

# **Conference on Animal Law, Ethics and Legal Education**

Liverpool John Moores University, School of Law in collaboration with the UK Association of Lawyers for Animal Welfare.

Tuesday, September 5<sup>th</sup> 2017

Time: 9.45 – 4.30 with registration from 9.00am.

Venue; LJMU, Redmonds Building, Brownlow Hill, Liverpool,

Conference aims:

- To examine the interface of law, ethics and the developing academic discipline Animal Law in the UK and elsewhere
- To explore how ethics affect the practical implementation of policy and law in practice
- To share good practice in the teaching and scholarship of Animal Law and Ethics including experience in setting up and running such courses
- To explore the animal welfare implications of Brexit

Programme: (may be subject to limited amendment)

Time	Event
9-9.45	Registration – Room 2.33 (tea/coffee in 2.34)
9.45-10.30	Keynote 1: Room 2.33 Chair: Simon Brooman  Mike Radford, Reader in Animal Law, University of Aberdeen Beyond Bestiality, Bunny-Hugging and Turkey Twizzlers: the increasing development and impact of animal welfare law scholarship.
10.30-11.10	Chair: Simon Brooman Room 2.33  Peter Stevenson, Compassion in World Farming Brexit: Opportunities and Challenges for Farm Animal Welfare
11.15-11.40	Parallel Session 1  Chair: Lorie Charlesworth - Room 101  Anna Marie Brennan Exploring the Classification of Animals as Combatants/Soldiers under the Law of Armed Conflict      Chair: Nirmala Pillay - Room 138  Bridget Martin The role of trophy hunting in the protection of elephants and rhinos: a possible way forward

11.45-12.10	Parallel Session 2	
	Chair: Lorie Charlesworth – Rm 101  Jamie Murray Placing the Animal in the Dialogue Between Law and Ecology	Chair: Darren Calley - Room 138  Gareth Spark Liability for killing a (non-wild) animal without proof of suffering
12.10-12.55	Lunch - A vegan lunch will be provided – Room 137	
12.55-1.20	Parallel Session 3	
	Chair: Jamie Murray Rm 101  Heather Dooley, Alex Nolan-Webster and Lauren Sas The effects of studying Animal Law	Chair: Darren Calley – Rm 138  Michael Bowman Animal Welfare in International Law
1.25-1.50	Parallel Session 4	
	Chair: Alex Pimor Rm 101  Samantha Hurn Who lets the dogs out?: Assessing the context for, and implications of, conflicting interpretations of Romania's stray dog management legislation.	Chair: Jim Hollinshead Rm 138  Carol Gray Is a paternalistic approach by the veterinary professional justified during discussions regarding consent to veterinary treatment?
1.55-2.20	Parallel Session 5	
	Chair: Alex Pimor Rm 101  Debbie Rook, Northumbria University Animal Law in the Law School Curriculum	Chair: Jim Hollinshead Rm 138  Joe Wills Killing Animals, the Harm Principle and the Criminal Law
2.25-2.50	Parallel Session 6	
	Chair: Nirmala Pillay Rm 101  Marie Fox and Sue Westwood Companion Animals as Family Members	Chair: Jamie Murray Rm 138  Darren Calley A Non-Utilitarian Account of Animal Protection Laws

2.50-3.05	Tea Break – Room 2.33 3.05 The Work of ALAW – Paula Sparks
3.10-3.30	Chair: Simon Brooman Rm 2.33  A skype conversation with Kathy Hessler - Clinical Professor & Director, Animal Law Clinic Center for Animal Law Studies Lewis & Clark Law School, USA Animal Law and Education in the United States
3.35-4.20	Keynote 2: Chair: Simon Brooman Rm 2.33  Chris Butler-Stroud, Chief Executive of Whale and Dolphin Conservation Science, law, and ethics in the sovereignty of whaling management: inherent tensions at the fragile heart of a quasi-legal debate
4.20-4.30	Closing remarks and the future

#### About the keynote speakers:

Mike Radford is Reader in the School of Law at the University of Aberdeen. He has taught animal welfare law since 1992, formerly at the University of East Anglia and subsequently at Aberdeen. Mike has worked extensively with politicians, officials, enforcement agencies, veterinarians, and NGOs in the development of legislation across the UK and internationally. He has also undertaken considerable teaching for those engaged in professions associated with animal welfare. Mike is presently a trustee of: Dogs Trust; the Association of Lawyers for Animal Welfare; the Humane Slaughter Association; and the Universities Federation for Animal Welfare. He is also a member of the Westminster All-Party Parliamentary Group for Animal Welfare and, at Holyrood, the Scottish Parliament's Cross Party Group on Animal Welfare. He has formerly been a trustee of the PDSA and a member of: the RCVS Animal Welfare Science, Ethics and Law Board; the Companion Animal Welfare Council; and the Advisory Council on the Welfare Issues of Dog Breeding. Mike was appointed OBE in 2008 for services to animal welfare law. His present work focuses principally on the breeding and supply of companion animals, particularly dogs, and the issue of enforcement generally.

Chris Butler Stroud, CEO Whale and Dolphin Conservation, is responsible for the overall delivery of Whale and Dolphin's objects as a charity operating around the globe. Chris has been involved in delivering most aspects of Policy, including participation at the International Whaling Commission, (for many years as a specialist advisor to the UK Government), CITES, UNEP SPAW (Caribbean) and the Convention on Migratory Species,

amongst others. Whilst at WDC, Chris has served for twelve years as a Board member (including as Chairman and Vice-Chairman) of the UK based Wildlife and Countryside Link (WCL), a registered charity, coordinating the activities of over 40 wildlife and countryside NGOs (collectively with a membership of over eight million supporters) in their policy delivery with the UK Government.

## Cost.

Full day conference attendance including lunch £45. Reserve a place at the conference at <https://www.ljmu.ac.uk/conferences/animal-law-ethics-and-legal-education>

Full Conference Venue address:	Accommodation
Liverpool John Moores University School of Law Redmonds Building Liverpool L3 5UG	A list of local accommodation within easy walking distance of the venue can be found at the website address above.

## Brexit: Challenges and opportunities for farm animal welfare

Peter Stevenson  
Compassion in World Farming



### Core objective 1

**Brexit should not lead to dilution of UK animal welfare standards**



## Government does not intend to incorporate Art 13 TFEU into UK law

- Art 13 recognises animals as “sentient beings” it is one of the cornerstones of UK law & policy on animal welfare
- Art 13 requires the Government & other public bodies in formulating & implementing policy in a number of specified areas including agriculture, fisheries, transport, research & technological development to “pay full regard to the welfare requirements of animals”
- Defra argues that because AW Act 2006 already includes good protections, Art 13 is unnecessary
- This is misleading. AW Act governs people’s relationships with animals while Art 13 places a duty on Government & other public bodies
- Repeal Bill must be amended to include Art 13



## Core objective 2: Improving animal welfare

Michael Gove has said “We need to maintain, and where possible enhance, environmental and animal welfare standards”. BBC Radio 4, Farming Today. 19 June 2017

Theresa May: “we are committed to maintaining and, where possible, improving standards of welfare in the UK, while ensuring of course that our industry is not put at a competitive disadvantage.” Prime Minister’s Questions on 8 February 2017



## Trade issues

- PM's proviso – "while ensuring that our industry is not put at a competitive disadvantage" – is crucial. If UK is unable to protect farmers from being undermined by lower welfare imports, farmers are likely to resist welfare improvements & may even press for existing welfare standards to be lowered.
- So, when negotiating new trade agreements UK must insist on inclusion of a clause permitting it to require imports to meet UK AW standards
- Or UK could press for ability to place differential tariffs on imports. Imports that do not conform to UK AW standards would be subject to tariffs sufficiently high to safeguard UK farmers; imports that meet UK welfare standards would benefit from a low or zero tariff.



## Trade issues: WTO

- Where UK does not conclude a trade agreement, trade will be governed by WTO rules
- Commonly assumed that WTO rules do not permit trade restrictions on AW grounds
- But this ignores WTO case law of last 16 years – this indicates countries can require imports to meet welfare standards equivalent to their own provided there is no element of discrimination that favours domestic producers & no discrimination between different would-be exporting countries.



## WTO case law

- In *US-Shrimp* WTO Appellate Body concluded that conditioning market access on the adoption of a programme comparable in effectiveness to that of the importing country is permissible under WTO Article XX which sets out General Exceptions to WTO's prohibition on trade restrictions (1)
- One of the Exceptions relates to public morals. In *EC-Seal Products* Appellate Body ruled that in the EU AW is a concern that comes within the field of public morals (2)
- WTO Dispute Panels & Appellate Body have stated that member countries have the right to determine level of protection they consider appropriate to achieve a given policy aim e.g. as regards public health, prevention of deceptive practices or public morals (3)



Significance of these rulings has been recognised by Defra Minister of State George Eustice who has said: "there are legal precedents and case law to support the use of ethical bans on certain practices ... I do not believe that anything along the lines that we would propose will cause any difficulty whatever with WTO rules" (1)



**Around 50% of UK sows are placed in farrowing crates a few days before giving birth & are kept there until the piglets are weaned at 3-4 weeks of age**



**These are so narrow the sow cannot even turn round**



Farrowing crates should be replaced by free farrowing systems

Piglet mortalities in loose farrowing systems can be as low as or lower than in crates

Several alternatives to farrowing crates are available – including PigSAFE developed by Scotland's Rural College & Newcastle University



© PigSAFE



Government should support move away from farrowing crates:

- Public procurement
- Farm support payments to help with part of capital cost &, for transitional period, with part of extra running costs
- Ultimately use of farrowing crates should be banned, with farmers being given a reasonable phase out period.



© 360° Freedom Farrower™



[ciwf.org](http://ciwf.org)

## Use of enriched cages for laying hens should be ended

48% of UK egg production is in enriched cages



- Enriched cages provide only minor welfare improvements compared with barren cages
- All UK's major supermarket chains have either stopped using eggs from hens kept in enriched cages or have pledged to do so by 2025
- Public sector should no longer use enriched cage eggs
- UK should emulate Germany which has banned enriched cages from 2025



**UK dairy sector is industrialising – cows are being taken off the fields & confined indoors all year round in ‘zero-grazing’ systems:**



**We need to reverse this trend  
(1) & (2)**

Post CAP subsidies should only be available for pasture-based farmers  
Public sector bodies should only use milk & dairy products  
from pasture-based herds



**Since 2004 EU law has required egg packs to be labelled as to farming method**



By law egg packs must be labelled:

- ‘Eggs from caged hens’
- ‘Barn eggs’
- ‘Free range eggs’ or
- ‘Organic eggs’

This has been an important factor in the move away from cage eggs. 50% of UK eggs are now free range



Do these products




Come from her?



Or her?



**You generally have no way of knowing**

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Law must require milk & dairy products to be labelled as to farming method so that consumers can play their part in supporting pasture-based dairying





Zero-grazed

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**Meat too – including that produced intensively - must be labelled as to farming method so that consumers can help drive enhanced welfare standards**



Free range



Intensive indoors



Extensive indoors

**Mandatory labelling as to farming method would stimulate the market for higher welfare products**



## **Public procurement: taking the lead, setting the standard**

- Defra public procurement policy only requires meat, milk & eggs to reach minimum legislative animal welfare standards
- Public sector bodies should, when buying meat, dairy products & eggs, use their buying power to augment the market for food produced to high nutritional, environmental & animal welfare standards



## Need to emulate Scotland on public procurement law

- Procurement Reform (Scotland) Act 2014
- Section 15: Public bodies must prepare a procurement strategy that includes a statement on how procurements involving the provision of food will “promote the highest standards of animal welfare”



## Public procurement: cost implications of adopting higher standards

- **Some US hospitals** use meat produced more sustainably & to higher nutritional & animal welfare standards but reduce the quantity of meat served in their meals (1) & (2)
- Savings made by using less meat can cover the extra cost of buying higher quality meat
- Two ‘wins’: (i) support for sustainable, high welfare farming, (ii) healthier diets for patients
- **Copenhagen House of Food:** Its goal is to increase the quality of the meals which the municipality offers its citizens & to create a healthy eating culture
- 75% of public meals served in Copenhagen are organic (3)
- By carefully balancing the contents of meals, they have been able to achieve a high organic level without increasing costs



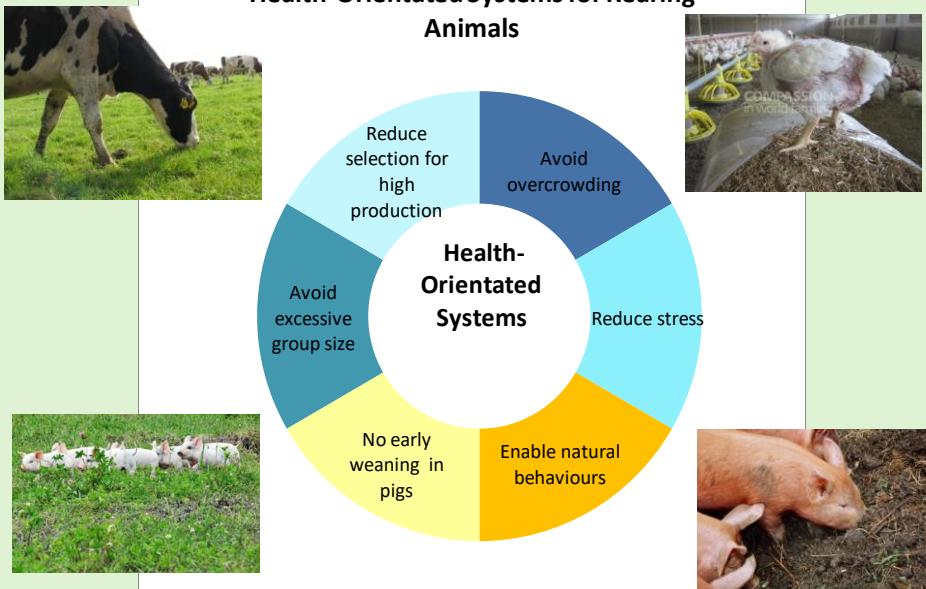
## Defra should ban routine preventive use of antibiotics – it no longer needs to wait for the EU

- Industrial livestock production tends to rely on routine use of antibiotics to prevent the diseases that are inevitable when animals are confined in overcrowded, stressful conditions: O'Neill Review on antimicrobial resistance, 2015 (1)
- Overuse of antibiotics in industrial animal production contributes significantly to antibiotics resistance in humans (2)
- Animals account for about 40% of antibiotic use in the UK (3)
- Need to “develop health-orientated systems for rearing of animals” The Lancet Infectious Diseases Commission, 2013 (4)



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### Health-Orientated Systems for Rearing Animals



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## Designing post CAP farming support

- Farmers should be rewarded by the market for outputs, with taxpayers' role being to provide funding for public goods that the market cannot – or can only partially - deliver such as high environmental & animal welfare standards
- We propose a two tier system of farm support payments to incentivise high animal welfare standards



## First tier farm support payments

- First tier will be for farmers who achieve welfare standards that are much higher than the current norm
- Government will not wish to create a new set of standards for this purpose. Evidence that a farmer is attaining welfare standards that qualify for funding could be provided by membership of schemes with genuinely higher welfare standards & effective monitoring arrangements, such as *RSPCA Assured*
- Not all parts of *RSPCA Assured* would attract funding e.g. funding for *RSPCA Assured* egg producers could not be justified as free range egg production is well supported by the market.
- But broiler producers who are *RSPCA Assured* members would receive funding as only 1-2% are members as *RSPCA Assured* broiler standards are – rightly - demanding



## First tier farm support payments: exceptions

- *RSPCA Assured* pig farmers would not receive funding if they have been given permission to tail dock
- *RSPCA Assured dairy* farmers would not receive funding if their cows are not kept on pasture during the grass-growing season
- Nor should funding be available for fish farming as this has inherently low welfare standards



## Second tier farm support payments

- Farmers who are members of a scheme recognised for Level One funding would qualify for additional support (Level Two funding) if they achieve specified high welfare standards that go beyond those of the scheme
- e.g. pig farmers who are able to bring their pigs to slaughter without tail biting or tail docking could receive additional support



## Defra should ban live exports for slaughter or fattening

Once UK is no longer bound by EU rules, it will be free to ban live exports - provided that in any new trade agreement with EU it insists on inclusion of clause permitting it to do so

Should now introduce Bill to ban live exports for slaughter or fattening to come into force the day after UK leaves EU



### Will live exports ban be compatible with WTO rules?

- Ban would breach GATT Article XI – prohibits restrictions on imports or exports
- Would need to justify ban under Art XX – General Exceptions – which permits measures:
  - “(a) necessary to protect public morals;
  - (b) necessary to protect human, animal or plant life or health”
- EC – Seal Products: animal welfare can be a matter of public morals



## **Would need to show ban is “necessary” to protect public morals**

- WTO challenge would argue that UK could achieve its objectives regarding protection of public morals by adopting the less restrictive measure of placing a maximum limit on overall journey times
- UK would need to be able to show that public opposition to live exports does not stem solely from concerns about length of the journeys. Opposition also arises from:
  - poor enforcement of EU legislation on welfare during transport in many Member States
  - concern that exported animals may be reared and/or slaughtered to lower standards than those that prevail in UK



## **Art XX prohibits measures being applied in a way that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail**

- UK would not wish to ban cross-border trade between Northern Ireland (NI) and Republic of Ireland (ROI)
- UK would need to show why exception permitting live exports from NI to ROI does not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”
- Journeys from NI to ROI usually much shorter than live exports from the UK to other countries or from other parts of the UK to ROI – so would not undermine & could be reconciled with objective of UK ban of protecting public moral concerns about animal welfare
- Farming & food industries of NI & ROI are highly integrated - UK could reasonably argue that the same conditions do not prevail in ROI as regards live imports from NI as prevail in other countries to which UK exports live animals”



## Need to expand Agriculture Bill into a Good Food and Agriculture Bill

- Need for integrated approach to the objectives of food & farming e.g. farming livelihoods, environment, dietary health, social equity, antibiotics resistance, climate change, animal welfare
- Scotland is proposing a Good Food Nation Bill



- Westminster Bill should clearly set out its statutory objectives e.g.
  - the farming livelihoods objective
  - the environment and natural resources objective
  - the dietary health objective
  - the climate change objective
  - the antimicrobial resistance objective
  - the animal welfare objective
- This approach is taken in Acts such as Equality Act 2010, Courts and Legal Services Act 1990, Financial Services Act 2012, Well-Being of Future Generations (Wales) Act 2015
- Compassion in World Farming has drafted suggested main clauses of a Good Food and Agriculture Bill



# A ‘duty-based’ approach to animal rights as an alternative to a utilitarian approach to suffering

Dr Darren Calley,  
The School of Law,  
The University of Essex

## What is a ‘duty-based approach’?

The ‘Duty-Based’ approach is a mixture of Hohfeldian right-duties analysis, underpinned by Feinberg’s interest theory of rights, with a bit of Tort theory thrown in

## Hohfeld's theory in a nutshell

"if 'A' has a right-proper to 'x' against 'B' then 'B'  
is under a duty to provide 'x' to 'A'"

The 'right-duties' symbiosis is often misconstrued  
though...

## Feinberg's Interest theory (in a nutshell again)

Basic premise: the (Kantian) logic that rights can only be endowed onto conscious individuals who can choose to exercise those rights is flawed. As Regan has also already demonstrated, this would rule out humans who lack capacity (the very young, the mentally impaired, etc) so this is not a sound basis for any system of rights. This focuses on procedure and protocol and ignores the content of the right.

## Feinberg's Interest theory (in a nutshell again)

Instead, Feinberg (and later Kramer, and Cochrane) focuses on the interest from a different perspective.

Does the putative rights holder have a sufficient interest in the content of the right? Once this 'interest' has been identified as sufficient then this could fall into the category of being a 'potential right' – but it is not enough, on its own, to be a 'right-proper' We need to introduce duties into the mix.

**BUT...not all duties confer rights,  
and not all rights impose duties:**

"The right to life" (art 2 ECHR) is there an all-encompassing duty on us all to uphold this right?

No, even those tasked with upholding this right must only do so in limited circumstances (*Osman v UK, Van Colle v Home Secretary*)

## When do duties translate into rights proper?

Positive obligations ('a duty to provide for') –  
proximity? Foresight?

*Osman v UK* – "when a real and immediate risk is posed to a known individual"

## When do duties translate into rights proper?

Negative obligations ('a duty to refrain from') – policy?  
Despite no positive obligation to protect the life of strangers being imposed upon us under art 2, ECHR it is obvious that the basis for a negative duty not to kill or cause harm is present. The basis of this is simply the public policy that to kill and cause harm is a wrong *per se*.

## Can this be translated into animal law?

Yes, easily. All of the philosophical traditions (even those that are ‘anti-animal’) seem to agree that animal cruelty debases humans (Kant, Aquinas). Ergo, it would be contrary to public policy to allow the wanton cruelty of animals: this is clearly evidenced by the numerous laws which prohibit this.

## Are we attempting to rewrite history?

No, all early pieces of legislation had duties at their heart – Erskine (positive and negative), Martin (negative), Pease (positive and negative)

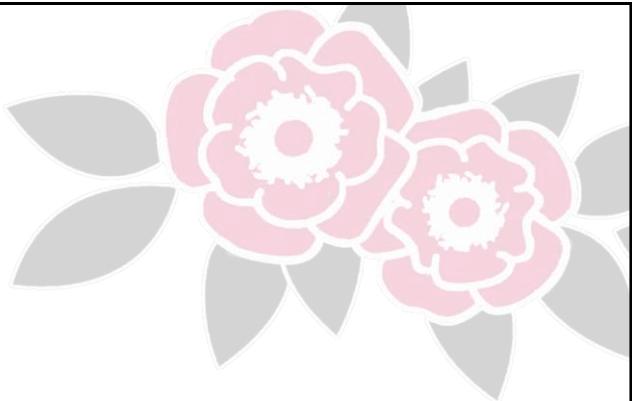
## Advantages of the duty-based approach

Certainty and simplicity: This approach reduces the need for endless metaphysical debates about the nature of animals and replaces it with a couple of simple questions.

## Advantages of the duty-based approach

Incremental development – it is establish legal wisdom that once legal duties are imposed the law should expand the categories of duty incrementally by analogy with existing duty scenarios (Lord Bridge in *Caparo Industries*, citing Brenan J, in *Sutherland*.)

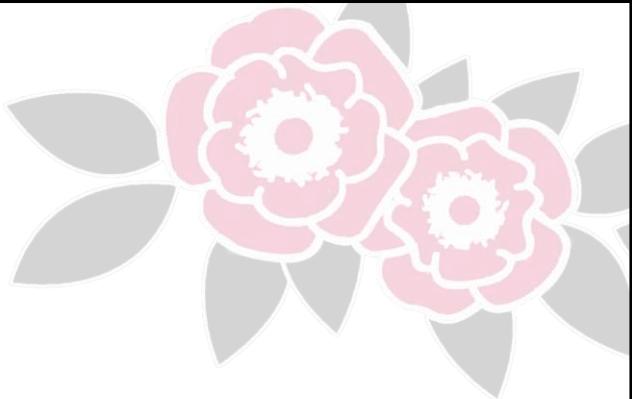
# **Elephants and Rhinos: ‘Trophy Hunting’**



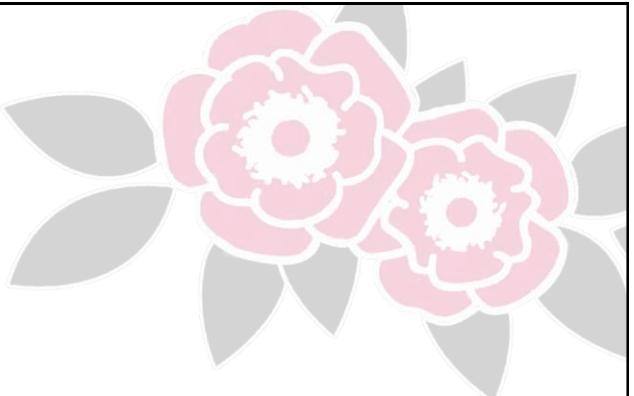
**Bridget Martin  
Senior Lecturer in Law  
Lancashire Law School  
University of Central Lancashire**

# **Elephants**

**Forest elephants – Africa  
Savannah elephants – Africa  
Asian elephants**



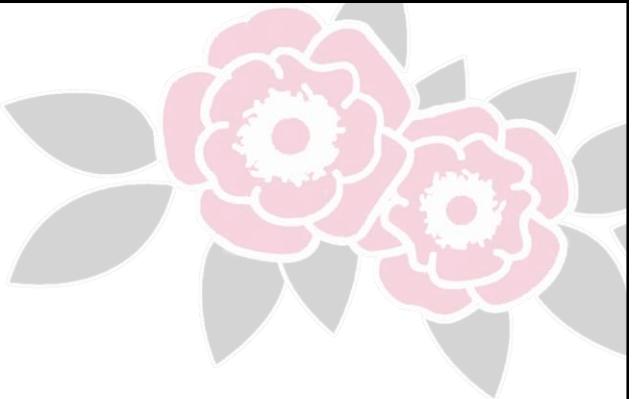
# Rhinoceroses



**Southern White rhinos – Africa  
Black rhinos – Africa  
Asian rhinos – three species  
(not hunted)**

**Eastern Black rhino (not hunted)** © Chester Zoo

# CITES



## **Convention on Trade in Endangered Species 1973**

- Regulates trade in endangered species, where trade is permitted, permits are required.
- Permits are required to export hunting trophies.

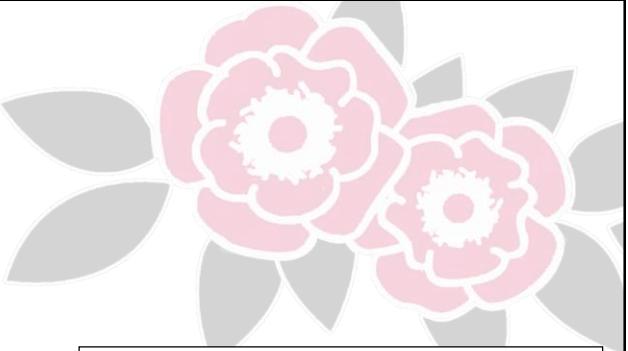
# CBD

## Convention on Biological Diversity 1992

Its first and second objectives are:

1. The conservation of biological diversity; and
2. The sustainable use of its components

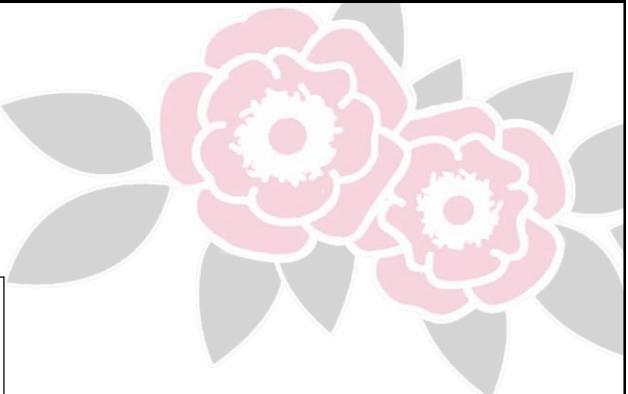
- Here we must think of the animals as 'commodities'
- Both elephant ivory and rhino horn are more valuable than gold.
- The illegal trade in elephant ivory and rhino horn threatens these animals with extinction.



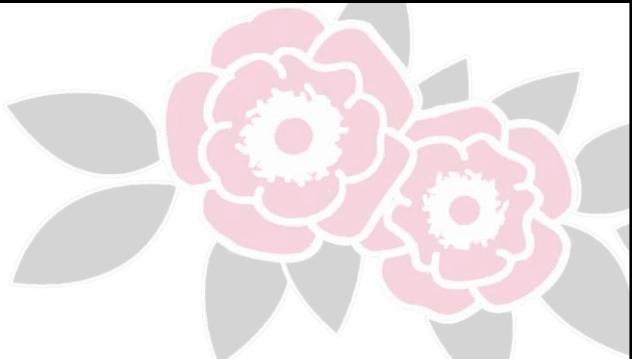
### Can hunting trophies be considered 'sustainable use'?

- A number of factors must be taken into account:
  - The first objective of the treaty, the conservation of biological diversity, is concerned with ecosystems and genetic diversity.
  - A use will not be sustainable if it has a negative impact on either of these key factors.

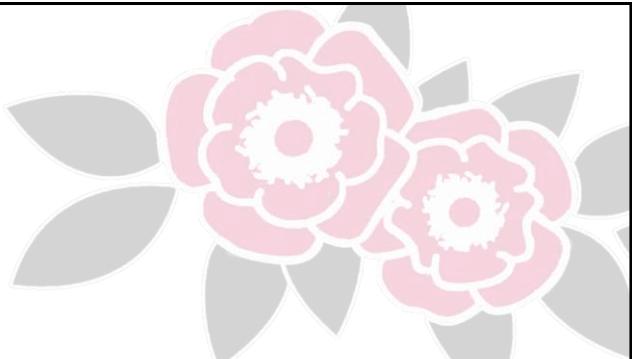
## What is 'trophy hunting'?



### Positive or negative? - Operation Campfire



## **Elephants: Trophy hunting is never justified!**



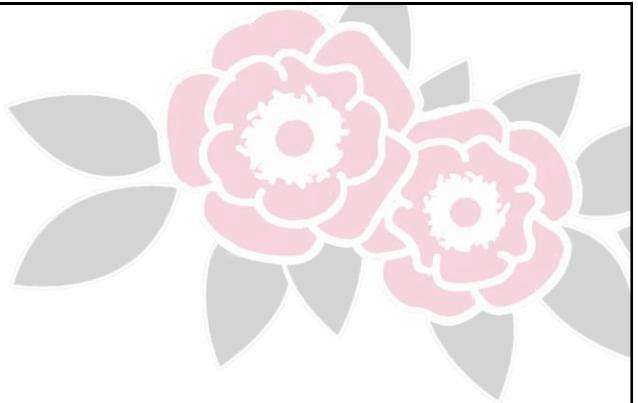
## **Rhinos: Trophy Hunting Can Be Beneficial**

- 1968 – white rhino trophy hunting resumed in South Africa when there were only 1800 rhinos**
- 2011 – numbers had increased to 18,800**
- Recovery due to trophy hunting!**

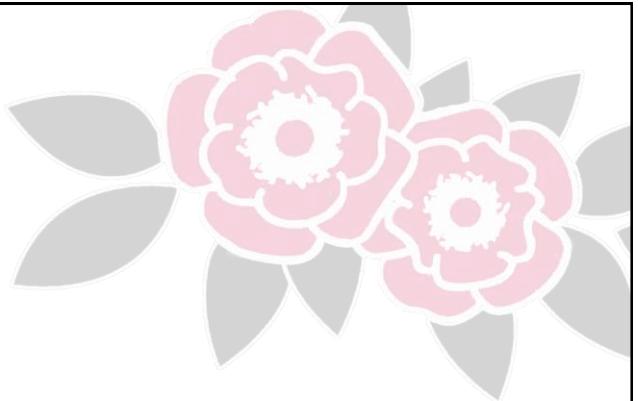
**Rhinos:**  
**Trophy hunting can  
be beneficial, but it  
can all go horribly  
wrong!**



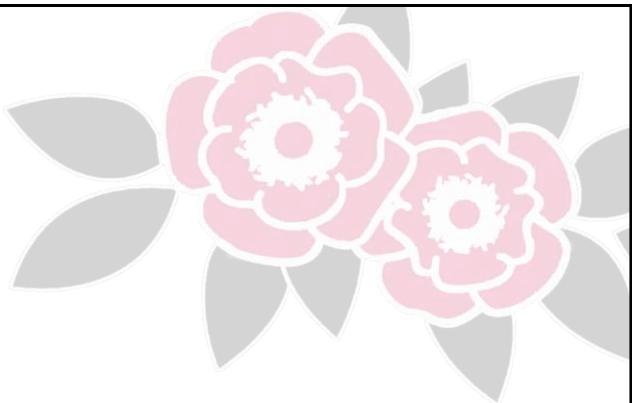
**South Africa and the  
Vietnamese ‘pseudo-hunters’**



**Elephants & Rhinos:  
Genetic Diversity**



# Any Questions?





Is a paternalistic approach by the veterinary professional justified during discussions regarding consent to veterinary treatment?

Carol Gray  
PhD candidate  
School of Law

# The plan

- consent in medicine
- consent in medical law
- consent in veterinary medicine
- is paternalism justified?

# Principles of biomedical ethics

- ① Autonomy
  - Non-maleficence
- ② Beneficence
  - Justice

# Professional ethical guidance

- a The doctor and patient make an assessment of the patient's condition, taking into account the patient's medical history, views, experience and knowledge.
- b The doctor uses specialist knowledge and experience and clinical judgement, and the patient's views and understanding of their condition, to identify which investigations or treatments are likely to result in overall benefit for the patient. The doctor explains the options to the patient, setting out the potential benefits, risks, burdens and side effects of each option, including the option to have no treatment. The doctor may recommend a particular option which they believe to be best for the patient, but they must not put pressure on the patient to accept their advice.
- c The patient weighs up the potential benefits, risks and burdens of the various options as well as any non-clinical issues that are relevant to them. The patient decides whether to accept any of the options and, if so, which one. They also have the right to accept or refuse an option for a reason that may seem irrational to the doctor, or for no reason at all.



# Did medical law catch up?

- Bolam v Friern Hospital Management Committee 1957
- Sidaway v Board of Governors of Bethlem Royal Hospital 1985
- Montgomery v Lanarkshire Health Board 2015



consent to veterinary treatment  
is not the same  
WHY NOT?



- Variety of caregivers
- Role of animal (species)
  - Money!



# professional ethical guidance

"..... ABOVE ALL, my constant endeavour will be to ensure the health and welfare of animals committed to my care."



<p><b>SPECIMEN FORM OF CONSENT FOR ANAESTHESIA, CLINICAL AND SURGICAL PROCEDURES</b></p> <p>Owner's Name _____ Address _____ _____</p> <p>Telephone: Home _____ Work _____ Mobile _____</p> <p><b>NB:</b> Please complete the section below if you have authority to act on behalf of the owner</p> <p>Name _____ Address _____ _____</p> <p>Telephone: Home _____ Work _____ Mobile _____</p> <p>Species and Breed _____ Name _____ Colour _____ Age _____ Sex M ____ F ____ Neutered M ____ Neutered F ____ Microchip/Tattoo/Brand _____</p> <p>Details of the Operation/Procedure _____ _____</p>	<ul style="list-style-type: none"><li>• I hereby give permission for the administration of an anaesthetic to the above animal and to the surgical or other procedures detailed on this form together with any other necessary has been explained to me.</li><li>• The nature of these procedures and of other such procedures as might prove necessary has been explained to me.</li><li>• I understand that there are some risks involved in all anaesthetic techniques and surgical procedures.</li><li>• I accept that the likely cost will be as detailed on the [attached] estimate and that in the event of further treatment being required or of complications occurring which will give rise to additional costs, I shall be contacted as soon as practicable so that my consent to such additional treatment and costs may be obtained.</li><li>• In the event that the veterinary surgeon is unable to contact me on the numbers provided, I understand the veterinary surgeon will act in the best interests of my animal.</li><li>• In order to protect the welfare of my animal, in the unlikely event of an emergency, or where additional pain relief or sedation may be required, I understand the veterinary surgeon may decide to use medicines that are not authorised for use in [state species].*</li></ul> <p>Notes and Instructions: _____ _____</p> <p>The cost of the procedures described above (tick as appropriate)</p> <p><input type="checkbox"/> will be: £_____ OR <input type="checkbox"/> will be within the range: £_____ to £_____</p> <p>Inclusive of: VAT _____</p> <p><input type="checkbox"/> If you are NOT the owner, please tick the box to confirm you have the authority to act on behalf of the owner of the animal described above</p> <p><input type="checkbox"/> Please tick the box if you are UNDER the age of 18</p> <p>*Signature: _____</p> <p>Date of Signature: _____</p> <p><small>*A copy of the form should be provided to the person signing and the original retained by the practice</small></p>
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# Deciding for others

- Who decides?
- What if there is disagreement?



# Legal guidelines

Animal Welfare Act  
2006

Animal Health Act  
1981



Animal &  
Plant Health  
Agency

**Return of expenditure incurred  
and prosecutions taken under  
the Animal Health Act 1981 and  
incidences of disease in imported  
animals for the year 2016**

Presented to Parliament pursuant to section 80 of  
the Animal Health Act 1981.

# beneficence



autonomy



## Paper for Animal Law Ethics and Legal Education conference LJMU 5<sup>th</sup> September 2017

**Title: *Is a paternalistic approach by the veterinary professional justified during discussions regarding consent to veterinary treatment?***

**Slide 2** – plan for talk, setting the scene

**Slide 3** – introduction to the principles as applied to consent

**Autonomy** is variously defined as liberty, dignity, free will, independence and critical reflection,<sup>1</sup> with philosophical underpinnings in both Kantian deontology and in Millian utilitarianism<sup>2,3</sup>. Kant does not separate autonomy from morality, based on the principle that all rational people have the capacity to act autonomously, but only those who act morally do so. In the utilitarian views of Hume and Mill,<sup>4</sup> individual liberty is the key and the Millian interpretation of autonomy is often regarded as the more suitable for healthcare, as it is based on self-interest and self-knowledge, with the only reason for overruling this personal freedom being prevention of harm to others.<sup>5</sup> The normative view of autonomy in healthcare upholds the rights of human patients to make decisions about their own treatment, but also gives it a value that is worth protecting; some authors claim that it is a value rather than a right.<sup>6</sup>

Beauchamp and Childress<sup>7</sup>, regard autonomous action as firstly, intentional; secondly, resulting from understanding, and thirdly, carried out free from controlling influences, which tie in comfortably with the foundations of informed consent, which Faden and others<sup>8</sup> categorise as follows:

1. The patient understands the proposed treatment
2. The patient is free from external control by others
3. The patient intends to make a decision
4. The patient gives authority for treatment

In medicine, the move to an autonomy-based model of consent followed a similar move in research, with increasing amounts of information provided to both research participants and patients.

**Beneficence becomes paternalism**

The traditional principles of medicine were “doing good for the patient, the avoidance of harm and the protection of life.”<sup>9</sup>

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<sup>1</sup> A Maclean, *Autonomy, Informed Consent and Medical Law* (Cambridge University Press 2009, p10).

<sup>2</sup> TL Beauchamp and JF Childress, *Principles of Biomedical Ethics* (7th edn, 2013, p340).

<sup>3</sup> M Donnelly, ‘Autonomy: Variations on a Principle’ [2010] Healthcare Decision-making and The Law: Autonomy, Capacity and the Limits of Liberalism 10, p17.

<sup>4</sup> Maclean (n 1, pp14-28).

<sup>5</sup> Donnelly (n 3, p21).

<sup>6</sup> M Sjostrand and others, ‘Paternalism in the Name of Autonomy’ (2013) 38 Journal of Medicine and Philosophy pp710-711.

<sup>7</sup> Beauchamp and Childress (n 39) p104.

<sup>8</sup> RR Faden, TL Beauchamp and NMP King *A History and Theory of Informed Consent*. (Oxford University Press 1986) p278

<sup>9</sup> Donnelly (n 40) p11.

In medicine, the beneficence model predominated until the middle of the 20<sup>th</sup> Century (Will 2011). The beneficence model was based on maximum physician autonomy, with minimal patient involvement. It derived from the Hippocratic tradition that physicians were ethically obliged to act for the benefit of patients, because only physicians had the requisite knowledge and skills to decide what *would* benefit patients.

Beauchamp and Childress (2013, p202) describe two types of beneficence. "*Positive beneficence*" obliges agents to provide benefits, whereas "*utility*" obliges agents to balance benefits and drawbacks to produce the best overall results. Utility differs from classic utilitarianism, in that it can be constrained by other principles.

Beneficence has become synonymous with paternalism, which is defined by Beauchamp and Childress (p215) as "*intentional over-riding of one person's known preferences or actions by another person.*" The intention of the paternalistic intervention is to prevent harm to, or to benefit, the decision-maker.

#### Slide 4

Advice from the General Medical Council (GMC) had moved away from paternalism to autonomy over the years.

GMC advice from Consent: Patients and Doctors Making Decisions Together (2008, p6)

*Whatever the context in which medical decisions are made, you must work in partnership with your patients to ensure good care. In so doing, you must:*

- a listen to patients and respect their views about their health*
- b discuss with patients what their diagnosis, prognosis, treatment and care involve*
- c share with patients the information they want or need in order to make decisions*
- d maximise patients' opportunities, and their ability, to make decisions for themselves*
- e respect patients' decisions.*

If patients have capacity to make decisions for themselves, a basic model applies:

- a The doctor and patient make an assessment of the patient's condition, taking into account the patient's medical history, views, experience and knowledge.*
- b The doctor uses specialist knowledge and experience and clinical judgement, and the patient's views and understanding of their condition, to identify which investigations or treatments are likely to result in overall benefit for the patient. **The doctor explains the options to the patient, setting out the potential benefits, risks, burdens and side effects of each option, including the option to have no treatment.** The doctor may recommend a particular option which they believe to be best for the patient, but they must not put pressure on the patient to accept their advice.*
- c The patient weighs up the potential benefits, risks and burdens of the various options as well as any non-clinical issues that are relevant to them. **The patient decides whether to accept any of the options and, if so, which one. They also have the right to accept or refuse an option for a reason that may seem irrational to the doctor, or for no reason at all.***

It was this vision of "autonomy-through-partnership" (Herring et al, 2017) which proved so persuasive in *Montgomery*.

## Slide 5

The legal journey from paternalism to autonomy is illustrated by several key cases, from which I have chosen three to illustrate the direction of travel.

### *Bolam v Friern Hospital Management Committee*

This case gave rise to the legal mechanism known as the “Bolam test,” giving doctors and other healthcare professionals a defence against a negligence claim if it could be proved that a reasonable body of peers would have acted similarly. *Bolam* was decided by jury, but with considerable direction from McNair J:

*“...he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.”<sup>10</sup>*

The “Bolam test” was challenged in *Sidaway v Board of Governors of the Bethlem Royal Hospital* 1985. This case centres on a surgeon’s failure to warn a patient of a <1% chance of spinal damage. Again, the case was decided in favour of the surgeon involved, but in a noteworthy dissenting judgment from Lord Scarman, he introduced the idea of a “prudent patient” test,

*“...what would a reasonably prudent patient think significant if in the situation of this patient?”<sup>11</sup>* and stated the opinion that it is the duty of the doctor to warn a patient of a risk that is “material” to the patient’s decision. Although this did not yet constitute a “reasonable patient” standard, things were certainly heading in that direction.

*Montgomery v Lanarkshire Health Board* takes the idea of the “reasonable patient” a step further. The plaintiff was a woman with diabetes mellitus, who was not offered a Caesarean section when having a larger than average baby. She was not warned of a 9-10% risk of shoulder dystocia during vaginal delivery. Subsequently, the baby suffered harm due to this occurrence.

Lord Kerr and Lord Reed considered the main preceding cases, and advice from the General Medical Council, in arriving at their judgment, that patients should be treated *“so far as possible as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices.”<sup>12</sup>*

## Slide 6

In contrast to the debate in medicine, there seems little to support autonomy’s status as the most important principle in veterinary medicine. The “consent as permission” aspect of authorisation to medical treatment is not applicable to veterinary treatment. We are not concerned with guarding the right to bodily integrity of the person giving consent nor with defending a case of battery in the situation of treatment without consent. If we apply the principles of informed consent from human healthcare to healthcare for animals, then a direct translation would require the animal owner to have the right to make autonomous decisions, even if these decisions were contrary to the animal’s welfare.

A key feature of autonomy-based medical consent is **the right to refuse treatment**, even if this compromises the welfare of the person giving (or withholding) consent. Human patients can make apparently irrational decisions about their own treatment, and, provided they are considered

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<sup>10</sup> *Bolam v Friern Hospital Management Committee* (1957) 2 All ER, 587.

<sup>11</sup> *Sidaway v Board of Governors of the Bethlem Royal Hospital* (1985) 871 AC 1, 888H .

<sup>12</sup> *Montgomery v Lanarkshire Health Board* (2015) 1430 AC 1, 81G.

competent to make these decisions, they must be respected<sup>13</sup>. Non-treatment or inappropriate treatment of veterinary patients is often a welfare concern, and may require intervention from welfare organisations.

There are further challenges to autonomy in the veterinary context.

### Slide 7

The next challenge to autonomy lies in the different categories of caregiver found in veterinary medicine. The owner of the animal may be a farmer, a zoo collections owner, a rescue organisation, a member of a sporting syndicate, or the animal may be “unowned” through being a stray, feral or a captive wild animal. The “client” presenting the animal for treatment may be a finder, trainer, farm manager, professional show handler, keeper or shelter worker.

A second rebuttal of autonomy in this context exists in the relationship between animal owner and animal patient. This depends on the value of the animal to the owner – is it merely instrumental, or is the value inherent, as with a family member?

If autonomy is to be considered as the overarching basis for consent to veterinary treatment, then the animal patient must be considered **purely as property**, with no moral status and therefore, with legislation providing the only constraint to what the owner can decide to do.

Veterinary healthcare, unlike most human healthcare in the United Kingdom, is not free at the point of delivery. Unless animal owners qualify to use charity clinics, and even these must operate within the constraints of charitable revenue, there is a cost implication for every veterinary treatment. An owner’s financial status, including presence or absence of insurance, may influence which, if any, treatment an animal receives. The range and complexity of treatments offered to animal owners increases each year, but the number of insured animals, whose owners are more likely to consider such expensive treatments, is still relatively low. Recent figures suggest that 75% of dogs and 85% of cats are uninsured (Key Note 2015).

Making decisions about treatment of animals involves more than just the owner’s preferences and values. A need to consider the animal’s best interests requires that the animal is more than just property, and requires some input from a welfare advocate to the decision-making process. Of course, there is a valid claim that the owner will also make decisions based on the animal’s best interests, but there are often other factors that impact on the owner’s decision, such as instrumental value and finances available.

So what does the veterinary profession’s governing body advise?

### Slide 8

The Royal College of Veterinary Surgeons’ Code of Professional Conduct requires the obtaining of informed consent for treatment of any animal:

*2.4 Veterinary surgeons must communicate effectively with clients.....(.....), and ensure informed consent is obtained before treatments or procedures are carried out.*

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<sup>13</sup> JF Will, ‘A Brief Historical and Theoretical Perspective on Patient Autonomy and Medical Decision Making’ (2011) 139 Chest 1491.

However, veterinary professionals, on admission to the College, promise that,

*“..... ABOVE ALL, my constant endeavour will be to ensure the health and welfare of animals committed to my care.”*  
(RCVS 2012)

This seems to suggest that where there is conflict between the veterinary surgeon's recommendation for treatment, and the client or animal owner's preference, some form of paternalistic persuasion may be justified.

### Slide 9

What about those who cannot consent for themselves?

GMC guidance:

*27. If a child lacks the capacity to consent, you should ask for their parent's consent. It is usually sufficient to have consent from one parent. If parents cannot agree and disputes cannot be resolved informally, you should seek legal advice about whether you should apply to the court.*

and decisions are usually made on the basis of the “best interests” of the child, which include what is **clinically indicated** in a particular case, but should also consider:

- a. the views of the child or young person, so far as they can express them, including any previously expressed preferences*
- b. the views of parents*
- c. the views of others close to the child or young person*
- d. the cultural, religious or other beliefs and values of the child or parents<sup>4</sup>*
- e. the views of other healthcare professionals involved in providing care to the child or young person, and of any other professionals who have an interest in their welfare*
- f. which choice, if there is more than one, will least restrict the child or young person's future options.*

There are some who argue that decision-making for children should be based on the “harm principle” (Elliston 2007, pp31-35) – does this have some parallels with veterinary treatment?

### Slide 10

Legislation exists to protect animals from cruel treatment, resulting either from deliberate cruelty or from neglect, i.e. the omission of care. Under section 9.2(e) of the Animal Welfare Act 2006, the owner is responsible for ensuring that an animal is

*“.....protected from pain, suffering, injury and disease.”*

Therefore, the animal owner can neither decide to refuse treatment, nor, indeed, not to seek it in the first place. This uses a “prevention of harm” approach to animals.

However, in some cases, the Government can decide to kill animals against the owner's wishes, for example, if a notifiable disease is discovered on a farm (foot and mouth, TB, avian flu, for example). So a simple “harm avoidance” approach will not work for all animals.

### Slide 11

We've already seen that autonomy is difficult to defend in the case of veterinary treatment. So is paternalism justified?

Veterinary treatment remains an individual contract-based service between the animal owner and the veterinary professional. The veterinary professional can suggest a treatment that is in the animal's best interests, but is out of reach of the owner due to financial constraints. There may be cheaper options available, or there may be only one option.

Many decisions regarding veterinary treatment are made on economic bases. The ability and willingness to pay for an animal's treatment are the animal owner's decision, a decision that cannot be coerced by anyone else, including the veterinary surgeon. However, faced with a refusal to pay for treatment, the veterinary surgeon must often propose, or agree with, a decision for euthanasia. This could also be defined as a paternalistic decision, as it may be the *only* decision available to the client, if no treatment is not an option on welfare grounds.

Although this may be in the "best interests" of the animal owner, if money is scarce, it would be difficult to argue that euthanasia is in the best interests of the animal, if it could have a life worth living. In some cases, rehoming the animal is offered, but this is also a strongly paternalistic decision. So, beneficence has major constraints, chiefly financial.

## **Slide 12**

Is there any way that we can, in some way, respect the autonomy of animal owners while at the same time considering the best interests of the animal? I think that there is an obvious answer, and it incorporates a utility-based beneficence. Dependent on shared decision-making, it also approximates to the "autonomy-through-partnership" approach described by Herring, and evident in the General Medical Council guidance on consent.

In this approach, the veterinary professional provides full information about options, risks, benefits and costs. In turn, the owner explains any financial constraints, lifestyle factors, and their concerns and expectations for the future of the relationship with the animal. Taking these into account, the veterinary professional and client reach a shared decision about the way forward, while prioritising the interests of the animal patient. In cases of impasse, the best interests of the patient prevail, but this may entail involvement of outside authorities.

The approach depends on excellent communication skills and on the availability of sufficient time for this conversation to occur, but acknowledges the importance of the animal's interests and therefore its status as more than just property.

In this way, I have accorded equal weight to autonomy and beneficence as the principles underpinning veterinary consent, but have not prioritised one above the other.

So is there a place for paternalism? Not on its own!

# Are We Family? Kinship, Species and Legal Families

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## Overview

- ❖ This paper addresses the meaning of 'the family' and the consequences of excluding non humans from legal definitions of family, and the implications for teaching family law. We explore two cases where individuals/families have been separated from their companion animals.
- ❖ We consider the changing socio-legal definition of the family and contrast judicial approaches in two contexts where judges had the opportunity to engage with the consequences of separating dogs from their human family: i) in implementing Dangerous Dogs legislation ii) in the addressing separation of an older woman from her beloved dog when she moved to a care home.

## Two Cases:

(1)

***Barnes v Belfast City Council (2012)***

(2)

***Mrs P v Rochdale Borough Council & NHS North,  
Central & South Manchester Clinical  
Commissioning Groups (2016)***

## Key issues:

- ❖ While law respects the right to family life under Article 8, this is currently generally understood as right to human family life.
- ❖ Thus, law fails to afford protections to people whose companion animals *are* their families.
- ❖ Why confine 'close and personal ties of a family kind' to exclusively human relationships? Might hybrid animal/human families be encompassed within Art 8?
- ❖ Could separation of an older person or a disabled child from their canine also amount to 'inhuman and degrading treatment' under Art 3? (NB – '*inhuman*')

# Art 8 Human Rights

## Article 8 – Right to respect for private and family life

- ❖ 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
- ❖ 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

# Art 8 Cases

- ❖ P v M (also known as FP v GM), Court of Protection, 2011
  - Where a person in a care home had a relatively short life expectancy (1-2 years), and would have wanted to be with their family if they had the mental capacity to decide, they should spend their remaining time with their family, rather than in a care home. Art 8 cited.
- ❖ DL v A Local Authority & Others 2012
  - Article 8 was used to protect an older couple where there were allegations that their son was abusing them. The couple did not lack capacity, but were subject to coercion or undue influence from him. Nonetheless had the right to choose whether they lived with him or not.

## Art 8 Case Law

- ❖ Hillingdon London Borough Council v Neary [2011] EWHC 1377
  - 21 year old man with severe learning disability lived with father, moved into LA support unit for a respite when father was ill. LA kept him there for nearly a year, against his and his father's wishes, pending a long-term residential placement. Court ruled Art 8 meant that the removal of vulnerable adults from their relatives or carers could only be justified when the state would provide better quality of care. LA had breached Art 8, and also Article 5 HRA.
- ❖ Resolved before going to court (BIHR 2012)
  - A husband and wife had lived together for over 65 years. He was unable to walk unaided and relied on his wife to help him move around. She was blind and used her husband as her eyes. They were separated after he was moved into a residential care home. A public campaign launched by the family, supported by the media, arguing breach Art 8. LA agreed to subsidised place so that she could join her husband in the care home.

## Adrian Franklin (2007)

'The symbolism of household space needs to be emphasised here. Bedrooms are largely highly private spaces, the inner sanctum of privatised societies ... in this sense when people in our survey stated that an animal was both a member of the family and allowed into their bedroom, it was a refined answer indicating that they were not just a member of the family but a very close intimate member ... in the past when dogs were kept outside, or when they were allowed inside but not on furniture, their separate, inferior status was being marked. To discover that half of those interviewed allowed their animals on furniture is to uncover a major shift in their status and position relative to humans and human society.'

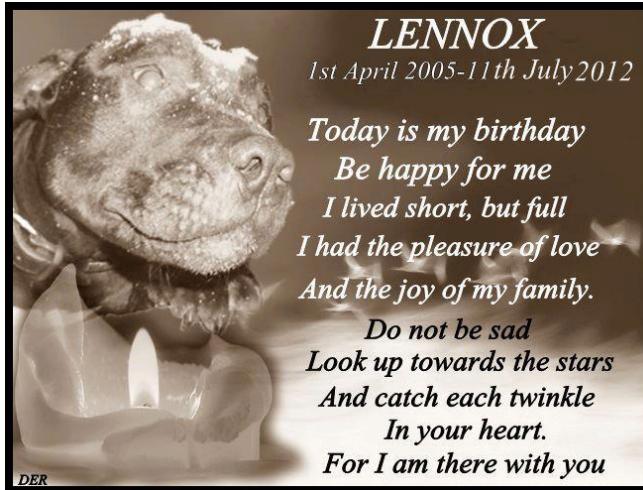
## Nickie Charles (2014)

'Surveys consistently show that pet keepers see their pets as family members... Women are more likely than men to ascribe family membership to a dog or a cat and many people report feeling closer to their dogs than other family members... Research shows that, as with human family members, pets are defined as kin due to the quality of the relationship... Families may be 'changing in structure' but they still provide love and support for family members and kin. Moreover, there is growing evidence that the social relations constituting domestic groups incorporate animals as social actors... As well as being seen as family members animals are also included in friendship networks.'

## Ani Satz (2009)

'Unlike most human animals, the dependence of non human domestic animals is permanent. Throughout their lives domestic animals rely on humans to provide them with nourishment, shelter and other care. The permanent dependency of domestic animals is created and controlled by humans, rendering them uniquely vulnerable to exploitation. Domestic nonhuman animals are, for this reason perhaps the most vulnerable of all sentient beings.'

# Lennox



## Barnes v Belfast City Council - summary

- Lennox was believed by his owner Caroline Barnes to be an American Bulldog/Labrador cross but, having lived safely with her family for 6 years, was seized by dogs wardens having been reported as having the appearance of a dangerous dog. Lennox had formed a particularly close relationship with Ms Barnes' disabled daughter who was 7 yo when he became part of their family. After two years in kennels, following legal challenges to the destruction order and disputed expert testimony, he was euthanised.

# Constructions of Lennox

- ‘Ms Whitefoot’s conclusion was that this dog was one of the most aggressive and unpredictable dogs that she had ever met. She also said that it took her six months after the dog was taken in the custody of the respondent to get to know it and she has good relationship with the dog now. She also said that the dog was on medication for depression and that had “mellowed” it. Her conclusion, however, was clear; it would not be possible to correct the dog’s faults and it remains a danger to the public and anyone around it’ (per Rodgers J).

# Victoria Stilwell

- ‘Lennox is the poster child against a law that is fatally flawed and needs to be changed. His family continues to fight against BSL so that other innocent lives can be protected and so that other families don’t have to experience the pain of having a beloved dog taken away from them, deemed guilty and killed just because of the way he looks.’

## Barnes: A Feminist Critique

- '[C]onfigured purely as property, [dogs'] vital role as family members is simply erased by a legal system which fails to acknowledge the lived experience or relational interests of animals, or to recognise the possibility of inter-species relationships which are equally valuable to the humans involved. (Fiona Cook in *Northern/Irish Feminist Judgments* 2017)

## Mrs P v Rochdale Borough Council



## P v Rochdale: Summary

- ❖ Mrs P was placed in a nursing home following two strokes, & lacked capacity.
- ❖ Case concerned arrangements under Mental Capacity Act 2005 s. 21A & whether care arrangements amounting to a deprivation of Mrs P's liberty were in her best interests. Issues over the appointment of a financial deputy who had been entrusted to deal with Mrs P's property and affairs.
- ❖ In her ruling Matharu J touched upon the significant relationship between an incapacitated woman - Mrs P - and her dog (Bobby) who had not been allowed to accompany her when she moved into the nursing home.
- ❖ She revoked the appointment of the financial deputy.

## P v Rochdale: The deputy's view

'In such a case we would say that possession of Bobby has passed to his new owners... in the absence of any factual information about Bobby, his owner or the home's policy on animals, it would seem *irresponsible in the extreme* to suggest that a dog visits a care home for elderly and frail people'.

## P v Rochdale: Matharu J

'The court is particularly troubled about how Mrs P, and the things that she needs are to be provided for. What is known is that her wishes and feelings before her second stroke were very clear, she enjoyed a good quality of life, she loved her dog, she likes to be made to feel glamorous'.

## P v Rochdale: Matharu J.

'It may seem to those not well rehearsed in the needs of a person who owns a pet, in this case a person who no longer has capacity to make decisions about various matters, what the importance of a pet is in their life. The deputy only has to read any single reference in reports, assessments or statements of Mrs P of how important Bobby is to her.'

# The MCA: patient-centred approach

'Insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being' (per Lady Hale in *Aintree v. James* [2014]).

## Conclusion

- ❖ For many people, companion animals are important family members. This may be particularly true for children and older persons who are socially isolated, and
- ❖ Law is out of step with changed attitudes to these hybrid cross-species families
- ❖ Case outcomes are crucially dependent on judicial attitudes - is animal-human relationality acknowledged, or are animals 'absent referents'?

# Conclusion

- ❖ There is a need for responsive legislative reform in a number of contexts which:
  - Supports companion animals and their humans in homes (including sheltered accommodation and care homes);
  - Is attentive to human rights implications and best interests assessments of legal decision-making for animals and their humans; and
  - Recognises, validates and protects animal-human relationality more broadly, including expanded legal definitions of family.

## Thank you!

