Statistics-Livestock Populations as at 1 June 2022, www.defra.gov.uk.

¹¹ Agriculture facts & figures June 2021, www.gov.scot.

¹² See Rambler's Association-www.ramblers.org.uk.

¹³ This repealed part IV of the National Parks & Access to the Countryside Act 1949, for a detailed review of the legislative scheme and the meaning of a “byway” see the decision in *Masters v SofS for the Environment* [2000] Case No: QBCOF/1999/109C.

themselves under s.56 are "conclusive evidence" of the existence of such rights of ways and therefore essential in preserving their use and enjoyment¹⁴. Significantly, any pre-1949 historical right of way which is not recorded by the 1 January 2026 will be legally lost forever¹⁵. However, given this statutory deadline is clearly unworkable¹⁶, DEFRA announced on the 16th February 2022 that it intended to suspend the provision, a decision welcomed by several campaign groups such as the Open Spaces Society and the Ramblers Association. However, in a reversal of policy DEFRA has now reinstated the cut-off date as the 1st January 2031¹⁷. A "public path" is defined under s.66 of the Countryside & Rights of Way Act 2000 (CROW Act 2000) as a highway consisting of either a footpath or bridleway. A footpath for this purpose is one that the public have a right of way on foot only, whilst a bridleway extends to a right of way on horseback¹⁸.

Equally, if it can be established that the public have had voluntary and continuous/uninterrupted use of access (as of right) over any land for at least 20 years, then under s.31 of the Highways Act 1980 such access will be presumed to be dedicated as a highway¹⁹ unless the contrary intention can be shown²⁰. To satisfy

this legal test the High Court in *DPP v Instone* [2022] EWHC 1840 ruled that there must be sufficient evidence to confirm actual (uninterrupted) use and enjoyment for at least two decades to create a legal presumption of dedication. Evidence that supports only a "mere physical opportunity" to access land will not suffice, neither does any inaction by the landowner to frustrate such an opportunistic access to their land (that they may or may not be aware of), indicate acquiescence in the absence of evidence of continuous use over the legal period²¹. Significantly, CROW Act 2000 in s.2 extends the right of the public to enter and remain on any access land which inter alia includes open country, mountain, moor, heath and down for the purposes of open-air recreation²². This gives a statutory right to roam freely over such land (subject to any bylaw restrictions) without fear of being a trespasser. Similar rights of access exist in the Malvern Hills Act 1995 and s.10 of Dartmoor Commons Act 1985, provided the person exercising this right is on foot and horseback for the purposes of "open space recreation". The meaning and purpose of s.10 was recently challenged in the Court of Appeal in *Darwall v DNPA* [2023] EWCA Civ 927 in which the court ruled as a matter of ordinary language "wild camping can naturally be regarded as a form of open-air recreation" that can be exercised on Dartmoor, subject to any By-Laws limitations/conditions. Natural England are charged with creating conclusive maps under s.4-10 of open country and undertake periodic reviews²³.

Offences of Attacking, Worrying or Chasing Livestock by a Dog

Criminal liability for dogs worrying livestock is found in s.1 of The Dogs (Protection of Livestock) Act 1953²⁴. At the time the Bill was

¹⁴ According to Natural Resource Wales, there is 20,750 miles of public rights of way in Wales, see Wales ROWIP Review March 2009 08/26, whilst the Ordnance Survey record 140,000 miles on definitive maps

¹⁵ S.53 of the Countryside & Rights of Way Act 2000, there is now a nationwide effort by interested bodies to ensure has many paths are documented and recorded-see Ramblers Association and its Don't Lose your Way survey on historical maps which claims 10,000 miles could be lost, Open Spaces Society, the British Horse Society. In Yorkshire there has been the parish paths survey.

¹⁶ See also the House of Lords short debate-Historic Rights of Way HL 2019 vol 797, 2nd April.

¹⁷ The Countryside & Rights of Way Act 2000 (Substitution of Cut-off Date Relating to Rights of Way) (England) Regulations SI 2023 No: 1126

¹⁸ See, Right of Way: A Guide to Law & Practice by John Riddall & John Trevelyan, Rights of Way: Restoring the Record 2nd Edition by Phil Wadey & Sarah Bucks. For the diversion of a right of way, see *Bennett v DEFRA* [2023] EWHC 2542

¹⁹ See s.328 & s.329.

²⁰ Upon enquiry this can be designated a right of way and added to the definitive map under s.53 of the W&C Act 1981.

²¹ The DJ had erroneously acceded to the appellant's claim they had lawfully used a right of way under s.31 to enter the respondent's land to protest and thus could not be trespassers for the purposes of aggravated trespass offence under s.68 CJ&POAct1994. The case was remitted back for the trial to continue.

²² See s.1 of CROW 2000.

²³ See CROW 2000(Review of Maps) (England) Regs 2019 SI 1069.

²⁴ Corresponding offences applying to Northern Ireland are found in article 28 of the Dogs (NI) Order 1983

passing through Parliament Lord Amherst proclaimed that the Bill was designed to encourage much needed meat production “by decreasing the amount of cruelty and suffering caused to livestock by dogs”. Under this legislation, subject to the livestock being lawfully on the land in question, any owner or person in charge of a dog, other than an exempt dog (police dog, guide dog, trained sheep dog, working gun dog and a pack of hounds)²⁵, regardless of their state of mind, commits a strict liability offence²⁶.

This is punishable by a fine, but only if their dog was shown to have either worried livestock on agricultural land as defined in s.3 and then only if there was sufficient evidence to prove that the dog either attacked (s.1(2)(a) offence) or gave chase (s.1(2)(b) offence) which objectively created a reasonable expectation of a risk of injury or physical/mental suffering, or loss of lamb or in product value, or alternatively if the dog (unless exempt in s.1(2A)) is at large (s.1(2)(c) offence) in a field or enclosure occupied by sheep and was neither on a lead, nor under close control at the material time. A dog owner can avoid liability in circumstances where the livestock either trespass on land occupied by them, provided they do not then encourage the dogs to attack (s.1(3)), or alternatively they can prove that at the time the dog was in the charge of somebody they reasonably believed to be a fit and proper person²⁷.

SI No: 764.

25 In Dec 2020 Cheshire Police rural crime team reported that 30 sheep had killed by what they believe to have been a pack of hounds. The aggrieved person can make a civil for loss and damage caused by the Hounds under the Animal Act 1971-see *Weir v Countryside Alliance Ltd* [2016] NIQB 16.

26 In *Dickson v Procurator Fiscal* [2013] HCJAC 157, the High Court of Judiciary ruled that given the clear and unambiguous language of the offence, the high public concern and the fact that liability is triggered not by “anything done or omitted, but the actions of the dogs,” meant that s.1 is clearly a strict liability offence.

27 For a detailed analysis of the meaning of a fit and proper person in similar legislation, see Forster “The Dangerous Dogs Act 1991: A Criminal Act that is Dangerous to Dogs” (April 2021) vol 5(1) UK Journal of Animal Law 2, see also the historic decision of the House of Lords in *Fleeming v Orr* [1855] 2 Macqueen 14.

Meaning of Worrying

The verb worries and its gerund worrying livestock is defined in s.1(2) and includes either attacking or chasing livestock on any agricultural land, or being at large in a field or enclosure containing sheep. However, this is not particularly well drafted in terms of logic and culpability and is unnecessarily cumbersome. It creates one offence of worrying which as a question of fact ought to carry its own natural meaning of either troubling, or causing a heightened state of anxiety amongst livestock. Yet it encapsulates three modes of action of differing gravity punishable by a single fine. It fails to distinguish the more serious incidents that can occur and therefore having a range of offences would allow the case to be more focused on a specific issue and if disputed, a lesser charge could be added in the alternative.

Meaning of Chase

In *R v Dunmow Justices Exp Anderson* [1964] 2 All ER, the High Court ruled that the meaning of “chase” is sufficiently wide to include not just pursuing, but also causing the animals to scatter or take “flight” or stampede and that, whilst sheep are particularly easily spooked by the mere presence of a dog, liability is founded not on what the owner did or omitted to do, but on the actual dog's behaviour which might reasonably be expected to cause injury, or unnecessary suffering²⁸.

Meaning of Being at Large

To incur liability a dog must be proved to being at large in a field or enclosure occupied by sheep which is then qualified by the statutory language either, “not on a lead or otherwise under close control.” No presumption of fact or law exists on the status of a lead, it all depends on the circumstances; a dog may be on a lead but not under close control, conversely a dog may not be on a lead but under close control. As it stands, what amounts to close control has not had the benefit from Judicial consideration meaning it is left for the Magistrates to decide whether the facts proved amount to a criminal offence, bringing with it the risk of inconsisten-

28 See also *Stephen v Procurator Fiscal* [1960] JC 119.

cy and potential injustice.

Under the old law laid down in *Fleeming v Orr* [1855] 2 Macq 14, the House of Lords noted that in Scotland, if the dog owner was culpa (to blame, at fault on the facts) for his dog worrying sheep, then he was liable for that consequence. Whereas in contrast, under English law (*Clark v Armstrong* [1315] 24 *D & Osborne* [1896] 2 QB 110) it was presumed that if the dog is mansuetudo naturoe (by its nature tame) "then no harm will arise from being at large", unless the owner otherwise has knowledge of the dog's actual "propensity to cause mischief" around sheep. Accordingly, until it is made mandatory to have all dogs on a lead when in the vicinity of sheep, then an owner will be able to plead ignorance to a first offence, unless it can be shown that the dog had such tendencies known to the owner which required control and training when at large near sheep and failed to do so.

Further Problems with the 1953 Act

Given the specifically defined prohibited harm means that the s.1 offence was reserved only for the more serious attacks, and then only if there was cogent evidence to bring a successful prosecution. Lord Amherst in his speech on the 2nd reading of the Bill felt that "the success of the Bill will be if it encourages the thoughtless and careless owner to be more careful and, by so doing reduces unnecessary loss of livestock." This is clearly borne out in the low prosecution figures which have steadily declined over the last 7 years, from 50 cases in 2013 to just 23 in 2019 with 21 convictions²⁹.

Yet the low conviction rate is clearly disproportionate to the number of reported incidences and clearly shows that the 1953 Act is ineffective in tackling this growing social problem blighting farmers across the Country, requiring urgent reform and modernisation. The deficiencies in the Act include the construction of the offence itself. Firstly, under s.3, the meaning of livestock is outdated and only includes the more traditional farm type animals of sheep, cattle, poultry, domestic fowls, geese, ducks, horses and goats which means that certain new breeds of farmed animals, such as camelids (for

instance Llama, Alpaca, Ostriches) are excluded.

Secondly, the offence can only be committed on agricultural land which is being used for arable, meadow or grazing land and that, whilst this is wide enough to include a cricket ground being used on a temporary basis for sheep grazing during the winter months as confirmed in *Williams v Richards* [1970] 114 Sol Jo, it still excludes roads or paths.

Thirdly, whilst the offence is one of strict liability and thus lacking a mens rea, without independent eye-witness testimony, it would be difficult under the current framework for the prosecution to identify the offender or sufficiently demonstrate that the dog was out of control at the time³⁰. Neither are poultry or gamebird protected from a dog being at large, only sheep, and thus creates an anomaly if there are sheep and chickens sharing the same enclosure, i.e., a public foot path through a farmyard.

Fourthly, unlike the Dogs Act 1871, there is no statutory power with the 1953 Act to impose either a control order or order the destruction of the offending dog and therefore, either a separate complaint will need to be made under the Dogs Act 1871, or alternatively under the Dangerous Dogs Act 1991, meaning two statutory regimes apply.

Lastly, the offence is punishable by a level 3 fine only, which neither acts as an effective deterrent, especially for repeat offenders, nor nearly reflects the gravity and culpability of the worst type of cases which can involve a savage attack. Additionally, the nature of the offence often means that reported incidences of sheep attacks and worrying cases will have occurred in remote and inaccessible areas and the fact that some attacks may not come to light immediately or indeed weeks later, poses particular and unique challenges for the rural police team (with limited resources and a wide geographical area to cover) to investigate and secure direct evidence within the 6-month statutory time limitation under s.127 of the Magistrates Court Act 1980 for commencement of summary

²⁹ Parliamentary Question to DEFRA 4 June 2020 tabled by Tim Loughton MP.

³⁰ See *Patterson v Procurator Fiscal* [1998] unreported.

offences in the Magistrates³¹.

This was a point noted in appendix II of the Middlesex University 2021 research led report commissioned by DEFRA on dog attacks generally, and a notable lack of police recorded data to better inform of the true gravity of the problem³². Equally, the NFU in a bid to help farmers through the legal quagmire have now produced an "advise and support" guide with useful links to further information on what steps to take in a case of sheep worrying, including a "callfirst" help line for free initial legal and professional advice³³.

Control and Destruction Orders under the Dogs Act 1871 & 1906

Whilst s.3 of the Dangerous Dogs Act 1991 creates the offence of having a dog dangerously out of control in either a public or private place is a possible alternative offence, it is essentially aimed at a different set of circumstances and unless there is a direct threat that the dog might cause injury to a person as opposed to livestock, then any prosecution is unlikely to be successful and therefore impracticable³⁴. A view shared by the NPCC in their comprehensive report "Livestock Worrying Policing Working Group"³⁵, but not one shared by George Eustice who, during a short debate³⁶ on Livestock Worrying in Sussex called by Brighton MP Lloyd Russell-Moyle, believed that the 1991 Act can be used in attacks on sheep and felt that there was a misconception amongst enforcement agencies that the 1991 Act could not be applied. Whilst the 1991 Act can be applied, it is still limited to attacks, rather than worrying

without attack which would not necessarily satisfy the dangerous threshold needed to secure a conviction for the purposes of that offence and is therefore far from ideal.

In these circumstances, s.1(4) of the Dogs Act 1906³⁷ does offer a solution by permitting a complainant³⁸ to seek a civil order under s.2 of Dogs Act 1871 that mandates the owner of a dog found to be dangerous, should keep it under proper control, or if not, for it to be destroyed. In *Smith v Baker* [1960] 3 All ER 653, Lord Parker ruled that a complaint for the purposes of s.2 is "unqualified", it is not limited to an aggrieved person, and that whilst anyone "at large" can lay a complaint before the Magistrates, the police are best placed to do so in the "public interest and for the protection of the public." In this respect the Attorney-General in 1996 under powers in s.3(2)(g) of the Prosecution of Offenders Act 1985 assigned the conduct of s.2 proceedings to the CPS on behalf of the police.

Meaning of Dangerous under s.2 of the Dogs Act 1871

The purpose of s.2 is to make the owner of a dangerous dog take adequate precautions to protect the public and property either in a public place or, if on the owner's private property, to lawful visitors such as the postman or a neighbour³⁹ from being endangered. Under s.2 two questions arise for the court, firstly is the dog dangerous, and secondly, if dangerous, can the dog be kept under proper control or must it be destroyed?

In *Briscoe v Shattock* [1999] 1 WLR 432 the High Court, confirmed that the question of dangerous is based, not on an act done by the dog, but whether the dog has a dangerous disposition that poses a risk not just to people and

³¹ For an analysis of the 6-month rule See Forster "Prosecuting under the Animal Welfare Legislation: Why Time is of the Essence?" (Dec 2019) vol 3(2) UK Journal of Animal Law 2

³² Science Search (defra.gov.uk)

³³ What to do if you are a victim of livestock worrying – NFUonline

³⁴ For a detailed analysis on the application of the s.3 offence see Forster "The Dangerous Dogs Act 1991: A Criminal Act that is Dangerous to Dogs" (April 2021) vol 5(1) UK Journal of Animal Law 2.

³⁵ February 2018 Wildlife Crime & Rural Affairs, North Yorkshire Police.

³⁶ Hansard House of Commons (2018) vol 639, 17 April 2018.

³⁷ It must be proved that the alleged dog injured cattle as defined in s.7 which did not include rabbits kept for commercial purposes-see *Tallents v Bell* [1944] All ER474, or poultry or chasing sheep.

³⁸ Can be an individual, the Police or a Local Authority to the Magistrates Court.

³⁹ In *Philp v Wright* [1940] JC 9, the Scottish High Court ruled that it was simply "not prepared to limit the usefulness of an effective Act" to being in public places only. Had Parliament intended to include such a restriction than it could expressly done so.



livestock, but to other animals, including dogs⁴⁰. Given that the legislative intent “was to protect people's property”⁴¹, Brooke LJ could find no legal basis either in the previous authorities or the Dogs Act 1906 to justify limiting the meaning of dangerous towards mankind or livestock only. Whether or not the nature of dog makes it dangerous, is a question of fact and degree across a wide spectrum of canine paroxysms. A dog, without necessarily being ferocious or savage⁴², can nonetheless be dangerous, regardless of whether this was known to the owner or not⁴³. It does not have to be proved that the dog was dangerous at the material time, simply that it is disposed to being dangerous. In *R(Workman) v Leicester Justices* [1964] 1 WLR 707, the High

Court rejected the defence contention that the word “is” dangerous in s.2 meant that the dog had to be dangerous at the time of the hearing.

Any propensity evidence of previous similar misconduct (including previous relevant convictions⁴⁴) or pattern of behaviour by the dog is therefore admissible and relevant to the wider question of dangerous and entitles the court to draw appropriate inferences⁴⁵. Whilst exceptionally a single act can, as confirmed in *Swale BC v Boutler* [2002] All ER 378, be indicative of a dog being dangerous, the Scottish High Court in *MacDonald v Munro* [1951] JC 8 warned against the temptation to focus on one isolated act, rather than the dog's overall character. In the instance case, the magistrates' court had wrongly assumed that a dog which bites a child is per se dangerous and discounted the

⁴⁰ See *Henderson v M'Kenzie* [1876] in which Clerk LJ ruled that “the quality of being dangerous, relates not to the acts of the dog, but to his nature and disposition.”

⁴¹ See *Williams v Richards* [1907] KB 88

⁴² See *Kedde v Payn* [1964] 1 WLR 262

⁴³ The scienter doctrine does not apply as knowledge is not required to the Act, see *Parker v Walsh* [1885] 1 TLR 583 & *Tallents v Bell* [1944] All ER 474, *Fleeming v Orr* [1855] 2 Macqueen 14

⁴⁴ Admissible under s.11 of the Civil Evidence Act 1968

⁴⁵ *Maile v Lenton* [1982] QBD The Times 9 Feb 1982, including any past conduct that occurred in another commission area or jurisdiction—see *R(Shufflebottom) v CC of GMP v CC of GMP* [2003] EWHC 246

fact that the dog, on the evidence, was “a good tempered and peaceful animal being momentarily exasperated or frightened or misled by the conduct of its playmates into committing an isolated act.” A mischievous dog is not a dangerous dog, unless it has a dangerous propensity to attack or bite.

Accordingly, an isolated incident of a dog merely arousing sheep in a field, being inquisitorial or, due to breed instincts such as a collie dog, is unlikely to satisfy the test. There must be some supporting evidence to show that the dog, when in the presence of sheep, is dangerous to them in the context of either attacking them or terrifying them to a sufficient degree.

Similarly, in *Queen v Huntingdon Justices* [1879] QBD 522, whether the owner kept the dog under proper control at the time is a question of fact and degree, and equally, any past evidence⁴⁶ of failing to do so, is relevant and admissible in the case of a breach of a previous court order or to rebut an innocent explanation.

Section 2 Control Orders and Civil Jurisdiction in the Magistrates Court

Section 2 is a civil remedy not a criminal sanction⁴⁷ and that, whilst wrongly laying an information as opposed to a civil complaint⁴⁸ would not be fatal due to remedial effect of s.123 of the MCA⁴⁹ 1980, the High Court in *R(CC of North Wales Police) v Anglesey Justices* [2008] EWHC 309, did warn against making this simple error when initiating action under s.2⁵⁰. A similar unfortunate error was made in *Young v CC of Warwickshire Police* [2014] EWHC 4213, when the CPS wrongly issued a summons, but then

decided to withdraw the complaint (sent notice of discontinuance of criminal proceedings) due to lack of evidence two days before the lodging of trial bundles, leading to the High Court having to determine which statutory scheme allows the court to make a defence cost order. Given that the police were “carrying out administrative functions of a regulator” the High Court ruled that the correct provision was s.52 of the Courts Act 1971 in which the court has a discretion to award costs should a complaint not be proceeded with, but only if it is just and reasonable to do so.

Whilst s.64 of the Magistrates Court 1980 is concerned only with costs on dismissal by the court, the statutory wording is identical to s.52 and thus the Magistrates could take account of the relevant case law under that provision. Noting that the leading authority in *Bradford MDC v Booth* [2000] 164 JP 485 and later approved in *Perinpanathan* [2010] EWCA Civ 40, which stated that a costs order is not presumed and a public authority should be free to conduct their regulatory function without undue fear of a costs order. Therefore, any award of costs should only be made, if and only if, the police/CPS have clearly acted in bad faith or unreasonably in the circumstances. In the present case, the magistrates were right to find that, due to a lack of sufficient evidence from the outset, linking the dogs to attacking the farmer's sheep to support the complaint, it was unreasonable for the Police and the CPS to have formally initiated court proceedings without assessing the sufficiency of the evidence and therefore an award of £5000 was just in the circumstances.

Equally, in *R v Dunmow Justices exp Anderson* [1964] 1 WLR 1030, the High Court gave a note of warning that if a Court is dealing with the two jurisdictions at the same time, then “the better practice would be to hear the criminal proceedings first, and then to invite the parties to accept the evidence which had been given in criminal proceedings in the subsequent civil proceedings.” Alternatively, the criminal conviction is admissible under s.11 of the Civil Procedure Act 1968 in the Dogs Act complaint.

Importantly, in *R (Shufflebottom) v CC of GMP* [2003] EWHC 246, the High Court ruled that

⁴⁶ For instance previous dog offence convictions or repeat offending.

⁴⁷ See para 5 in *R(Shufflebottom) v CC of GMP* [2003] EWHC 246.

⁴⁸ See s.53 of the MCA 1980.

⁴⁹ See *R v Jones Exp Daunton* [1963] 1 WLR 270,

⁵⁰ See the contrasting cases of *R v Towcester Justices exp Gusterson* [1991] (unreported) *R v Nottingham Justices Exp Brown* [1960] 1 WLR 1315, *White v Main* [1897] 81 2 Adam 151, *R v Cambridge Magistrates Court exp Turley* [1986] (unreported), for procedural irregularities see *R v Clarke* [2008] 2 CrAppR 2 and *R v Johnson* [2018] EWCA Crim 2485 on the modern approach to nullity, *R v Adams* [2021] EWCA Crim 1525.

under s.52 of the Magistrates Court Act 1980 jurisdictionally a magistrate's court can still deal with a s.2 case in which the incident occurred outside of its commission area, but the dog is ordinarily kept within its boundaries. The whole purpose of the legislation is to avoid a situation where a dog with dangerous tendencies is not being properly supervised or controlled, regardless of location or current owner. As confirmed in *R(Workman) v Leicester Justices* [1964] 1 WLR 707, a transfer of ownership does not prevent the Court from imposing a control order on any new owner for a dangerous dog by the previous owner. Parker LJ was clear in that "it is quite right that if a man buys a dangerous dog a court should be able to say: you must ensure that for the future it is kept under proper control".

Shooting the Dog as an Act of last Resort under the Animal Act 1971

The Animal Act 1971 was introduced in order to simplify the overly complicated previous common law concerning civil liability for damage done by animals following the recommendations in the Law Commission Report 1967 Civil Liability for Animals (Law Com No:13). Section 3 provides that, subject to s.5(4), any keeper of a dog which either kills or injures livestock will be strictly liable in Tort to the farmer for the damage caused⁵¹. Whilst a farmer is entitled to shoot a dog in order to protect their livestock from being attacked or worried, this clearly has to be an act of last resort and treated with real caution. In such circumstances, under s.9, the farmer not only has to report the incident to the police within a 48-hour period, but also justify the shooting as one in which "there was no other reasonable means" to stop or prevent the dog from worrying the livestock, or the dog is at large and the owner cannot be established. Otherwise, he will be liable to pay damages to the owner for interference with goods⁵².

⁵¹ For a detailed analysis of the Act generally, refer to the House of Lords decision in *Mirvahedy v Henley* [2003] 2 AC 491 and also *Ford v Seymour-Williams* [2021] EWCA Civ 1848.

⁵² ³⁹ For stray dogs the relevant legislation is s.149 of the Environmental Protection Act 1990 which places a duty on the Local Authority to deal with stray dogs. For general liability and the construction of likely to in s.1 see *Welsh v Brady* [2009] CSIH 60 & *Smith v Ainger* [1990] Court of Appeal Civil Division (unreported).

In *Goodway v Becher* [1951] 2 All ER 349 the High Court, considering the decision in *Cresswell v Sirl* [1948] 1KB 241, confirmed that the question is not whether the farmer had exhausted all other practical means before shooting a dog, but whether in all the circumstances, he had acted objectively reasonably in doing so in order to protect his livestock, taking account of his subjective belief at the time. The magistrates had therefore "come to the wrong conclusion in law" on that basis. Neither does the farmer have to wait, or give a prior warning shot, provided always he is acting reasonably. Equally, an intention to shoot a dog the next time it was seen worrying livestock can still be justified.

Under s.10 of the Criminal Damage Act 1971, a domestic dog constitutes personal property of a tangible nature and therefore the farmer, by shooting the dog, is at risk of committing an offence of basic criminal damage under s.1⁵³, unless it can be shown he had a lawful excuse under s.5(2)(b). This entitles the farmer to claim that, at the material time, he honestly (subjectively) believed that his property, namely the sheep, were in immediate need of protection and the means of protection adopted, namely the shooting, was an objectively reasonable measure to take given the immediacy of the situation and having regard to all the circumstances⁵⁴. Alternatively, the farmer could rely on s.3 of the Criminal Law Act 1967 by using reasonable and proportionate force to prevent the crime of livestock worrying⁵⁵. Although superseded by s.3, there still exists a common law defence of protecting property as confirmed in *DPP v Bayer & Others* [2003] EWHC 2567.

The other risk a farmer faces if the shooting is unreasonable, is being prosecuted for animal cruelty by causing unnecessary suffering, (unless as stated in *Isted v CPS* [1997] unreported, the dog was killed outright and did not suffer unnecessarily) under s.4 of the Animal Welfare

⁵³ See *Isted v CPS* [1997] unreported.

⁵⁴ *R v Hill & Hall* [1988] 89 Cr App R 74, *Chamberlain v Lindon* [1998] 1 WLR 1252.

⁵⁵ This applies the same mixed subjective and objective test for self-defence, see Forster "Belief & Reasonable Force: Is there a Legitimate Purpose?" (2014) 178 Criminal Law & Justice Weekly 279, and *R(Collins) v SofS for Justice* [2016] EWHC 33, para 13-17.

Act 2006 which carries a sentence of 5 years on conviction on indictment⁵⁶, a sentence far higher than that for the offence of livestock worrying revealing a stark disparity.

Other Measures of Control and Prevention

Obviously, education and awareness campaigning can be an effective measure to improve responsible dog ownership such as notices and signage in prominent areas, leafleting, or providing information at visitor's centres, or pro-active police/warden patrols⁵⁷, or campaigning strategies such as the creation of licensed designated dog walking area⁵⁸. Observation of and compliance with the Countryside Code, which clearly states that dogs always need to be kept under close control and supervision and in sight, is a useful reminder of the standards of ethical behaviour expected when in the countryside. Equally important is the Statutory Code of Practice for the Welfare of Dogs which provides useful information on how to properly care for a dog to ensure good practice and dog training⁵⁹.

However, for those who ignore the advice, aside from the criminal sanctions, Part 4 of the Anti-social Behaviour, Crime & Policing Act 2014 provides for several civil remedies in the form of either Community Protection Orders (CPO) or Public Places Protection Orders (PPPO) which replaced dog control orders⁶⁰. Both orders are injunctive in nature and are an effective measure in controlling the conduct of an individual dog owner whose behaviour is unreasonable, persistent or continuing and is having a detrimental effect on the quality of life of others. Measures include compelling the owner to

muzzle the dog, always having it on a lead in public, or prohibiting them from entering certain areas. Under a PPO which covers any place of public access, a Local Authority can also impose restrictions on the use of public rights of way over the highway and non-compliance constitutes a criminal offence.

However, neither of these offer an immediate solution, given the length of time to gather the evidence and satisfy the legal tests before an LA can impose an order⁶¹. Section.23 of CROW Act 2000, allows an owner of access land under schedule 2 to require a dog to be on a short lead during the period of 1 March to 31 July to protect ground nesting birds. However, no such provision exists for the lambing session.

S.13 of the Animal Health Act 1981 gives the Secretary of State for the Environment the power to create secondary legislation "for prescribing and regulating the muzzling of dogs and the keeping of dogs under control", including the seizure and destruction of any offending dog. To date however, the only regulation passed is the Control of Dogs Order 1992⁶², which provides that any dog found to be on highway or "in a place of public resort", unless exempt, must be wearing a collar containing the owner's details, otherwise the person in charge (who causes or permits and without lawful excuse) will be guilty of an offence under s.73 of the AHA 1981, punishable by a level 5 fine which is much higher than the level 3 fine for an offence of worrying livestock. This clearly lacks coherency.

A further useful measure is the mandatory requirement of all dog owners to ensure their dog is microchipped under the Microchipping of Dogs (England) Regs 2015⁶³, which certainly assists in identifying an offending dog and its owner for potential prosecution or other control measures. Interestingly, the punishment for failing to comply with any mandatory notice is a level 4 fine, whereas an offence of attacking

56 See *Isted v CPS* [1997] unreported.

57 See the All-Party Parliamentary Group for Animal Welfare report "Tackling livestock worrying & encouraging responsible dog ownership" which made 13 recommendations in order to better develop a more focus regional approach to tackling the problem 2017.

58 One was recently granted in West Marton in North Yorkshire, see also the Kennel Club positive awareness campaign, and the formation of partnership groups involving the NFU and other Stakeholders.

59 Issued under s.15 of the Animal Welfare Act 2006.

60 Repealed s.55 of the Clean Neighbourhoods & Environment Act 2005.

61 If the dog owner has been convicted of an offence, then it is possible for the prosecution to apply for a criminal behaviour order under chap 1 of the Sentencing Act 2021.

62 SI [1992] No 901.

63 SI [2015] No 108 created under the AWA 2006, applies to all dogs 8 weeks or over.

livestock under the 1953 only carries a level 3 fine which, again, is difficult to reconcile.

In contrast the Scottish Government have taken a more consistent approach with the creation of a dog control database system which came into effect on the 31 December 2021 and will retain vital information on any dog subject to a dog control order, which can then be shared and accessed by either the police and the Local Authority⁶⁴ as a useful investigative tool, whilst the Northern Ireland Assembly introduced a dog licensing scheme⁶⁵.

England initially had a voluntary dog licensing scheme, but take up was small making the scheme unviable to administer and it was abolished in 1987⁶⁶. Other measures also include the newly created responsible dog ownership scheme project, which brings together the police, charities and local authorities to consider further the findings of the Middlesex University 2021 study including better enforcement and dog training and awareness courses. In response the Government has devised the responsible dog ownership scheme LEAD (Local Environment Awareness on Dogs)⁶⁷ including a multi-agency taskforce steering group to bring about best practice and enforcement measures

The Legal and Ethical use of E-Collars

A more controversial method of dog corrective behaviour control and suppression of a dog's predatory instincts, is the use of e-collars or shock collars, which allow the owner to administer a sudden electrical shock to the dog to gain compliance. However, their ethical use has been brought into question, with those in favour claiming the devices are an effective method of obedience/correction control, whilst those against argue that pets need to be protected from an unacceptably cruel form of corporal punishment, that they are ineffectual, cause unnecessary harm and should not be used as

a training aid or replace other conformity approved training methods⁶⁸. A study by School of Life Sciences at the University of Lincoln in 2014, which was commissioned on behalf of DEFRA, concluded that the use of e-collars not only caused distress but created negative behavioural responses and, like other aversive methods of positive corrective training, proved to be less effective compared to the use of professional reward-based training⁶⁹.

This is disputed by those who support the devices and have challenged the reliability and credibility of the research conducted by the University of Lincoln. Opposing a ban is the campaign group the Association of Responsible Dog Owners who have pointed to a review conducted by Professor Elliffe of the University of Auckland which criticizes the lack of academic rigour undertaken by the research and identified problems not only with the procedural steps, but also with the research design and data analysis techniques, making it "very seriously flawed" and "should not be relied on" as evidence in policy making decisions. Professor Elliffe argues that in the context of sheep worrying, unlike other forms of direct reprimand, when an e-collar is used "the sheep will become a Pavlovian negative conditioned stimulus" to the dog and thus associate the sheep as a primal cause of the discomfort, not the owner, and will instinctively avoid the sheep⁷⁰.

68 British Veterinary Association are a proponent of an outright ban based on the risk that such devices are "open to potential abuse and incorrect use" with the risk of causing welfare and training problems and have made seven recommendations - www.bva.co.uk, other supporters of a ban include animal welfare charities (i.e. Dogs Trust).

69 China et al "The Welfare Consequences & Efficacy of Training Pet Dogs with Remote Electronic Training Collars in Comparison to Reward Based Training" 2014 CNRS (POLIS online) & China et al, "Efficacy of Dog Training with & without Remote Electronic Collars vs. a Focus on Positive Reinforcement" July 2020 *Frontiers in Veterinary Science Journal*.

70 Dr Elliffe, Faculty of Science, University of Auckland, www.science.auckland.ac.nz- Commentary on China et al research paper, 26 November 2020, another supporter of e-collars is Ian Botham, the ex-cricketer-see article published in the Telegraph "Dogs will go on killing if we ban electronic collars" May 5th 2021. For a contrasting view see those of Claire Stallard an animal behaviourist at Blue Cross www.bluecross.org.uk/news, "we need to ban aversive devices to protect pets."

64 The Scottish Dog Control Database Order 2021 SI No 458.

65 The Dogs (Northern Ireland) Order 1983 SI No: 764 (N.I.8) as amended.

66 Dogs Licenses Act 1959 repealed by the Local Government Act 1988.

67 Dog Control and Welfare - Guidance to Police and Local Authorities Dec 2 .pdf

Jennifer Dobson, an animal behaviour consultant, in her written evidence before the DEFRA Select Committee in 2004, noted that not all dogs are equally manageable and, whilst e-collars are not suitable for most dogs, they are essential in addressing troublesome cases in which recognised training methods have proved ineffectual. E-collars can therefore be essential, albeit an act of last resort, in resolving problems in these harder to deal cases, especially "if the dog shows signs of aggressive chasing."

Nevertheless, the Welsh government has already acted and made it an imprisonable offence to attach or caused to be attached an e-collar to a dog⁷¹, whilst the Scottish Government currently have opted for regulatory guidance, rather than an outright ban. Despite, DEFRA having initially decided in 2017 to only amend the advice in Code of Practice for the Welfare of Dogs that positive training was the preferred method, it instead announced in 2018⁷² that it now intended to impose a ban. This change in policy direction led the Electronic Collar Manufacturers Association (ECMA) to unsuccessfully challenge the legality of the decision by Judicial Review proceedings in *ECMA v DEFRA* [2021] EWCA Civ 666⁷³. However, until there is a legislative prohibition on the use of these devices, it is still currently legal in England to purchase and use them, notwithstanding the fact that any owner would risk being prosecuted for animal cruelty by causing unnecessary suffering under s.4 of the Animal Welfare Act 2006.

Dr Matthew Offord MP who is a strong opponent to the legality of e-collars on the grounds that they are ineffectual and detrimental to animal welfare, introduced in 2014 a private member's bill (Animal Welfare Electronic Collars Bill) and would have prohibited the sale and use of e-collars had it been successful⁷⁴. In May

2021 DEFRA launched its much-awaited Action Plan for Animal Welfare which puts the protection and welfare of animals at the forefront of Government policy and reform, this includes recognizing animal sentient and carries a clear message to ban e-collars "given their scope to harm cats and dogs"⁷⁵. Acting upon data from two commissioned research papers which suggest that not only are e-collars being used inappropriately, they could actually exacerbate the problem and responses received from a public consultation in 2018.

To this extent DEFRA fully support reward-based behavioural training⁷⁶ and as from the 1st February 2024 in England it has become a criminal offence under the Animal Welfare (Electronic Collars) Regulations 2023. This creates two summary offences punishable by a fine in regard to a person who is responsible for a dog or cat to either, (1) attach or cause to be attached an electronic collar, or (2) the dog or cat is wearing an e-collar and at the same time possesses a controlled device that is designed or adapted to activate the collar remotely.⁷⁷ The Regulations can be enforced by Local Authorities. If convicted the offender risks a disqualification order including seizure.

Reforms in Part 2 of the Animal Welfare (Kept Animals) Bill

During the 2nd reading of the Bill, George Eustice the Secretary of State for DEFRA, recognized that "livestock worrying is a serious and increasing problem" and that the new measures in the Bill "will update legislation going back to the 1950s".

However, given the recent announcement on the 8 June 2023 that the Government has now decided to withdraw the Bill in controversial circumstances⁷⁸, despite a manifesto

⁷¹ The Animal Welfare (Electronic Collars)(Wales) Regulations 2010 SI No: 943.

⁷² See also a short debate on "Electric Dog Class" secured by Ross Thomson (Hansard Vol 637-14 March 2018)

⁷³ A similar challenge was brought against the ban in Wales in *R(Petsafe & ECMA) v Welsh Ministers* [2010] EWHC 2908.

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⁷⁵ <https://www.gov.uk/government/publications/action-plan-for-animal-welfare>

⁷⁶ Animal Behaviour & Training Council.

⁷⁷ The Regulations have been created by s.12 of the Animal Welfare Act 2006 are currently in draft form and await approval under the affirmative resolution procedure.

⁷⁸ According to the BBC the Bill was withdrawn to avoid an uncomfortable amendment being tabled to include trail hunting. See also the comments in the Par-



commitment to strengthen animal welfare, the much-vaunted Bill which was introduced two years ago, but then failed to progress through its Parliamentary stages due to political turmoil⁷⁹ in Westminster, is devastating to the farming community in equal measure.

Significantly, the reform package included several new post-conviction ancillary orders designed to prevent and reduce re-offending and the harm it causes. The 1953 Act would have been repealed and replaced with a new specific offence which would have been extended to include any road or path. The meaning of livestock would have been broadened to include 26 farmed type animals, including camelids, ratites, enclosed gamebirds and Zebra, which is a much-needed improvement from the previ-

ous offence⁸⁰.

In an attempt to somehow refine the new offence, at large does not include circumstances when the dog is either on a 1.8 metre lead or less or within sight of the person in charge, who is not only aware of the dog's actions but has reason to be confident that on his command the dog would return "reliably and promptly". Had this been enacted, far from giving farmers clarity in the law, it would only have led to an evidential quagmire⁸¹.

Nevertheless, police powers would have been strengthened, allowing the police to apply to the Magistrates court for a warrant to enter and search specific premises for the purpose of identifying the suspected dog, or to seize and detain it, or to be able to take a sample or

liamentary statement on Animal Welfare, Hansard vol 733 (25 May 2023), which was debated on 7 June Hansard vol 830.

⁷⁹ See the e-petition debate on the progression of the Bill led by Elliot Coburn which took place on 5 Dec 2022, Hansard vol 724 at 4.30pm.

⁸⁰ Also includes cattle, buffalo or bison, horses, ponies, donkeys, asses, hinnies, and mule, poultry, enclosed deer pig, goats-for the full list refer to the general interpretation provision in s.39. see 2nd reading of the bill Hansard 25 Oct 2021 vol 702

⁸¹ Hansard 2nd sitting on the bill Tue 9 Nove 2021

impression, or to seize any potential evidence in the furtherance of an investigation. Likewise, police would have been under a duty to maintain a register of all dogs seized detailing the dog's description, when it was seized and disposed of. This would have allowed the police to collate local intelligence of troublesome dogs as part of the prevention and detection of livestock attacks.

Another new effective measure that was contained in the Bill is the power of the Magistrates court to impose a control order on the convicted offender, or the owner, or both. However, before doing so the Court must be satisfied that, at the time of the offence occurring, the offending dog was not under proper control and include any conditions within its ambit. This is a marked improvement and is designed, not only to target irresponsible ownership of dogs, but also reduce repeat worrying incidents and to save the farmer from having to seek an alternative remedy under the Dogs Act.

If the offender subsequently breaches the order, then unless they have a reasonable excuse for doing so, they commit a summary offence punishable by way of a level 3 fine. At the same time, the court would have the power to disqualify the offender from either owning or keeping dogs, or both, for any period as the "court thinks fit" and can impose a specified prohibition period. If there is a further potential risk that the dog could worry or attack livestock again, then subject to expert evidence from a dog behaviour specialist, a destruction order can be imposed on the offending dog, with a right to appeal.

A duty to have a Dog on a Lead when around Livestock

The Government rejected the idea of making it mandatory to have a dog on a lead in the vicinity of livestock as being a step too far, instead preferring to only recommend the use of leads through voluntary codes and for dog owners to take responsibility in managing and controlling the dog's behaviour. This is included in the statutory code of practice for the welfare of dogs which informs dog owners of their care responsibility and that it is best practice to use a lead. Similarly Natural England has updated

the Countryside Code to now emphasise the importance of keeping dogs in sight and under control at all times and to avoid livestock where possible. Whilst these remain voluntary and cannot be legally enforced, they can be admissible in evidence, including any warning signs, to rebut any suggestion of lack of knowledge or awareness.

This may be of little comfort to Nicola Robinson a farmer from Grange-over-Sands in South Cumbria who in 2022 suffered the loss of 28 lambs due to a dog attack in horrific circumstances when they drowned trying to cross a stream in order to escape. Virginia Crosbie MP, although welcoming the Government reforms, felt they still failed "to give farmers the security they so desperately need."

Responding to one her constituents who had to deal with the death of seven pregnant ewes and three tups, having sustained traumatic injuries from a dog attack, she decided (with little prospect of success) to introduce a draft Dogs (Protection of Livestock) Bill which had the support of the NFU. This sought to amend the 1953 Act by firstly removing the words "otherwise under close control" to make it a requirement for a dog to be on a lead, otherwise it would be unlawfully at large, and secondary to increase the maximum fine to £5000⁸².

Sentencing

In response to a recent Parliamentary question from Matthew Offord, Victoria Prentis on behalf DEFRA stated "All reported instances of livestock worrying should be taken seriously, investigated and, where appropriate, taken through the courts and met with tough sentences." Such sentiments are misplaced given that the new offence would have remained a summary only non-imprisonable offence, punishable only by a level 3 (£1000) fine⁸³, and simply does not go far enough. This offers little in the way of deterrence and is, therefore, woefully inadequate to address the worst kinds of attacks deserving of condign punishment necessary to reflect the devastating consequences that it causes, not just in terms of appalling injuries to livestock and financial loss suffered,

82 Hansard 20 July 2021 vol 699.

83 s.122 Sentencing Act 2020.

but also the lasting effects on the farmer and wider community.

With equal force, it is difficult to reconcile having a summary-only fine for this type of offending whilst the Government's animal welfare policy acknowledges that vertebrate animals are sentient beings in the Animal Welfare (Sentience) Act 2022 and the increase in punishment for animal cruelty offences under the Animal Welfare Act 2006 is 5 years imprisonment⁸⁴. In contrast, the Scottish government has taken a far more robust approach by increasing the sentence for the equivalent offence to 12 months imprisonment and/or a maximum £40,000 fine⁸⁵, following a campaign by Emma Harper MSP and having the support of interested parties such as the Law Society of Scotland, Dogs Trust and the NFU (Scotland).

As with dangerous dogs, one possible option would have been to create an either-way aggravated offence of attacking and a lesser offence of worrying but with a proportionate sentencing range. This would enable the court to impose either imprisonment, or community punishment orders in appropriate cases, whilst the police could use restorative justice disposal in minor incidences⁸⁶. A sentencing court is required under s.43 of the Sentencing Act 2020 to make a victim surcharge order which is 10% of the fine value⁸⁷. In addition, a court does have a discretionary power to make a compensation order upon conviction as set out in Chapter 2 of the Sentencing Act 2020. This will very much be dependent on the financial circumstances of the offender but, given that the financial loss is likely to be significant, ultimately the farmer will have to shoulder the loss or claim through insurance.

Concluding Remarks

Part 2 of the Animal Welfare (Kept Animals) Bill would have implemented the much-needed

reforms to protect livestock from dog attacks and therefore the withdrawal of the Bill is an abject failure of Government, leaving farmers with the ineffectual 1953 Act instead. The reforms relating to livestock worrying are uncontroversial and the measures would have been better contained in a short Bill instead of a broad-ranging Animal Bill. The only prospect of this happening now is either by being re-introduced as a Private Members Bill or by the Government introducing its own specific Bill. However, with the summer recess looming and the constraints on Parliamentary time, it is unrealistic to believe that this will occur this side of the next election, if ever.

⁸⁴ See Forster "Prosecuting under Animal Welfare Legislation: Why is Time of the Essence?" (Dec 2019) Vol 3(2) UK Journal of Animal Law 2.

⁸⁵ Dogs (Protection of Livestock) (Amendment) (Scotland) Act 2021,

⁸⁶ Community resolution, Conditional Cautions.

⁸⁷ See the Sentencing Act 2020 (Surcharge) (Amendment) Regs 2022 SI 584.

Re-forming the ban: How to shape hunting legislation around the interests of wildlife

A-LAW Student Essay Competition winning entry by Daniel Clark

The United Kingdom was the first country to implement laws protecting animals. In 1822, it passed the Cruel Treatment of Cattle Act, which declared that 'if any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any Horse, Mare, Gelding [...] or other Cattle, [they] shall forfeit and pay any Sum not exceeding Five Pounds, not less than Ten Shillings...' (my emphasis). More than two centuries and several animal protection acts later, the end of wanton and cruel animal abuse is still written on paper more than realised in practice.

Few animal protection laws so starkly highlight the dissonance between legal aspirations and actions as the Hunting Act 2004 (in England and Wales) and the Protection of Wild Mammals Act 2002 (in Scotland).¹ These acts banned, among other things, the use of hounds in the hunting of wild animals; yet, two decades later, the practice still takes place in all parts of the UK through a series of loopholes, exemptions and difficulties of enforcement. This essay will (briefly) consider two possible routes to achieving practical protection for UK wildlife: (1) reforming existing legislation to close loopholes and (2) re-forming (and re-formulating) legislation to enshrine rights for wildlife. While the first approach could reduce some suffering, this essay will argue that only the second can provide genuine and lasting protection.

Every wild life

Humanity's relationship with wild animals is complex. After taking over the planet and destroying vast swathes of natural landscapes, humans are belatedly starting to recognise

that biodiversity is critical to our own continued survival. Conservation is thus becoming a key global concern.² At its core, protecting wildlife means removing, as far as possible, the influence of humans. Indeed, the simplest definitions of 'wildlife' refer to wild animals who 'live independently of people, in natural conditions'.³ An array of human activities have a harmful effect on wildlife, whether directly (hunting and poaching) or indirectly (land use change, road building and anthropogenic climate change).

Since 1970, some 41% of all UK species have declined,⁴ while 14% of land species globally will be at risk of extinction if the Earth warms by 1.5 degrees Celsius,⁵ a threshold which is on track to be breached by 2027.⁶ Yet, this focus on the collective (species, ecosystems, biomes) can come at the expense of individual beings. As Richard Ryder has explained in relation to his theory of 'painism', it makes little sense to consider the aggregated suffering of species since it is individuals who feel pain.⁷ As such, when discussing whether hunting legislation can protect UK wildlife, it is important to consider the impact on every "wild life" rather than the overall effect for species. Likewise, for the purposes of this essay, 'protection' will be used

2 Consider, for example, the deal agreed at the COP15 summit in Montreal in December 2022.

3 Cambridge Dictionary [online]. Available here: <https://dictionary.cambridge.org/dictionary/english/wildlife>.

4 NBN Trust, 'State of Nature', 2019 [available here: <https://nbn.org.uk/wp-content/uploads/2019/09/State-of-Nature-2019-UK-full-report.pdf>].

5 IPCC, 'Summary for Policymakers' in Climate Change 2023: Synthesis Report A Report of the Intergovernmental Panel on Climate Change, Core Writing Team, H. Lee and J. Romero (eds.), Geneva: IPCC, 2023.

6 World Meteorological Organisation, 'Global Annual to Decadal Climate Update (Target years: 2023-2027)', 2023.

7 See Richard Ryder, *Painism: A modern morality* (London: Centaur Press, 2001).

1 Attempts to ban hunting with dogs in Northern Ireland have been voted down in the Northern Ireland Assembly, most recently in 2021.



in its simplest sense to mean 'safety from injury, damage and destruction'.⁸ It is individual animals who desire (and require) the safety that effective hunting legislation could provide.

Hunting and the law

Hunting an animal is not compatible with protecting that animal. Fox hunting, the most popular and controversial type of hunting in the UK, is a cruel "sport" and one of the most wanton examples of abuse against UK wildlife. The Hunting Act 2004 became law after more than a century of campaigning. In its first article, the act states that,

A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt.

Hence, from the outset, the act falls short of practical protection: it outlaws only specific

⁸ Cambridge Dictionary [online]. Available here: <https://dictionary.cambridge.org/dictionary/english/protection>.

methods of hunting. Moreover, the exemptions fill four pages and include 'preventing or reducing serious damage which the wild mammal would otherwise cause... to livestock... game birds... food for livestock... [or] other property'; 'obtaining meat to be used for human or animal consumption', and 'the observation or study of the wild mammal'. Amid these technicalities and grey areas, there is ample opportunity for huntsmen to avoid legal scrutiny. Trail hunting, whereby huntsmen claim to be following an artificial trail rather than a live animal, is a well-publicised deception used by hunts: when the hounds invariably rip a fox to shreds, the huntsmen can claim that this death was not intentional, which is difficult to disprove in court.

The UK public has a net positive opinion of foxes.⁹ Although no living being should have to justify their existence by winning a popular-

⁹ Sandra Baker, Paul Johnson, David Macdonald and Stephanie Maw, 'Not in My Backyard: Public Perceptions of Wildlife and 'Pest Control' in and around UK Homes, and Local Authority 'Pest Control'', *Animals*, 10: 222 (2020).

ity contest, public support for protecting foxes highlights how a vocal minority of pro-hunt lobbyists have an outsized influence on the debate. Since the Hunting Act came into force, hunt supporters have tried to spread confusion with false and exaggerated claims about pest control and by playing up “culture war” arguments. In 2017, Theresa May included a free vote on repealing the Hunting Act in the Conservatives’ manifesto, even though polls showed that only one in 10 voters supported such a repeal.¹⁰

For fox’s sake: reform or re-form?

Legislation relating to animal protection does not exist to protect animals. From the Slaughter of Beasts Act 1488, which was motivated by a desire to avoid bad smells in cities, to the Welfare of Animals at the Time of Killing (England) Regulations 2015, which set acceptable slaughter standards, protection laws have repeatedly failed to keep animals safe. In the absence of consideration of animals’ own interests, their place within (human) legal structures is muddled by a tangled web of conflicting (human) interests.

How then could legislation be redrawn to achieve practical protection? There are two main options: reform current legislation or re-form how we consider wildlife protection more broadly. These opposing approaches correspond roughly to Welfarist and Abolitionist positions, respectively. The Abolitionist stance has been criticised for staking everything on an imagined (and hard-to-achieve) utopia at the expense of present-day incremental gains, while Welfarists are accused of diluting their animal rights message by pushing for small (or counter-productive) concessions that fall short of full protections. Let’s look first at the argument for reform.

a. Blunt the knife?

Where protections exist in theory, these are not always observed in practice. Currently, the Hunting Act 2004 is far too easily bypassed

since a defendant need only prove that ‘he reasonably believed that the hunting was exempt’. There is massive scope for reforms that could close loopholes, remove unnecessary exemptions and enforce the law more stringently.

In Scotland, a new Hunting with Dogs Bill came into effect in January 2023 to replace the Protection of Wild Mammals Act 2002. Henceforth, it is now illegal to use more than two dogs to flush out animals unless a licence has been granted. Although it strengthens some shortcomings and goes further than previous legislation to outlaw hunting for sport, the new bill still falls short of a full ban. The extent to which it will provide any practical protection for wild animals will depend on how many licences are granted and how strictly these are enforced.

b. Remove the knife?

Hunting legislation that does not actually ban hunting can never ensure genuine protection for its victims. Instead of tweaking and amending a law that allows hunting to continue, the other option is to dismantle the Hunting Act, take its essential parts and rework these into a new piece of legislation. To do so would require a new way of thinking about wildlife. Putting in place practical protection for wild animals does not necessarily mean incorporating these animals intricately into the human legal system; it need only mean enshrining in law their right to life and freedom from abuse by humans.

Rather than focusing on the Hunting Act, it is the Wild Mammals (Protection) Act 1996 that could provide a better framework for protection. This act states that if ‘any person mutilates, kicks, beats [...] any wild mammal with intent to inflict unnecessary suffering, he shall be guilty of an offence’. Evidently, the bar for what constitutes ‘unnecessary suffering’ needs to be lowered considerably: marginal human benefit cannot be allowed to prevail over the life of a non-human animal. But, if animals’ own interests were taken into account, this new protection act would shut down any excuse for hunting.

Hunting, like any “sport” that depends on causing suffering to sentient beings, is an anachronism in a modern society. However, it is far

¹⁰ The Independent, 27 May 2017, [available here: <https://www.independent.co.uk/news/uk/politics/conservative-manifesto-bring-back-fox-hunting-only-one-in-10-voters-support-a7757891.html>].

from the only risk faced by wild animals. It is estimated, for example, that the most common way for foxes to die in the UK is on roads.¹¹ Similarly, habitat loss caused by human activities is a leading reason for declining populations of wildlife. To achieve practical protection for wild animals, the legal status of wildlife needs to be re-formed.

Conclusion: Beyond the barbarity

Reform to hunting legislation could improve the lives of some wild animals by sparing cruel and painful deaths. Existing legislation, however, is necessarily limited by its focus on human interests and cannot ensure the safety of wildlife unless accompanied by a broader legislative shift. It is time to re-think our relationship with (wild) animals, re-formulate debates to include animals' own interests and, consequently, re-form legislation to provide real practical protection.

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¹¹ P Baker, S Harris, P White, 'After the hunt: the future for foxes in Britain' in International Fund for Animal Welfare (2005).

Cases, Updates & Materials

Recent work of the Scottish Animal Welfare Commission

On 9 October 2023, the Scottish Animal Welfare Commission ("SAWC") published its review of the Scottish Government's activities affecting the welfare of animals as sentient beings.¹ SAWC's review focuses on the Scottish Government's 2022-2023 programme, and provides a helpful overview of recent legislative and policy developments in animal welfare in Scotland. The main piece of legislation affecting animals which was passed by the Scottish Parliament this year is the Hunting with Dogs (Scotland) Act 2023.² The previous legislation applicable in this area, the Protection of Wild Mammals (Scotland) Act 2002, was controversial and challenged in the courts.³ Recommendations for reform were made in a judge-led review in 2016.⁴ To strengthen the law on the hunting of wild mammals by restricting the circumstances in which such hunting can lawfully take place, the Hunting with Dogs (Scotland) Act 2023 was passed in January this year. Hunting a wild mammal with a dog is a specific offence under section 1 of the 2023 Act, but this is subject to various exceptions such as: managing wild mammals above ground, or foxes below ground; falconry, game shooting and deer stalking; or environmental benefit.

1 Scottish Animal Welfare Commission, Review of Scottish Government Activity affecting the Welfare of Animals, as Sentient Beings (9 October 2023) <<https://www.gov.scot/publications/animal-welfare-scottish-government-activity-scottish-animal-welfare-commission-review/pages/2/>> last accessed 10 December 2023

2 2023 asp 1, available at: <<https://www.legislation.gov.uk/asp/2023/1/enacted>> last accessed 10 December 2023

3 See for example *Adams v Scottish Ministers* 2004 SC 665 and *Whaley v Lord Advocate* 2007 UKHL 53.

4 The Rt Hon Lord Bonython, Report of the Review of the Protection of Wild Mammals (Scotland) Act 2002, (21 November 2016), <<https://www.gov.scot/publications/report-review-protection-wild-mammals-scotland-act-2002/documents/>> last accessed 10 December 2023

In other recent work, SAWC has published a position paper on the welfare of wildlife, which is a useful read for anyone who would like to learn more about some topical issues in this area, such as terminology of "pests" and "vermin", human-wildlife conflicts, and how best to assess animal welfare in the wild context.⁵

Dog welfare focus in new Scottish Parliament Bill

In June this year, the Welfare of Dogs (Scotland) Bill was introduced by Christine Grahame MSP. The key features of the Bill are: (i) it provides for the Scottish Ministers to prepare a code of good practice on keeping dogs as pets; (ii) it introduces a written certificate to be completed by a new owner before buying a dog or puppy; and (iii) a new register of puppy litters bred by unlicensed breeders is to be introduced, to provide for greater transparency of breeding carried on outside licensing requirements. The Bill is designed to encourage a more responsible approach to dog ownership and improve the welfare of dogs throughout their lives.⁶ Over recent years, there has been an increase in dog ownership in Scotland, including the rise of "pandemic puppies",⁷ therefore legislative efforts to increase public understanding and awareness of the responsibilities of dog ownership are welcome. The Bill's progress can be followed online. It is currently at stage 1, where the relevant Scottish Parliament committee examines the general principles of the Bill and seeks views and comments.⁸ The Scottish Ani-

5 Scottish Animal Welfare Commission (29 August 2023), Wildlife and animal welfare: position, <<https://www.gov.scot/publications/scottish-animal-welfare-commission-position-on-wildlife-and-animal-welfare-august-2023/>> last accessed 10 December 2023

6 Scottish Parliamentary Corporate Body, Welfare of Dogs (Scotland) Bill Policy Memorandum, <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/welfare-of-dogs-scotland-bill/policy-memorandum-accessible.pdf>> last accessed 10 December 2023

7 *ibid* 3-4

8 The Scottish Parliament, Welfare of Dogs (Scot-

mal Welfare Commission's response to the Bill, dated 11 August 2023, is also available to read online.⁹

Charlotte Edgar, Legal Correspondent Scotland

Animals (Low-Welfare Activities Abroad) Act 2023

The UK continues to deliver on its plan to build its reputation as a world leader in animal welfare standards.¹⁰ The Animals (Low-Welfare Activities Abroad) Act 2023 (the "Act") received royal assent on 18 September 2023.¹¹ The Act aims to protect animals from being exploited, abused or killed for entertainment outside the UK by prohibiting the sale and advertising in England and Northern Ireland ("NI") of specific activities with such animals. Hopefully, Scotland and Wales will follow suit.

What's prohibited under the Act?

Under the Act, it is an offence to sell, or offer or arrange to sell, in England and NI, the right to observe or participate in an activity outside the UK involving a vertebrate animal.¹² The specific activities will be described in "activity regulations" made by the "appropriate national authority" (for England, the Secretary of State; for NI, the Department of Agriculture, Environment and Rural Affairs). It is also an offence to print, publish or distribute, or cause to be printed, published or distributed, advertisements for "low-welfare" animal activities in England and NI.¹³ Advertisements in publications (other than

in-flight magazines) printed outside England and NI whose principal market does not include England and NI are exempt from the publishing and distribution offences.¹⁴ Advertisements distributed electronically by persons who do not carry on business in England or NI,¹⁵ and the sale of publications to a member of the public, are exempt from the distribution offence.¹⁶ It is a defence to the printing and distribution offences if a person did not know and had no reason to suspect that the non-compliant advertisement would be published.¹⁷

Whether an activity is "low-welfare" depends on whether the condition or treatment of an animal would be an offence under the "appropriate national legislation" (i.e., the Animal Welfare Act 2006 and the Welfare of Animals Act (Northern Ireland) 2011).¹⁸ These statutes make it an offence to commit an act of cruelty to an animal (e.g., causing unnecessary suffering and mutilating) and include provisions surrounding an animal's welfare needs (e.g., suitable environment and diet).

What's next?

The UK Government must now identify the specific activities the sale or advertising of which would constitute an offence. These should include activities where animals are "kept in captivity or confinement, subjected to cruel and brutal training methods, forced to take selfies or are ridden, drugged and de-clawed."¹⁹ To do this, the Act permits the UK Government to enact secondary legislation applying bans to the sale, offering for sale and advertisement of

land) Bill, <<https://www.parliament.scot/bills-and-laws/bills/welfare-of-dogs-scotland-bill/stage-1#topOfNav>> last accessed 10 December 2023

⁹ See Published Responses to the Welfare of Dogs (Scotland) Bill available here: <https://yourviews.parliament.scot/raine/ecbegff1/consultation/published_select_respondent> last accessed 10 December 2023

¹⁰ <https://www.gov.uk/government/news/uk-to-lead-the-way-on-animal-welfare-through-flagship-new-action-plan>

¹¹ <https://www.legislation.gov.uk/ukpga/2023/45/enacted>

¹² Section 1 of the Animals (Low-Welfare Activities Abroad) Act 2023

¹³ Section 2 of the Animals (Low-Welfare Activities

Abroad) Act 2023

¹⁴ Section 2(5) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁵ Section 2(6) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁶ Section 2(7) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁷ Section 2(8) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁸ Section 1(3) of the Animals (Low-Welfare Activities Abroad) Act 2023

¹⁹ <https://www.gov.uk/government/news/legislation-to-clamp-down-on-cruel-animal-experiences-abroad>



such activities.²⁰ To ensure appropriate regulations exist for different species, the UK Government will consult with various animal organisations and industry stakeholders.

This Act is a crucial step towards helping animals used in the name of tourism. If enforced appropriately, it could steer the tourism market towards ethical animal activities and save animals in low-welfare activities from further abuse.

The Hunting Trophies (Import Prohibition) Bill

The Hunting Trophies (Import Prohibition) Bill (the "Bill") did not pass before the end of the parliamentary session on 7 November 2023. This is a blow to endangered species abroad: if it had been successful, the Bill would have banned the importation into the UK of hunting trophies from animals of conservation concern.

²⁰ Section 5 of the Animals (Low-Welfare Activities Abroad) Act 2023

What does the Bill prohibit and why is it necessary?

Currently, British people can bring hunting trophies such as ivory horns and stuffed lion heads into the UK as long as they have the correct import and export permits.²¹ According to a report published by the All-Party Parliamentary Group, since the 1980s, approximately 25,000 hunting trophies have been brought into the UK by British hunters.²²

The Bill proposed prohibiting the importation of hunting trophies from animal species listed in Annexes A and B of the 'Principal Wildlife Trade Regulation' (a retained EU law), which are either threatened with extinction or overly exploited and require trade control. Establishing a ban on the importation into the UK of hunting trophies

²¹ See the Convention on International Trade in Endangered Species of Wild Fauna which is implemented through the EU Wildlife Trade Regulations.

²² Trophy Hunting & Britain: The Case for a Ban A report of the All-Party Parliamentary Group on Banning Trophy Hunting dated 29 June 2022

of these endangered and exploited species is one way the UK can play its part in putting a stop to the killing of these species in the name of sport.

Why did it fail to pass?

Despite the Bill having the support of over 80% of the British public²³ and the support of the UK Government (having already passed through the House of Commons with only minor amendments), the Bill was allowed to be frustrated by a small group of pro-hunting members of the House of Lords. This is because the Bill was a Private Member's Bill ("PMB"), as opposed to a Government Bill. PMBs require approval from both the House of Commons and the House of Lords before the end of a parliamentary session to become law. With the timing restrictions in mind, the pro-hunting members tabled over 60 amendments at the Committee Stage. They flagged that the profits from trophy hunting are essential to fund conservation projects ultimately protecting endangered species and that the Bill "may be misconceived as some form of neocolonialism" by attempting to strip communities of their right to independently govern their wildlife management practices.²⁴ The Lords requested for each amendment to be debated individually causing time to run out and the Bill to fail at the end of the parliamentary session on 7 November 2023.

The UK Government has missed an opportunity to confirm its reputation as a world leader in animal welfare standards. It is hopeful that the Bill is re-introduced as a Government Bill so that it will not be subject to processes and timings associated with a PMB.

Online Safety Act 2023

The UK continues to maintain its reputation as a world leader in animal welfare standards and now also aims to be the "safest place in the world to be online".²⁵ The Online Safety Act 2023

(the "Act"), which received royal assent on 26 October 2023,²⁶ aims to protect children from harmful online content and give adults greater control over what they see online. The Act imposes new obligations on certain technology companies to keep the internet an animal cruelty safe place.

How are animals included in the Act?

Every year, many animals are tortured online for clicks and social media is a facilitator of this. A recent example of this was uncovered in BBC's investigation *Hunting the Monkey Torturers*, which found that Facebook was hosting numerous monkey torture groups.²⁷ This investigation sparked public outcry and paved the way for animal cruelty content to be included in the Act.

Under the Act, in-scope technology companies²⁸ (e.g., social media platforms and search services that are based anywhere in the world with a significant number of UK users or which target the UK market) are required to proactively remove "priority offences" content from their platforms.²⁹ "Priority offences" include those that would constitute an offence under section 4(1) of the Animal Welfare Act 2006, relating to causing unnecessary suffering to an animal.³⁰ Further, to protect children online, in-scope technology companies also have a duty to carry out risk assessments relating to, and include provisions in their terms of services or publicly available statements specifying how, children in various age groups are protected from encountering, "priority content that is harmful to children".³¹ "Priority content that is harmful to children" includes content that depicts real or realistic serious violence against or injury of an

line-animal-cruelty-activity-to-be-removed-from-social-media-platforms

26 <https://bills.parliament.uk/bills/3137/stages>

27 <https://www.bbc.co.uk/news/extra/lot1dl-WVS5/hunting-the-monkey-torturers>

28 Part 2 of the Online Safety Act 2023

29 See for example, section 10 of the Online Safety Act 2023

30 Section 38 of Schedule 7 of the Online Safety Act 2023

31 See for example, sections 11(6)(b)(ii) and 12(9)(b) of the Online Safety Act 2023

23 Survation carried out a poll of 1020 respondents in March 2021 on behalf of the APPG on Banning Trophy Hunting

24 <https://hansard.parliament.uk/lords/2023-09-12/debates/DCC57FBE-241C-4FC3-BB4D-407604F836DB/HuntingTrophies>

25 <https://www.gov.uk/government/news/on->

animal.³²

How will the Act be enforced?

The Act provides the Office of Communications ("OFCOM") wide powers to enforce provisions of the Act - ranging from imposing fines of up to the greater of £18 mil or 10% of a company's global annual revenue³³ to initiating criminal proceedings against senior managers who deliberately destroy or withhold information or who fail to ensure compliance with information requests from OFCOM.³⁴ OFCOM must now provide guidance and set out codes of practice for how in-scope companies can comply with their duties under the Act. This will be done in three phases over the next two years, along with a public consultation period for each phase.³⁵

The inclusion of animal cruelty as an offence in the Act is a crucial step towards helping animals that are abused online for entertainment purposes. By targeting the online facilitators of views, the Act will hopefully restrict the online animal abuse market from continuing to operate.

XL Bully Dogs

A sad Christmas for American XL Bully dogs and their owners. Following a number of attacks by American XL Bully dogs ("XL Bully"), on 31 October 2023, the UK Government added the XL Bully to the list of dogs banned under the Dangerous Dogs Act 1991 (as amended in 1997) by issuing The Dangerous Dogs (Designated Types) (England and Wales) Order 2023. The new law aims to protect the public by creating conditions that will eventually remove XL Bully-type dogs from England and Wales, and imposing conditions on owners who wish to keep their XL Bully-type dog.

What are the legal implications?

The new law will come into effect in two stages.

³² Section 62(7) of the Online Safety Act 2023

³³ Schedule 13 of the Online Safety Act 2023

³⁴ Section 110 of the Online Safety Act 2023

³⁵ <https://www.ofcom.org.uk/online-safety/information-for-industry/roadmap-to-regulation>

From 31 December 2023,³⁶ it will be illegal to sell, abandon (or let stray), give away or breed an XL Bully. It will also be illegal to walk an XL Bully in a public place (which includes common parts of a building containing two or more separate dwellings)³⁷ without a lead and muzzle. From 1 February 2024,³⁸ it will be illegal to own an XL Bully unless the dog is registered on the Index of Exempt Dogs.³⁹ If an XL Bully is not exempted before 1 February 2024, it will need to be euthanised and the UK Government is offering keepers £200 in compensation towards the cost of euthanasia. The police will have the power to seize non-exempt dogs they suspect could be an XL Bully.⁴⁰ These rules also apply to animal rescue centres and shelters.

To prevent an XL Bully from being euthanised (or seized by the police), the owner must get a Certificate of Exemption. The UK Government has published guidance on how to get an XL Bully exempted, which requires (amongst other things) getting third party public liability insurance cover for the XL Bully, neutering the XL Bully, getting the XL Bully microchipped and paying a £92.40 fee for each XL Bully.⁴¹

What is an XL Bully?

The "type", rather than the breed of dog, is the key concern.⁴² That is, the prohibited "types" are identified depending on the physical characteristics of the dog, rather than their genetics. The UK Government has published an official definition of XL Bully, which includes detailed descriptions regarding (amongst other things) height, head, teeth, neck and coat.⁴³ One of the most important factors is the height re-

³⁶ Article 1(2) of The Dangerous Dogs (Designated Types) (England and Wales) Order 2023

³⁷ Section 10(2) of the Dangerous Dogs Act 1991

³⁸ Article 3 of The Dangerous Dogs (Designated Types) (England and Wales) Order 2023 and section 1(3) of the Dangerous Dogs Act 1991

³⁹ Section 1(5) of the Dangerous Dogs Act 1991

⁴⁰ Section 5 of the Dangerous Dogs Act 1991

⁴¹ <https://www.gov.uk/guidance/prepare-for-the-ban-on-xl-bully-dogs>

⁴² Section 1(a) of the Dangerous Dogs Act 1991

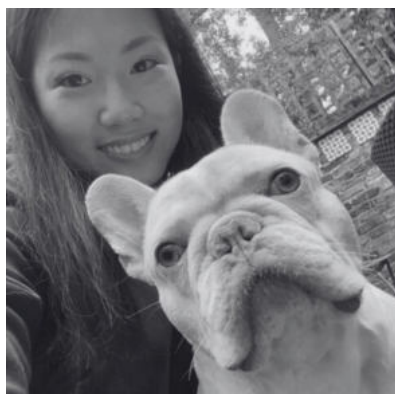
⁴³ <https://www.gov.uk/government/publications/official-definition-of-an-xl-bully-dog/official-definition-of-an-xl-bully-dog>

quirement. If the dog is below 51cm at the withers (for a male) or 48cm at the withers (for a female), then it will not be classified as an XL Bully. If the dog is above this height, the dog will only be classified as an XL Bully if a “substantial”⁴⁴ number of the other characteristics are met. If an owner is unsure about whether their dog is an XL Bully, the UK Government has advised taking a precautionary approach.⁴⁵

There are concerns that the new law could lead to many XL Bully dogs being abandoned and euthanised. According to figures recently released by Defra, over 4,000 exemption applications had been received by 18 December 2023.⁴⁶ An application for an interim injunction by campaign group, Don't Ban Me, Licence Me (LicenceMe Group Ltd), was unsuccessful on 20 December 2023. However, permission was granted for a judicial review hearing.

This is undoubtedly a stressful period for owners, vets and animal shelters.

Jessica Tang (seen here with Kasper) is an Australian qualified solicitor currently practising in the UK. She specialises in corporate law and has an interest in animal welfare. Having volunteered working with animals back in Australia, she now aims to use her legal skills to work for animals.



⁴⁴ <https://www.gov.uk/government/publications/official-definition-of-an-xl-bully-dog/official-definition-of-an-xl-bully-dog>

⁴⁵ <https://www.gov.uk/guidance/prepare-for-the-ban-on-xl-bully-dogs>

⁴⁶ <https://www.gov.uk/government/news/owners-urged-to-take-action-as-xl-bully-dog-deadline-approaches>

High Court rejects challenge to government guidance on broiler chicken welfare

Introduction

Chicken is the most popular meat in the world, and it is predicted by the OECD and FAO that the number of chickens raised and slaughtered for food worldwide (currently 74 billion) is likely to rise to 85 billion by 2032.¹ Modern meat chickens have been genetically selected to grow very fast, leading to them being termed “Frankenchickens” by animal welfare campaigners.² In recent months, there has been increasing attention paid to farming practices for broiler chickens (also known as meat chickens) in the UK and abroad. In May 2023, Poultry World reported that over 350 companies in Europe and the UK have signed up to the Better Chicken Commitment,³ a set of standards for broiler welfare which is intended to improve practices within the chicken meat industry.⁴ The European Commission announced that by the end of 2023, EU animal welfare legislation will be reviewed to bring it up to date with the latest scientific evidence.⁵ This review will include Directive 2007/43/EC,⁶ known as the Broilers Directive.

¹ Kenny Torrella, 'Chickens are taking over the planet', (Vox, 4 August 2023) <<https://www.vox.com/future-perfect/2023/8/4/23818952/chicken-meat-forecast-predictions-beef-pork-oecd-fao>>, accessed September 2023

² Linsey Smith, 'Frankenchicken, farming and the cost of living crisis' (BBC News, 8 September 2023) <<https://www.bbc.co.uk/news/uk-england-lincoln-shire-66721642>>, accessed September 2023

³ Tony McDougal, 'Support growing for Better Chicken Commitment across Europe', (Poultry World, 12 May 2023), <<https://www.poultryworld.net/the-industry/markets-2/support-growing-for-better-chicken-commitment-across-europe/>>, accessed September 2023

⁴ See <https://betterchickencommitment.com/uk/>

⁵ The European Commission, 'Revision of the animal welfare legislation' (Directorate-General for Health and Food Safety, undated) <https://food.ec.europa.eu/animals/animal-welfare/evaluations-and-impact-assessment/revision-animal-welfare-legislation_en#:~:text=The%20Farm%20to%20Fork%20Strategy,with%20the%20latest%20scientific%20evidence.>, accessed September 2023

⁶ ibid

In light of these developments, the judicial review raised by The Humane League against the Secretary of State, challenging the Code of Practice on broiler welfare,⁷ is timely (*R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin)). On 24 May 2023, Sir Ross Cranston, sitting as a High Court judge, dismissed the case.

The main issues in the judicial review

The Humane League argued that the Secretary of State had misinterpreted the requirements of paragraph 29 of the Welfare of Farmed Animal (England) Regulations 2007, which provide that: “animals may only be kept for farming purposes if it can reasonably be expected, on the basis of their genotype or phenotype, that they can be kept without any detrimental effect on their health or welfare.” The Humane League claimed that the UK Code of Practice for broilers is unlawful as it takes into account irrelevant considerations. It was also argued that the Secretary of State acted irrationally in the conclusions she reached about broiler welfare. Readers who are familiar with public law will appreciate that the legal tests for unreasonableness and irrationality in decision-making are high.

The evidence in the case was that 95% of fast-growing broiler chickens are raised conventionally in large, closed buildings with a maximum stocking density (weight of birds per square metre) of 39kg.⁸ 39kg per square metre is the maximum stocking density permitted by the Broilers Directive.⁹ Fast-growing chickens

reach slaughter weight of 2.2kg in 5-6 weeks.¹⁰ One billion meat chickens are slaughtered in the UK every year, and the value of the UK industry is approximately £2.4 billion.¹¹

The most significant broiler welfare evidence in the case took the form of an RSPCA report entitled: “Eat. Sit. Suffer. Repeat. The Life of a Typical Meat Chicken”, published in 2020.¹² Significantly, this report notes that “...the most commonly used genetics do not adequately safeguard chicken welfare and are not consistent with ensuring the vast majority of chickens live a good life or even have a life worth living.”¹³ In his judgment, Sir Ross Cranston quoted from the executive summary of the RSPCA report, which states that genetic selection of broiler chickens “has been reported to be responsible for contributing to not only the most, but also the most severe, welfare problems seen in broilers today...”.¹⁴ Such welfare issues, as noted in the judgment, include: heart conditions, leg fractures, ulcers and lesions to the feet, as well as reductions in natural behaviours such as foraging, dustbathing and perching.¹⁵

The Secretary of State argued that there is no scientific consensus that fast-growing broiler breeds cannot be kept without detriment to their welfare.¹⁶ For example, some studies suggest that environmental conditions, such as lower stocking densities, and straw bale or step platforms, can improve the welfare of fast-growing breeds.¹⁷ Sir Ross Cranston noted that in forming this view, the Secretary of State had reviewed the relevant literature and taken expert advice. Therefore, his Lordship decided

⁷ Department for Environment, Food & Rural Affairs, ‘Code of practice for the welfare of meat chickens and meat breeding chickens’ (UK Government, 26 March 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694013/meat-chicken-code-march2018.pdf>, accessed September 2023

⁸ *R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin), para 14

⁹ Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, Article 3(4), <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0043>, accessed September 2023

¹⁰ *R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin), para 15

¹¹ *ibid*, para 13

¹² RSPCA, ‘Eat. Sit. Suffer. Repeat. The Life of a Typical Meat Chicken’ (RSPCA, 2020), <<https://www.rspca.org.uk/webContent/staticImages/BroilerCampaign/EatSitSufferRepeat.pdf>>, accessed September 2023

¹³ *ibid*, page 31

¹⁴ *R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin), para 18

¹⁵ *ibid*, paras 19 and 20

¹⁶ *ibid*, para 77

¹⁷ *ibid*

that the Secretary of State had not acted contrary to her legal duties in preparing the Code of Practice for broiler welfare.¹⁸ It is noteworthy that the RSPCA report takes a different view to the Secretary of State: "While changes to the birds' environment can lead to improvements in welfare, a failure to consider the birds' genetics means that any such improvement in welfare will be, at best, modest."¹⁹

Conclusion

Where the evidence demonstrates that fast-growing broiler breeds experience welfare issues as a consequence of their genetics, it can be argued that these breeds do not meet the legal requirements of the Welfare of Farmed Animal (England) Regulations 2007. When a fast-growing broiler breed cannot be kept without "any" detriment to its welfare, as a consequence of its genotype or phenotype, it would be unlawful for this breed to be kept for farming purposes.

The Humane League has filed an application to appeal the decision.

18 *ibid*, para 102

19 RSPCA, 'Eat. Sit. Suffer. Repeat. The Life of a Typical Meat Chicken' (RSPCA, 2020), page 11, <<https://www.rspca.org.uk/webContent/staticImages/BroilerCampaign/EatSitSufferRepeat.pdf>>, accessed September 2023

The legal protection of sentient invertebrates in food production in the UK

Dr Deborah Rook (Northumbria university), Dr Debbie Legge (Open university) and Dr Heather Browning (Southampton university)

Currently legislation in the United Kingdom (UK) offers protection to vertebrate animals that are bred and kept for the production of food. The Animal Welfare Act 2006 (AWA 2006) and the Welfare of Farmed Animals Regulations 2007 (WFAR 2007) protect against unnecessary suffering and require minimum standards for meeting the welfare needs of farm animals in England and Wales. There is similar protection in Scotland under the Animal Health and Welfare (Scotland) Act 2006 (AHWA 2006) and Welfare of Farmed Animals (Scotland) Regulations 2010. This article will focus on the law in England and Wales, but the same arguments apply to Scotland and the equivalent statutory provisions from Scottish law will be referenced in the footnotes. While vertebrates such as pigs and cattle benefit from legal protection under the animal welfare legislation, invertebrates that are bred or kept for food purposes are excluded. Scientific research supports the view that decapod crustaceans (such as lobsters, crabs, crayfish, prawns and shrimp) and cephalopods (such as octopus, squid, cuttlefish and chambered nautilus) are sentient (i.e., have the capacity to experience mental states such as pleasure and suffering).¹ This evidence includes demonstrations that octopuses value receiving painkillers when injured,² that hermit crabs can make sophisticated trade-offs between pain, shell quality, and fear of predators,³ and

that crayfish show anxiety-like behaviour that is modified by the same drugs used to treat anxiety in humans.⁴ Consideration of this evidence led to the inclusion of cephalopod molluscs and decapod crustacea in the Animal Welfare (Sentience) Act 2022, meaning they are officially recognised as sentient animals for the purposes of this legislation. Section 5(2) of that Act gives power for the Secretary of State to make regulations to amend the Act "to bring invertebrates of any description" within its remit and therefore more species of invertebrates may be included. Is it time for the definition of 'animal' in the AWA 2006 and AHWA 2006 to be extended to include sentient invertebrates and would it make any difference in practice to the welfare of invertebrates eaten as food?

In England and Wales vertebrate farm animals benefit from legal protection under the Animal Welfare Act 2006. Section 1 defines 'animal' as "vertebrate other than man" and applies to mammals, birds, reptiles, amphibians and fish.⁵ A 'protected animal' includes animals domesticated in the British Isles or under the control of a human or not living in a wild state.⁶ Therefore, pigs, cattle and chickens come within the protection of the Act as domesticated vertebrates, whereas, octopuses, lobsters and crabs - all of which are commonly eaten in England and Wales - are outside the scope of the Act.

1 Birch, J., Burn, C., Schnell, A., Browning, H., & Crump, A. (2021). Review of the Evidence of Sentience in Cephalopod Molluscs and Decapod Crustaceans. LSE Consulting.

2 Crook, R. J. (2021). Behavioural and neurophysiological evidence suggests affective pain experience in octopus. *iScience*, 24, 102229.

3 Appel, M., & Elwood, R. W. (2009). Motivational trade-offs and potential pain experience in hermit crabs. *Applied Animal Behaviour Science*, 119, 120–124; Magee,

B., & Elwood, R. W. (2016). Trade-offs between predator avoidance and electric shock avoidance in hermit crabs demonstrate a non-reflexive response to noxious stimuli consistent with prediction of pain. *Behavioural Processes*, 130, 31–35.

4 Fossat, P., Bacqué-Cazenave, J., De Deurwaerdère, P., Delbecque, J. P., & Cattaert, D. (2014). Anxiety-like behavior in crayfish is controlled by serotonin. *Science*, 344(6189), 1293–1297.

5 In Scotland the equivalent provision is s.16 Animal Health and Welfare (Scotland) Act 2006.

6 Section 2, Animal Welfare Act 2006 (for England and Wales); s.17, Animal Health and Welfare (Scotland) Act 2006.



The Explanatory Notes to the AWA 2006 give the rationale for restricting the scope of the Act to vertebrates “as these are currently the only demonstrably sentient animals”.⁷ Clearly this is not now the case. The inclusion of cephalopods and decapod crustaceans in the Animal Welfare (Sentience) Act 2022 recognises their sentience and challenges their exclusion from the AWA 2006 and AHWA 2006. New Zealand (1999), Switzerland (2008) and Norway (2009) already include octopuses and decapod crustaceans in their animal welfare legislation. Is it time for the UK to do the same?

The protection given to farm animals in England and Wales under the AWA 2006 is arguably both significant and insufficient. It protects the animals from unnecessary suffering (s.4) as well as imposing a positive duty on the person responsible for the farm animal to meet their specified welfare needs (s.9).⁸ This is significant

because farm animals have the legal status of property and without such legal protection an owner could treat their property as they wish, such as starving the animal or injuring them for pleasure. However, the legal protection of farm animals is arguably inadequate as it permits intensive farming practices that cause farm animals pain, distress and suffering. For example, the case of *Humane League UK v Secretary of State* (2023) EWHC 1243 describes the use of fast-growing broiler chickens in intensive farms in England that have been selectively bred to grow very fast, which can lead to health problems such as chronic leg disorders and heart failure. It is crucial to understand that the AWA 2006 prohibits only unnecessary suffering. Therefore, if the suffering is considered to be necessary, no offence is committed. Where a farm animal suffers, the question of whether an offence has occurred therefore rests on the issue of necessity. Section 4 sets out statutory considerations to assist the court in assessing the necessity of any animal suffering. This in-

7 Explanatory Notes to the Animal Welfare Act 2006, commentary on section 1. <https://www.legislation.gov.uk/ukpga/2006/45/notes>. Accessed 9 August 2023.

8 For Scotland, the equivalent provisions are s.19

and s.24 Animal Health and Welfare (Scotland) Act 2006.

cludes a legitimate purpose and proportionality between the aim to be achieved and the means of achieving it. Therefore, some animal suffering will be permitted to achieve the legitimate aim of food production, but the suffering must not be disproportionate to that aim, though what counts as disproportionate will be interpreted differently by different parties.

When the AWA 2006 came into force it created a new welfare offence under s.9.⁹ This was deemed a significant step in animal welfare law at the time. It imposes a positive duty on a person who is responsible for an animal to take reasonable steps to meet the specified welfare needs of that animal, such as its need for a suitable environment and diet and its need to be able to exhibit normal behaviour patterns. For farm animals, this legal protection is extended under the Welfare of Farmed Animals (England) Regulations 2007, which provide more detailed specifications for the welfare of farmed animals.¹⁰ Schedule 1 sets out the general conditions under which farm animals must be kept, for example: daily inspections, the use of trained staff, and specifications about accommodation and food. Under WFAR 2007, a farm animal is defined as “an animal bred or kept for the production of food, wool or skin or other farming purposes”. The regulations specifically exclude fish, reptiles and amphibians but as these are vertebrates, they enjoy protection against unnecessary suffering under the AWA 2006 (subject to an exception that excludes suffering caused to fish in the “normal course of fishing”, s.59 AWA 2006). WFAR 2007 implements EU law (as was required at that time) and transposes the provisions of the relevant EU Directive (98/58/EC). The authority to create the regulations comes from s.12 AWA 2006. There is no definition of animals in WFAR 2007 and invertebrates are not mentioned. This means that the provisions under the AWA 2006 and WFAR 2007 that seek to protect the welfare needs of farm animals are not available to protect sentient invertebrates such as octopus, crabs and lobsters that are used as food.

⁹ For Scotland, the equivalent provision is s.24 Animal Health and Welfare (Scotland) Act 2006.

¹⁰ For Wales, see the Welfare of Farmed Animals (Wales) Regulations 2007; For Scotland, see the Welfare of Farmed Animals (Scotland) Regulations 2010.

Interestingly invertebrates are included in the Welfare of Animals at the Time of Killing (England) Regulations 2015 (WATOK 2015) and the Welfare of Animals (Transport) (England) Order 2006.¹¹ This protects sentient invertebrates used in food production during any transport and at the time of killing. WATOK 2015 is derived from an EU Regulation (No.1099/2009) but schedule 4 of WATOK concerns ‘Killing animals other than those to which the EU regulations applies’. Schedule 4 defines animal to include invertebrates and requires the humane killing of these animals.¹² This means the animal must be killed without causing unnecessary suffering and there is a requirement that the killing is carried out by a person who has the requisite knowledge and skill to do this. The fact that UK law now recognises some invertebrates used in food production as sentient means that the killing must be carried out without causing unnecessary suffering to the animal. It is arguable that the practice of boiling crabs and lobsters alive in restaurants and homes in England and Wales has now become unlawful because the law recognises these animals as sentient. If boiling alive sentient invertebrates causes them pain and suffering and that pain is deemed to be disproportionate to the aim to be achieved, bearing in mind suitable alternatives such as stunning,¹³ then death by boiling alive will be deemed to cause unnecessary suffering and be unlawful under WATOK 2015. In 2018 Switzerland legislated to prohibit the practice of boiling alive lobsters and other crustaceans based on evidence of their sentience. The Swiss law now requires prior stunning before death.¹⁴

The inclusion of cephalopods and decapod

¹¹ For Wales, see the Welfare of Animals at the Time of Killing (Wales) Regulations 2014 and The Welfare of Animals (Transport) (Wales) Order 2007.

¹² For Scotland, the Welfare of Animals at the Time of Killing (Scotland) Regulations 2012 does not include an equivalent to schedule 4, WATOK 2015 and therefore invertebrates are not included in the Scottish Regulations.

¹³ Conte, F., Voslarova, E., Vecerek, V., Elwood, R.W., Coluccio, P., Pugliese, M and Passantino, A. (2021) Humane Slaughter of Edible Decapod Crustaceans. *Animals*, 11(4), 1089.

¹⁴ Nicholls, S. (2018) Swiss law bans boiling lobsters alive. Available at <https://www.euronews.com/2018/01/11/swiss-law-bans-boiling-lobsters-alive> Accessed 7th August 2023.

crustaceans in the Animal Welfare (Sentience) Act 2022 is a significant step in protecting the welfare of these animals. However, the recognition of sentience means that there is inconsistency and confusion in the current law relating to farm animals, with some protection for sentient invertebrates during transport and at the time of killing (in England and Wales but not Scotland) but no legal protection while they are being kept alive for the purpose of food production. The AWA 2006 and AHWA 2006 need to be urgently amended to provide clarity and consistency. Both Acts permit the definition of animals to be extended to include invertebrates. In England and Wales this is possible where “the appropriate national authority is satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering”.¹⁵ In Scotland, Scottish Ministers may by regulations extend the definition of animal to include invertebrates.¹⁶ As there is now evidence that cephalopods and decapod crustaceans are sentient¹⁷ and this is expressly recognised under UK law in the Animal Welfare (Sentience) Act 2022, there is sufficient evidence to comply with s.1(3) AWA 2006 and s.16(3) AHWA 2006 and extend the definition of animals to include sentient invertebrates.

This is increasingly important due to the pressures on sentient invertebrates. There are environmental pressures such as from warming seas and pollution leading to disease and die offs, such as that seen in the Northeast of England around the crab fisheries and in a lesser way to the lobster fisheries.¹⁸ As the number of sentient invertebrates falls in the wild then there is pressure on them to be farmed to meet demand. In Spain, there is a proposal to build the world's first industrial octopus farm and to

raise a million octopuses a year for food. Expert scientists oppose the octopus farm, arguing that the conditions the octopuses will live in will lead to stress, conflict and high mortality.¹⁹ The World Organisation for Animal Health “has considered the welfare of farmed aquatic animals and has developed welfare guidelines for farmed fish but not for cephalopods, and therefore, octopus welfare. In other parts of the world where octopus farming is being developed, such as the US, Mexico, and Japan, octopuses are not protected by law”.²⁰

There are three issues with octopus farming on this scale: animal welfare, environmental pollution, and sustainability. There are a range of animal welfare issues caused by farming octopuses, arising from their behaviour and cognitive capacities. Industrial octopus farming is likely to have high stocking density, but octopuses are solitary animals in the wild and can be aggressive when housed in groups, leading to injury and even cannibalism.²¹ Octopus tanks can be barren and unnatural, without the hiding places octopuses need to feel safe,²² and without any behavioural or cognitive enrichment.²³ Most importantly, there is currently no humane slaughter method for octopuses that would be viable at a commercial scale.²⁴ The second concern

¹⁵ Section 1(3), Animal Welfare Act 2006.

¹⁶ section 16(3), Animal Health and Welfare (Scotland) Act 2006.

¹⁷ Birch, J., Burn, C., Schnell, A., Browning, H., & Crump, A. (2021). Review of the Evidence of Sentience in Cephalopod Molluscs and Decapod Crustaceans. LSE Consulting.

¹⁸ Hughes, G. (2023) ‘Experts to investigate Teesside mass crab die-off, government says’. Environment Journal. Available at: Experts to investigate Teesside mass crab die-off, government says (environmentjournal online). Accessed 27th June 2023.

¹⁹ Marshall, C. (2023) World's first octopus farm proposals alarm scientists. Available at www.bbc.co.uk/news/science-environment-64814781 Accessed 27th June 2023.

²⁰ Lara, E. (2021) Compassion in World Farming - Octopus Factory farming - A recipe for disaster. Available at: www.ciwf.org.uk/research/species-aquatic-animals/octopus-factory-farming-a-recipe-for-disaster/ Accessed 27th June 2023.

²¹ Jacquet, J., Franks, B., Godfrey-Smith, P., & Sanchez-Suarez, W. (2019). The case against octopus farming. *Issues in Science and Technology*, 35(2), 37-44.

²² Vaz-Pires, P., Seixas, P., & Barbosa, A. (2004). Aquaculture potential of the common octopus (*Octopus vulgaris* Cuvier, 1797): a review. *Aquaculture*, 238(1-4), 221-238.

²³ Jacquet, J., Franks, B., Godfrey-Smith, P., & Sanchez-Suarez, W. (2019). The case against octopus farming. *Issues in Science and Technology*, 35(2), 37-44.

²⁴ Lara, E. (2021) Compassion in World Farming - Octopus Factory farming - A recipe for disaster. Available at: www.ciwf.org.uk/research/species-aquatic-animals/octopus-factory-farming-a-recipe-for-disaster/ Accessed 27th June 2023.

for octopus farms is the risk of environmental pollution from release of biological waste from farms and at processing sites. Finally, octopus farms raise concerns about their sustainability. Octopuses are carnivorous and the feed for octopuses "contains human-edible ingredients such as soyabean or fish (90% of the wild fish caught to produce fishmeal and oil is human edible)".²⁵ This goes against the 'Strategic Guidelines for the Sustainable Development of Aquaculture' adopted by the EU Commission in 2021.²⁶ which aims to limit this practice as it places additional pressure on wild fish stocks. Due to these concerns the farm animal organisation Compassion in World Farming is "urging the aquaculture industry to stop octopus farming altogether to prevent unnecessary suffering and environmental damage".²⁷ Although there are currently no plans to farm octopus in the UK, pre-emptive regulation of the practice, as well as potential regulation of trade in farmed octopus, could send a strong international signal and prevent future harmful developments in this industry.

In conclusion, just as there is concern over the welfare of farm animals versus commercial interests for chickens, pigs, and cattle, which suffer in intensive farming practices (e.g. *Humane League UK v Secretary of State* (2023) EWHC 1243), so it can be seen that the move to farm sentient invertebrates such as octopus raises concerns for their welfare. Given that farmed vertebrates benefit from legislative protection, but still suffer under intensive farming practices, will legally protecting sentient invertebrate animals raised for food make any difference in practice? There are potentially two ways in which it could. Firstly, it prevents the worst types of suffering, particularly those arising from inhumane methods of killing such as boiling alive (subject to the practical difficulties with enforcement of the law). Secondly, it educates people that (at least some) invertebrates are sentient creatures that can feel pain, which can then increase public concern for the welfare of invertebrate animals. Therefore, following the enactment of the Animal Welfare (Sentience)

Act 2022, and in recognition of the growing body of scientific evidence on the sentience of some invertebrates, the authors believe that the time is right for the AWA 2006 and AHWA 2006 to be extended to protect sentient invertebrates used in food production in the UK.

25 Ibid, at 37.

26 Ibid, at 37.

27 Ibid, at 37.

One Billion Crimes? Farm Animal Welfare Law in the United Kingdom

Jamie Gardiner

There was an animal welfare incident involving a mother pig. A week before giving birth, she was put into a crate too narrow to turn around in. Confined to that spot for weeks, held in place by metal bars, it was where she had to eat, sleep, dung, urinate, give birth, and nurse her piglets.

Yet there has been no prosecution; nor will there be, because there was nothing unusual about treating the mother pig this way. The conditions complied with the government's code of practice for the welfare of pigs ("This Code is intended to help all those who care for pigs to practise good standards of stockmanship to safeguard pig welfare."). The conditions even complied with higher Red Tractor Assurance Scheme standards for pigs ("These comprehensive standards underpin our industry's strength and credibility, securing its future as a world-leader in pig welfare, stockperson competency and biosecurity").

More than one billion farm animals are reared in Britain each year, the great majority of them in intensive, factory-like conditions. This raises moral issues – but does it raise legal issues?

What legislative scheme applies?

England, Scotland, Wales, and Northern Ireland each has its own legislative scheme. These schemes are similar, but not identical. Scotland, for example, has some distinctive rules regarding fish because of the scale of its wild fish and aquaculture industries. References in this article are to the English scheme.

The overarching statute governing conditions for animals on farms is the Animal Welfare Act 2006. Broadly speaking, it does three main things.

The first thing it does is create several general offences. These include knowingly causing an

animal to suffer where "the suffering is unnecessary"¹, and failing to take "such steps as are reasonable in all the circumstances" to meet an animal's needs "to the extent required by good practice"². In determining whether "the suffering is unnecessary," the Act lists some potentially relevant factors. These include "whether the suffering could reasonably have been avoided or reduced," whether the conduct complied with any relevant regulations or codes of practice, and whether "the suffering was proportionate to the purpose of the conduct concerned."

Although the offences are set out in skeletal form, the second thing that the 2006 Act does is provide for flesh to be put on the bones. It allows this to be done through the making of regulations to "promote the welfare of animals" and which may create further offences³. Of most significance is The Welfare of Farmed Animals (England) Regulations 2007. These regulations go into much more detail than the 2006 Act, and the schedules at the end contain species-specific provisions for pigs, meat chickens, laying hens, cattle, calves, and rabbits. Originally, many of these provisions gave effect to European Directives on farm animal welfare. There are further statutory instruments covering other aspects of animal farming. These aspects include mutilation⁴, transport⁵, and killing⁶. The 2006 Act also allows codes of practice to be created "for the purpose of providing practical guidance"⁷. These go into more detail. To illustrate, the pig-specific schedule in

1	Section 4
2	Section 9
3	Section 12
4	Mutilations (Permitted Procedures) (England) Regulations 2007
5	Welfare of Animals (Transport) (England) Order 2006
6	Welfare of Animals at the Time of Killing (England) Regulations 2015, Mandatory Use of Closed Circuit Television in Slaughterhouses (England) Regulations 2018
7	Section 14

the 2007 regulations is 6 pages, whereas the code of practice for pigs is 54 pages. Failing to comply with the codes of practice is not an offence, but is potentially evidence that suffering is unnecessary or that animals' needs are not being met.

The third thing that the 2006 Act does is provide for inspection⁸ and enforcement. Statutory enforcement is by way of improvement notices⁹, and prosecution by local authorities¹⁰. Sentencing powers on conviction include imprisonment¹¹.

When is suffering necessary?

Some requirements in the regulations and codes of practice are unambiguous, for example on the minimum frequency of feeding. Whether they are breached is a legally straightforward question of fact. Yet there are other aspects of farming on which the regulations and codes of practice are ambiguous or silent. Most notably, the 2007 regulations do not cover fish¹², so there are no detailed requirements as to how they are kept. This makes it necessary to go back to the more general provisions in the 2006 Act, and to consider whether any suffering is unnecessary and whether the needs of the fish are being met.

Judicial discussion of when suffering is unnecessary predates the 2006 Act. The leading case is *Ford v Wiley* (1889) 23 QBD 303, regarding the prosecution of a farmer who had the horns of his oxen sawn off. This caused the oxen extreme and prolonged pain, “like cutting through the quick of a man's finger.” But it also increased the value of the oxen. The sawing was held to be unnecessary, with the court in effect asking (i) whether the ends justified the means, and if so (ii) whether those ends could reasonably have been obtained without the suffering. At pages 209 to 210 and 215, Lord Coleridge LCJ explained:

“There is no necessity and it is not necessary to

sell beasts for 40s. more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard, or a railway truck, than could otherwise be packed; nor to prevent a rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary. That without which an animal cannot attain its full development or be fitted for its ordinary use may fairly come within the term “necessary,” and if it is something to be done to the animal it may fairly and properly be done. What is necessary therefore within these limits, I should be of opinion may be done even though it causes pain; but only such pain as is reasonably necessary to effect the result. . . There must be proportion between the object and the means. . . If the suffering inflicted is necessary, as I have tried to explain it, it may be inflicted; if not, it is “unnecessary abuse of the animal,” and we have neither the moral nor the legal right to inflict it, a conclusion not of sentimentalism but of good sense.”

Unnecessary suffering on farms has led to some convictions. In *R. (on the application of Gray) v Aylesbury Crown Court* [2013] EWHC 500 (Admin), a horse trader and members of his family were convicted after over 100 horses and ponies were found dead, dying or starving. In *R. v Woodward (Robert)* [2017] EWHC 1008 (Admin), two directors and three employees of a slaughterhouse were convicted after an undercover investigation filmed them abusing sheep. In *R. (on the application of Highbury Poultry Farm Produce Ltd) v Telford Magistrates' Court* [2020] UKSC 39, a case that went all the way to the Supreme Court on a different point, a company that owned a slaughterhouse was convicted when chickens were put “into the scalding tank (where [their] feathers would be removed) while still alive”.

In all these examples, though, the conduct was supposedly an aberration from industry practices. It has been more challenging to secure convictions where a widely used system makes suffering inevitable. In the unreported case of *Roberts v Ruggiero* QBD, 3 April 1985, raising calves in veal crates was held to be lawful, although regulations subsequently banned

8 Section 28
9 Section 10
10 Section 30
11 Section 32
12 Paragraph 3

the practice. In *RSPCA v Secretary of State for the Environment, Food and Rural Affairs* [2008] EWHC 2321, it was lawful in an emergency to kill chickens by turning off the fans in their shed, thereby suffocating them or roasting them alive. And, in *Compassion in World Farming Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1009, it was lawful to restrict feed for parent chickens selectively bred to be permanently hungry.

But widespread suffering might still be held unnecessary despite being part of an established system. There is no comparison with, say, medical negligence law, where conduct in accordance with a body of recognised professional opinion is generally lawful. (And, even in that area of law, a judge can still find that such a body of opinion is neither reasonable nor responsible.) There is no reason for judges to be deferential in farm animal welfare cases. Unlike doctors, intensive farmers are not professionally obligated to avoid unnecessary suffering. They will have objectives that conflict with reducing suffering, especially reducing costs, and these objectives may cause them to act illegally.

Ultimately, though, cases will be highly fact-sensitive. The practices most open to challenge will be those where (i) there is no express provision for them in the relevant regulations and codes of practice, (ii) there is evidence of great suffering, often from undercover investigations, and (iii) there are realistic alternatives. It is not hard to find such practices. For example, in *R (The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin) permission was granted for a recent judicial review regarding the use of fast-growing chicken breeds. Although the challenge was unsuccessful, an appeal is currently in progress. These birds no longer resemble wild chickens, their under-developed legs often buckling under the weight of over-developed breast muscle.

When is secondary legislation illegal?

The regulations and codes of practice are weak. Take the minimum space requirements. Laying hens in enriched cages must have 750cm² of space per hen (smaller than a page

of a tabloid newspaper), 600cm² of which must be “usable” (smaller than a sheet of A4)¹³. Adult pigs weighing 85-100kg must have 0.65m² (meaning that 6 pigs can be confined to a pen the size of a table tennis table)¹⁴.

Regulations like these protect intensive farms far more than they protect animal welfare, potentially making poor conditions difficult to challenge. This is because compliance with even weak regulations, like the minimum space requirements, is potentially relevant to whether suffering is necessary. Second, under the 2006 Act it is necessary to establish that a defendant knew, or ought to have known, that their act or omission would cause suffering¹⁵. Intensive farmers may be able to argue that they reasonably assume conduct complying with the regulations does not cause suffering.

Challenging the supporting regulation can be a necessary prerequisite for establishing that a practice is unlawful. Where regulations are inconsistent with the primary legislation to which they owe their existence, the challenge can be by judicial review. The relevant ground of judicial review will be illegality. Many of the challenges to established practices have been by way of judicial review, like in the ventilation shutdown case of *RSPCA v Secretary of State for the Environment, Food and Rural Affairs*. That case challenged the lawfulness of including ventilation shutdown as a permitted method of killing for the purposes of disease control.

Once again, whether a particular challenge to regulations succeeds will be highly fact dependent. To the reasonable reader, though, there seems an inescapable disjunct between the words of the 2006 Act and the regulations. Does keeping six pigs in an area the size of a table tennis table satisfy their “need for a suitable environment,” and leave them “able to exhibit normal behavioural patterns?” Is it necessary to put six pigs into that space, rather than four, or one? When considering whether such conditions can sensibly be called necessary or be said to meet an animal’s needs, it is difficult not to think of the famous words of Lord

¹³ The 2007 regulations at sch. 4, para. 2

¹⁴ The 2007 regulations at sch. 8, para. 43

¹⁵ Section 4

Atkin in *Liversidge v Anderson* [1942] AC 206: “I know of only one authority which might justify the suggested method of construction: ‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean, neither more nor less.’”

How can the law be enforced?

Regarding inspection, article 53 of retained Regulation (EU) 2017/625 requires that, “the frequency of official controls should adequately address risks to human, animal and plant health, [and] animal welfare.” But a report by the Animal Law Foundation and Animal Equality found that between 2018 and 2021 just 3% of farms get inspected each year, one third of these inspections identifying regulatory breaches¹⁶. Just half the farms that are the subject of a complaint get inspected. Prosecution rates seem to be low too, with only one in every three hundred complaints leading to a prosecution. In 2019 and 2020, the number of CPS prosecutions for offences under the 2007 regulations was zero.

If an inspection or prosecution body has a blanket-policy of inaction in relation to particular offences, it could be judicially reviewed for fettering its discretion. In practice, though, the low rates of inspection and prosecution may be more to do with under-funding of local authorities. Courts will afford public bodies considerable latitude on those matters. In *Compassion in World Farming Ltd v Secretary of State* for the Environment, Food and Rural Affairs, one challenge was to DEFRA’s failure to adopt a policy of prosecuting intensive farmers who kept breeder chickens hungry. This challenge was emphatically rejected: “The court would rarely, if ever, order a public authority to prosecute and certainly not in the present case”¹⁷.

Once again, though, the outcome will turn on the facts. If there was a refusal to investigate or take any other enforcement action despite clear evidence of unlawful conduct, for example video footage from an undercover investigation, then the chances of a judicial review succeeding would be improved. The argument would be that the public body is effectively

shutting its eyes to the evidence. An alternative to judicial review would be a private prosecution. The RSPCA regularly brings private prosecutions in England, although generally in relation to companion animals. In Scotland, it is much harder to bring a private prosecution and almost all prosecutions are public.

Prosecution is not the only way of putting the lawfulness of farming systems before a court. For example, shareholders in a company can bring a shareholder derivative action under section 260 of the Companies Act 2006. Such an action could be brought on the basis that directors are breaching their statutory duties by adopting unlawful farming practices. The statutory duties include a duty to promote the success of the company (a duty that requires them to have regard to “the desirability of the company maintaining a reputation for high standards of business conduct”)¹⁸. Although there do not seem to be any reported examples of this sort of action being used to challenge farming practices in the UK, there are examples of the equivalent provisions being used in the United States. For example, last year two Costco shareholders raised an action against its directors on account of the mistreatment of chickens reared for the rotisserie. The action was ultimately dismissed, but – repeating the familiar refrain – success or failure in these cases will always be highly fact dependent.

Are there any other legal means to challenge suffering?

Intensive animal rearing brings environmental, health, planning, and food safety risks, each having its own legislative scheme. In addition, common law causes of action like nuisance could be engaged on the right facts.

Perhaps the most promising avenue for challenge, though, is stopping intensive animal farmers misleading consumers about the way they rear their animals. This avoids having to establish that the conditions are unlawful. It is important when 77% of the public think the UK has “very high” or “generally has high” animal welfare standards on farms¹⁹.

¹⁶ The Enforcement Problem, October 2022

¹⁷ Paragraph 47

¹⁸ Section 172 of the Companies Act 2006

¹⁹ YouGov, September 2020



The first step is generally complaining to the Advertising Standards Authority, which applies the UK industry code on Broadcast Advertising, as well as the code on Non-broadcast Advertising, Sales Promotion and Direct Marketing. The Advertising Standards Authority has shown itself willing to rule against misleading claims about animal welfare. One example involved an advert with Heston Blumenthal and a farmer discussing the benefits of "outdoor bred" pigs against a backdrop of fields and straw²⁰. Blumenthal asked, "So, Phil, what is it about outdoor bred pigs that makes the meat taste so good?" The farmer replied, "I think it's got to be the environment they're living in: plenty of fresh air, cereal-based diet and of course a comfortable bed." He neglected to mention that, after being weaned as piglets, the "outdoor bred" pigs spent the rest of their lives indoors in cramped pens. Another example is a ruling against the claim that "Red Tractor Pork is high welfare pork"²¹.

If the Advertising Standards Authority's ruling goes against the complaint, there are also regulatory provisions. The Consumer Protection from Unfair Trading Regulations 2008 prohibit misleading actions and omissions²². The Competition and Markets Authority generally enforces these regulations, but consumers now have the option of doing so directly²³.

Conclusion

Farm animal welfare is a developing area of law and a developing area of social concern. While it is not the place of the courts to legislate, they do not need to. A prohibition on unnecessary suffering is already written into law. But it is not given meaningful effect by the regulations and codes of conduct, or reflected on intensive animal farms. Selective, creative, and persistent litigation is needed to close the gap between words and reality.

The author extends thanks to Edie Bowles of Advocates for Animals for providing helpful comments and suggestions.

²⁰ Waitrose Ltd, 20 October 2010

²¹ Agriculture and Horticulture Development Board t/a lovepork.co.uk, 29 August 2012

²² Paragraphs 3, 5 and 6

²³ Part 4A

Norwegian Supreme Court Upholds Ban on Breeding Cavalier King Charles Spaniels but rejects call for English Bulldog Breeding Ban

Vanessa Barnes¹

The landmark Norwegian court proceedings, spanning three years and going before all three of the Norwegian courts, have finally been decided, with the Supreme Court of Norway upholding a breeding ban on Cavalier King Charles Spaniels but rejecting the claim for a similar breeding ban for the English Bulldog².

This case stretches back to 2020 when civil proceedings were commenced by the Norwegian Society for Protection of Animals (NSPA) against the Norwegian Kennel Club (NKK). The NSPA argued the breeding of Cavalier King Charles Spaniels and English Bulldogs contravened Norwegian animal welfare law and specifically, section 25 of the Norwegian Animal Welfare Act (2009) which states that:

"Breeding shall encourage characteristics which give robust animals which function well and have good health.

Reproduction, including through methods of gene technology, shall not be carried out in such a way that it:

a. changes genes in such a way that they

influence the animals' physical or mental functions in a negative way, or passes on such genes,

b. reduces the animals' ability to practise natural behaviour, or

c. cause general ethical reactions.

*Animals with a genetic constitution as cited in the second article shall not be used for subsequent breeding."*³

At first instance, the Oslo District Court in 2022 found in favour of the NSPA. They agreed that any future breeding of both Cavaliers and English Bulldogs was unlawful due to the high predisposition of these breeds to significant health issues, such as Chairi-like malformation for the Cavalier and brachycephalic obstructive airway syndrome (BOAS) for the Bulldog. The NKK appealed against this ruling to the Oslo Court of Appeal who in turn upheld the breeding ban for Cavaliers but overturned the District Court's ban on breeding bulldogs. Both parties then submitted appeals to the Supreme Court against the Appeal Court's ruling; the NKK appealed the decision to uphold the Cavalier breeding ban and the NSPA appealed against the decision not to implement a ban on breeding Bulldogs.

In giving their judgment, the Supreme Court unanimously upheld the decision of the Court of Appeal and agreed the breeding of purebred

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² HR-2021-1975-S, (case no. 20-143891SIV-HRET), (case no. 20-143892SIV-HRET) and (case no. 20-143893SIV-HRET). An English translation of this case is available at: <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2021-1975-s.pdf>

³ S. 25 Animal Welfare Act (2009)(Norway). Available at: <https://www.regjeringen.no/en/dokumenter/animal-welfare-act/id571188/#:~:text=%25%20&text=Breeding%20shall%20encourage%20characteristics%20which,well%20and%20have%20good%20health.>



Cavaliers should be banned due to the significant health issues these dogs experience. Furthermore, due to the significant inbreeding of these dogs over several generations, there was no reasonable prospect for developing any framework that could allow for the safe breeding of future generations of purebred Cavaliers. The decision of the court does not provide an outright ban on any breeding from a Cavalier and therefore a purebred Cavalier may still be used in breeding provided the dog it is mated with is not also a purebred Cavalier.

With respect to the Bulldog, the Supreme Court felt that whilst there were indisputable welfare issues with the breed, it was safe to continue breeding Bulldogs provided this is done within a clear framework which ensures breeding is carried out responsibly and done in a way that minimises the incidence of dogs being bred with extreme conformations. This framework includes carrying out all health testing and screening as set out by new guidelines for the breed provided by the NKK. Any breeding of Bulldogs which is outside of this frame-

work would be regarded as illegal.

The verdict by the Norwegian Supreme Court is seen as a significant victory by animal welfare activists who are concerned by the continuing and growing demand for dogs with extreme conformations. It shows a willingness on the part of the Norwegian Courts to exercise their discretion when interpreting the Norwegian Animal Welfare Act and, in particular, to apply the protections under section 25 to safeguard the welfare of future generations of dogs.

To what extent this verdict will influence the regulation of pedigree dog breeding in other countries remains to be seen, however the case has received widespread media attention across Europe and there are similar calls in the UK for future progeny to be given protection under the Animal Welfare Act 2006 (AWA). In addition, there are calls for amendments to be made to strengthen schedule 6.6(5) of the Animal Welfare (Licensing of Activities Involving Animals (England) Regulations (2018) (LAIR) concerning the welfare of dogs involved in

breeding which currently states that:

"No dog may be kept for breeding if it can reasonably be expected, on the basis of its genotype, phenotype or state of health, that the breeding from it could have a detrimental effect on its health or welfare or the health or welfare of its offspring"⁴

The popularity of dog breeds with extreme conformations, such as the Cavalier and the Bulldog, continues to rise at an alarming rate⁵. Concern over this increasing trend and current dog breeding practices has led The All-Party Parliamentary Group on Animal Welfare (APGAW) to undertake a review of current dog breeding practices in England and, in particular, to consider the adequacy of the AWA and LAIA Regulations to govern these. APGAW is working with stakeholders from across the spectrum of the canine welfare community including leading members of the veterinary profession, the Kennel Club, animal welfare charities and members from our own Legal Advisory Group on Extreme Conformation in Dogs⁶ (LAGEC-Dogs) and further details from this review should be provided in early 2024.⁷

⁴ Animal Welfare (Licensing of Activities Involving Animals)(England) Regulations 2018. Available at: <https://www.legislation.gov.uk/ukdsi/2018/9780111165485>.

⁵ In excess of 11,500 English Bulldogs and 42,500 French Bulldog puppies were registered with the Kennel Club in 2022. See: <https://www.thekennelclub.org.uk/media/5989/quarterly-breed-stats-utility.pdf> for further details.

⁶ <https://www.alaw.org.uk/companion-animals/extreme-dog-conformation/#:~:text=Our%20aim%20is%20to%20inform,are%20not%20a%20campaigning%20organisation.>

⁷ For further information see: <https://APGAW.org/2023/07/16/APGAW-leads-on-dog-breeding/>.

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