

# Undercover evidence: The use of covertly filmed footage as evidence in animal welfare prosecutions

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Every so often, a news story about an apparent case of animal abuse provokes such a strong public reaction that politicians and decision-makers are forced to respond. The outpouring of public disgust, outrage, and sometimes anger, is so politically powerful because it is seen to come, not only from people who already support animal causes, but from people with no previous involvement. Such news stories have historically played an important role in expanding the supporter base for animal welfare groups. Without the prompt of the emotional response, most people are simply too busy to turn their minds towards ethical questions.

Such news stories are, of course, critically dependent on filmed footage. Pictures (and particularly moving pictures) have a power to prompt emotional responses from the public in a way that written descriptions very rarely do nowadays. If the public conscience is to be pricked, it is therefore vital that campaigners be able to obtain filmed footage, including from laboratories, intensive farms and other places from which the public are normally kept out.

Once the footage has been obtained, the footage may appear to show, not only lawful uses of animals, but also

abuses that contravene the criminal law. In such cases, there is likely to be public clamour for prosecutions to be brought, to assuage the strong sense that society needs to condemn, and thus disclaim responsibility or approbation for, the conduct in question. But to what extent, if at all, does the way that filmed footage was obtained affect its admissibility as evidence to support a prosecution?

That is a question that has recently come to the fore again, as a result of the filming of the treatment of animals at an Essex slaughterhouse.

An individual animal rights supporter had entered a slaughterhouse premises and placed a CCTV camera there with a view to obtaining footage of the slaughtering process. But the footage, when it was viewed, in fact revealed much more than that. In particular, it revealed what appear to be multiple examples of breaches of the Welfare of Animals (Slaughter or Killing) Regulations 1995 (“WASK”) and, worse still, examples of the deliberate infliction of suffering (the deliberate infliction of suffering on a captive animal being an offence not only under WASK but also under the Animal Welfare Act 2006). By way of example, the footage appears to show slaughterhouse workers abusing pigs in the slaughter chain by kicking and

punching them, and burning them on their faces with cigarettes.

The individual who obtained the footage passed it on to Animal Aid (a national animal rights organisation), who in turn sent it to the Food Standards Agency (“the Agency”) (the body which enforces WASK) so that the serious concerns raised by the footage could be urgently investigated and prosecutions brought wherever appropriate.

To Animal Aid’s dismay, the Agency refused to investigate the matters revealed by the footage. The Agency explained that prosecutions brought following the Agency’s investigations were brought by the Department for Environment, Food and Rural Affairs (Defra), and Defra had stated that it would not bring prosecutions using “*evidence provided by a third party that it could not obtain under its own*

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*statutory powers*". As to the place where this alleged policy could be found, the Agency referred to a document previously provided to Animal Aid in July 2010 in which Defra had made various suggestions that such evidence could not properly be relied on by Defra because of the Human Rights Act, the Regulation of Investigatory Powers Act and/or other legislation (though the document did not state any definite conclusions about those matters). The Agency's refusal to investigate the matters revealed by the footage received widespread media attention, with Sky News, *The Daily Telegraph*, *The Independent* and the *Daily Mail* being among the media outlets that gave prominent coverage to the story. The coverage generated a considerable amount of public disquiet at the Agency's refusal to investigate and Defra's apparent refusal even to consider bringing prosecutions.

**The Agency's refusal to investigate the matters revealed by the footage received widespread media attention**

Defra's immediate response to this media coverage was to deny that it had in place the policy to which the Agency had referred, thus contradicting the Agency's public

statements. Then, within two weeks of the date when the news story first appeared, Defra and the Agency informed Animal Aid that the Agency would, after all, commence an investigation with a view to possible prosecutions. Animal Aid understands that files have now been submitted to the Crown Prosecution Service ("CPS") (which has now taken over responsibility for the tasks previously performed by Defra's prosecutions team), and decisions on whether and whom to prosecute are currently awaited.

So what is the law on whether or not prosecutions can be brought using videotape evidence obtained by a private citizen acting on his own initiative (i.e. without any instructions or involvement of any State agency)?

The starting point appears to be the principles applied by the Court of Appeal in *Rosenberg*.<sup>1</sup> That case arose out of a long-running dispute between neighbours, during which one neighbour (Mr B) had installed a video camera on the wall of his house to film the goings-on in the garden of his next door neighbour, Ms R. The video footage revealed evidence of drug dealing. Mr B handed the footage to a police officer, and Ms R was subsequently prosecuted and convicted of drug offences. She challenged her convictions on the ground that the video filming of her garden had been in breach of the Regulation of Investigatory Powers Act 2000 ("RIPA"), and that the footage should therefore not have been admitted as evidence against her.

**“ police involvement in any filming carried out by a private citizen was a factor that the trial court could take into account ”**

The Court of Appeal dismissed Ms R's appeal. Section 78 of the Police and Criminal Evidence Act 1984 ("PACE") provided a discretion for the trial court to exclude evidence "if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it". The degree of police involvement in any filming carried out by a private citizen was a factor that the trial court could take into account in deciding to exercise its Section 78 discretion to exclude evidence. On the facts of Ms R's case, however, the police had neither initiated nor encouraged the filming; and, accordingly, their acceptance and use of the video footage provided to them by Mr B did not constitute a breach by them of PACE, RIPA or Article 8 of the European Convention on Human Rights. Thus, there was no reason why the evidence should not be admitted.

As *Rosenberg* illustrates, the fact that a private citizen has obtained particular evidence through covert filming and/or civil trespass is unlikely to itself be sufficient to lead to the exclusion of the footage as evidence at trial, at least where the filming has not been initiated or

<sup>1</sup>R v Rosenberg [2006] EWCA Crim 6, [2006] All ER (D) 127 (Jan).

encouraged by the police or other government agencies.<sup>2</sup> In that regard, it is important to remember that the Human Rights Act applies only to public authorities; it does not apply ‘horizontally’. A decision by the CPS or Defra to bring a prosecution in circumstances where the “evidential test” and the “public interest test” in the Code for Crown Prosecutors were both met could not sensibly be said to in itself constitute a breach of the Human Rights Act.

These principles have been recognised by the CPS in its published guidance on the enforcement of the Hunting Act 2004. The guidance states:

*“No authorisation under RIPA or the Police Act needs to be sought where an NGO ... conducts surveillance for its own purposes. RIPA and the Police Act regulate the activities of public authorities so that those activities do not offend against Article 8 of ECHR.”* (emphasis in the original.)

Accordingly, *“no authorisation would be required where the police neither initiate nor encourage the surveillance even though they may be aware of it”*.

On the other hand, where the police *“are aware of the intention of the NGO to conduct covert surveillance and intend making use of the surveillance product in the event that*

*it reveals evidence of a crime, it would be appropriate to seek an authorisation. This would undoubtedly be the case where the NGO is tasked to conduct the surveillance, whether explicitly or by necessary implication.”* Even in circumstances where an authorisation should have been obtained, however, the fact that one was not obtained does not mean the evidence will automatically be excluded. Rather, *“the fact that the evidence was obtained in breach of a Convention right is a factor which the court will consider when exercising its discretion under section 78 of PACE”*.

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Thus, campaigners wishing to use covert surveillance or similar means to uncover unlawful conduct may wish to be aware of the potential for any prior discussions that they may have with the police (or the RSPCA)<sup>3</sup> about the use of such means to be relied on by a defendant to resist the admission of the evidence against

him. Where, however, there have been no such prior discussions and the footage appears otherwise reliable, it is likely to be admissible. The law therefore strikes a fair balance between: (i) discouraging the police from using relationships with third parties to circumvent the legal restraints which attach to the police’s own investigatory powers; and (ii) enabling prosecutions to be brought where the efforts of journalists or campaigners, carried out independently of government agencies, has revealed criminal misconduct that might otherwise never have been uncovered.<sup>4</sup>

<sup>2</sup> Indeed, there are every year cases of high profile prosecutions being brought following undercover investigations by national newspapers and TV documentary makers, in circumstances where the evidence would almost certainly have been excluded had the same methods used by the journalists been employed by, or with the connivance of, the police.

<sup>3</sup> An interesting question arises (though outside the scope of this article) as to the extent to which it is appropriate to regard the position of the RSPCA as being, for these purposes, analogous to that of the police or other state agencies with law enforcement responsibilities. Pursuant to section 67(9) of PACE, the PACE codes of practice apply, not only to police officers, but also to other persons “who are charged

with the duty of investigating offences or charging offenders”. Such a duty can arise from a private employment contract where one of the things the person is employed to do is to investigate criminal offences (see *Joy v Federation Against Copyright Theft Ltd* [1993] Crim LR 588; and *RSPCA v Eager* [1995] Crim LR 59). It is therefore likely that RSPCA inspectors are bound by the PACE codes, and that courts should therefore be more ready to exclude evidence obtained by the RSPCA in circumstances where it would not have been lawful for the police to have used the same methods, even if the evidence would not have been excluded if obtained by another non-State organisation or individual. The RSPCA is not, however, a “public authority” for the purposes of

s.6 Human Rights Act (see *RSPCA v Attorney General* [2002] 1 WLR 448 at [37(a)]), and it is therefore not required to act compatibly with the Convention rights.

<sup>4</sup> The fact that the evidence is admissible does not, of course, protect individuals or organisations from civil liability for trespass or other torts, or indeed from criminal liability in respect of any offences committed in order to obtain the evidence. Those individuals and organisations may, however, in some circumstances have an arguable defence based on ‘the public interest’, ‘necessity’ or ‘lawful excuse’. Appropriate legal advice should be sought by anyone planning to carry out covert filming or voice recording activity.