Improving the Law for Animals: a Campaigning Lawyer’s Perspective

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Abstract
The protection which the law gives animals is based on a fundamentally different philosophy to that it gives people. With people, causing significant physical harm is nearly always prohibited, irrespective of any benefit which might accrue to others. By contrast, animals’ essential interests are weighed against a wide range of human interests, and usually they lose out. That routinely means that significant harm is inflicted on them, quite legally. Many consider that there is therefore a pressing need for lawyers committed to maximising the protection which animals receive. This article discusses the numerous ways in which lawyers can help animal protection organisations realise their goals, with two case studies. The first relates to the global trade in seal products and the second to the legal status of domesticated animals as chattels and the implications this has for their welfare.

Keywords Animal protection · Role of campaigning lawyers · Legislative philosophy

Introduction

1822 saw the first, very limited law to protect animals anywhere in the world, in the UK. Before that, a person could beat their cow to death simply because she belonged to them. Since then, in Britain as in many other countries, there has been much legislation, some of it very good. But consider this shocking fact: there is, without doubt, exponentially more suffering caused to animals by human beings today than in 1822.

The Cruel Treatment of Cattle Act 1822 (commonly known as ‘Martin’s Act’ after its sponsor, Richard Martin MP): it made it a crime to treat a handful of domesticated animals—cattle, oxen, horses and sheep—cruelly or to inflict unnecessary suffering upon them.

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There may be less domestic cruelty, and attitudes are generally more enlightened, at least in liberal democracies. The problem is that technology now enables us to cause immense suffering to billions of animals—in laboratories, factory farms, on fur farms—and to transport them across the globe.

In addition, the exploitation is usually covered in secrecy—from national governments, international institutions and companies. Some US states have introduced so-called ‘ag-gag laws’, preventing or restricting the dissemination of information about the abuse of animals at factory farms. Very often, the public does not know what is done to animals in their name—and often, to be candid, does not want to know for fear of being upset and because awareness forces rethinking of lifestyles.

Ethical opposition to the cruel exploitation of animals is founded on the same basis as ethical opposition to the cruel exploitation of people: that it is wrong to cause suffering to those who have done nothing to deserve it and who will not benefit from it. But whereas society condemns the latter (even if it does not always practise what it preaches), it often tolerates the former. The law can help to address the imbalance and animal protection lawyers seek to steer it in that direction, as I will show.

The Importance of Legislative Philosophy

The philosophy underpinning animal protection law is crucial in all this. Animals only receive protection if and to the extent that it does not interfere with some human interest. That interest could be sport, or cheap meat, or product safety, or medicine, or fashion or more functional clothing, or a cultural tradition like bullfighting—just about anything where animals may be perceived as being of use to people. And, inevitably, it is human beings who decide whether a human interest is more important than an animal’s. The approach is a discrete form of utilitarianism, where the victims (the animals being exploited) and the beneficiaries (human beings, occasionally other animals) are in separate, hermetically sealed camps.

Contrast legislative protection for people. We do not weigh the interests of slaves against the economic interests of slaveowners. We do not weigh the desire of people not to be experimented on non-consensually against medical advances for society as a whole. We do not weigh the interests of child labourers against those of their employers.

Rather, we take not an utilitarian approach but a deontological one: it is wrong, we say, knowingly to cause significant physical or psychological harm to an individual human being, whatever the benefits to others.

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2 A number have been held to infringe the First Amendment (freedom of expression) but attempts continue to be made. Laws similarly restricting activism against factory farming have been introduced in Australia and Canada.
Reasons for Optimism

There are, nonetheless, reasons for guarded optimism for people concerned about animal welfare. Increasing numbers believe that it is wrong to exploit animals in a cruel way. Attitudes are changing, not least amongst the young. There has been an explosion in interest in veganism in the UK and elsewhere. Only foreigners wear fur in our country. Wild animals in circuses are now banned in England and Wales. A few—by no means all—of the worst farming practices, such as veal crates and sow stalls, have been prohibited in the EU and hunting with dogs outlawed in most of the UK. Domestic pets receive reasonable legislative protection.

The EU has also banned the trade in seal products and cat and dog fur (see below) and has protected habitats and enacted other relatively progressive measures.

When the British Government initially decided not to include, in post-Brexit legislation, Article 13 of the Treaty on the Functioning of the European Union— which recognises that animals are sentient and therefore requires the EU and member states to pay full regard to their welfare when legislating in certain areas—there was, to the surprise of many, a public and political outcry. The Government has now introduced the Animal (Welfare) Sentience Bill to fill the gap, if imperfectly.

But the challenges remain enormous. Governments can sometimes be persuaded to pick the low-hanging welfare fruit, whilst leaving largely undisturbed the major institutional forms of exploitation, such as factory farming, the trade in wildlife and animal experiments.

Animal Protection Law as a Serious Intellectual Discipline

It is only recently that animal protection law has come to be seen as a serious intellectual discipline. The traditional, rather disparaging, view has been that it is all rather fluffy (pun intended), concerned for the most part with individual acts of cruelty and liability for damage caused by out-of-control farm animals. Pioneering university courses such as that at Liverpool John Moores University are helping to dispel the myth.

Animal protection law is, in fact, intellectually demanding. This is in part because of the breadth of areas of law it encompasses. Much of it is international. Around two-thirds of UK animal law comes from the EU, and this will remain true for a long time because EU law has nearly all been carried over into domestic law. The UK can, it is true, repeal or amend that law now that the transition period has ended. So, the Environment Act 2021 amends for UK purposes REACH, the EU legislation governing the safety of chemicals which has spawned a huge amount of animal testing. But the UK may well choose not to change EU law in most areas, particularly where access to the EU single market depends on regulatory alignment.

3 Wild Animals in Circuses Act 2019.
4 Regulation (EC) No 1907/2006.
EU law is often convoluted and unclear. The interpretative approach of the EU Courts can be alien to lawyers used to the common law tradition (judge-developed caselaw). Other international instruments are also directly relevant to animal protection. The World Trade Organisation (WTO) agreements provide an example. The decisions of the WTO dispute resolution panels are often exceptionally complicated. A case in point is the decision of the Appellate Body in the seals product case, discussed below. It runs to 200 closely typed, closely reasoned pages. Holiday reading it is not.

In addition, international treaties and bodies such as the Convention on International Trade of Endangered Species (which does what it says on the tin), l’ Office International des Epizooties (which focuses on the transmission of animal diseases—really to safeguard people but which has codes for the welfare of terrestrial and aquatic animals) and the Organisation for Economic Cooperation and Development, like REACH relevant to the safety of chemicals, have a huge impact on animals.

Then there is domestic legislation. Or one should say the distinct legislation of the four constituent parts of the UK. Scotland and Northern Ireland, for example, have their own versions of the Animal Welfare Act 2006 which governs England and Wales; the Animal (Scientific Procedures) Act 1986 (ASPA), regulating animal experiments, has some modifications for Northern Ireland; each country has its own regulations governing the welfare of farmed animals, originally transposing Directive (EC) No 98/58 (the farm animal welfare directive); England/Wales and Scotland have their own versions of the prohibition on hunting with dogs (Northern Ireland allows the practice save for hare coursing); and other wildlife legislation is piece-meal in its application across the UK.

Many other areas of law impinge upon animal protection and those campaigning to improve it. Information is an essential tool in the armoury of campaigners. The Freedom of Information Act 2000 (and its Scottish equivalent) creates a right to information from public bodies but with a large number of exemptions (some absolute, some subject to a public interest test), which have spawned a huge amount of caselaw. In fact, the best way of obtaining information about animal cruelty is via undercover investigations. They bring in a number of areas of law, most obviously the law of confidence: in many countries, information obtained during an investigation which is prima facie confidential may be disseminated if in the public interest, an important if elusive concept. Trespass is relevant too, as can deception offences be.

Other forms of intellectual property—copyright, trademarks, patents (genetically modified animals can be an ‘invention’ qualifying for protection as a

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5 The International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH) is the equivalent body for medicines.
6 Animal Health and Welfare (Scotland) Act 2006 http://www.legislation.gov.uk/asp/2006/11/contents and the Welfare of Animals Act (Northern Ireland) 2011 http://www.legislation.gov.uk/nia/2011/16/contents respectively.
7 A current private member’s bill seeks to bring the province into line with the rest of the UK.
8 Freedom of Information (Scotland) Act 2002.
monopoly)\textsuperscript{9}—can also be relevant, and the animal protection lawyer needs to be well-versed in many other areas of law, including contract, tort and property. The criminal law is also of obvious relevance, and in England and Wales a private prosecution may need to be considered if a public prosecutor is reluctant to prosecute, as is often the case with hunting with dogs and farm animals.\textsuperscript{10}

Counter-intuitively, perhaps, human rights law can have a part to play too. In \textit{R (on the application of Countryside Alliance and others and others (Appellants)) v Her Majesty’s Attorney General and another},\textsuperscript{11} members of the hunting community argued that the Hunting Act 2004 breached various rights protected by the European Convention on Human Rights (the Convention): the right to a private life (Article 8), the right to manifest beliefs (Article 9), the right to freedom of expression (Article 10) and the right to free assembly (Article 11), in many cases in conjunction with the right to freedom from discrimination (Article 14). The House of Lords rejected the arguments, as it did those based on various freedoms under EU law, including free movement of goods and people and the establishment of businesses, all said to be adversely affected by the Act.

By contrast, an employment tribunal recently accepted that veganism was a protected belief within the Equality Act 2010, underpinned by Article 9 of the Convention.\textsuperscript{12} The principle gives vegans a degree of freedom to manifest their beliefs in various areas of life.

\textbf{Animal Protection Law as Public Law}

Much animal protection law is a species of public law, in the sense that various uses of animals are regulated by public bodies. In the UK, the principal way of challenging a regulatory decision thought to be unlawful is by judicial review, a type of action designed to ensure that ministers and public officials stay within the law. Illegality includes not only misconstruing legislation and misapplying caselaw but also procedural unfairness and making findings of fact or exercising discretion irrationally.

Judicial reviews can be hugely important in protecting minorities and the rule of law, but they have had limited success with animal protection. This is not because of any inherent barriers—indeed, leading animal protection organisations have little difficulty in establishing standing\textsuperscript{13}—but, some believe, because of judicial attitudes. Perhaps the most infamous example was a case brought by Compassion in World Farming in 2004.\textsuperscript{14} The genotype of most broiler chickens has been altered to make

\textsuperscript{9} Such as the oncomouse, predisposed to get cancer: see T 0019/90 (Onco-Mouse) of 3.10.1990.

\textsuperscript{10} Private prosecutions require exceptional justification in Scotland and are rare in Northern Ireland.

\textsuperscript{11} [2007] UKHL 52 (28 November 2007).

\textsuperscript{12} In a case brought by Jordi Casamitjana against his former employers, League Against Cruel Sports, in March 2020.

\textsuperscript{13} i.e. \textit{locus standi}, the right to bring a case.

\textsuperscript{14} \textit{R (Compassion in World Farming Ltd) v The Secretary of State for the Environment, Food and Rural Affairs} [2004] EWCA Civ 1009 http://www.bailii.org/ew/cases/EWCA/Civ/2004/1009.html.
them grow faster to slaughter weight. That causes significant welfare issues for those to be slaughtered for meat but, were the breeders to grow at the same rate, their organs and skeletons would actually risk collapse. Their diet is therefore severely restricted: they sometimes are allowed only 20% of what they would naturally eat. The Government accepted that they were chronically hungry. Schedule 1 to the Welfare of Farmed Animals (England) Regulations 2000, then in force, required both that animals were fed ‘sufficient quantity to maintain them in good health, to satisfy their nutritional needs and to promote a positive state of well-being’ and that they ‘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’.

CIWF argued that the genotypes used were therefore unlawful: without the alteration to the chickens’ genotype, food restriction for the breeders would not be necessary. The Court of Appeal disagreed, ruling that, in considering the feeding provision, one had to take the genotype as read. This surely goes against the general principle that the provisions of a piece of legislation must be viewed together: there was no doubt that the obligations in schedule 1 were cumulative.

As disturbing in its outcome if not perhaps legal reasoning was the failure of the RSPCA’s challenge to government proposal to suffocate, as a last resort, millions of birds by shutting down ventilation systems to prevent the spread of avian flu. A high degree of suffering was inevitable. However, the DEFRA vet argued, without demur from the judge or other parties, that the hierarchy of priorities under the relevant law was, with a nod in the direction of Aristotle and the Abrahamic religions: (i) the health of people (both workers likely to come into contact with avian flu and the general public); then (ii) elimination of the disease; and only finally (iii) animal welfare. The challenge failed, though ventilation shutdown was not used on that occasion.

The courts in judicial reviews have tended to give wide latitude to ministers exercising discretion given to them by Acts of Parliament and officials in assessing evidence about welfare and are usually reluctant to engage with competing science. Since public bodies only need to show that there is some basis for their view of the science—which almost invariably coincides with the inevitably self-serving view of industry—irrationality challenges are extremely difficult, even where there are logical flaws in a scientific argument.

More positively, public bodies often change their approach when a case is brought, without the need for a hearing. Take animal experiments as an example.

15 The subject of a current judicial review: R (The Humane League) v Secretary of State for the Environment, Food and Rural Affairs CO/2956/2021.
16 SI 2000 No 1870.
17 The 2000 regulations have since been replaced by the Welfare of Farmed Animals (England) Regulations 2007 (SI 2007 No 2078). The relevant provisions are identical.
18 Para 22.
19 Para 29.
20 Ventilation shutdown, as it is known, has been used in some countries in the context of Covid-19.
Following judicial reviews initiated by Cruelty Free International, \(^{21}\) the Home Office has, for instance: directed its officials that permission is needed for animal tests on a product-by-product basis for post-market quality control tests\(^ {22}\); introduced guidance preventing an owner of an establishment from being a laboratory’s named veterinary surgeon; and adopted a more realistic approach to the degree of distress suffered by macaques forced to perform daily tests for hours, for months on end, while restrained by head and body and severely deprived of fluid (relevant to the harm:benefit test which must be applied before a licence can be granted under ASPA).

**Creative Use of the Law to Advance Animal Protection**

Creative use of the law is, in fact, central to animal protection, if used judiciously alongside rigorous science and various campaigning and lobbying techniques. The law has a role at each stage of campaigning: finding out information; ensuring as level a playing-field as possible in the battle for hearts and minds via various ‘soft law’ vehicles such as self-regulatory media, opinion surveys and advertising bodies and ombudsmen charged with rooting out maladministration, as well as threatening or resisting defamation claims; drafting legislation with as few loopholes as possible; ensuring that it is then interpreted in the way intended and enforced properly (the latter a real issue in practice); and ensuring that hard-won gains are not rolled back by opposing forces.

**The Seals Case**

Two contrasting examples perhaps illustrate the creative use which can be made of litigation. The first is the EU seal products ban and the second a case about the status of animals as chattels.

**Background**

First, seals. Gruesome footage from the annual Canadian seal hunt led to mounting public revulsion over a couple of decades. Sustained lobbying, aided by assorted celebrities taking their turn for photo opportunities on the ice, built on the revulsion. According to the European Commission, at one time around 900,000 seals were hunted each year, with Canada, Greenland and Namibia accounting for some 60% of those killed. Russia and Norway are other participants. About one third of the global trade in seal products formerly either passed through or ended up in the EU. This is why the sealing nations opposed an EU ban so vigorously.

\(^{21}\) Some in its previous name, BUAV.

\(^{22}\) This is because whether there is an alternative approach, mandatory under ASPA, depends with this kind of animal test on the particular product or chemical substance.
The EU first dipped its legislative toe into the choppy seal waters as long ago as 1983, when it prohibited trade in the skins and products from harp and hooded seal pups. Subsequently, several Member States banned or were considering banning the trade in seal products (especially seal skins). Because not all had, that gave the EU the legal basis – some would say the pretext—for a more extensive measure. The Regulation which eventually followed (Regulation (EC) 1007/2009 (the seals products regulation)), although motivated by animal welfare, has as its formal aim the harmonisation of laws in the EU, under Article 114 TFEU (internal market). This is true of much animal welfare legislation emanating from the EU, because animal welfare, though a EU value, is not a formal EU competence. With seals, the consensus was that regulation needed to be at EU rather than member state level for internal market reasons.

**Free Trade Principles**

The legislation only came about after sustained lobbying. The EU is at root a free trade institution. It has a developed social and environmental dimension—too much so, in the eyes of those opposed to UK membership of the EU—but the dismantling of barriers to trade, both internal and external, courses through its veins. All member states are also members of the WTO, and the EU negotiates with, and conducts litigation at, the WTO on their behalf.

The WTO is an even greater disciple of free trade, as reflected in some of the early decisions of its dispute panels. It is opposed to protectionism, overt or covert. If member countries unjustifiably erect barriers to the import and sale (collectively, ‘marketing’) of products from other members, the exporting member can impose retaliatory measures.

**The Public Morals Exception**

There are, however, exceptions to the free trade principle in the WTO agreements, partly reflected in the EU treaties with regard to intra-EU trade. The most notable for present purposes is the protection of public morals (under Article XX(a) of the General Agreement on Tariffs and Trade (GATT), one of the main WTO agreements). ‘Public morals’ has been defined by the WTO Dispute Settlement Panel (DSP) (its first instance tribunal) as ‘standards of right and wrong maintained by or on behalf of a community or nation’. However, even where an exception *prima facie* applies, it has to be non-discriminatory in intent and effect between the importing and exporting country, and a member imposing the measure has to show that no less trade-restrictive measure was reasonably available to meet the identified objective.

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23 Council Directive 83/129/EEC, extended by Commission Directive 85/444/EEC.

24 Recital (21): regulation at EU level would not breach the principle of subsidiarity, under Article 4 of the Treaty on the Functioning of the European Union.

25 United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, DS285, 2005.
Historically, the EU has not been keen to use either the public morals or other exceptions for animal welfare. When a marketing ban for cosmetics tested on animals was mooted around the turn of the century, the Commission was firm in its view that Article XX(a) was not available, and it was supported by many member states, including the UK. Lawyers challenged that view, deploying a careful analysis of WTO and comparative caselaw, and were eventually able to persuade the European Parliament that a carefully targeted ban could pass muster. The Parliament, as the most democratic of the EU institutions, is traditionally the most susceptible to public opinion. No WTO challenge to the resulting marketing ban has been brought.

That was an important victory won (as so often) by legal argument rather than litigation: animal welfare did not have to founder on the altar of free trade. But still the Commission proved resistant. Its objection to a ban on the trade in cat and dog fur also centred on the WTO but for differing reasons. This time it accepted that Article XX(a) applied but said it could not ban intra-EU trade (because Article 95 of the EU Treaty, the then main legal basis, cannot without more be used to prohibit EU production of a particular product) and therefore an import ban would be discriminatory under WTO rules.

Again, lawyers for animal protection organisations were able to identify a way through and Regulation (EC) No 1523/2007 was the result. The first recital reads: ‘In the perception of EU citizens, cats and dogs are considered to be pet animals and therefore it is not acceptable to use their fur or products containing such fur …’.

The Commission’s tack with seal products was different. It did not argue that the WTO represented a fundamental obstacle. Rather, it sought to introduce as limited a measure as possible. It commissioned a report from the European Food Standards Agency with this term of reference: ‘On the basis of current scientific knowledge including … available information on different killing and skinning practices, [what are] the most appropriate/suitable killing methods for seals which reduce as much as possible unnecessary pain, distress and suffering?’ (emphasis added). The problem with the emphasised words is that removing ‘unnecessary’ pain, distress and suffering can still leave a great deal of pain etc.

In discussions with the Commission and the Parliament, lawyers pointed this out and showed that the evidence was indisputable that suffering could not be divorced (or anything close) from seal hunting, as the EFSA report indeed acknowledged.

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26 Part of the debate was whether a measure prohibiting the import of goods produced by a cruel method had extraterritorial effect, by seeking to impose values on other WTO members – WTO caselaw disapproves of extraterritoriality. Campaigners argued that the EU would not be seeking to change production (or testing) methods in other countries but rather to protect the moral sensibilities of its own citizens by banning the import of cruelly produced goods. The objective was inward- not outward- looking.

27 The Court of Justice of the European Communities (CJEU) is, in fact, reluctant to trespass on whether legislation would breach the WTO agreements, preferring to leave this to the WTO dispute panels. That is not to say that the spectre of a successful challenge cannot be raised or dismissed before the CJEU and its junior partner, the General Court.

28 Now replaced by Article 114 of the Treaty on the Functioning of the European Union.

29 See, further, Donnellan The Cat and Dog Fur Regulation: A Case Study, on the European Union’s Approach to Animal Welfare Liverpool Law Rev (2018) 39:71–97.
That was the basis of the moral concern of EU citizens. The evidence indicated that they overwhelmingly wanted the suffering eradicated, not mitigated. Importantly, there was no alternative, less trade-restrictive method of meeting that concern. Labelling seal products the result of particularly poor welfare, for example, would not suffice (any more than labelling clothes as produced by child labour would satisfy most people: they prefer a ban on the trade).

The political battle, with legal argument at its core, was again won. Recitals to the Seals Regulation recognise that the moral objection is to ‘the killing and skinning of seals as such, because of animal welfare considerations’; that ‘consistent verification and control of hunters’ compliance with animals requirements is not feasible in practice …’; and that labelling requirements would not achieve the same result.  

The WTO Litigation

The Regulation did include some limited exceptions but that did not satisfy Canada and Norway, who launched a challenge at the WTO. It is right to acknowledge that the European Commission fought the case effectively, whatever the misgivings it had originally had about a ban. In an historic ruling, the WTO Appellate Body (AB) endorsed the statements of the DSP that, because public morals vary, a WTO member should be ‘given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values’; and that public moral concerns with regard to animal welfare were ‘an important value or interest’. The AB also said that, although there had to be some relationship between the measure adopted and the objective it pursed, the causal connection did not need to be significant.

Interestingly, the AB rejected Canada’s further argument that the EU was inconsistent, and the Seals Regulation therefore unlawful, because the institution tolerated animal suffering in slaughterhouses and wildlife hunts, similar to that involved in seal hunting. The argument was wrongly predicated, the AB said, on a need to identify the precise content of a risk to public morals: unlike Article XX(b) of GATT (risk to public and animal health and life), paragraph (a) did not require an analysis of risk. More prosaically, the AB thought that policymakers do not have to be perfectly consistent, which will no doubt come as a relief to legislators all over the world.

The AB accepted that there were no reasonably practicable alternative measures (relevant to whether the ‘chapeau’ or introductory words to Article XX were satisfied). An alternative measure may not be reasonably available where it is ‘merely

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30 Recitals (4), (10), (11) and (12).
31 Para 7.632, referring to its report in China – Publications and Audiovisual Products para 7.817.
32 Para 5.198.
33 Paras 5.200 and 5.201.
34 ‘Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures’.
theoretical in nature, for instance where the responding WTO Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties’. 35 Cost or practical difficulties for industry might also be relevant, especially if they could affect its ability or willingness to comply with the requirements of the alternative measure. 36 The alternative measure must achieve the desired level of protection.

After closely examining the exceptions permitted by the EU seal regime, the AB did identify unlawful discrimination, particularly with regard to subsistence hunting by Inuit and other indigenous communities. As a result, the EU amended the Seals Regulation, 37 by removing one of the three exceptions as well as amending the Inuit one. A general lesson is that legislation which contains an absolute ban on an activity can, ironically, be easier to defend under an international treaty that one which represents a compromise between different interests, with exceptions built in.

**Comment**

The overwhelming importance of the ruling is the recognition that concerns about animal welfare can justify reliance on the public morals exception, and the standards for doing so are not too exacting. In the appeal, the EU argued that, as a result of the ban, there had been a ‘precipitous reduction in the number of [Canadian] seals hunted’, with statistics showing a decline in Canada’s seal exports. 38 Many will think that the hunt still causes far too much suffering, but it is much diminished.

In a recent article, Iyan Offor argues that the EU has disappointingly not built on its success in the seals case. That is simply a reminder that politics is always the determinant consideration. Importantly, however, the seals case has established that the legal foundation is there if the political will exists to build on it.

International litigation on an issue may be conducted in different fora, using different legal strategies. The EU General Court has rejected two challenges to the EU ban brought by the Inuit community. 39 The arguments drew on EU free movement of goods principles.

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35 AB report in *Brazil – Retreaded Tyres* para 156 (quoting AB report *US – Gambling* para 308).
36 Para 5.277 of the AB report in the present case.
37 Commission Regulation (EU) 2015/1775.
38 See para 5.245 of the AB report.
39 T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council* https://curia.europa.eu/juris/document/document.jsf?Docid=895B67A56C8A9579A8121B5ADC8631E1?text=&docid=109461&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=691869 (the applicants were refused standing); T-526/10 *Inuit Tapiriit Kanatami, v Commission* (25 April 2013) https://curia.europa.eu/juris/document/document.jsf?text=&docid=136881&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=692986
Sylvie’s Case

The Facts

The second case is more prosaic but in its way important as well. It involved a cross-collie called Sylvie, who came to the UK from a Romanian animal shelter (nicknamed, oxymoronically, ‘the killing shelter’). She is blind and has a multitude of medical issues.

The charity fostered Sylvie to June Lane, an experienced fosterer, while they sought a suitable permanent home. The parties entered into a fostering agreement, which was silent about when the charity could demand Sylvie’s return, save if they thought she was not getting proper care (the charity acknowledged in fact that Ms Lane had given Sylvie ‘wonderful care’).

One adoption had already failed and Sylvie was in a distressed state when she came to Ms Lane. Her confidence improved but unfortunately in time her health deteriorated. A veterinary neurologist suggested that she had a canine form of dementia and that it would be better not to move her. The charity asked for Sylvie back but Ms Lane declined. She offered to adopt Sylvie but the charity refused.

The charity brought proceedings for Sylvie’s return and were successful before the district judge. The judge said that, in law, Sylvie was ‘essentially the same as a car or something else’ and that therefore she could not take her welfare into account. Ms Lane appealed.

The Issues on the Appeal

There were two issues on the appeal. First, although a fostering agreement is by its nature temporary, should a term be implied here that the charity could not demand Sylvie’s return if that would be significantly detrimental to her welfare? The point of the agreement, after all, was to safeguard her welfare.

Second, if there was no such implied term and the charity was entitled to demand Sylvie’s return whenever they wanted, should the court in the exercise of its discretion under Sect. 3 of the Torts (Interference with Goods) Act 1977 (the 1977 Act) instead order Ms Lane to pay damages to the charity? Whenever an owner brings proceedings for the return of their chattel, the court can order damages instead if that would compensate the owner adequately.

The Appeal Judgment

In his judgment, Judge Godsmark QC accepted that the fostering agreement was an example of what the law calls a bailment. This is where someone temporarily

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40 Orton and others v Lane Chesterfield County Court (30 June 2020) E00HF536.

Judge Godsmark QC (unreported but judgment available from Advocates for Animals info@advocates-for-animals.com).
transfers possession but not ownership of a chattel to someone else. He said the agreement had some features of a bailment at will, which arises where there is no agreed endpoint for the arrangement. With such a bailment, the owner—the bailor—can demand return of the chattel at any time.

Could an implied term save Ms Lane? There are a number of hurdles which must be overcome before a court will imply a term into a contract. The leading decision is now that of the Supreme Court in Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Another [2015] UKSC 72. The crucial issue in the present case was whether the suggested implied term would have been obvious to a reasonable observer when the agreement was entered into. The test is stringent: the starting-point, and usually the finishing-point, is what the parties have expressly agreed.

The judge decided that the posited implied term did not reach the obviousness threshold. The charity was entitled to call for Sylvie’s return without regard to her welfare. Indeed, the trustees would be within their rights to put her to sleep ‘at a whim’ (it was not suggested that they intended to do that).

However, the judge found for Ms Lane on the second issue. The district judge had wrongly failed to exercise her discretion under the 1997 Act and the appeal judge could therefore exercise his. He decided that Ms Lane should be ordered to pay damages rather than return Sylvie. He was influenced by the fact Sylvie was not the trustees’ pet—they simply wished to place her elsewhere. She therefore had no particular value to the charity.

Damages could compensate, the judge held. The most the charity could expect to get for Sylvie was their standard adoption fee of £255. However, Ms Lane had made an open offer of £2500—evidence of her commitment to Sylvie—and the judge decided that that should be the measure of damages.

**Comment**

The judge recognised that, in law, Sylvie was a chattel, subject to the same incidences of ownership as, say, a book. That clearly influenced him in applying the implied terms obviousness test. That test is largely a matter of impression: reasonable people can easily disagree whether it is met with a particular contract.

However, the judge said that perhaps animals should not be regarded as chattels: ‘they play a large part in our emotions and our lives, they breathe, they feel pleasure and pain. Maybe the law should recognise this, but it does not’. In other words, perhaps time for reform of the law.

Moreover, he recognised that Sylvie was both unique and sentient. Her market value was relatively small but she had ‘substantial emotional value’. Ms Lane was invested in her welfare. It seems clear that Sylvie’s welfare needs influenced the way the judge exercised his discretion.

County Court judgments are not legal precedents and this judgment does not represent revolution. But it is important in showing that what happens to an animal does not have to follow property rights. Sentiency and the animal’s best interests have an important role to play too. Indeed, in a forthcoming article Dr Joe Wills
makes a compelling case, based in part on comparative law, why the common law should develop to mitigate the narrowness of the ‘animals as chattels’ approach. Legislative reform is always the gold standard. But cases can have an important, if incremental, role in moving the law in a more enlightened direction. It is hoped that future cases will build on Judge Godsmark’s approach in Sylvie’s case.

**Conclusion**

In a democracy, the law should broadly reflect prevailing morality, as best that can be measured.

Human beings have ethical rules because what we do can adversely affect others. A civilised society recognises that we should restrict our activities if they would be grossly unfair to others. And many believe with John Stuart Mill that ‘others’ should include non-human animals because they are just as capable of suffering.41

Under this approach, the law, like ethics, should centre on the needs of the victim, rather than the desires of the would-be exploiter. As the ancient Greek poet Bion said: ‘Though boys throw stones at frogs in sport, the frogs do not die in sport but in earnest’. Everyone agrees that the cruel exploitation of vulnerable people is wrong. Should not the law also protect vulnerable animals, not those wishing to exploit them, and do so unconditionally? Perfect harmony between laws protecting humans and those protecting animals is not possible and may not even be desirable, but many will think that as much confluence as possible should be the goal where there is communality of interest between victims.

There is also dawning realisation that what is in animals’ interests is often—though not always—also in the fundamental health and sometimes economic interests of humans. Covid and other zoonotic diseases have shown that too close interaction between wildlife and people, and keeping farm animals in unnaturally confined conditions, are bad for our health as well as for their welfare.

Whatever the precise motivation for greater animal protection, it seems likely that lawyers, working closely with scientists and others, will continue to ratchet the issue up the global political agenda. Because protection of any group is ultimately achieved through the law, creative deployment of legal argument and technique has a key role in improving the lot of animals.

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41 ‘The reasons for legal intervention in favour of children, apply not less strongly to the case of those unfortunate slaves and victims of the most brutal part of mankind, the lower animals’ JS Mill. *Principles of Political Economy* (book 5, chap. 11, Sect. 9).
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